

# **Air National Guard**



## **Commander's Legal Deskbook**

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# Chapter 1, Administrative and Personnel Matters

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## Absent Military Members

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**Updated by Major Jeffrey Knickerbocker, November 2008**

**AUTHORITY:** ANGI 36-2503, *Administrative Demotion of Airmen* (1 Mar 2004); AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 2005); AFI 36-2911, *Desertion and Unauthorized Absence* (1 Jun 98); applicable state law.

### INTRODUCTION

Attendance and participation by all members of your unit is imperative to the accomplishment of your mission. Unexplained absences are detrimental and should be avoided if at all possible. Encourage your subordinates to report their prospective attendance problems at the earliest possible time to the unit or squadron orderly room. Commanders should establish uniform internal policies for prompt and genuine assistance to handle potential absenteeism, as well as for confirmed absenteeism.

### ABSENCE

Under ANGI 36-2503 and AFI 36-3209, a member is absent without leave (AWOL) when he or she fails to be present for a scheduled 4 hour unit training assembly (UTA) and has not been excused by the command. For members on Title 10 orders, AFI 36-2911 defines AWOL as an unexcused absence of at least 24 hours and no more than 30 days.

### DUTY STATUS AT TIME OF ABSENCE

The specific action that you take against an absent member will depend on whether the ANG member is on active duty, full-time national guard duty (AGR), annual training (AT) or is merely missing a regularly scheduled unit training assembly (UTAs).

1. If the ANG member is AWOL from AT or UTAs, or is an AGR, you should check with your unit Staff Judge Advocate (SJA) for guidance on any state military code, regulation or policy governing AWOL.
2. If the ANG member is on Title 10 active duty, you should follow the directives of AFI 36-2911.

### ACTION UPON DISCOVERY OF ABSENCE

#### Locate the Member

When you discover a member is AWOL, try to locate the member to determine if the absence is excused or explainable. You may contact the member directly for this information, or you may have your first sergeant or the member's supervisor contact the member. If you cannot locate the member, contact the member's relatives and/or friends within the unit to determine the member's whereabouts and reason(s) for missing military duty. Caveat: Contact your JAG to discuss Article 31 or state code rights advisement requirements prior to discussions with a member you suspect of an offense.

#### Determine Reasons for Absence

If the member missed duty due to illness or hospitalization or other reason you deem legitimate, you should require the member to provide written evidence before considering the absence excused. If the member was missing because of confinement in jail by civilian authorities then the absence is with authority unless it is later learned that the reason for the confinement was unjustified (*i.e.*, the criminal charges are dismissed or the member is exonerated).

### **Absence from Active Duty**

If the ANG member is on active duty, you should take the following actions:

1. Once it is decided that the absence is unexcused and the member cannot be located, notify the unit's Security Forces Squadron as well as the member's active duty base of assignment or the nearest active duty Air Force Security Forces Squadron;
2. Special processing is required if the member has had access to classified information within the past twelve (12) months, has traveled to or remains in a foreign country, or has some duty or travel restrictions. See AFI 36-2911, paragraphs 3 and 4;
3. Prepare an AF Form 2098, Duty Status Change and forward it to the member's servicing MPF and Finance Office after 24 hours of discovery of the AWOL;
4. Within 72 hours of the AWOL, prepare and forward a report of "Commander's inquiry" to MPF and Security Forces. Determine whether the casualty regulation, AFI 36-3002 applies. See AFI 36-2911, paragraph 10. This is to provide investigative leads which might result in the absentee's return to active duty;
5. Ensure that other important reporting actions are taken on the 10th, 31st, 60th, and 180th day of absence as outlined in AFI 36-2911;
6. Within 30 days of the AWOL, ensure the member's personal effects are secured until the member's return; and
7. When the member is returned to military control, prepare another AF Form 2098, Duty Status Change. Forward to MPF and Security Forces.
8. Continually coordinate with your SJA regarding possible administrative and disciplinary actions.

See AFI 36-2911, Table 1.1

### **Absence from UTAs, AT, or AGR Full-Time Training**

If the ANG member is not on active duty but is missing UTAs or full-time training with regularity, or has missed an AT period without explanation, you should take the following actions:

1. Contact your unit SJA and MPF to determine if there is any relevant unit, regulation, policy guidance or state law on AWOL. For example, check your state Code of Military Justice;
2. Appropriately document, through unit roll call rosters and memos for the record, the member's unexcused absence;
3. Generally, for absences from UTAs:
  - a. While the commander has discretion, typically it is best to document an AWOL in a written letter of counseling to the member. The letter should include a discussion of the potential consequences for continued unexcused absence, *i.e.*, demotion, nonjudicial punishment, non-recommendation for reenlistment, involuntary transfer to the Individual Ready Reserve (IRR) with an unfavorable service characterization, involuntary discharge from the ANG, or involuntary recall to extended active duty if member is Palace Chase. Offer the member the opportunity to document and explain the absences and improve his or her attendance. Order the member to report on his or her next regularly scheduled duty day;

b. After six (6) unexcused absences, you may choose to recommend the member for demotion. Notify the member by letter through certified mail or personal delivery of your intention to seek demotion, pursuant to ANGI 36-2503, section C. Attachment 4 contains the elements of a proper demotion notification letter. A decision to recommend demotion does not excuse the member from further AWOLs and your notification memorandum should include an order for the member to report on the next regularly scheduled duty day;

c. After nine (9) unexcused absences, you may notify the member of your intention to seek the member's discharge from the unit pursuant to AFI 36-3209. Advise the member of all rights under AFI 36-3209, Chapter 4, including the right to: legal counsel, a copy of the discharge package, submit statements, and an administrative discharge board, if applicable. Give the member thirty (30) calendar days after the date of the letter to acknowledge receipt of your recommendation for discharge, and to exercise those rights. Serve the notification letter in person if possible, otherwise by certified mail to the member's last known address. If efforts to serve the member by certified mail are unsuccessful, the notification must also be sent by first class mail. If both the certified mail notification and first class mail are returned as undeliverable, request verification of the last permanent mailing address from the postmaster and re-mail the correspondence to the correct address. Document all efforts taken to locate the member in the file in the format suggested in Attachment 10 to AFI 36-3209.

## CONCLUSION

When you must deal with the unauthorized absence of a unit member, consult with the unit SJA throughout the entire process to ensure the legal sufficiency of your actions. The SJA can advise you of the appropriate steps to take in handling each AWOL case.

***KWIK-NOTE: Determine the type of duty the member missed, the reasons for the absence, and take prompt appropriate action.***

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## AFSC Reclassification and Training

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Updated by Major Christine Lennard, September 2006

**AUTHORITY:** AFI 36-2101, *Classifying Military Personnel* (7 Mar 2006); AFMAN 36-2108, *Enlisted Classification Directory* and AFMAN 36-2105, *Officer Classification Directory* (see *MAJOR CHANGES*); AFPD 36-21, *Utilization and Classification of Air Force Military Personnel* (1 Apr 98); AFI 36-2626, *Airman Retraining Program* (1 Jul 1999); ANGI 36-2607, *Air National Guard Retention Programs* (30 Jan 1998); AFI 36-2201, Volume V, *Air Force Training Program, Career Field Education and Training* (8 Jun 2004).

### MAJOR CHANGES

Use the AFPC website to view the most recent AFMAN 36-2108 and AFMAN 36-2105. These directories are constantly updated with new, removed, and modified AFSC information.

### INTRODUCTION

AFSC reclassification and training issues can arise for a variety of different reasons and routinely impact individual careers and overall unit readiness and effectiveness. While reclassification may seem like a simple administrative action, significant lead time and assistance may be needed to ensure a member meets the qualification and training requirements for a new AFSC.

### AFSC DEFINED AND THE MILITARY PERSONNEL CLASSIFICATION SYSTEM

The purpose of the military personnel classification system is to identify duties and tasks for every position needed to accomplish the Air Force mission and also to match the qualifications and abilities of each Air Force and Air National Guard member to an appropriate position. Each job identified as necessary to the Air Force mission is called an Air Force Specialty (AFS) and each AFS is represented by an alpha-numeric Air Force Specialty Code (AFSC). For instance, a base level judge advocate (AFS) has an AFSC of 51J3.

AFMAN 36-2108 is the directory of enlisted classifications and lists all currently valid enlisted AFSCs. Likewise, AFMAN 36-2105 contains the current officer AFSCs. Policies and procedures pertaining to classifying Air Force personnel on active duty also apply to Air National Guard personnel not in active military service, except as modified by the Chief, National Guard Bureau. (See AFI 36-101, Chapter 5)

### RECLASSIFICATION

Upon entry to service, a member is awarded an initial AFSC and then, typically, receives education and training and is reclassified as he or she progresses. Qualifications for award of subsequent AFSCs for ANG personnel must be conducted using the same standards applicable to active force personnel insofar as possible. In addition to a traditional progression track, other changes along the way may require the member to be reclassified and retrained. If you do have a member who is removed from an AFSC or whose AFSC is modified, they will need to be temporarily classified with a Reporting Identifier number.

### TRAINING

Training and education may be gained by inactive or active duty training, completing formal military courses, civilian experience, or civilian education. Commanders use their Unit Education and Training Manager (UTEM) to coordinate education and training opportunities for unit personnel, help ensure timely progression, and identify changes requiring action, such as loss of a position on the Unit Manning Document (UMD). The Military Personnel Flight (MPF) provides a Base Education and Training Manager (BETM) who is the Commander's and UTEM's main POC for reclassification and training questions.

Other valuable resources include your base Retention and Recruiting offices. For instance, most Retention offices have a database of enlisted ASVAB scores and can help identify AFSCs that the member is eligible to retrain into.

Each member must take responsibility for advancing in his or her own training. Commanders should realize that the UTEM will have numerous training schedules to organize, and less self-motivated individuals in the unit can get lost in the shuffle. To help avoid this pitfall, a commander should encourage supervisors to actively help younger or less experienced members train and progress.

### **PUNITIVE OR ADMINISTRATIVE ACTION**

Commanders should not take punitive or administrative action against airmen solely because of their failure to remain qualified in an AFSC. There are a host of reasons why a member may fail to remain qualified in his or her AFSC, such as: removal of an AFSC from the enlisted or officer directory, failure to progress in OJT, medical or physical restrictions, loss of security clearance, or cross-training. Commanders may consider downgrading an individual's AFSC under certain conditions, such as lack of recent performance, a reduction in grade, substandard performance, or failure to maintain mandatory qualification standards other than by reason of physical or medical incapacity. Counseling or other administrative action may also be appropriate for cases of unsatisfactory performance, but punitive action will only be appropriate when there is evidence of a violation of the state code or UCMJ (depending on the status of the ANG member). Consult your Staff Judge Advocate for assistance when considering punitive and administrative actions.

### **CONCLUSION**

Reclassification and training questions are a normal and constant concern for every commander. Commanders should know what the unit manpower needs are, be aware of individual and personnel changes, employ an active Unit Education and Training Manager (UTEM), and encourage supervisor involvement to help manage these important personnel issues.

***KWIK-NOTE: Questions concerning AFSC reclassification should be coordinated through the BETM at your MPF. Contact the Staff Judge Advocate when contemplating AFSC related disciplinary action.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Reporting Identifiers	1-34
Administrative Demotion of Airmen	24-2
Quality Force Management Actions	24-12

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# ANG Assistants

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**Updated by Major Jeffrey Knickerbocker, November 2008**

**AUTHORITY:** There is currently only one reference to the existence of an ANG Assistant Program. The reference is made in Para 2.1.1.1 of ANGI 38-101, *State Headquarters Manpower/Organization Guide*. The ANG program eligibility, criteria and selection process was contained in ANGPAM 36-15, *Air National Guard Assistant Program* (1 Oct 85), but this authority has been rescinded. NGB-GO is developing new instructions. The information contained in this article was taken from the now rescinded ANGPAM 36-15 and is, in practical terms, how the program is currently administered.

## **PURPOSE**

The Air National Guard (ANG) Assistant Program is designed to provide liaison between the Active Air Force and the Air National Guard. It enhances understanding and cooperation within the Total Force and provides a means through which communications, ideas, and recommendations can be transmitted; policies and procedures reviewed; and problems resolved between the National Guard Bureau (NGB) and the gaining major air commands, separate operating agencies (SOA) and other organizations for which positions have been approved. National Guard Assistant Program positions are determined by NGB-GO

## **DUTIES OF ASSISTANTS**

Specific duties will vary with the position to which assigned. Duties may include but not be limited to the following:

1. Serve as advisor to the organization to which assigned in the Air National Guard program;
2. Maintain frequent and regular contact with Air National Guard agencies and ANG units, particularly those gained by the MAJCOM to which the ANG assistant is assigned, in order to enhance understanding and rapport between the ANG and the organization of assignment;
3. Review policies and programs which affect the relationship between the organization and the ANG and make recommendations on proposals affecting the interface, policy, operations, and utilization of ANG forces;
4. Develop and maintain active association with community and Government leaders to facilitate effective working relationships among such persons, the Air Force, and the Air National Guard;
5. Develop, conduct, and/or participate in training and indoctrination programs to broaden familiarity with the mission, policies, and procedures of the ANG and the interface with the Active Force under the Total Force policy;
6. Conduct special studies and analyses on issues of mutual interest to the ANG and the organization of assignment; and
7. Serve at protocol and official functions as requested.

In addition to the above, ANG assistants assigned to Major Commands (MAJCOMs) should perform the following duties:

1. Coordinate with the functional NGB division/office when NGB staff assistance is needed, *i.e.*, accompany on trips, provide briefings, point papers, or administrative support;

2. Prepare and provide NGB/CF a quarterly schedule of proposed upcoming activities. This schedule will be forwarded NLT 30 days in advance of each fiscal quarter. After each quarter, a recap of actual accomplishments will be forwarded NLT 15 days after the end of the quarter;
3. Attend an annual meeting held in the spring;
4. Attend the senior commanders' conference held in the fall;
5. Monitor operations readiness of ANG units gained by MAJCOM of assignment, be cognizant of capabilities and limitations, and provide recommendations to the MAJCOM Commander and Director, ANG on actions needed for improvement;
6. Monitor safety record of MAJCOM-gained ANG units and make recommendations toward reducing the accident rate and potential;
7. Monitor conversions of MAJCOM-gained ANG units and make recommendations to support these conversions; and
8. Monitor the participation of MAJCOM-gained ANG units in readiness exercises and deployments, act as liaison between NGB and MAJCOM staff, and provide recommendations as appropriate.

Rating and administrative responsibilities for ANG assistants were provided in paragraphs 5-1 and 5-2 of now rescinded ANG Pamphlet 36-15.

***KWIK- NOTE: ANG Assistants are invaluable liaisons between the Air Force and the Air National Guard, and will help each component be continuously informed of the other components needs and requirements.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Judge Advocate Training Regulation	17-6
Staff Assistance Visits - Judge Advocate	17-16
TJAG's ANG Council	17-17

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# Assignments

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**Updated by Major Christine Lennard (Sept 2006)**

**AUTHORITY:** ANGI 36-2101, *Assignments Within the Air National Guard* (11 Jun 2004); AFI 36-2110, *Assignments* (20 Apr 2005)

## **PURPOSE**

Assignments within the Air National Guard are regulated by ANGI 36-2101. Generally, the rules therein apply equally to officers and airmen. AFI 36-2110 only applies to ANG officers and enlisted members when on extended active duty (EAD).

The primary purpose of the Air National Guard assignment system is to assign ANG Officers and Airmen to enhance unit effectiveness for sustained mission accomplishment and to meet the personnel resource needs of each ANG unit. The primary objective of the system is to attain and maintain 100% manning of all Unit Manpower Document Guard (UMDG) positions. All ANG assignments will be made on a non-discriminatory basis. Long-range assignments planning must be undertaken to maintain the operational effectiveness of the Air National Guard.

## **CRITERIA AND RULES**

All assignments within the ANG will be consistent with the classification instruction and procedures contained in AFI 36-2101, Military Personnel Classification Policy (Officers and Airmen) and consistent with enlistment, appointment, promotion, demotion, retention, and separation procedures outlined in applicable United States Air Force (USAF) and ANG directives.

Unit commanders will select personnel for assignment to authorized UMDG positions consistent, when possible, with individual AFSC, skill level, and grade to meet unit manpower needs. Each unit will provide assignment change data to its servicing MPF. Commanders and MPFs must work together to fill all MDG positions, either through reassignment or through recruiting. Do not leave positions vacant. Positions vacant for more than 30 days are considered open for recruiting unless it meets an authorized exception.

Assignments of UMDG vacancies must be made in conjunction with state and unit personnel force management plans.

Military technicians and military duty personnel must be assigned as the position incumbent to a military UMD position compatible with their full-time duties and responsibilities. Under no circumstances will military technicians or AGR personnel be assigned in an excess status without written approval from ANG/DP.

Nepotism is not permitted. Family members may be assigned to the same unit, however, where there is no preferential treatment or real or potential conflict of interest. Additional restrictions for assignment of family members listed in ANGI 36-2101, para. 2.4, include that no family member may be assigned to a unit commanded by another family member (or to command a unit with a family member in it), family members must be separated by at least two levels of supervision, and they may not be in each other's rating chain as a 1<sup>st</sup> or 2<sup>nd</sup> level rater/reviewer. The prohibition on commanding family members also precludes assignment as a Command Chief Master Sergeant or First Sergeant.

Although fitness for worldwide duty is required for each member, temporary deferments may be granted for conditions that are expected to be resolved within a 12-month period.

ANG members in the intelligence field may not be assigned to worldwide locations where they previously served as members of the Peace Corps. No waivers will be considered.

Air Force Reserve IMAs may be assigned to Air National Guard units for training with the approval of the Adjutants General, but they do not have to be reported in the ANG unit's strength. When such individuals are attached, the provisions of AFMAN 36-8001, Reserve Personnel Participation and Training Procedures, must be followed.

Physicians may be appointed as excess to any existing physician position, other than a medical facility Commander position. This exception does not apply to Judge Advocates, Chaplains or other officer categories, but see ANGI 36-2101 for additional exceptions that may apply.

Women are restricted from assignments with a primary mission of direct ground combat, or collocation with same. Women applying for entry into direct combat skills will be reviewed on a case-by-case basis.

Assigning members in excess or overgrade status may be done under specifically enumerated circumstances. See ANGI 36-2101, para 2.20 and Chapter 4, for a discussion of the specific requirements for assignment in excess or overgrade status. Members so assigned must acknowledge their awareness of that status and possible impacts of the assignment on NGB 36-11.

Under various statutes and regulations, a sanctuary zone exists for members with at least 18 but less than 20 years of creditable service. Generally, these members may not be involuntarily separated without cause prior to eligibility for retired benefits. There are many detailed provisions relating to the sanctuary zone.

## CONCLUSION

Although assignments within the Air National Guard are generally within the purview of the Directorate of Personnel, Commanders are urged to consult with their servicing Judge Advocate for interpretations of these policies or on potentially sensitive questions. Errors in assignments which are prejudicial to individuals may become the subject of later corrective action, at significant expense to the government.

***KWIK-NOTE: Long-range assignment planning is a tool for maintaining the operational effectiveness of the Air National Guard.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Promotion of ANG Airmen	1-30
Promotion of ANG Officers	1-31
AFSC Reclassification and Training	1-3
Selective Retention in the Air National Guard	1-36
ANG Assistants	1-4

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# Board for Correction of Military Records

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Updated by Major Jeffrey Knickerbocker, October 2008

**AUTHORITY:** 10 U.S.C. 1552; 32 C.F.R. Part 865; AFI 36-2603, *Air Force Board for Correction of Military Records* (1 Mar 96); AFPAM 36-2607, Applicants' Guide to the Air Force Board for Correction of Military Records (3 Nov 1994); See also The Judge Advocate General of the Air Force opinions (OpJAGAF) (contact your SJA for access to these opinions) and the AFBCMR reading room for decisions at <http://boards.law.af.mil>.

## PURPOSE AND FUNCTION

The Air Force Board for Correction of Military Records (AFBCMR or "the Board") is a civilian administrative agency within the Office of the Secretary of the Air Force charged with considering applications and directing correction of military (Air Force) records where there is "sufficient evidence of a probable material error or injustice". The remedies offered by the Board may be as simple administrative correction of records, or as substantial as directing promotion or awarding back pay. The Board's authority is not unlimited; for example, membership in the ANG is a state prerogative so, the Board cannot order the state to reinstate a member in the ANG.

## WHO MAY APPLY

Anyone with Air Force military records, his or her heirs, or legal representative, may apply for relief from the AFBCMR. Applicants must provide "proof of proper interest" when seeking to correct records other than their own. Applications may include concerns such as reprisal under the Military Whistleblowers Protection Act, 10 U.S.C. 1034, upgrading a performance report or discharge, challenges to disciplinary punishment imposed pursuant to Article 15, UCMJ, entitlement to retirement pay, or rank adjustment. AFI 36-2603, paras 3.1 and 3.7.

## WHEN TO APPLY

You must submit your application to the Board within three years (statute of limitations (SOL)) of the error or injustice. The SOL starts when an applicant discovers or reasonably could have discovered the basis for the claim. However, before applying to the Board, an applicant should attempt to exhaust all other administrative remedies first, or risk having the claim dismissed for failure to do so. This means, for instance, an application for a discharge upgrade should first be properly appealed through the Air Force Discharge Review Board. Consult with your functional area experts to help identify the proper procedure and administrative chain of appeal for your claim. Generally; the application must be filed within the three year SOL; if it is filed late, the Board can waive the SOL and consider the claim "in the interest of justice" if it is otherwise meritorious. AFI 36-2903, paras 3.3 and 3.5.

## PROCEDURE

Applications to the AFBCMR are submitted on Defense Department (DD) Form 149, Application for Correction of Military or Naval Records (July 2006), which can be obtained from VA offices, service organizations such as the American Legion and Red Cross, any military personnel flight, SAF/MIBR, electronic publication websites or from the AFBCMR itself. The applicant may also need to obtain official copies of military service records from the National Personnel Records Center, 9700 Page Avenue, St. Louis, Missouri 63132-5100. Air National Guard personnel may obtain copies of their records from or through their military units.

The claimant may augment DD Form 149 by attaching a statement or a legal brief, and supporting documentation, such as witness statements or affidavits. The burden of proof in these cases is on the claimant to show that there has been a "probable material error or injustice." The completed application is mailed to the AFBCMR at the address indicated on the DD Form 149. Although the claimant may request a hearing, the Board hears very few cases and, if granted, the claimant bears the expenses of traveling to Washington D.C. for the hearing. Applicants should be aware that a wait of six months to two years before receiving a response from the AFBCMR is not unusual.

## **BASIS FOR DECISION**

The AFBCMR normally decides applications based on the individual's record and the additional evidence provided. However, at the request of the Board, Air Force activities and officials will furnish it with other available military records pertinent to the application and/or an advisory opinion concerning the application, to include: an analysis of the facts of the case, a statement of what administrative relief is available, an opinion as to the timeliness of the application, an opinion on the merit of the request, and specific instruction on any corrective action recommended.

## **FINAL AGENCY ACTION**

The Board may recommend denial of the application, or approval, in whole or in part. Favorable decisions from the AFBCMR become effective upon the approval of the Secretary of the Air Force. In rare cases, the Secretary may deny the relief recommended by the Board, or return the application for further action. Final decisions of the Board (as approved by the SAF) may be judicially reviewed by the United States Court of Claims or an appropriate United States District Court.

## **WHERE TO GET HELP**

AFPAM 36-2603 and AFI 36-2607 are short and instructive, and may answer most of your questions. Many veteran service organizations have staff members who will assist with applications to the AFBCMR. You may obtain a list of these organizations by writing to the AFBCMR, 1535 Command Drive, EE Wing 3rd Floor, Andrews AFB MD 20331-7002. You may also write to the AFBCMR directly or visit the Board website at: [http://ask.afpc.randolph.af.mil/main\\_content.asp?prods3=76&prods2=75&prods1=56](http://ask.afpc.randolph.af.mil/main_content.asp?prods3=76&prods2=75&prods1=56),

***KWIK-NOTE: The Air Force Board for Correction of Military Records may correct any military record where, in its judgment, such action is necessary to correct an error or to remove an injustice.***

## **RELATED TOPICS:**

## **SECTION**

Access to Military Records

14-4

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## Boards and Courts-Martial – A View from the Inside

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Updated by Lt Col Karen Hornsby, May 2001

**AUTHORITY:** Manual for Courts-Martial (MCM); Rules for Courts-Martial 912, MCM; Personal experience of an ANG Major General, who served as a Director of Operations, Air Commander and Group Commander, an Assistant AG for Air, and Adjutant General (TAG).

### INTRODUCTION

This topic is included in this Deskbook for one reason: to acquaint all potential Board or Court-Martial members with an insider's view of what actually goes on at one or both of these proceedings. By having some familiarity with what to expect, it is hoped that service as members of these proceedings will be more meaningful to both the member and the cause of seeking the truth.

The subject of this topic is broken down into two parts: Board service and service as a member of a court-martial (jury). While court-martial in the ANG are not nearly as frequent as board proceedings, the material provided on court-martial service is similar to what is provided to prospective court members on active duty. It is written from a Staff Judge Advocate's perspective, and is in the form of a written "conversation" with prospective court members to acquaint them with their duties as court members and tell them the nature of the proceedings and the procedures used. Some of this material is also applicable to Board proceedings, especially the information concerning qualifications to serve.

The material provided on Board proceedings is from the personal perspective of an officer who served as President of an ANG Flying Evaluation Board (FEB). While the insights and thoughts expressed are in the factual setting of an FEB and from one who served as the Board's President, many of them are applicable to service on any kind of board, in any fact-finding or adjudicative capacity. Because boards are far more prevalent in today's ANG, that part of the topic is presented first.

All Commanders are urged to share the information in this topic with any member of their unit who will serve as either a Board member or member of a court-martial.

### BOARD PROCEEDINGS - A PRESIDENT'S PERSPECTIVE

A few thoughts from the President of a Flying Evaluation Board:

Nothing sneaks up on you with more stealth than the realization of what you are really up against when you find yourself calling an FEB into session...as its President. Most of the boards we chair are administrative in nature, with few surprises, fewer risks, and rarely a challenge to our authority. We fully understand the process at hand, and have a high comfort level concerning our ability to skillfully guide the proceedings to a successful conclusion.

Flying Evaluation Boards are different. There is a lot at stake for both the unit and the respondent (In the FEB in which I served, the respondent and his lawyer were males, so I will use the masculine pronoun to keep the personal tone of my experience even though my thoughts have more general applicability). The unit (if the case involves an alleged lack of competence) is determined to divest itself of this "accident-waiting-to- happen" and will not yield an inch if Flight Safety is the issue. The Wing or Group Commander may even (improperly) have expressed a view on the desired outcome of the FEB. The respondent is equally determined in his effort to preserve a number of things: his honor; his flight pay, which can amount to a considerable sum over a working lifetime; his promotion potential (rated officers have more opportunities); and, perhaps most important, his Dream, upon which he has focused, and for which he has worked very hard for several years.

Candidates standing before a promotion board represent themselves: if they fail, they will get another chance. Besides, they know it could be counter-productive in the long run to be seen as anything less than a team player. The FEB respondent, in contrast, is playing by another set of rules. His back is to the wall. He will do whatever he thinks is necessary to win. He will hire a lawyer.

The lawyer will very likely be someone who specializes in government hearings, may well have been a crew member himself, and certainly has represented clients at similar boards. He will raise questions about the training and evaluation process that may be difficult to answer, and will put others on the defensive. But when the final verdict is reached, you will better understand just how necessary his questioning was to help ensure clarity and objectivity.

You will serve unit interests and those of the respondent best if you think of this process you are about to begin as a search for truth rather than a contest of wills. You have no rational choice other than being dispassionate and open-minded, regardless of any personal bias you bring to the table, or any outside interest or pressures, or unlawful command influence in the background. Everyone in the room has arrived with their view of the desired outcome, but the professionals will set their biases aside and play their designated role for the duration of the proceedings. Most importantly, it's a matter of survival for you, the President. I can still clearly remember days as a member of my high school debating team where I would work to get my adversary emotionally involved in the argument. If successful, I would be a sure winner. In an FEB (or any other board proceeding), you CANNOT become emotionally involved. You CANNOT lose your "cool." Not once.

Your closest ally is not your OPS officer (who likely will have a position on the rated potential of the respondent), it's your JAG (the board's legal advisor). Choose carefully. Your professional life will depend every bit as much on his skill in the board room as his physical life depends on your skill at the aircraft controls. Resist the urge to be a Lone Ranger. Your instincts during the Board proceeding may be as faulty at times as your sense of balance while flying in instrument conditions. You trust your instruments, so trust your JAG. Ask him to walk you through the entire process well in advance of the event. The greater your knowledge, the higher your comfort level, and the better your performance. Do not assume that this will be easy.

During the course of the proceeding, you may be personally challenged by an attorney as I was, you may get "hung up" on a point of law or interpretation of a regulation, and you will certainly be confronted by situations you did not expect and do not instinctively know how to handle.

But all will be well if you never lose sight of the fact that YOU set the pace of this Board. If you are unsure of anything at any time, don't try to "wing it." Take your time, consult with your JAG, and call a recess if necessary. The more obvious it is that you are well aware of your limitations and able to compensate, the less likely it is the opposing attorney will try to take advantage of those limitations.

Be prepared for the process to take more time than you assumed it would, and be ready to conduct the Board during other than normal duty hours. The Board I presided over ran from a Friday morning until 0200 Sunday morning. We agreed to this schedule because the attorneys for the respondent were from out of town, and could fit his case into their busy schedule in no other way. They were able to charge their young client a more favorable rate by working when their local courts were not in session. Had we not been willing to work long hours over the weekend, the respondent could not have afforded private legal counsel. A little compassion never hurts.

When the arguments are over and all the evidence is in, you will be more sympathetic to juries who seem to take an unreasonably long time reaching their verdict. What seemed only a few days ago to be a simple open-and-shut case had become unexpectedly complex. After concluding the Board proceedings to begin our deliberations, we spent hours discussing the details, while trying our best to get the issue in clear focus and in perspective. The decision we reached is not important here. When we walked back into that Board room to face an exhausted and emotionally drained respondent, we were confident that our decision was fair, and was well-supported by all the evidence the experts could muster.

The experience of presiding over a Board where so much is at stake for all concerned is one you will remember for years. If you have come well prepared, maintained an open mind, taken full advantage of your JAG's guidance,

paced yourself well, been flexible and understanding of the respondent's problems, and demonstrated by your actions that your only mission is to arrive at a decision well supported by the facts and circumstances, you will walk away from the experience with a lasting sense of satisfaction.

## **SERVING AS A COURT MEMBER**

### **Generally**

At some time in your military career you may be chosen to sit as a member of a court-martial (juror). This is a duty which you should not take lightly.

When you are selected as a member of a court-martial you will be asked to complete a data sheet similar to the "Court Member Questionnaire" set forth below. This data sheet provides the counsel for both sides with information about a member's personal background which enables them to determine whether there could possibly be a ground for challenge for cause against a member. It is not intended to pry into the personal life of a member for any ulterior purpose. The authority for obtaining this information is found in Rules for Court-Martial 912, MCM, 1984.

A court-martial panel member may act as a fact-finder, sentencing authority or both. In a "not guilty" plea case, you will determine guilt or innocence and, if found guilty, an appropriate sentence. In a "guilty" plea case, you will only be required to determine an appropriate sentence for the offense(s) the accused was found guilty of by the Military Judge.

You will be disqualified from a court-martial panel if you are the accuser, witness, counsel, reviewer, or the investigating officer on the case.

Both Government and Defense counsel are entitled to ask you questions at trial to discover facts that could disqualify you as a court member. Listen closely and carefully during the trial to testimony by the witnesses. Read thoroughly the documents presented to you. The judge is there to assist you. You are required to follow the judge's instructions and directions.

Next is a letter you may, in similar form and content, receive from the convening authority's Staff Judge Advocate upon your selection as a court member. The letter outlines what some of your duties will be, why you were selected, and some the things you may expect from service as a court member.

Enclosed with the letter will be the Convening Authority's order appointing you to the court-martial and a Court Member Questionnaire.

### **The Letter**

1. The Commander, \_\_\_\_\_, has personally selected you to serve as a member of the (General) (Special) Court-Martial tentatively scheduled to convene at \_\_\_\_\_ Air (National Guard)(Force) Base, on (date). Uniform will be Service Dress (Blouse with (short)(long) sleeve shirt and tie).

2. Only personnel of the highest caliber are selected for duty as a court member. (Section) of the (State) Code of Military Justice requires the Convening Authority to choose as members of a court only those individuals who, in the Convening Authority's opinion, are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Duty as a court member is paramount; it is not an additional duty, and it takes precedence over virtually all activities, with the exception of mission-essential operational commitments that cannot be delegated to anyone else.

3. Individuals selected as court members may only be excused from attending court when the Commander personally excuses that individual. Any requests for excusal should be based on good cause such as extraordinary military commitments or acute personal hardships, and should be forwarded to the Convening Authority through the Staff Judge Advocate. Members selected for court-martial duty should not depart the base on leave or TDY without coordination with the Staff Judge Advocate.

4. One fact that bears stressing is that duty as a court member is always very tentative in nature. Even when you have been selected as a court member in a particular case, there is always the possibility that the accused will request a trial by military judge sitting alone. In such an event, selected members would not be required to attend the court. Since such a request must be approved by the military judge during preliminary trial proceedings, we cannot state for a fact whether the accused will be tried by judge alone or by court members, until the day of the trial.

5. In order to minimize inconvenience to court members, we have the members on a 15-minute standby on the day of the trial so that they will not have to wait around while the attorneys go through their preliminary proceedings before the military judge. Thus, it is essential that you keep my paralegal informed of the telephone number where you can be reached on the day of the trial.

6. I sometimes get requests from court members to brief them on their duties. Under the current Manual for Court-Martial, the duties of a court member are very similar to the duties of members of a jury in a civilian criminal trial. Basically, all that you need to do is to come into the court with an open mind and follow the instructions given you by the military judge. In this regard, it can be said that legally, the less a court member knows about a case before it is tried, the better. Accordingly, when a court member asks me if I can tell what the case the member is sitting on is about, the answer is no.

7. Once you have been selected as a court member for a specific trial and have weathered any possible delays in the trial, challenges, etc., you can look forward to a unique and in-depth view of our military justice system. Duty as a court member is a serious matter and one which I think you will find to be a most interesting challenging assignment. If you have any questions not answered by this letter about your potential duties as a court member, I will be glad to answer them to the extent permitted by law.

8. The data sheet that you fill out will be maintained on file in the Legal Office. This data sheet should include your projected leaves, TDYs, and the number of courts or discharge boards you served on previously. This information is of the utmost importance; please return it to the Legal Office as soon as possible.

9. I appreciate your support in this matter, and look forward to having you serve as a member of the panel.

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Staff Judge Advocate

2 Attachments

1. Special Order (omitted here)
2. Data Sheet (Questionnaire)

**Court Member Questionnaire**

The Manual for Courts-Martial requires that we provide the following information to the defense counsel. Would you please take a moment and provide us with the following biographical data and return it to the Legal Office within fifteen (15) work days.

A. Name: \_\_\_\_\_

B. Sex: Male Female

C. Race: \_\_\_\_\_.

D. Marital Status: \_\_\_\_\_.

1. Spouse's name: \_\_\_\_\_.

2. Dependents: NAME: \_\_\_\_\_, SEX: \_\_\_\_\_, AGE: \_\_\_\_\_  
NAME: \_\_\_\_\_, SEX: \_\_\_\_\_, AGE: \_\_\_\_\_  
NAME: \_\_\_\_\_, SEX: \_\_\_\_\_, AGE: \_\_\_\_\_  
NAME: \_\_\_\_\_, SEX: \_\_\_\_\_, AGE: \_\_\_\_\_

E. Home of Record: CITY: \_\_\_\_\_, STATE: \_\_\_\_\_

F. Education & Schooling (college):

1. NAME OF SCHOOL \_\_\_\_\_, YR GRAD \_\_\_\_\_, DEGREE \_\_\_\_\_  
2. NAME OF SCHOOL \_\_\_\_\_, YR GRAD \_\_\_\_\_, DEGREE \_\_\_\_\_

G. Past Five Duty Assignments:

DUTY TITLE BASE STATE/COUNTY YEARS

1. \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_-\_\_\_\_  
2. \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_-\_\_\_\_  
3. \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_-\_\_\_\_  
4. \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_-\_\_\_\_  
5. \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_-\_\_\_\_

H. Any Past Discharges From the Service:

1. BRANCH OF SERVICE \_\_\_\_\_, TYPE \_\_\_\_\_, YEAR \_\_\_\_\_  
2. BRANCH OF SERVICE \_\_\_\_\_, TYPE \_\_\_\_\_, YEAR \_\_\_\_\_

I. Number of Courts Served on Previously: \_\_\_\_\_

J. Number of Boards Served on Previously: \_\_\_\_\_

***KWIK-NOTE: ANG members should gain an insight to their upcoming service on Boards and Courts-Martial.***

**RELATED TOPICS:**

**SECTION**

Boards - Investigative	16-4
Command Influence	2-2
Courts-Martial	8-15
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Worldwide Duty Medical Evaluations	19-11

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## Conditional Release

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**Updated by Major Jeffrey Knickerbocker, November 2008**

**AUTHORITY:** AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 2005); DoDI 1205.19, *Procedures for Transfer of Members Between Reserve and Regular Components of the Military Services* (3 Apr 95).

### INTRODUCTION

All members of the Air National Guard must satisfactorily participate in all scheduled training in order to fulfill their statutory military obligations, service agreements, or current enlistment contracts. However, there are times when members seek to leave their current ANG unit of assignment and re-affiliate with another unit in the National Guard or in another component or another branch of service of the Armed Forces of the United States. Before a member can join another unit they must be released from their current unit with a completed conditional release.

Members planning to re-affiliate with another unit or enlist in another component of the Armed Forces must continue to satisfactorily participate in UTAs and other required training of their current unit of assignment until they have been released from their current unit and enlisted in the new unit or component. Treat those members who do not continue to participate as you would any unsatisfactory participant, and use the full range of quality force management actions appropriate under the circumstances.

### CONDITIONAL RELEASE

Approving a conditional release excuses the member from training with the unit of assignment before the member's expiration of term of service (ETS). It is given on condition that within 60 days, the member will enlist in another unit. NOTE: The 60 days can be extended with approval from losing commander.

What usually happens is that your member decides to move out of the commuting distance to your unit (losing unit). The member speaks with the gaining unit enlisting. The gaining unit must send the losing unit a DD Form 368, Request for Conditional Release or an AF Form 1288, Application for Ready Reserve Assignment, requesting that the individual be released so they can enlist in the new unit. The approving authority for a conditional release is the TAG or Commander having custody of field record group (FPRGp)

Unless and until the conditional release is approved, the member must satisfactorily participate in all required training even if the member has moved beyond the commuting distance.

### MONITOR PROGRESS

In addition to the potential unsatisfactory participation problems, your MPF must keep track of the member's affiliation progress with the gaining unit to avoid having the member remain on your manning document beyond the required period, and thereby prevent the enlistment of a replacement member.

### ACTIONS AFTER 60 DAYS

At the end of the 60-day period, one of two things will have happened:

1. You will have received confirmation of the member's new enlistment, and the member will be discharged from the Air National Guard of your state ; or

2. If the member has not enlisted in the other unit, you may:
  - a. Arrange for make-up training and retention in your unit if the member wishes and you are convinced the member can and will satisfactorily participate in required training despite the commuting distance; or
  - b. In absence of the mutual desire or the ability of the member to remain with your unit, you will process the member for discharge; or
  - c. You will grant an extension and allow the member more time to affiliate with another unit.

## CONCLUSION

This area is usually routinely handled by your MPF, but should you encounter any problems with interpreting the regulations in light of the particular factual scenario involved, consult your Staff Judge Advocate before initiating discharge action. Your Staff Judge Advocate should review the discharge actions of members who do not enlist in the new unit for legal sufficiency.

***KWIK-NOTE: Keep track of members who are “conditionally released,” and promptly take the appropriate action upon expiration of the release period.***

## RELATED TOPICS:

	<b>SECTION</b>
Absent Military Members	1-2
Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Assignments	1-5
Legal Reviews	17-11
Palace Chase	1-26
Quality Force Management Actions	24-12
Recruiting – Consolidation of Air Force, Air Force Reserve and Air National Guard Programs	1-32
Relationship with Other Military Components	11-6
Stop-Loss	20-6
Transfer to the Individual Ready Reserve (IRR)	1-37
Unsatisfactory Participation	1-40

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# Conscientious Objectors

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Updated by Major Jeffrey M. Knickerbocker, November 2008

**AUTHORITY:** DODI 1300.06, *Conscientious Objectors* (5 May 07); AFI 36-3204, *Procedures for Applying as a Conscientious Objector* (15 Jul 94); See also the Opinions of The Judge Advocate General of the Air Force (OpJagAf).

## INTRODUCTION

A Conscientious Objector (CO) is a member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form, including those whose convictions permit military service in a noncombatant status. A conscientious objection is a firm, fixed, and sincere objection by reason of religious training and belief (or other system akin to religion) to participation in war in any form, or the bearing of arms. A CO is classified as either Class 1-0, (objects to participation of any kind in war in any form) or Class 1-A-0 (objects to participation as a combatant in war in any form, but whose convictions permit military service in a noncombatant status.)

## NATIONAL POLICY

Congress has recognized that deep and sincerely held convictions against the use of force may place a citizen in a dilemma between conscience and patriotic obligation. Therefore, Congress provided a means whereby these citizens may be restricted in duties (Class 1-A-0) or excused from their military obligation (Class 1-0) by receiving status as COs.

## APPLICATION

An individual makes an application for CO status and requests either: separation based on conscientious objection (Class 1-0) or reassignment to noncombatant training and service based on conscientious objection (Class 1-A-0).

The applicant bears the burden of proof. The applicant must establish by clear and convincing evidence that:

- The nature or basis of the claim falls under the definition of conscientious objections as described in AFI 36-3204.
- The applicant's belief is honest, sincere, and deeply held.
- The applicant's belief is by virtue of religious training or other belief system akin to religion.
- The applicant opposes participation in war in any form or the bearing of arms.

## PROCEDURES

Procedures for submitting, processing, and approving/disapproving an application for CO status are thoroughly outlined in AFI 36-3204. The general procedural flow is as follows: the member submits application to his/her immediate commander (unless on EAD, then to servicing MPF) (paragraph 1.3 and Table 1); MPF obtains required interviews with the chaplain and psychiatrist, counsels member on impacts of designation as a CO, and forwards prepared case file to the IO (paragraph 2.7); the appropriate commander (paragraph 3.1.3) appoints an IO who must be a judge advocate serving in active military service; the IO conducts hearing (non-adversarial in nature, although applicant may be represented by counsel, at his or her own expense) and files report with recommended action (paragraph 3.2 et seq); applicant is notified of IO's recommendation and has opportunity to respond. The package then continues through appropriate channels at the wing level (paragraph 2.10) for legal review and recommendation by the commander who appointed the IO. After completion, the file is forwarded through channels to HQ ANGR/DPM for final disposition.

SecAF or a designated representative makes the decision regarding CO status for officer applicants. The final approval decision for enlisted personnel is by ANG/DPP

## **COMMANDER’S RESPONSIBILITIES WHILE APPLICATION IS PENDING**

After a member requests CO status, any potential promotion is withheld or delayed because the member’s potential for future service is questionable. While a CO request is under consideration, a commander should make every effort to assign applicants to duties that will conflict as little as possible with their asserted beliefs. However, the member remains subject to the normal requirements of military service, including military discipline under the applicable state code or the Uniform Code of Military Justice.

Note that the law provides that if a person is discharged on the grounds that he or she was a CO, all veterans benefits are barred under 38 U.S.C. 5303. Recoupment of educational benefits and special pay or bonuses will also be made when applicable.

***KWIK-NOTE: Once a member has requested Conscientious Objector status in accordance with the instruction, the request should be promptly investigated and acted upon.***

### **RELATED TOPICS:**

### **SECTION**

Quality Force Management Actions

24-12

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# Dependent Care Responsibilities

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**Updated by Major Christine Lennard - Sep 2007**

**AUTHORITY:** AFI 36-2908, *Family Care Plans* (1 Oct 00); AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005); applicable state law.

## INTRODUCTION

The successful accomplishment of the Air National Guard mission is predicated on the availability of trained and motivated people. To achieve the force characteristics of responsiveness and flexibility, the Air National Guard must have people in the right place at the right time, unencumbered and ready to perform the jobs for which they have been trained. Unless they are specifically deferred or exempted, all members of the Air National Guard are expected to be available at all times to perform a full range of military duties and assignments.

All Air National Guard members are responsible for making adequate dependent care arrangements in advance to ensure that they are available for mobilization, a temporary tour of duty (TDY) (to include no-notice or short-notice deployments), recall, alert, extended duty hours, shift work, or similar military obligation.

While the Air National Guard will assist members with dependent care planning, personnel with dependents have the primary responsibility of ensuring that they can fulfill both their personal obligations to their dependents and their professional obligations to the Air National Guard.

## PLAN IN ADVANCE

Advance planning is the key to dependent care arrangements. All Guard members with dependents must take the initiative to use every military and civilian resource at their disposal to ensure that dependents receive adequate care, support, and supervision in a manner that is compatible with the member's military duties. Dependent care plans must cover all possible situations, both short and long term, and must be sufficiently detailed and systematic to provide for a smooth, rapid turnover of responsibilities to another individual during the absence of the military sponsor. Several civilian and military agencies are available to assist you and your supervisors and members in developing dependent care plans (for example, Personal Affairs, Staff Judge Advocate's Office, Accounting and Finance, unit Chaplain, and the American Red Cross).

## BE AWARE OF RESPONSIBILITIES

Present members of the Air National Guard must be informed of the Guard's policy on the relationship between dependent care responsibilities and the accomplishments of military duties and obligations. Members and potential members of the Air National Guard must be counseled and briefed on family care responsibilities by individual counseling, unit briefings and, when necessary, mobility briefings. Annual briefings on family care responsibilities are required by AFI 36-2908.

## SINGLE PARENTS, MILITARY COUPLES, AND UNIQUE FAMILY SITUATIONS

In cases of single member sponsors and military couples with dependents, there is no civilian spouse available to fulfill dependent care responsibilities during the absence of the military sponsor(s). Nevertheless, these parents and sponsors must be available to meet all their military obligations, and must document their family care plans on the AF Form 357. Additionally, the Commander or First Sergeant may determine that certain members with civilian spouses have unique family situations (for example, where the spouse is unable to provide care for family members or for themselves). These members may also be required to document a family care plan on the AF Form 357. Any

parent or sponsor who fails to make dependent care arrangements permitting a full range of military duties will be subject to prompt command action.

## **DEPENDENT CARE CERTIFICATION**

The AF Form 357 is a “Dependent Care Certification.” On this form, members certify that they have adequate arrangements for the care of their dependents if and when their military obligations call them away from home. These non-military persons who will be responsible for this dependent care are identified on the form. Annually, the Commander or First Sergeant must personally review all AF Forms 357 on file.

Members should also be advised at the time they present the completed AF Form 357 to have a Special Power of Attorney prepared with the assistance of the Judge Advocate’s office, whereby they give authority to the temporary dependent care provider for such things as medical treatment, school decisions, and the spending of money received from the military sponsor for the dependent’s support. The effectiveness of this Special Power of Attorney is usually made contingent upon the member’s mobilization, deployment, or otherwise being called away from home because of military obligations.

This topic should be made part of your Preventive Law program, and Newcomer’s Briefing. You may also need to consult State law for permissible or alternative dependent care arrangements.

## **ENFORCEMENT OF RESPONSIBILITIES**

You and your unit supervisors should establish duty schedules or unit procedures that are equitable for all members. Inequitable or inconsistent scheduling to accommodate dependent care arrangements is disruptive to unit morale and also counter-productive. Consider taking prompt command action with personnel whose continued failure to fulfill dependent care responsibilities, despite counseling and assistance, interferes with performing their military obligations (AFI 36-3209). Military Justice actions under state Codes may be appropriate in some cases; for example, where there is a refusal to provide the required information amounting to willful disobedience of a superior, failure to obey a lawful order or regulation, or an AWOL.

***KWIK-NOTE: The Judge Advocate’s Office should be part of the advice and review process of all Dependent Care Certifications to ensure they are legally sufficient and satisfy the requirements of AFI 36-2908.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Counseling	24-7
Dependent Support	23-10
Enlistment and Reenlistment	1-13
Financial Responsibility	23-12
Legal Assistance Program	17-8
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Personal Affairs Checklist	20-3
Powers of Attorney	23-19
Preventive Law Program	17-15
Pre-Mobilization Legal Counseling	20-4

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# Disposal of Personal Property

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Updated by Major Christine Lennard - Sep 2007

**AUTHORITY:** 10 U.S.C. 2575, 9712; AFI 34-244, *Disposition of Personal Property and Effects* (2 Mar 01); applicable state law and regulation.

## HOW WE GET THE PROPERTY

Personal property of Air National Guard members, civilian employees, residents of Air National Guard installations, and visitors on Air National Guard installations can come into the custody or control of the Air National Guard for a variety of reasons including death, capture, missing in action, incompetency, absence without leave, medical evacuation, loss, abandonment, or failure to claim.

## WHAT TO DO WHEN WE GET IT

If this occurs, Commanders should consult with their Judge Advocates to check AFI 34-244 and applicable state statutes and regulations that govern the collection, inventory, safekeeping and distribution of such property. These procedures may be contained in state civilian statutes rather than military regulations. When such property is identified the Installation Commander may be required to:

1. Have a written inventory of the property prepared together with an estimate of the fair market value of the property;
2. Place such property in safekeeping; and
3. Ascertain and locate the owners of the property, their heirs, next-of-kin, or legal representatives, and tag and segregate property believed to belong to identified individuals.

## SPECIAL GUIDANCE

Three key themes to remember:

1. Safeguard the property until it has been distributed to the proper person;
2. Make sure you distribute that property only to the person who is authorized to receive it; and
3. Get written receipts showing the name, address, date and list of property distributed.

## CHECK STATE LAW ALSO

AFI 34-244, 10 U.S.C. 2575 and 10 U.S.C. 9712 provide guidance on procedures for disposal of personal property of active duty Air Force members and other eligible persons. However, given the state nature of the Air National Guard, the applicable procedures will most likely be found in state statutes, with many requiring a court order before the property may be released. In absence of a state statute, the AFI may be helpful.

If you have any questions or problems in this area, contact your Staff Judge Advocate.

**KWIK-NOTE:** *As most states, by statute or regulation, delegate authority over state-owned ANG bases to the Installation Commander, this topic should be supplemented by applicable state law.*

**RELATED TOPICS:**

**SECTION**

Absent Military Members

1-2

Personal Affairs Checklist

20-3

Report of Facts and Circumstances of Death

1-35

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# Dress and Appearance

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**Updated by Major Jeffrey M. Knickerbocker - November 2008**

**AUTHORITY:** AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (2 Aug 2006), MAJCOM and local supplements; 36-3014, *Clothing Allowances for Air Force Personnel* (22 May 2007).

## THE STANDARD

Each ANG and Air Force member must maintain a high standard of dress and personal appearance. This standard is comprised of four elements: neatness, cleanliness, safety, and military image.

The fourth element, military image, is a subjective but necessary element of the standard. The American public and its elected representatives draw certain conclusions as to military effectiveness based on what they see; that is, the visual image the Air Force presents. Consequently, Commanders have the authority to direct individuals to enter the Fitness Improvement Program, regardless of overall composite score if the individual does not present a professional military appearance. AFI 36-2903, Chapter 1.

## COMMANDER'S RESPONSIBILITIES

Commanders must know the grooming standards in AFI 36-2903, Table 1, and ensure that these standards are maintained throughout the unit. A policy of strict conformance at the squadron level is the only feasible means to ensure uniform standards throughout the Air Force.

Since much of this area involves personal judgment, any nonconformity to these standards should be thoroughly documented. Minor infractions which become a pattern or habitual must be corrected either through disciplinary action or administrative means.

State and federal courts have refused to review judicial challenges to Air Force dress and appearance standards, deferring to "administrative discretion" of the services to set their own appearance standards.

Individual members have the responsibility to procure and maintain all required uniform items, with some exceptions as stated in Table 1. A clothing allowance is provided for that purpose. Compliance with this requirement cannot be assumed, but will require periodic inspection. Routine equipment reviews by Unit Deployment Managers can also help assure Commanders that personnel are meeting this requirement.

## MAINTAIN AND ENFORCE A UNIFORM POLICY

To protect the right to enforce military regulations, a uniform policy must be followed. Few areas of military tradition are as important as bearing and the proper wear of the prescribed uniform. Minor infractions, left unchecked, could become the standard unless AFI 36-2903 is strictly and uniformly enforced. Commanders should avoid any appearance of "selective enforcement" of the instruction.

Commanders have many options for dealing with nonconformance to Air Force standards. They may send the individual home, denying participation with the unit until the appearance meets the standard. If the individual has been warned that the standard is not met, and still comes to drill or other duty periods without improvement, the individual may be punished for failure to obey a lawful order or regulation under the appropriate section of the punitive articles of a state's military law or regulations. As with any disciplinary infraction, document the infraction and counseling. Discharge from the Air National Guard is the ultimate option in a well-documented case.

***KWIK-NOTE: Commanders should STRICTLY and UNIFORMLY ENFORCE dress and appearance standards throughout their units.***

**RELATED TOPICS:**

**SECTION**

Issue Items and Equipment Turn-In  
Newcomer's Briefing  
Officer Evaluation System  
Pregnancy of ANG Personnel  
Selective Enforcement  
Training

25-13  
1-22  
1-23  
1-29  
24-14  
26-2

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# Enlistment and Reenlistment

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**Updated by Major Jeffrey M. Knickerbocker, November 2008**

**AUTHORITY:** ANGI 36-2002, *Enlistment and Reenlistment in the Air National Guard and as a Reserve of the Air Force* (1 Mar 2004).

## ENLISTMENT QUALIFICATIONS

### Age

**No Prior Service** - An applicant must be 17 years old and younger than 35 at the time of enlistment. Parental consent is required for those persons who are 17, but less than 18 years of age, unless married. Waivers of this provision will not be granted.

**Prior Service** - Normally, applicants who can substantiate satisfactory prior service may be enlisted. However, qualifying/disqualifying reenlistment codes (RE) should be checked. Enlistment waivers should not be processed unless specifically authorized by Table 1.9 of ANGI 36-2002, or when there are extenuating circumstances such as RE codes obviously issued in error.

### Citizenship

Each applicant must be a citizen of the United States or possess a valid Immigration and Naturalization Service (INS) Form I-551/I-151 that does not expire during the proposed period of enlistment. Prior service applicants who are not U.S. citizens will not be enlisted. A non citizen military member will not be allowed to reenlist; citizenship must be obtained during the initial enlistment.

### Education

Both Prior Service and non Prior Service need a high school diploma or equivalent with at least a 31 score on the Armed Forces Qualifications Test, and a minimum aptitude index shown in AFMAN 36-2108, *Airman Classification*, for the career field subdivision in which considered for enlistment.

A non-prior service high school senior may be enlisted with an official statement from school officials that the individual has or will obtain sufficient acceptable credits to be awarded a high school diploma.

Prior AF service or Palace Chase/Front personnel may be enlisted without a high school diplomas or equivalent provided they have obtained a 3-skill level or higher.

### Physical Standards

Applicants must meet the medical standards contained in AFI 48-123. Prior service applicants are subject to the retention standards of AFI 48-123, Attachment 2, provided they have not been separated from the Air Force or Air Reserve Components for more than 180 days. Applicants separated for more than 180 days are subject to enlistment standards as indicated in AFI 48-123, Attachment 3. Applicants from other components must meet continued service standards of AFI 48-123, Attachment 2, which must include a current physical (within the last 5 years), and a Standard Form (SF) 93 with complete documented medical history, which has been completed within the last six months. Waivers can be approved through ANGSC/SG, and processed through your unit's medical personnel.

### Personal Security Investigation

Security investigations will be processed by security forces. A National Agency Check (NAC) or Single-Scope Background Investigation (SSBI) request, as appropriate, will be initiated on prior service applicants not later than 3 working days after enlistment. Applicants who have a break in federal employment, active military service, or

active participation in a reserve program of a period less than 24 months, or who have a security clearance as a DoD civilian employee or a contractor with a clearance issued under the Defense Industrial Security Program, need not be reinvestigated if the previous investigation has been recorded as favorable. An Entrance National Agency Check (ENTNAC), or SSBI, as appropriate, will be initiated on all non-prior service first term enlistees. The completed ENTNAC paperwork must be at the Base Security Manager's office NLT 3 working days after enlistment.

### **Applicants with Dependents**

Table 1.4 of ANGI 36-2002 outlines enlistment eligibility based on dependency status. Generally, single non prior service applicants with dependents are not eligible to enlist without a written TAG waiver. Prior service applicants with dependant may enlist so long as dependency was not a factor in the person's discharge or release from active status. If the basis of the discharge or separation was due to dependency complications, a court order to release custody of the children is necessary in order to qualify for enlistment. Married applicants with dependants and married to a military spouse are ineligible to enlist without a written TAG waiver. All applicants, whether prior service or non-prior service, will be required to complete AF Form 357, Family Care Certification, before enlisting.

### **APPLICANTS - NO WAIVER PERMITTED**

#### **Morally Unacceptable - Applicants are ineligible:**

When they have been convicted by a civilian court of an offense punishable by death or convicted of one or more Category 1 offenses as set forth in Attachment 2 to ANGI 36-2002; are presently under restraint (see definitions in ANGI 36-2002); have questionable moral character, or a history of antisocial behavior (including a history of psychosis), frequent difficulties with law enforcement agencies, trans-sexualism and other gender identity disorders, exhibitionism, transvestitism, voyeurism, and/or other paraphilic, or homosexual, or bisexual conduct; or have a background makes their enlistment inconsistent with protecting the national security.

#### **Disqualifying Medical –Conditions (see Table**

- Documented history of mental illness
- HIV positive
- History of addiction to alcohol. (Waiver is available to Individuals who can document successful completion of a rehabilitation program, have maintained sobriety for at least 2 years, and are medically qualified.)
- "4" profile in any area of the PULHESX Criteria in an AF Form 422 (or DAC Code C).

#### **Other Disqualifications**

**Prior service applicants who deserted**, were discharged with a less than honorable service characterization (UOTHC), were separated for drug abuse, homosexuality or unsatisfactory participation and officers removed from active duty for unsuitability, misconduct or on unfavorable terms may not be re enlisted or re commissioned

#### **Non Prior Service Applicants and Drug Use**

Applicants are not eligible for enlisting if they have been convicted of possession, use, sale or transfer of dangerous or narcotic drugs; or ever been a distributor or manufacturer of dangerous drugs. Experimental use of marijuana may not disqualify an applicant but waivers will not be granted where the applicant has used marijuana within six months of enlistment or is psychologically dependent or a chronic user of marijuana.

#### **Other Reasons - Applicants are not eligible for enlistment who:**

1. Are conscientious objectors

2. Have no social security number;
3. Have served in another country's armed forces;
4. Have willfully or intentionally failed to register for the selective service;
5. Are active duty members not Palace Chase;
6. Are reserve personnel who do not have a conditional release; or
7. Are students in ROTC, a service academy, high school but not seniors, or enrolled in professional courses leading to a medical or veterinary degree;
8. Have been convicted of a crime involving domestic violence;
9. Cannot attain 20 years for retirement purposes by age 60;
10. Are Palace Chase applicants and have 18 or more creditable years of service;
11. Are under parole, probation or a suspended sentence;
12. Are under the influence of alcohol or drugs anytime during the accession process;
13. Refuse to be tested for drugs/alcohol.

#### **INELIGIBILITY FACTORS WHICH MAY BE WAIVED AT THE NGB LEVEL**

1. Certain civilian court convictions (see table 1.3 in ANGI 36-2002).
2. Applicants with excessive or distracting tattoos.
3. Certain family relationships.
4. Persons receiving retirement or retainer pay from any branch of the Armed Forces. There are some exceptions for those with between 20 and 30 years of service.
5. Persons previously eliminated from AF Basic Military Training for other than medical reasons.
6. Persons previously discharged for failure to meet training requirements.
7. Applicants who are employees of the federal government or who are in other critical positions. Federal employees should submit a certificate of availability from their agency. Other applicants, who because of their employment or position would not be available for active duty, may need a waiver.

#### **INELIGIBILITY FACTORS WHICH MAY BE WAIVED BY THE ADJUTANT GENERAL**

1. A person who is granted a release from criminal charges filed or pending against them under the condition that they apply and are accepted into the military.
2. Persons previously separated or discharged by reason of dependency or hardship.
3. Those who have five or more days lost time on Title 10 active duty.
4. Prior service personnel in the grade of E-4 or below.

#### **REENLISTMENT AND EXTENSION OF ENLISTMENT**

Voluntary extension of enlistment can be from a minimum of six (6) months to a maximum of six (6) years.\*  
Retention beyond the age of 60 is not authorized except when:

1. The member has been hospitalized, or has a temporary physical disability, or has a pending medical - physical evaluation; or
2. The member is not qualified for retirement and has received an NGB waiver upon reaching 60 but will qualify for a pension before age 62, and may be extended for the time needed to qualify for retirement. This provision applies only when a waiver for retention beyond age 60 was granted by ANG at the time of enlistment.
3. Members may be allowed an extension beyond age 60 for purposes of qualifying for a technician annuity if approved by ANG/DPP.

Members enrolled but not making satisfactory progress in the Fitness Program at ETS will not be permitted to reenlist. Waivers may be granted by TAG for a period not to exceed the time it will take to attain the fitness standard (minimum extension is 6 months).

\*Only one extension will be executed per enlistment/re-enlistment, and exceptions to this will require approval by ANG/DPP.

An airman may be involuntarily extended for the time to complete an investigation or await trial for a UCMJ violation.

The eligibility factors for reenlistment are similar to those mentioned before in "ENLISTMENT QUALIFICATIONS" above, but with the following additional factors:

1. Immigrant aliens who enlisted in the ANG on or after 1 June 1983 must acquire U.S. citizenship status during their initial enlistment to be eligible for reenlistment extensions;
2. Individuals not selected for retention;

Should any problems arise in this area, Commanders should consult with their Judge Advocate, Recruiters and MPF.

***KWIK-NOTE: Be familiar with the criteria for enlistment, reenlistment and extensions of enlistment.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Adoption Expenses Reimbursement	23-2
AGR Program	11-4
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Selective Retention In The Air National Guard	1-37
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## Enlistment and Reenlistment Bonus Programs

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** ANGI 36-2607, *Air National Guard Retention Programs* (30 Jan 1998); Applicable National Defense Authorization Acts.

### **BONUS PROGRAMS**

**Each Defense Authorization Act has included a bonus program. Bonuses could include a payment or a student loan repayment. The education office and the recruiting office are excellent sources of information relating to bonuses.**

Bonuses are authorized for ANG members who enlist, reenlist, or are appointed to serve in selected AFSCs. The bonus program change depending on shortages and funds available to fund the various bonus programs. The best point of contact for the most up to date bonus information is your base Recruiting Office.

Bonus participation may be terminated for failure to satisfactorily participate, separation, transfer to another AFSC, becoming a military technician, or the AFSC is withdrawn. Recoupment of unearned bonus payments will occur for the above reasons, or also when the member accepts an Air National Guard officer's appointment having served less than one (1) year from the initial bonus payment.

***KWIK-NOTE: Widely disseminate the existence of this program to aid in recruiting and retention.***

### **RELATED TOPICS:**

### **SECTION**

AFSC Reclassification and Training  
Enlistment and Re-enlistment  
Montgomery G.I. Bill  
Palace Chase  
Reporting Identifiers

1-3  
1-13  
4-6  
1-26  
1-34

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## Enlistment of Airmen - Defective

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 2005).

### INTRODUCTION

Members who have enlisted and have intentionally or unintentionally concealed facts, characteristics or matters which would have made them ineligible for enlistment are subject to administrative separation.

### COMMANDERS ACTION

When Commanders are faced with a **defective** enlistment of one kind or another, they should take the following steps:

1. Verify the facts;
2. Obtain copies of all documents which involve the member's enlistment and proof of the defect. (For example, the enlistment contract and later acquired documents proving the defect);
3. Evaluate the facts and verify the defect; and
4. If the **defective** enlistment is verified, commence the administrative separation action through the CBPO.

### PRACTICAL TIPS

Types of **defective** enlistments and some things to watch for are:

1. Enlistment of minors - a person under 17 years of age is barred by law from enlisting; this is considered a *void* enlistment (it never legally existed), and, therefore, no discharge certificate or other evidence of service will be issued. This is not waivable.
2. Erroneous enlistment (or re-enlistment or extension of enlistment)- one which should not have been accepted but does not involve fraud; this exists if:
  - a. It would not have occurred had the relevant facts been known by the Air Force, or had appropriate directives been followed; and
  - b. It was not the result of fraudulent conduct on the part of the member; and
  - c. The defect is unchanged in material respects.

If the unit commander recommends that the member be retained, the initiation of separation processing is not required if:

- a. The defect is no longer present
- b. The defect is waivable and the appropriate waiver has been obtained, or

- c. The defect consists of failure to meet physical standards for enlistment, and the member is medically qualified for worldwide duty.
3. Defective Enlistment Agreements – exists if:
    - a. As a result of a material misrepresentation by recruiting personnel, upon which the member reasonably relied, the member was induced to enlist with a commitment for which the member was not qualified; or
    - b. The member received a written enlistment commitment from recruiting personnel for which the member was qualified, but which cannot be fulfilled by the Air Force or ANG; or
    - c. The enlistment was involuntary as defined in the UCMJ or state military code.

This may apply to re-enlistments and extensions of enlistment as well. Also, the existence of a defective enlistment agreement does not bar appropriate disciplinary action, or other separation or discharge proceedings, regardless of when the defect is raised. Separation for defective enlistment is appropriate only if the member did not knowingly participate in the creation of the defective agreement and once the member discovers the defect, notifies the appropriate authorities within 30 days of discovery. The member must also request separation instead of other authorized corrective actions.

4. Fraudulent Entry - one involving deliberate deception on the part of the enlistee regarding any material misrepresentation, omission, or concealment which might have resulted in rejection if known at the time of enlistment. Do not use for concealment of minority or consent of a parent or guardian. This is waivable, but it is not recommended that waivers be granted to members who conceal acts involving moral turpitude.

#### Cautions to Commanders:

Be sure the documents upon which you intend to rely are the appropriate ones. An example is the enlistee who conceals or "forgets" to include a prior criminal conviction which the FBI "rap sheet" later reveals. You cannot support a discharge with just the "rap sheet," which may itself contain erroneous or incomplete information. Write to the court (or local police department to find the court) to obtain a CERTIFIED COPY OF CONVICTION or DISPOSITION of the offense. That document - not the rap sheet - is required to support the discharge for this reason.

In certain erroneous and fraudulent enlistment situations, there are waiver options. Consult AFI 36-3209. BE CAREFUL, however: if the Commander has knowledge of an erroneous or fraudulent enlistment and fails to act (to at least begin to gather the necessary documents to begin the discharge action) within a reasonable time, a constructive waiver may result. This means that in certain erroneous and fraudulent enlistment situations, a Commander can waive the defect and retain the enlistee. You may not want to retain, however. But, if you do not act timely, you may be deemed to have waived the defect in the enlistment and be forced to retain the enlistee.

#### **DISCHARGE CHARACTER AND AUTHORITY**

Consult AFI 36-3209 for the authorized characterization of the discharge in each situation.

Usually, the discharge authority is the State which discharges the enlistee from both the State ANG and as a Reserve of the Air Force.

#### **CONCLUSION**

Close coordination among first sergeants, the MPF, and the Staff Judge Advocate is essential to ensure efficient and accurate processing of these actions. As with most administrative discharge actions, these actions should be reviewed for legal sufficiency by the unit SJA before being sent to the discharge authority for final action.

***KWIK-NOTE: Commanders must act promptly in defective enlistment cases.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Administrative Discharge of Enlisted Personnel	24-3
Barring Reenlistment	24-6
Conscientious Objectors	1-9
Drug Abuse	10-4
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# Federal Commission Status Withdrawal

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** 32 U.S.C. 323; OpJAGAF 1989/6, *Federal Commission Status Withdrawal* (25 Jan 89); AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 2005).

## FEDERAL RECOGNITION

If an officer in the Air National Guard meets the prescribed Federal standards for the grade and position to which appointed or promoted by the State, then the Federal Government will generally “recognize” that appointment or promotion. This process is what is meant by the phrase “federal recognition” although the appointment and promotion of officers in the Air National Guard is a function performed by the State.

## WITHDRAWAL CRITERIA

Under federal law, however, this recognition of officer appointments and promotions can be withdrawn, if that officer is no longer qualified concerning grade, branch, position or type of unit or organization involved. The Secretary of the Air Force sets the criteria for members of the Air National Guard. Chapter 4 of AFI 36-3209 outlines the procedures for withdrawal of Federal recognition.

In 1984, as a policy matter, the Secretary mandated that Air National Guard officers must have at least a bachelor’s degree before their seventh year of commissioned service or risk losing their federal recognition.

If an Air National Guard member transfers to the Air Force Reserve, federal recognition is withdrawn automatically because there is no longer a state requirement to recognize.

## DISCHARGE

Former Air National Guard officers who transferred to the Air Force Reserve may still be discharged by the Air Force Reserve for substandard performance of duty or unsatisfactory participation if the bachelor’s degree is not attained within the required period of time.

Should a question arise along this line, a Commander should contact the Staff Judge Advocate for advice.

***KWIK-NOTE: Commissioned officers who are no longer qualified may have their federal recognition withdrawn.***

## RELATED TOPICS:

## SECTION

Federal Recognition of Officers  
Selective Retention in the ANG

1-17  
1-36

# Federal Recognition of Officers

Updated by Major Jeffrey Knickerbocker (November 2008)

## **AUTHORITY:**

ANGI 36-2504, *Federal Recognition of Promotion in the Air National Guard (ANG) and as a Reserve of the Air Force Below the Grade of General Officer* (28 Jul 04)..

## **"PROMOTION" AND "FEDERAL RECOGNITION" DISTINGUISHED**

The term "federal recognition" means an acknowledgment by the Federal government that an officer appointed or promoted in the ANG meets the prescribed Federal standards for the grade and position to which appointed or promoted by the State. Distinguish the terms "promotion" of officers from "federal recognition" of such promotion. The promotion of officers in the ANG is a function of the State. Federal recognition of a promotion is a federal function which has generally been delegated to each Adjutant General to exercise on behalf of the Chief, National Guard Bureau and the Secretary of the Air Force.

Even though an officer has been promoted by the State, it is only upon that officer's promotion becoming "federally recognized" that the officer is entitled to wear the new rank to which promoted and begin to collect pay in the higher grade. Once federally recognized, the ANG officer will receive a Reserve of the Air Force appointment in the same grade.

However, federal recognition of the ANG officer's rank does not necessarily subject that officer to all federal authorities, such as for military justice purposes. One of the distinguishing features of the ANG from the active duty force and reserves, is that while ANG officers and other ANG members are performing duty in a Title 32 status, they are not subject to the UCMJ, even though the rank of such ANG officers has been "federally recognized."

## **FEDERAL RECOGNITION BOARD**

NOTE: General officer federal recognition boards are conducted by the National Guard Bureau; therefore, the information below applies only to boards for promotion to O-6 and below.

An officer in the ANG is promoted based upon the fully qualified method of selection, without regard to race, color, creed, gender, age, or national origin. A federal recognition board, which must have a minimum of three, but not more than five officers as voting members, to include a recorder without a vote, and who must be appointed separately, is convened to determine a candidate's qualifications for federal recognition. The senior member of this board acts as its president. All members have a vote in the matter, and must be senior to the individual being examined. The board members review a candidate's physical and moral qualifications, and potential for success in the ANG. The whole person concept is utilized as a general guide.

For an initial appointment to grades O-1 to O-6, a personal appearance is mandatory before the board, unless waived by the Adjutant General of the State of appointment. For unit vacancy promotion to grades O-2 to O-6, a personal appearance is at the discretion of the Adjutant General.

Upon completion of the examination, if conducted, the president of the board will excuse the candidate, and the board members will deliberate the candidate's qualifications. Voting is by secret written ballot. The president of the board will then recall the candidate if a personal examination was conducted, to advise the candidate of the board's findings and recommendations, and to take whatever other action is necessary. If a personal examination was not conducted, the candidate is notified of the same information by the president of the board.

All actions of the board are recorded on NGB Form 89 in accordance with sections 307 and 308 of Title 32 of the USC and NGR (AF) 36-3 (28 May 93). Thereafter, this form is returned to the State Adjutant General for approval and submission to the Chief, National Guard Bureau, for appropriate federal recognition actions, including submission for confirmation by the United States Senate, if required.

It is strongly suggested that all officers whose promotions are being considered by a Federal recognition board personally review their files and the record that will be submitted to the board BEFORE that record is submitted. The CBPO Chief should be consulted, and in appropriate instances, based upon what may be in the files and records, so should the Staff Judge Advocate.

***KWIK-NOTE: ANG officers who are promoted cannot wear their new rank or begin to receive higher pay in the new grade, until their promotion is federally recognized.***

**RELATED TOPICS:      SECTION**

Enforceability of Orders by AF Officers to ANG Personnel Not in Federal Service	11-5
Equal Opportunity and Treatment Program	9-5
Federal Commission Status Withdrawal	1-16
Officer Evaluation System	1-23
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Relationship with Other Military Components	11-6
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# Homosexuality

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**Updated by Major Jeffrey Knickerbocker, November 2008**

**AUTHORITY:** 10 U.S.C. 654, *Policy Concerning Homosexuality in the Armed Forces*; DoDI 5505.8, *Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations* (24 Jan 2005); AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (15 Apr 2005); AFI 51-602, *Boards of Officers* (2 Mar 1994); DoD Memo, *Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality* (12 Aug 1999); DoD Memo, *Implementation of Recommendations Concerning Homosexual Conduct Policy* (12 Aug 1999); AF/CC Ltr, *Homosexual Policy Guidance* (10 Mar 2000); SAF Ltr, *Air Force Policy on Harassment* (10 Jan 2000); *TJS-1, TJAGD Core Principles and Focus Areas* (15 Oct 2002); NGB Policy Ltr, All States Log Number P00-0042, *National Guard Bureau Policy on Homosexual Conduct and Harassment* (27 Jun 00).

## **DOD POLICY**

Homosexual *conduct* is incompatible with military service. References to Congressional findings to that effect can be found in AFI 36-3209, para. 1.15. Sexual *orientation*, however, is considered a personal and private matter. Homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual "conduct." Homosexual conduct is the focus of the DoD policy. The DoD policy is often called "Don't Ask. Don't Tell," although this may be an over-simplification.

## **DEFINITIONS**

Homosexual Conduct includes a homosexual act, statement, or a homosexual marriage or attempted marriage.

A "homosexual act" is defined as any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; or any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts.

A "statement" occurs when the member states that he or she is homosexual or bisexual, or words to that effect. It includes language or behavior that a reasonable person would believe intends to convey the statement that a person engages in or has a propensity or intent to engage in homosexual acts (*e.g.* statements such as "I am a homosexual," "I am gay," "I am lesbian," or "I have a homosexual orientation").

"Propensity" is defined as more than an abstract preference or desire to engage in homosexual acts; it indicates a "likelihood" that a person engages in or will engage in homosexual acts.

## **ACCESSIONS**

Applicants will not be asked to reveal their sexual orientation or whether they have engaged in homosexual conduct. ("Don't Ask"). All applicants will be informed of the separation policy for homosexual conduct. An applicant shall be rejected for entry into the Air Force if independent evidence is received which indicates the applicant has engaged in homosexual conduct.

For homosexual acts, an applicant will be rejected, unless a further determination is made that:

Such acts were a departure from the applicant's usual and customary behavior;

Under all the circumstances, such acts are unlikely to recur;

Such acts were not accomplished by use of force, coercion, or intimidation; and

The applicant does not have a propensity or intent to engage in homosexual acts.

An applicant who makes homosexual statements will be rejected, unless a further determination is made that the applicant has demonstrated that he is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Same sex marriage or attempted marriage will also bar an applicant's admission.

Information must come from "independent" sources.

### **SEPARATIONS**

If credible information exists of a homosexual conduct (a homosexual act, statement, marriage or attempted marriage), the commander shall initiate separation action unless the commander determines by a preponderance of the evidence that:

The member engaged in homosexual conduct for the purpose of avoiding or terminating military service; in which case, separation or disciplinary action of some other kind might be appropriate; *and*

Separation is not in the best interest of the Air Force.

Credible information means information that, considering the source and the surrounding circumstances, supports a "reasonable belief" that a service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just belief or suspicion. Credible information DOES NOT include associational activity such as going to a gay bar or possessing or reading homosexual publications or associating with known homosexuals marching in a gay rights rally in civilian clothes, or listing someone of the same gender as an emergency contact or as an insurance beneficiary.

Any military member being separated for homosexual conduct is entitled to a board hearing where the member is afforded full due process rights. A member will be separated for homosexual acts unless he/she can demonstrate:

The homosexual acts were a departure from his or her normal behavior;

Under all the circumstances, such acts are unlikely to recur;

The acts were not accompanied by use of force, coercion or intimidation;

Under the particular circumstances, the member's continued presence in the armed forces is consistent the interests of the armed forces in proper discipline, good order and morale; and

The member does not have a propensity or intent to engage in homosexual acts.

Statements create a rebuttable presumption that the service member engages in, attempts to engage in, or intends to or has a propensity to engage in homosexual acts. The member may rebut the presumption in an effort to avoid separation by presenting evidence to the contrary. Some or all of the following may be considered:

Whether the member has engaged in homosexual acts.

The member's credibility.

Testimony from others about the member's past conduct, character, and credibility.

The nature and circumstances of the member's statement.

Any other evidence relevant to whether the member is likely to engage in homosexual acts.

In all cases where there is a finding of homosexual conduct, other than those in which the member's conduct was solely the result of a desire to avoid or terminate military service, the member bears the burden of proving by a preponderance of the evidence that retention is warranted as outlined above.

Characterization of Discharge: A discharge for homosexual conduct may be characterized as Honorable, General, or Under Other than Honorable Conditions (UOTHC). To warrant separation with a UOTHC discharge, the case file must establish that the conduct occurred in a manner involving at least one of the following aggravating factors:

By using force, coercion, or intimidation;

With a person under 16 years of age;

With a subordinate in circumstances that violate customary military superior-subordinate relationships;

Openly in public view;

For compensation;

Aboard a military vessel or aircraft; or

In another location subject to military control under aggravating circumstances.

Recoupment: Under certain circumstances a member separated for homosexual conduct is subject to recoupment of educational assistance funds or special bonuses. The board must actually make a separate specific finding that recoupment is possible under the facts of the case and then make a separate specific finding that recoupment should be effected.

## **INQUIRIES AND INVESTIGATIONS**

Only the member's commander is authorized to initiate a fact-finding inquiry involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is a basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs. The commander should consult with the installation staff judge advocate prior to initiating an inquiry. The installation staff judge advocate should consult with senior level judge advocates prior to initiation of any inquiry based on homosexual conduct (statements or acts).

*Investigations are conducted only by the OSI, Security Forces, or another DoD law enforcement organization.* Inquiries and investigations are limited to the factual circumstances "directly" relevant to the specific allegations. Thus, inquiry officers are not permitted to inquire into the sexual orientation of the subject of the inquiry. The inquiry must focus on the alleged *conduct*.

*Inquiries/Investigations solely to determine a member's sexual orientation are prohibited.*

Inquiries: Informal fact-finding inquiries are the preferred method of addressing homosexual conduct. Only the member's commander may initiate a fact-finding inquiry into alleged homosexual conduct. A

commander inquiry must be based on "credible information" that a basis for discharge exists. In other words, the commander must have a "reasonable belief" that the military member engaged in homosexual conduct (an act, statement, or marriage/attempted marriage). An inquiry consists of a preliminary examination of reported information and, if necessary, a more extensive inquiry. Whether there is "credible information" depends upon a "totality of circumstances," considering the source of the information and the surrounding circumstances. An inquiry must be based on articulable facts, not just a belief, suspicion, or rumors. This DOES NOT include: information based solely on an association with known homosexuals, patronizing gay bars, possessing or reading homosexual publications, marching in a gay rights rally in civilian clothes, or listing someone of the same gender as an emergency contact or as an insurance beneficiary. Prior to questioning a member regarding alleged homosexual conduct, the member must be advised of DoD policy on homosexual conduct (i.e. that homosexual conduct (acts, statements, and marriages) is a basis for discharge, prior to questioning). A member must be advised of rights under Article 31, UCMJ, if appropriate.

**Harassment:** The fact that a service member reports being threatened or harassed because he or she is said or is perceived to be a homosexual SHALL NOT by itself constitute credible information justifying the initiation of an inquiry/investigation of the threatened or harassed service member. The report of a threat or harassment should result in the prompt investigation of the threat or harassment itself. Investigators should not solicit allegations concerning the sexual orientation or homosexual conduct of the threatened or harassed person. If during the course of an investigation, information is received that the service member has engaged in homosexual conduct, commanders shall carefully consider the source of that information and the circumstances under which it was provided in assessing credibility. Such information does not negate the need to investigate the alleged harasser.

## **REPORTING REQUIREMENTS**

Initiation of an inquiry, significant developments and final action taken in all homosexual cases shall be reported to AF/JAG. Coordinate the scope of inquiries in statement cases, where recoupment or the motivation for making the statement is at issue, with AF/JAG. SAF approval is required of any "substantial investigation" to determine if a statement regarding homosexuality was made for the purpose of seeking separation. Consult your staff judge advocate as to the latest developments on homosexual policy and procedures.

## **RELATED ISSUES**

Be watchful for attempts by local school boards or colleges to attempt to restrict or deny access to your recruiters on the basis of their claim that the ANG discriminates against sexual orientation. These attempts were prevalent at one time. If your recruiters are denied access to any place because of the military's policies on homosexuality, immediately contact your Staff Judge Advocate and make your State Headquarters aware of the situation.

***KWIK NOTE: Discharge those who engage in homosexual conduct, but do it correctly, as your action may generate substantial media interest.***

## **RELATED TOPICS:**

## **SECTION**

Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Courts-Martial	8-15
Evidence - Differing Standards and Burdens of Proof	8-4
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Recruiting - Consolidation of Air Force, Air Force Reserve and Air National Guard Programs	1-32

# Line of Duty Determinations

Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** *Executive Order 9397*; Title 5 of the United States Code; 10 U.S.C. 972; 10 U.S.C. 1074a; 10 U.S.C. 1201 and 1203-1207; 10 U.S.C. 1219; 10 U.S.C. 1448; 10 U.S.C. 8013; 21 U.S.C. 812; 32 U.S.C. 318; 32 U.S.C. 502(f); 37 U.S.C. 204(g) and (h); 38 U.S.C. 1110; 38 U.S.C. 1131; National Defense Authorization Act for Fiscal Year 2002, Public Law 107-107 (Dec 28, 2001), {642; The Paperwork Reduction Act of 1995; AFD 36-29, Military Standards (1 Jun 96); AFI 33-332, Air Force Privacy Act (29 Jan 2004 ); AFI 36-2910, *Line of Duty (Misconduct) Determination* (4 Oct 2002); ANGI 36-3001, *Air National Guard Incapacitation Benefits* (31 May 1996); DoDI 1332.38, *Physical Disability Evaluation* (14 Nov 96); DoDD 1332.18, *Separation or Retirement for Physical Disability* (4 Nov 96); AFH 41-114, *Military Health Services System Matrix* (1 Mar 97); System of Records Notice F036, Military Personnel Records System.

## INTRODUCTION

Federal laws require a determination of whether certain diseases, injuries, illnesses or death suffered by a military member 1) existed prior to services and if so was an EPTS condition aggravated by military service; 2) was incurred while in a line of duty status or 3) was a result of a member's own misconduct. The purpose of conducting a Line of Duty (LOD) or misconduct investigation is to protect the interests of the United States and the interests of the military member so that government benefits are awarded justly and in accordance with applicable law and regulations.

The determination is important to resolve whether certain statutory rights or benefits accrue to military members, dependents or survivors. Air National Guard LOD determinations are binding for most benefits administered by the Department of Defense, except for disability processing. They are not binding on other federal agencies, although normally those agencies will concur with Air National Guard findings. LOD findings help to determine eligibility for physical disability retirement, eligibility for medical care, pay and allowances, Veterans Administration (VA) benefits and civil service preference.

LOD determinations cannot be used by Command for disciplinary action. Commanders should note that an LOD proceeding is neither a substitute for, nor a bar to, such disciplinary action as may be warranted. Disciplinary actions are separate and distinct from the LOD determination. Though, in some situations, it may be appropriate for Command to conduct disciplinary actions at the same time the LOD is being initiated and determined. LOD determinations are not a bar to medical treatment nor does a LOD determination allow the United States to recoup medical care costs from the military member.

Congress set up the standard of Line of Duty for purposes of laws administered by the VA at 38 U.S.C. 105. The Air Force and Air National Guard use this statutory definition as a guide:

An injury or disease incurred during active military ... service will be deemed to have been incurred in line of duty and not the result of misconduct when the person ... was, at the time the injury was suffered or disease contracted, in active military service, whether on active duty or on authorized leave, unless such injury or disease was the result of the person's own willful misconduct ....

AFI 36-2910 implement the statutory requirements.

LOD investigations involve two separate determinations: line-of-duty status and misconduct status. There is little connection between the two except that when an injury or disease is determined to be the result of misconduct, it is automatically not in line of duty.

## **PRESUMPTIONS AND EVIDENTIARY STANDARDS**

### **PRESUMPTIONS**

There is a presumption of LOD status when an illness, injury, disease or death is sustained by a member in an active duty or IDT status.

The presumption is rebuttable when:

1. A medical officer diagnoses that the illness, injury or disease existed prior to military service
2. A formal investigation determines that the illness, injury, disease or death:
  - a. Was proximately caused by the member's misconduct, or
  - b. Was incurred while the member was AWOL.

We also presume that members are mentally responsible for their acts unless there is contrary evidence. This presumption usually means that it is unnecessary to pursue the issue of mental responsibility. However, when there is credible evidence of lack of mental responsibility, the issue must be resolved. Members may not be held responsible for their misconduct and its foreseeable consequences if, as a result of mental disease or defect, they lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform the conduct to the requirements of law. Mental disease or defect does not include, for example, mental impairment as a result of knowingly ingesting a hallucinogen.

### **EVIDENTIARY STANDARDS**

The evidentiary standard in LOD determinations is the preponderance of evidence. LOD and misconduct determinations should be made on the basis of all evidence, both direct and indirect.

1. Direct evidence is that based on actual knowledge or observation of witnesses.
2. Indirect evidence is facts or statements from which reasonable inferences, deductions and conclusions may be drawn to establish an unobserved fact, knowledge or state of mind.
3. There is no distinction between the value of direct and indirect evidence.

The burden of establishing that an injury or disease not contemporaneously reported was in line of duty rests with the person asserting the claim. Ordinarily, proof of the validity of a claim can be found in Government records, but in situations where official records or other evidence which may prove or disprove the validity of a claim cannot be produced from Government files or elsewhere, the claim must be denied.

### **WHO MAY BE SUBJECT TO LOD DETERMINATIONS**

Status of the military member is critical in the Line of Duty determination. With Guard and Reserve military members transitioning from civilian status to Title 32 or Title 10 and back to civilian status frequently, Chapter 3 of AFI 36-2910 provides guidance as to functional area responsibilities and how LOD process should flow.

NOTE: If you have questions regarding the applicability of Chapter 2 or 3 to ANG members in a Title 10 status, be advised there is not an updated ANG/DP supplement to AFI 36-2910 to help answer those questions. It is being suggested by those ANG/JA members who have been involved with the LOD process from an administrative perspective, that the ANG member and the government are both benefited by applying Chapter 3 to all ANG military status situations (i.e. AGR, Title 32, Title 10, etc) where a possible LOD exists. The use of the AF Form

348, which provides a description of the member's illness, injury or disease and the date it occurred, is available to all Air Force medical providers regardless of location. The applicable use of the AF Form 348 and the processing of that form for informal and formal LODs through the ARC member's MPF to HQ ARC/DP, IAW Chapter 3, ensures consistency in processing and accountability of all ARC members.

The following military personnel may be subject to LOD determinations:

1. Active duty Air Force members.
2. Members of the ARC who die, or incur or aggravate an illness, injury or disease while on published orders for any period of time or while on inactive duty and when traveling directly to or from the place the member performs active duty, or inactive duty for training (IDT).
3. United States Air Force Academy (USAFA) cadets.
4. Air Force Reserve Officer Training Corps (AFROTC) cadets who die, or incur or aggravate an illness, injury or disease while performing military training.

### **WHEN AN LOD IS REQUIRED**

AFI 36-2910, Chapter 1 identifies five (5) situations when the LOD process **MUST** be initiated, whether the member has been hospitalized or not, but when the member's illness, injury or disease results in:

1. The death of a member. In every case where a member dies on active duty, at a minimum, an AF Form 348 must be accomplished. An Administrative Determination is not applicable in a death situation.
2. Inability to perform military duties for more than 24 hours.
3. Likelihood of permanent disability.
4. Medical treatment of a member of the ARC regardless of the member's ability to perform military duties.
5. The likelihood of an ARC member applying for incapacitation pay.

Chapter 3 supplements the Chapter 1 list by identifying six situations when an Informal LOD determination is required for ARC members:

1. When there is a likelihood an ARC member may apply for incapacitation pay.
2. When the case involves service aggravated EPTS medical conditions.
3. When the medical condition involves a disease process such as coronary artery disease, cancer, diabetes mellitus, etc. or,
4. All cardiac conditions, including heart attacks, rhythm disturbances, etc.
5. When the member has been hospitalized.
6. When the member requires continuing medical treatment or treatment in a civilian hospital.

## **POSSIBLE LOD DETERMINATIONS**

1. In Line of Duty. The ARC member was in a duty or direct travel status and disease, injury, death or aggravation was not due to the member's own misconduct.
2. Not in Line of Duty - Existed Prior to Service (EPTS) – NO aggravation: where there is clear evidence that a disease or injury, or the underlying condition causing it, existed before the members entry into military service and was not aggravated by service.
3. Not In Line of Duty, Not Due To Own Misconduct: disease, injury or death was incurred during a period of AWOL (or during a material deviation from an authorized travel route) or off-duty, but was not proximately caused by the member's own misconduct.
4. Not In Line of Duty, Due to Own Misconduct: disease, injury or death proximately caused by member's own misconduct regardless of whether the member was AWOL.

The LOD issue will often surface when there are injuries to a member while en route to a UTA, but the member detoured from the most direct route to drill; or the member is injured on Saturday night of a UTA weekend, if the member resides in the vicinity of the duty location. Members remaining overnight at or in the vicinity of the place where inactive duty training is to be performed immediately before serving on duty are entitled to LOD benefits, if the duty location is outside reasonable commuting distance from the member's residence. Thus, depending on the location of duty and the member's residence, some drill status members who are injured on Friday or Saturday nights prior to performing UTAs may be entitled to LOD benefits.

## **TYPES OF LOD DETERMINATIONS**

The line of duty determination should be made by the medical office that first provided treatment or who is assigned nearest to the civilian facility that first provided treatment and is made one of three ways:

1. ADMINISTRATIVE DETERMINATION: This is made by a medical authority and is entered in the member's health record when:
  - a. The medical diagnosis is that an illness, injury, disease or the underlying condition causing it, existed prior to entry into military service, or between periods of services, and was not aggravated by services.; or
  - b. Clear evidence indicates that the member was in a duty status at the time of the injury, and the injury was not incurred while the member was absent without authority and was clearly not due to the member's misconduct
    1. Characterized as a hostile casualty;
    2. Incurred as a passenger in a common carrier or military aircraft;
    3. Clearly not involving misconduct or caused by abuse of drugs or alcohol;
    4. A simple injury (e.g. sprain, contusion or minor fracture which is not likely to result in permanent disability).

Administrative determinations are made in the majority of LOD cases. If the medical officer makes the determination that the illness, injury, disease or underlying condition causing it existed prior to entry into military service or between periods of service and was not aggravated by service, he or she documents this finding in the member's medical records with an entry of "EPTS, LOD NOT Applicable." If the medical officer makes an Administrative determination of LOD based on one of the reasons enumerated in 1 (b) above, in these instances, the medical officer does not have to make any entries in the member's records or initiate any forms.

2. **INFORMAL DETERMINATION:** This determination is initiated when an administrative determination is not appropriate but an LOD determination is required. An LOD is processed as an informal determination unless a formal determination is required because the Staff Judge Advocate nonconcur with the Commander's finding of "In the Line of Duty." The medical officer initiates an AF Form 348 providing a narrative of the member's medical condition. The medical officer DOES NOT make an LOD determination

An Informal Determination should not be used when there is doubt or possible aggravation of a known or unknown pre-existing condition.

An Informal Determination can be turned into a Formal Determination by the Commander recommending an investigation be conducted. If, as a result of the commander's investigation of the informal Determination the preponderance of the evidence the Commander finds:

1. That the illness, injury, disease, aggravation or death occurred while the member was absent without authority or
2. Is due to the member's own misconduct.

The Commander can make a recommendation to higher authorities that a Formal Determination be made. This recommendation is noted on the AF Form 348.

Table 2.3 Overview of Informal Determination Process, AFI 36-2910

<b>If the Commander's Recommendation Is:</b>	<b>If SJA's Recommendation Is</b>	<b>And Appointing Authority</b>	<b>Then</b>
In the Line of Duty	Concur	N/A	Case is Finalized
In the Line of Duty	Nonconcur	Finds In Line of Duty	Case is Finalized
In the Line of Duty	Nonconcur	Appoints IO	Formal Determination Process initiated
Not in the Line of Duty	Concurs	Appoints IO	Investigation is Begun
Not in the Line of Duty	Nonconcur	Finds In Line of Duty	Case is Finalized
Not in the Line of Duty	Nonconcur	Appoints IO	Formal Determination Process Initiated

3. **FORMAL DETERMINATION:** This determination is required when neither an Administrative Determination nor an Informal Determination can be made. A formal determination is made by a higher authority and should be made:

- a. In cases of strange or doubtful circumstances, suspected misconduct, or willful negligence.
- b. While the member was absent without authority.
- c. When the Commander believes the circumstances should be fully investigated.
- b. When agreement on the line of duty determination differs.

Formal Determinations are recorded on DD Form 261, Report of Investigation, Line of Duty and Misconduct Status and processed IAW AFI 36-2910.

Table 2.4 Overview of Formal Determination Process, AFI 36-2910

<b>If IO recommends finding that injury or disease occurred</b>	<b>Appointing Authority</b>	<b>Reviewing Authority, Who is Not also Approving Authority</b>	<b>Reviewing Authority, Who is Also Approving Authority</b>	<b>Approving Authority</b>
In Line of Duty, OR Not In Line of Duty	Can return case for more investigation; or recommend approval or disapproval, and forward to Reviewing Authority	Can return case for more investigation; or recommend approval or disapproval, and forward to Approving Authority	Can return case for more investigation; or approves or disapproves. Case is Finalized	Can return case for more investigation; or approves or disapproves. Case is Finalize.

## DUTY STATUS

Generally, most members of the ANG fall into one of two types of duty status. The first is inactive duty training (UTA, SUTA, EQT, AFTP) under 32 U.S.C. 502 which here will be collectively referred to as "UTA." The second is full-time National Guard duty, which includes school tours, and is under 32 U.S.C. 316, 32 U.S.C. 502, 32 U.S.C. 503, 32 U.S.C. 504 or 32 U.S.C. 505. It will be collectively referred to here as "FTNGD." Remember, the member must be in a duty status before the LOD status becomes an issue; and whether the member is in a UTA or FTNGD status, and if in FTNGD status, the duration of that status, may determine the benefits to which the member is entitled.

As previously stated, even if the injury or disease was sustained or incurred in a duty status, if it was caused or resulted from the member's own misconduct or existed prior to service (EPTS) and was not aggravated by such service, no benefits may be received.

## WHO INITIATES THE LOD PROCESS

Chapter 3, LOD Determination Procedures for Members of the Air Reserve Component, AFI 36-2910 requires a prompt completion of an LOD and notice not to separate or retire an ARC member while the LOD is pending. In addition to this AFI guidance, regardless of the reason for demobilization, any ARC member who requires medical testing or treatment may, with the member's consent, be continued on Title 10, 12302 in order to complete the testing and/or treatment. . The policy for extending ARC personnel mobilized under 10 USC 12302, Partial Mobilization, for medical purposes and UCMJ processing was published on 28 Jan 2003 and clarified on 9 Dec 03. In a 7 Jan 05 Memo, SAF/MR formalized the objective of preserving mobilization authority by placing ARC members on MPA man-days when continued on AD for medical reasons.

The ARC member's servicing MPF must keep track of LODs since the MPF has overall responsibility for the management and processing of LOD determinations. Unit SJA and servicing MPF should ensure a copy of the current ANG Personnel guidance is reviewed to ensure the member's extension request is processed accurately and timely.

It is the ARC member's responsibility when TDY to immediately notify the ANG Liaison attached to the TDY location or immediate TDY unit commander of any illness, injury, or disease incurred while in a duty status. Upon return to his/her home station, the member will also notify their home station medical facility or supervisor/commander. If the illness, injury or disease occurs while at home station, the ARC member must immediately notify his/her supervisor or medical facility. This notification must occur within 30 calendar days of

incidence. Failure to notify the medical facility or the member's supervisor/commander within 30 calendar days may lead to loss of benefits. (ANGI 36-2910, Section 1.9 and 3.1, 31 May 1996)

Another significant ARC change in Chapter 3 of AFI 36-2910 is the affirmative responsibility that is placed on the Medical Officers, Commanders, SJAs and Air Staff member when he or she learns of an ARC member's illness, injury, disease or death that may warrant an LOD determination. This affirmative responsibility existed under Chapter 2, but is now specifically applicable to the ARC through Chapter 3. Although AFI 36-2910 does not specify what "timely manner" means, Table 2.1, Goals for Completing Line of Duty Determinations, provides insight as to how quickly the LOD determination process should take.

## **STAFF JUDGE ADVOCATE REVIEW**

The SJA has an affirmative duty to follow through upon knowledge of a potential LOD situation regardless of the duty status or duty location of the member. The Commander should ensure that the Clinic routinely copies the SJA on all Administrative LOD Determinations, so the SJA can monitor compliance with the regulation and determine the propriety of payment of the member's medical bills and other LOD benefits. When an Informal Determination and Commander Investigation is conducted, the SJA reviews the Commander's recommendation for legal sufficiency. If a formal determination is initiated by higher authorities, the SJA at that level serves as a legal advisor to the Investigating Officer. The SJA will also review the Investigating Officer's findings and recommendations for legal sufficiency.

## **HOW THE DETERMINATION IS MADE**

What is a "disease" or "injury" is usually a medical determination.

Careful review of the facts with the Staff Judge Advocate is essential to ensure that an injured person has the full protection of the regulation. In addition, the Commander has a duty to protect the government's interests and avoid the obligation of government funds when the member was not in a duty status or the member was injured as a result of the member's own misconduct. A member would not be in line of duty, for example, if the member was intoxicated during annual training and as a result of the intoxication was injured; or, the member initiates a fight and is injured during the fight.

Finally, any injury to a member of the National Guard should be investigated as quickly as possible. Memories fade as time passes. Timely documentation of the facts surrounding the incident is necessary to insure that the interests of the member and the government are protected. Under ANGI 36-2910, the appointing authority is to inform the investigator to consult with the Staff Judge Advocate (SJA) for advice on appropriate duties and procedures.

Note that 10 U.S.C. Section 1219 provides that a member of the armed forces (including ANG personnel for LOD purposes) may not be required to sign a statement relating to the origin, incurrence or aggravation of a disease or injury claimed. Any such statement taken in an LOD investigation in violation of 10 U.S.C. 1219 is invalid and may not be used to reach a decision in the LOD determination. The member must be advised of this right, but can voluntarily waive it and consent to sign such a statement.

If an In Line of Duty finding is made, the member is entitled to various benefits such as medical care and incapacitation pay.

## **PERIOD OF COVERAGE**

LOD benefit coverage begins and ends the same for UTA and FTNGD status. The member generally is covered for injuries and diseases sustained or incurred from the time the member leaves home with the intention of going directly to the place where ordered to perform duty. The duty status continues until completion of the tour of duty upon leaving the duty station and returning directly home.

Once a member is released at the end of an FTNGD tour, after going directly to the member's home and arriving there, the LOD benefits coverage ceases, even though the orders are for 24 hours on the last day of the tour.

A common FTNGD situation is where a tour is from, for example, 1 August to 5 August (consecutive days). If the member is authorized to return home each night, there is still coverage for LOD benefits if an injury is sustained or a disease is incurred on 3 August at 1900 hours while playing softball at home. This is because the absence from the duty station was with authority and the member was still in an FTNGD status because, in the example, the injury or disease occurred after the tour started and before it ended.

Remember, however, an injury occurring on Saturday night after the Saturday UTAs and before the Sunday UTAs may not entitle the member to LOD benefits, if the member resides within commuting distance of the duty location.

## **REINVESTIGATION**

If new and significant evidence indicates a likelihood of error when making a final LOD determination, Appointing Authority or higher may direct a reinvestigation. The member or next of kin may request the reinvestigation within 45 days of receipt of the final LOD Determination. Written application, to include the new and significant evidence should be attached to the member's LOD and sent to the Appointing Authority. The servicing MPF should be copied. The processing of the reinvestigation request, how to conduct the reinvestigation and documentation of the reinvestigation is set forth in Chapter 4 of AFI 36-2910.

## **BENEFITS**

### **UTA STATUS OR ACTIVE DUTY**

Injuries sustained or aggravated, or diseases incurred in Line of Duty, is in UTA status, or is traveling directly to or from the place where duty is to be performed, or is remaining overnight in the vicinity of duty outside reasonable commuting distance from his or her residence entitle the member to medical and dental care and a portion of monetary pay and allowances. The amount of pay and allowances will not exceed the total of pay and allowances due the member for a similar period of active duty, nor will such pay be paid for more than 6 months unless approved by the Secretary of the Air Force (SAF). Additionally, the monthly entitlement may not exceed the member's demonstrated loss of earned income from nonmilitary or self-employment.

ANGI 36-3001, Military Entitlements, Attachment 2, (31 May 1996) provides a sample briefing of financial entitlements for ANG members, and ANGI 36-3001, Attachment 4 provides the member with a letter format for requesting Incapacitation Pay LOD determinations. 37 U.S.C. 204, Chapter 3 provides additional guidance for questions related to LOD entitlements for ANG members on active duty for 30 days or less, more than 30 days, or in Title 32 status while performing military duty.

Title 10 U.S.C. 1448, Application of Plan and Section 643 of the National Defense Authorization Act for Fiscal Year 2002, Public Law 107-107 (28 Dec 2001) provides that surviving dependents of a member who dies on active duty ad in the line of duty, may be eligible for benefits under the Survivor Benefit Plan.

## **VA DETERMINATIONS**

The VA will make an LOD determination in addition to the military LOD determination for purposes of entitlement to VA benefits. In practical terms, the VA usually uses the military LOD determination if the military has found "In Line of Duty," but where there has been no such finding, as in most death cases, the VA will separately make the determination. In short, there may be an "In Line of Duty" finding for VA benefits only, by the VA, even if the military made an "In Line of Duty" determination.

## **INFORMATION ON INCAPACITATION PAY**

See ANGI 36-3001, *Air National Guard Incapacitation Benefits* (31 May 1996)

## SURVIVOR BENEFIT PLAN

As a result of recent legislation, if a member dies on active duty and in the line of duty, his or her surviving dependents may be eligible for benefits under the Survivor Benefit Plan.

## NOTIFICATION OF MEMBER

The ARC member's servicing MPF will provide him or her with a copy of the LOD determination and investigation. Legal reviews of the LOD determination are not to be given to the member or family member in the event of the member's death. The servicing MPF should advise the member of the "Reconsideration Process." Sample notification letters are provided in AFI 36-2910.

## VICTIMS WITNESS ASSISTANCE PROGRAM

SJAs should be aware of state or federal Victims Witness Assistance Program protections and their applicability in limited LOD situations. For example, the rape of a member while on military duty.

***KWIK-NOTE: When a member is injured or becomes ill during a duty period, an LOD determination usually needs to be made. Use this topic to assist in LOD determinations.***

## KEY DEFINITIONS

1. Administrative Determination: medical determination of LOD. Used in limited situations (i.e. battle casualties, disease of natural origin, simple injury and conditions that existed prior to service).
2. Existed Prior to Service (EPTS): term added to a medical diagnosis where there is clear evidence that an illness, injury or disease, the underlying condition causing it, existed before the member's entry into military services, and was not aggravated by military service.
3. Incapacitation Benefits: ARC member entitlement for compensation for incapacitation or loss of civilian earnings because of LOD.
4. Misconduct: intentional conduct that is wrongful, improper, or willful neglect.
5. Proximate Cause: the cause that in a natural and continuous sequence unbroken by an independent and unforeseeable new cause, results in the disease, injury or death, and without which, it would not have occurred; the primary moving cause or predominating cause; the connecting relationship between the intentional misconduct or willful neglect and the disease, injury or death.
6. Preponderance of the Evidence: the greater weight of credible evidence; the evidence that produces the stronger impression and is more convincing as to its truth when weighed against the evidence in opposition.

## RELATED TOPICS:

## SECTION

Disability of National Guard Members	4-4
Evidence – Differing Standards and Burden of Proof	8-4
Investigations and Inquiries	16-11
Medical and Dental Care During Inactive Duty Training	19-8
Payment for Healthcare Treatment of ANG Members	4-7
Report of Facts and Circumstances of Death	1-35
Status of National Guard Members	11-7
Travel Expenses	27-10
Veterans Benefits	4-8
Information Control – Access to Military Records	14-2
Information Control – Confidentiality and Privileged Communications	14-6
Information Control – Privacy Act	14-13

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## MAJCOM 265 Officers

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Updated by Lt Col Karen Hornsby and Lt Col Joan Lawrence, June 2001

**AUTHORITY:** Title 10, United States Code, Section 10211 (formerly Section 265)

**WHO ARE THEY?**

The number 265 refers to the former section of the federal law which provides that within such numbers and in such grades and assignments as the Secretary of the Air Force may prescribe, the Air Force shall have officers of its reserve components on active duty (other than for training) at the seat of government, and at headquarters responsible for reserve affairs, to participate in preparing and administering the policies and regulations affecting reserve components. While so serving, such officers are additional members of any staff with which they are serving. In other words, 265 officers are not accessed into Active Air Force end strength. They retain their ANG affiliation.

***KWIK-NOTE:*** A unit's 265 officer's role should be understood by all key unit members.

**RELATED TOPICS:**

**SECTION**

Active Duty - Air National Guard Members

11-2

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## National Security Cases

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** AFI 31-501, *Personnel Security Program Management* (27 Jan 2005); AFI 51-201, *Administration of Military Justice* (21 Dec 2007); AFI 31-401, *Information Security Program Management* (1 Nov 2005).

### PERMISSION TO PROCEED REQUIRED

Unit commanders and supervisors contemplating disciplinary or administrative action against military members or civilian employees that could lead to discharge or removal must first obtain permission to proceed when the member or employee holds a special access as follows:

1. SCI access and persons debriefed in the last three (3) years;
2. Current SIOP/ESI and other XO special access programs and persons debriefed within the past two (2) years;
3. Current access to R & D special access programs and persons debriefed within the past year; and
4. Persons who have had a duty assignment with AFOSI and have held an AFOSI special access.

Procedures for obtaining permission are continued in AFI 31-501, para 8.9.

It should be noted that expeditious processing of such requests must be pursued to comply with any speedy trial rules and restrictive time requirements in civilian removal cases (the goal is to process the cases within 15 duty days of the date of the message initiating the request). Voluntary separation requests from members with access will not be handled under these procedures unless they are instead of adverse action.

### ACTION ALLOWED PENDING PERMISSION TO PROCEED

The following actions are permitted pending decision:

1. COURTS-MARTIAL - permitted: completion of preferral of charges and Article 32 investigation; not permitted: referral of charges to trial by Convening Authority (under state law);
2. AIRMEN DISCHARGES - permitted: notification letter of the proposed discharge, member's response, and necessary appointments; not permitted: discharge or convening of a board;
3. OFFICER DISCHARGES - permitted: initiation of case, member's response, necessary appointments; not permitted: show cause for retention; and
4. CIVILIAN REMOVALS - Cannot even present notice letter to employee without authority to proceed.

### CASES REQUIRING REPORTING

Any case that has the potential for becoming a national security case must be reported to AFLSA/JAJM (through your State Headquarters and the NGB) as soon as the SJA learns of it. The following must be handled as national security cases:

1. Espionage;
2. Subversion

3. Spying;
4. Aiding the enemy;
5. Sabotage; and
6. Violations of punitive regulations or criminal statutes concerning classified information.

These cases involve decisions about how the investigation is to proceed, whether a prosecution will occur, and if so, who will try the case and in which court. Therefore, it is mandatory for the SJA to check with AFLSA/JAJM at the earliest time.

***KWIK-NOTE: If a matter affecting national security is involved in any court-martial, discharge or removal action, notify higher headquarters immediately and before proceeding.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Classified Material	14-2
Courts-Martial	8-15
Personnel Security Access Program	1-28
Quality Force Management Actions	24-12
Revocation of Security Clearance	24-13
Withdrawal of Authority to Bear Firearms	1-41

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# Newcomer's Briefing

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**Updated by Major Jeffrey Knickerbocker, November 2008**

**AUTHORITY:** AFI 36-2103, *Individualized Newcomer Treatment and Orientation (INTRO) Program* (3 Jun 94)(information only); command policy; applicable state law and regulations.

## USE

A well developed and presented Newcomer's Briefing can be invaluable to both the new ANG member and to the unit. The orientation creates an important first impression for the newcomer; the briefing is where retention begins. A good Newcomer's Briefing will be a broad brush of many topics, and should include several different speakers. The briefing should be concluded in an hour or so. It should be given frequently enough (at each monthly UTA, for example) so that the group of listeners does not exceed 15 to 20 people. Speakers should be prepared to discuss and field general questions on all of the below "Related Topics." Some listeners will have no prior military experience while the experience of others will be extensive, either from other ANG units or from the Air Force or other branches of service.

## WHAT TO INCLUDE

The mission of the Air National Guard and of the particular unit should be concisely explained. The chain of command through the unit Commander, and the importance of following the chain of command, should be made clear.

The impact of Guard membership on one's family life and working life should be discussed. The family support mechanisms of the unit as well as the Employer Support to Guard and Reserve organizations in the community should be explained.

The ANG's military educational requirements and civilian education expectations, as well as the CCAF and the Montgomery GI Bill benefits should be discussed.

The importance of the enlistment contract and the serious nature of the commitment to the ANG which has been made should be emphasized, as well as the requirement to be and remain drug free. The Urinalysis Program should also be discussed.

Military training requirements and opportunities should be explained to the newcomers. Assignment and promotion policies, the possibilities for full-time employment, and the possibilities of appointment as an officer are important motivational topics at a Newcomer's Briefing. Pride in oneself, in one's dress and appearance, and personal growth potential should flow throughout the briefing.

## BRIEFING PERSONNEL

Speakers from various offices within the unit should make short but professional presentations. These would include a Judge Advocate presentation on Military Justice and Standards of Conduct. Both the Federal UCMJ (applicable at basic training and tech school) and the State Code of Military Justice should be explained at an introductory level. First impressions are important, and it is the responsibility of all unit members to welcome new unit members and mentor them as they become part of the organization.

***KWIK-NOTE: Each function on base should send a speaker who should have handouts available which describe that function and provide useful information for each listener at the briefing.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Administrative Demotion of Airmen	24-2
Administrative Discharge of Enlisted Personnel	24-3
HIV	19-2
Alcohol Abuse	10-3
Benefits	4-2
Civilian Employment And Guard Membership	23-8
Classified Material	14-2
Code of Conduct	15-4
Courts-Martial	8-15
Dependent Care Responsibilities	1-10
Dress and Appearance	1-12
Driving While Intoxicated and Other Offenses Involving Intoxication	8-17
Drug Abuse	10-4
Equal Opportunity and Treatment Program	9-5
Financial Responsibility	23-12
Professional and Unprofessional Relationships	7-4
Homosexuality	1-18
Legal Assistance Program	17-8
Medical And Dental Care During Inactive Duty Training	19-8
Montgomery G.I. Bill	4-6
Motor Vehicle Rules - Military Bases	21-6
Pass And Registration	3-14
Personal Affairs Checklist	20-3
Personnel Security Access Program	1-28
Pre-Mobilization Legal Counseling	20-4
Sexual Harassment	9-8
Suspension Of Base Driving Privileges	21-7
Travel Vouchers	27-12
Urinalysis Program	10-7
Vehicle Registration	21-8
Veterans Benefits	4-8
Weight And Body Fat Management Program	24-15

# Officer Evaluation System

Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** AFI 36-2406, *Officer and Enlisted Evaluation Systems* (15 Apr 2005); AFPD 36-24, *Military Evaluations* (11 Jun 93).

## BACKGROUND

The Officer Performance Report (OPR), AF Forms 707A and 707B, and the Promotion Recommendation, AF Form 709, are used by evaluators in the promotion recommendation process. The purpose of the Officer Evaluation System is to provide:

1. Reliable feedback to officers on how well they meet the Air Force's expectations at each point in their professional growth and on how they can improve;
2. A cumulative record of the officer's performance; and
3. Promotion boards the means to differentiate among officers on the basis of performance in determining who is the best qualified for promotion.

## CRITERIA

Key to the Officer Evaluation System is the separation between the AF Form 707 and AF Form 709, clearly splitting evaluation of one's current performance from that officer's promotion potential. The AF Form 707 provides only two possible ratings as to each aspect evaluated, those being "meets standards" and "does not meet standards". The narrative description of the officer's performance is also highly condensed in comparison, and reference to promotion potential is specifically prohibited. In the Air National Guard, the use of AF Form 709 is used only with respect to promotion to Colonel and promotion to Lieutenant Colonel under the Reserve Officer Promotion Management Act (ROPMA). Specific procedures are established by NGB/CF with coordination of HQ AFPC.

Although promotion potential is not a direct consideration in preparation of the AF Forms 707, comments made in the narrative summary of the officer's performance should provide an indication of whether or not the officer is capable of assuming greater responsibilities. This is key in the AF Form 707 being considered by a promotion board, or in providing the appropriate earlier basis to support an AF Form 709 recommendation for promotion consideration to Colonel or Lieutenant Colonel under ROPMA provisions. NGB standards currently require that the most recent two OPRs contain appropriate statements as to suitability for increased responsibility for the individual to be favorably considered for promotion.

In the consideration of Judge Advocate officers, an appropriate description in their narrative summary describing their professional accomplishments is appropriate. It would be both wise and helpful for the rater to coordinate with the State Judge Advocate on appropriate comments to be placed in a Judge Advocate Officer's rating.

**KWIK-NOTE:** *The ANG has far too long lagged behind the Active Air Force and the AFRES in the written quality of OPRs. Commanders should ensure proper attention is given to writing top quality OPRs.*

## RELATED TOPICS: SECTION

Promotion of ANG Officers  
Officership

1-31  
1-24

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# Officership

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** DoD 5500.7-R, *Joint Ethics Regulation (JER)*( C6, 23 Mar 2006); UCMJ (as applicable); state military code.

## STANDARDS AND EXPECTATIONS

Officers should conduct their personal and professional lives such that they could withstand scrutiny from outside the Air National Guard. That is what OFFICERSHIP entails. As Commanders, you have access to personnel, property and equipment which is entrusted to you by the Air National Guard. Any use of Air National Guard manpower or resources for personal benefit is improper. For example, transportation squadron personnel cannot work on private vehicles on duty, or utilize government facilities or equipment to repair private vehicles off duty for themselves, other unit members or you. These are just two of the areas which require constant vigilance to avoid breakdowns in officership.

Officership also requires that the conduct of your fellow officers be evaluated by the same high standards Commanders uphold. Officers are not officers only while in uniform. If officers leave duty and engage in misconduct, they should be held to the same standard as an officer who engages in misconduct on duty. There should be no differentiation. Individuals who provide continuously outstanding performance of their duties and are super troops in all respects, but engage in criminal activity while off duty are still criminals. They have simply limited the misconduct to specific times. Misconduct on or off duty is still misconduct. You, as Commanders, must insure your junior officers recognize the responsibilities of officership and its continuous application to an officer's conduct.

The subjects of the Related Topics listed below are those that adversely affect officership.

***KWIK-NOTE: Breakdowns in officership frequently have legal ramifications.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Administrative Discharge of Officers	24-4
Alcohol Abuse	10-3
Bad Checks	23-3
Claims	18-2
Dependent Support	23-10
Driving While Intoxicated and Other Offenses Involving Intoxication	8-17
Drug Abuse	10-4
Financial Responsibility	23-12
Professional and Unprofessional Relationships	7-4
Fraud, Waste and Abuse	16-7
Sexual Harassment	9-8

## Orders – Problem Areas

Updated by Lt Col Karen Hornsby and Capt Alice Niedergall, June 2001

**AUTHORITY:** AFI 33-328, *Administrative Orders* (1 Feb 99); AFI 65-103, *Temporary Duty Orders* (1 Sep 97)

### INTRODUCTION

This topic summarizes the purpose of military orders and special problems associated with them, especially in light of potential scrutiny later on in the context of a Fraud, Waste and Abuse allegation that the trip was unnecessary.

### “PURPOSE” CLAUSE

When an ANG member travels on technician or military orders, it is recommended that the section of the order entitled “purpose” specify in some detail the purpose of the trip rather than a general statement such as, “Meeting at Pentagon.” Better detailing of the purpose of the trip may be of assistance at later periods of time if justification for the trip is required. For example, deployment to a specific base for a specific reason, a particular exercise or specifically named conference is preferred.

Some sample “Do’s” and “Don’ts” for the order’s purpose clause:

DON’T just write:

1. “Official Business”; or
2. “Meeting at (ANGSC) (Pentagon, Washington, DC).”

DO write:

1. “Attend TJAG Annual Survey of the Law - ARPC, Denver, CO”;
2. “Meeting at Pentagon, Washington, DC - (MAJCOM) Senior Commanders Conference”; or
3. “Meeting at ANGSC - to discuss with DP unit personnel upgrades.”

For OCONUS trips or other situations where an ANG member is in Title 10 status, the orders should expressly state that the member is “Subject to the jurisdiction of the UCMJ.” For ANG units going OCONUS, orders should specify, if known, the Active Air Force organization of attachment for general court-martial jurisdiction. In addition, the Remarks section of the individual’s orders should contain a statement concerning OPCON AND ADCON.

***KWIK-NOTE: Incomplete purpose clauses in orders may expose the member to scrutiny to justify the travel and the duty.***

### RELATED TOPICS:

### SECTION

Fraud, Waste and Abuse	16-7
TDY and Travel	27-9
Travel Advances	27-10
Travel Vouchers	27-12
Visits to Other Bases	27-13

# Palace Chase

**Updated by Major Jeffrey Knickerbocker, November 2008**

**AUTHORITY:** AFI 36-3205, *Applying for the Palace Chase and Palace Front Programs* (10 Oct 2003); AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 2005)(paras. 2.24.1.2 3.13.2.1.2).

## INTRODUCTION

PALACE CHASE is an early release program that allows active United States Air Force officer and enlisted members to request transfer from active military service to an Air Reserve Component (ARC). These releases are based on the needs of the ANGUS and United States Air Force Reserve (USAFR) by AFSC and manning levels in the Air Force.

PALACE CHASE members consent to recall to extended active duty if they fail to report to the ARC assignment, fail to satisfactorily participate in ARC training, or fail to satisfactorily perform or behave in accordance with 10 U.S.C §12301(d). Enlisted members must serve two times the amount left of their commitment and an officer must serve three times the amount left. Contract time is not less than 1 year or greater than 6 years.

## ACCESSIONS

Recruiters and units can assist the Air Force Personnel Center (AFPC), Military Personnel Flight, Personnel Relocation Element (DPMAR) in expediting the PALACE CHASE accession process by promptly notifying AFPC of the availability of positions.

## RECALL PROGRAM

Guard Unit Commanders are faced with a PALACE CHASE problem when members who have been released early from their active duty commitments because they agreed in writing to serve in the ANG fail to report, satisfactorily participate, or satisfactorily perform or behave as required by the gaining ANG unit. Commanders do not have the authority to discharge contracted PALACE CHASE personnel. When faced with the problem of an unsatisfactory PALACE CHASE participant, Commanders must notify HQ AFPC/DPPRSR, which will determine whether the member will be PROCESSED FOR RETURN TO ACTIVE DUTY or PROCESSED FOR DISCHARGE. This must be coordinated with NGB.

### **Recall Procedures for Failure to Report or Return After the First Unit Training Assembly**

- a. Send certified return receipt letter to member expressing intent to recall for failure to report within 10 days of the report date. Send letter by first class mail when attempts to deliver by certified mail are unsuccessful. Complete an affidavit of service (by mail) and file it in the case file if the member fails to acknowledge receipt of the letter sent by certified or first class mail.
- b. Send letter of notification to HQ AFPC/DPPRSR within 10 workdays of all PALACE CHASE personnel who fail to report or fail to return after the first UTA.
- c. If the member fails to acknowledge notification to report on the date specified, proceed with the recall request.
- d. Forward the following documents to HQ AFPC/DPPRSR with the request for recall:
  - AF Forms 100, 1288, and 2631
  - DD Form 40102, DD Form 93, and DD Form 214
  - SF 93, Report of Medical History
  - Copy of certified letter of notification of intent to recall to member.

- e. Hold the member's FPRG until HQ AFPC/DPPRSR provides disposition instructions.

### **Recall Procedures for Unsatisfactory Participation**

Take the following appropriate actions within 30 days of each infraction. Failure to do so may make it legally impossible to recall the member. Notify members by certified return receipt mail after each unexcused absence or UTA. Send the letter by first class mail when attempts to deliver by certified mail are unsuccessful.

- a. After the fourth unexcused absence, notify the member that they are in violation of their PALACE CHASE contract and that continuing such conduct could result in a demotion and a recall to EAD.
- b. Demote members as the commander determines appropriate in accordance with the applicable directive.
- c. After a member's ninth unexcused absence, initiate recall procedures as outlined below.

### **Recall Procedures for Unsatisfactory Performance or Behavior**

Some examples of unsatisfactory performance or behavior are: not fulfilling responsibilities commensurate with the members grade, not completing on-the-job training within the required time frames, or not maintaining weight standards.

Take the following appropriate actions within 30 days of each infraction. Failure to do so may make it legally impossible to recall the member.

- a. Counsel members concerning unsatisfactory performance or behavior. Document the counseling and have the member acknowledge understanding of what is expected of him/her.
- b. Issue letters of reprimand or take other administrative action as appropriate. Document the receipt of the letter of reprimand and have the member acknowledge understanding what is expected of him/her.
- c. Demote members as the commander determines is appropriate.
- d. If all else fails, initiate recall procedures as outlined below.

### **Procedures for Initiating Recall for Unsatisfactory Participation, Unsatisfactory Performance, or Unsatisfactory Behavior**

- a. Notify the member of the intent to recall, using certified return receipt mail. Send the letter by first class mail when attempts to deliver by certified mail are unsuccessful.
- b. Complete an affidavit of service (by mail) and file it in the case file, if the member fails to acknowledge receipt of the letter sent by certified and first class mail.
- c. Maintain copies of correspondence and certified mail receipts.
- d. Write to the postmaster at the member's last known address and ask for verification of the address if the certified receipt does not come back.
- e. Forward correspondence to the member's new address, if available.
- f. Proceed with the recall if the postmaster confirms that the last known address is correct. Include the postmaster's response in the package. Make every effort to locate the member's current address.
- g. Complete a check of the NCIC IAW 5 U.S.C. §9109.

- h. Process the member for immediate discharge instead of recall if the NCIC check reveals disqualifying information.
- i. Submit the recall request to HQ AFPC/DPPRSR including AF Forms 100, 1288, and 2631; DD Forms 40102, 93 and 214; and SF 93; a memorandum stating that the NCIC found no derogatory information; Postmaster verification (if applicable), all notices to the member and any demotion orders.
- j. Hold the member's FPRG until HQ AFPC/DPPRSR provides disposition instructions.
- k. Mail copies of correspondence on all recall requests to Unit CC and MPF, and ANGRC/DPMMO.
- l. Update the member's new GI Bill eligibility status DIN EP1 to "H", upon receipt of recall orders.

***KWIK-NOTE: The ANG Commander's objective in dealing with unsatisfactory PALACE CHASE participants should, in most cases, be to successfully have the member recalled to active duty as an E-1.***

**RELATED TOPICS:**

**SECTION**

Administrative Demotion of Airmen	24-2
Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Admonitions and Reprimands - Administrative	24-5
Judicial Review of Military Administrative Actions	18-5
Legal Reviews	17-11
Mailing or Delivery - Affidavits and Certificates of Service	24-10
Nonjudicial Punishment	24-11
Quality Force Management Actions	24-12
Unsatisfactory Participation	1-40
Transfer to the Individual Ready Reserve (IRR)	1-37

Attachment

Unit Letterhead

Date

MEMORANDUM FOR Name and address of unit member

FROM: Unit Commander's Office Symbol  
Address

SUBJECT: Unsatisfactory Participation

1. You are advised that your unexcused absence(s) from the scheduled training period(s) of (has) (have) been recorded.
2. You are aware from previous briefings and/or counseling of your requirement to attend all scheduled inactive duty and other required training periods and the serious nature of your absence.
3. As a Palace Chase member, your failure to satisfactorily participate in unit training assemblies (UTAs) and your other unit training requirements is a violation of your Palace Chase contract and could result in your demotion and involuntary recall to Extended Active Duty.

[If demotion action is being initiated, use: "4. You are advised that an action which could result in your demotion in grade is being initiated at this time, and of which you will receive separate notice." If this paragraph is used, renumber the remaining paragraphs].

4. You may have a valid excuse for one or more of these unexcused absences because of illness, injury, emergency or other circumstances beyond your control. If such is the case, you must furnish this office, not later than 15 days from the date of this letter, appropriate documentation such as a doctor's certificate, affidavit, etc. supporting your written request to be excused. If documentation is not readily obtainable, indicate in your request the date it will be furnished. All requests for excused absences are subject to approval. The denial of the request to be excused or failure to submit a written request within the time limits may result in initiation of a separation action with a recommendation for you to receive a discharge under other than honorable conditions, nonjudicial punishment, administrative demotion, or other adverse administrative action.
5. If I accept your explanation and consider your unexcused absence(s) as excused you may be required to make up the training. If the make up training is not performed, as ordered, it will be recorded and counted as an unexcused absence.
6. You are ordered to report for duty at the next scheduled Unit Training Assembly on (date), beginning at (time) hours, place of duty:\_\_\_\_\_.
7. If you have any questions, you are to contact (POC) at (phone #).

Signature Block  
Commander

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## Credit for Part - Time Service

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Updated by Lt Col Karen Hornsby and Capt Alice Niedergall, June 2001

**AUTHORITY:** NGB Personnel Qualifications Handbook (18 Jun 90), para 3 (1998 change).

### INTRODUCTION

This topic discusses credit for part-time National Guard service which will be granted when an individual applies for a full-time excepted civil service position.

### THE CREDIT

There is authority for part-time National Guard military service to be considered full-time experience when evaluated against the qualification requirements for a technician position. Each state is permitted to dictate the amount of credit for each year of guard experience. Check with your state's Human Resource Office for the specific formula. It is therefore important that the Optional Application for Federal Employment (OF 612) for a specific vacancy announcement reflect all part-time National Guard service.

Commanders should help ensure that this information, as well as all future information generally applicable to technician announcements, is disseminated to all personnel.

***KWIK-NOTE:*** Applicants for full-time technician positions should include their part-time service in the National Guard on the Application for Federal Employment in order to receive proper credit for their years of service.

### RELATED TOPICS:

### SECTION

Labor Relations

5-5

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# Personnel Security Access Program

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Updated by Major Jeffrey M. Knickerbocker, 2008

**AUTHORITY:** AFI 31-501, *Personnel Security Program Management* (27 Jan 2005); DoD 5200.2-R, *Personnel Security Program* (1 Jan 1987, C3, 23 Feb 96); DoDD 5200.2, *DoD Personnel Security Program* (9 Apr 99).

## INTRODUCTION

The USAF Personnel Security Program is governed by AFI 31-501. This regulation establishes Air Force personnel security policies and procedures; establishes the standards, criteria, and guidelines upon which personnel security determinations are made; prescribes the kind and scope of personnel security investigations required; details the evaluation and adverse action procedures by which personnel security determinations are made; and assigns overall program management responsibility.

This regulation applies to Air Force members or applicants, including ANG and USAFR personnel, and to civilian employees of the Air Force, including applicants for employment under certain conditions. This regulation essentially deals with assignments to sensitive duties or access to classified information.

## STANDARDS

There are two separate standards in this regard: (1) Military Service Standard; and (2) Clearance and Sensitive Position Standard. The former standard applies to a person's SUITABILITY for military service, and is based upon national security criteria. The latter standard applies to a person's ELIGIBILITY for access to classified information, and is based upon the person's loyalty, reliability and trustworthiness. The ultimate decision in applying either of the security standards must be based upon all available facts, and is essentially a common sense determination. The local Commander must first determine the member's suitability before submitting the request for a member's security clearance to the Air Force or DoD agency for determination of the member's eligibility. If the Commander determines the member is not suitable, there is no need for the eligibility determination; or if the Commander determines the member is suitable, but the member is found not to be eligible for a security clearance, the member will be processed for administrative discharge because of failure to have or maintain a security clearance. The grounds for discharge could include Convenience of the Government and the character of the discharge could be Entry Level Separation, if applicable and appropriate.

## ELIGIBILITY DETERMINATION

Security clearance eligibility authority resides with the Air Force Central Adjudication Facility (AFCAF/PSA, 229 Brookely Ave, Bolling AFB 20032) The criteria for determining eligibility for a security clearance is based, in part, upon criminal or dishonest conduct, any behavior or illness that may cause significant defects in judgment or reliability, use of intoxicants to excess, acts of sexual misconduct, etc. The Administrative Assistant for Security to the Secretary of the Air Force has overall responsibility for this program within the Air Force.

## COMMANDER'S AUTHORITY

During wartime, or during a Presidential declaration of national emergency, wing commanders or their equivalents may approve individual access to classified information at a higher level than authorized by an existing clearance. Commanders may also suspend individual access to classified information or to restricted areas when continued access may be inconsistent with the interests of national security.

## ADVERSE ACTIONS AGAINST PERSONS IN SPECIAL ACCESS PROGRAMS

Commanders contemplating disciplinary action which could result in discharge or removal of members or employees who have been in special access programs as defined in AFI 31-501 must obtain approval from the

program before proceeding. See AFI 31-501, para 8.9. Commanders should ensure that any required clearance authority is expeditiously obtained to minimize the processing time of these actions, and should coordinate with their Staff Judge Advocate in advance.

### **MANDATORY REPORTING**

As a Commander you have a responsibility to suspend a security clearance if you believe that individual access to classified information should be limited or suspended. Misuse of a government credit card requires that you make a determination about continued access to classified information. See AFI 31-501, paragraph 8.1.2. Chapter 8 of AFI 31-501 contains additional guidance; examples of conduct that would require limiting access to classified information include: Refusal or intentional failure of an individual requiring an investigation or periodic reinvestigation to provide the personnel security questionnaire information or release statements for review of medical, financial, or employment records; refusal by an individual to be interviewed in connection with a personnel security investigation, regardless of whether the information is requested by the investigative agency or the CAF; or incidents of theft, embezzlement, child or spouse abuse, unauthorized sale or use of firearms, explosives, or dangerous weapons, or misuse or improper disposition of government property or other unlawful activities. Once access to classified has been suspended only CAF can reauthorize access.

***KWIK-NOTE: Scrutinize to whom you give a security clearance, and know that certain adverse actions against an individual with a security clearance may only proceed with the permission of Security Clearance authorities.***

### **RELATED TOPICS:**

	<b>SECTION</b>
Administrative Discharge Of Enlisted Personnel	24-3
Administrative Discharge Of Officers	24-4
Alcohol Abuse	10-3
Classified Material	14-2
Computer Acquisition And Security	25-6
Courts –Martial	8-15
Drug Abuse	10-4
For Official Use Only	14-3
National Security Cases	1-21
OSI And SF Reports	8-14
Quality Force Management Actions	24-12
Revocation Of Security Clearance	24-13

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# Pregnancy of ANG Personnel

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** ANGI 40-104, *Pregnancy of Air National Guard Personnel* (12 Aug 2008); AFI 41-115, *Authorized Health Care and Health Care Benefits in the Military Health Services System* (28 Dec 2001).

## INTRODUCTION

Any ANG member who becomes pregnant is allowed to continue performing the duties of her assigned AFSC as long as certain precautions and procedures are followed as provided in ANGI 40-104.

## PROCEDURES

The member's pregnancy must first be verified by an ANG medical officer, who then notifies the member's Commander or supervisor of that fact.

The Commander or supervisor then advises the medical officer of the member's assigned duties. The medical officer performs a medical evaluation to determine if a physical profile change is required based upon the pregnancy and the member's normal duties in the assigned AFSC.

Pregnant members may be excused from training at the discretion of the medical officer, but must be excused from annual or other active duty training which is scheduled at least six weeks before the expected birth date. Service school attendance is permitted so long as any required physical activity can be tolerated by the expecting mother.

Commanders should ensure that all members who are new parents are advised of their dependent care responsibilities as soon as possible after birth and return to duty.

## MEDICAL CARE DURING PREGNANCY

Medical care for pregnant members is authorized at government expense only while serving on a tour of duty under Title 10 or a full-time active duty tour under Title 32 (AGR), which exceeds thirty days duration. Other medical care is only authorized in accordance with the Line of Duty Regulation.

## CONCLUSION

Eligibility for Tricare coverage by members of the reserve component (Uniformed Services Health Benefits Program under Title 10, Chapter 55) has substantially changed the delivery of health care and dental benefits for service members and their dependents. Consult with judge advocate and medical service officers when dealing with pregnancy or any other medical issues which impact members.

***KWIK-NOTE:*** *Commanders should closely follow the advice of their medical officers when dealing with training requirements of pregnant ANG members.*

## RELATED TOPICS:

	SECTION
AFSC Reclassification and Training	1-3
AGR Program	11-4
Dependent Care Responsibilities	1-10
Medical and Dental Care During Inactive Duty Training	19-8

Medical and Dental Care to Persons Authorized	19-10
Training	26-2
Medical Evaluation (Profile Change)	19-12

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# Promotion of ANG Enlisted Personnel

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Updated by Major Jeffrey M. Knickerbocker, October 2008

**AUTHORITY:** DoDD 1308.1, *DoD Physical Fitness and Body Fat Program* (30 Jun 04); ANGI 36-2502, *Promotion of Airmen* (6 Aug 2002); ANGI 36-2503, *Administrative Demotion of Airmen* (1 Mar 2004); AFI 36-3209 *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 2005).

## PROMOTION POLICY

The intent of the Air National Guard (ANG) enlisted promotion policy is to advance airmen who have demonstrated the potential for greater responsibility based on their past and present performance. This policy is to be implemented without regard to race, gender, color, religion, ethnic group, or national origin.

ANG promotion criteria are designed to ensure that airmen are given timely consideration for promotion. However, due to limitations in grade vacancies, an airman may meet the criteria for promotion without being selected for promotion. In such cases, only the best-qualified airmen may be promoted.

## ADJUTANT GENERAL'S AUTHORITY

The State Adjutant General has the authority to promote airmen. The authority to promote through the grade of Technical Sergeant may be delegated to subordinate unit Commanders. Before promotion to any grade, the immediate Commander must recommend promotion. Before recommending promotion, the Commander must ensure the airman's duty performance and training progress clearly warrant promotion. Particular emphasis is placed on supervisory and leadership potential as well as previously demonstrated technical skills for promotion to the NCO grades. Requirements for promotion are contained at Table 2.1 of ANGI 36-2502.

## DISQUALIFYING FACTORS

Certain conditions may make an airman ineligible for promotion. *See* ANGI 36-2502, para 1.3. Airmen are disqualified for promotion if they:

1. Fail to meet the requirements of the physical fitness programs prescribed in ANGI 10-248;
2. Have a medical profile of 4, and are not qualified for worldwide duty (temporary profiles may be waivable);
3. Do not receive a recommendation for retention by the unit Commander;
4. Decline in writing to reenlist or extend;
5. Are unsatisfactory performers IAW paragraph 3.13.2, AFI 36-3209;
6. Are undergoing administrative demotion IAW ANGI 36-2503;
7. Have requested voluntary retirement or separation including joining another military component;
8. Are in excess status; or
9. Are being processed or considered for involuntary separation IAW AFI 36-3209.

## UNIT PROGRAMS

Commanders should be aware of special promotion opportunities for airmen, such as the Deserving Airmen promotion, which allows a Commander to promote to SSgt through TSgt without regard to position vacancy, Exceptional Performer Promotions (EPP), Officer Training Promotions, and Retraining Promotions. For information on these promotion opportunities, Commanders should consult with DP.

Many units develop unit regulations or supplements to existing regulations to implement local procedures for promotion of airmen. Should additional questions arise concerning promotion, Commanders should consult their Staff Judge Advocate and MPF Chief.

***KWIK-NOTE: Know which Commanders have the authority to promote to certain grades. Promotion authority is often commensurate with demotion authority.***

**RELATED TOPICS:**

**SECTION**

USAF Instructions, ANG Supplements and Unit Instructions	1-39
Weight and Body Fat Management Program	24-15
Unsatisfactory Participation	1-40
Medical Evaluation (Profile Change)	19-12

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# Promotion of Officers

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** 10 U.S.C. 14001, *et seq.*; 10 U.S.C. 12203; 32 U.S.C. 307; AFI 36-2501, *Officer Promotions and Selective Continuation* (16 June 2004); AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force* (9 Jan 2003); AFI 36-2604, *Service Dates and Dates of Rank* (2 Dec 2004); ANGI 36-2505 *Federal Recognition Boards for Appointment or Promotion in the Air National Guard Below General Officer* (1 Oct 07) ; and ANGI 36-2504 *Federal Recognition of Promotion in the Air National Guard of the United States and as a Reserve of the Air Force Below the Grade of General Officer* (28 Jul 04).

## INTRODUCTION

Promotion and retention of all reserve officers is governed by The Reserve Officer Promotion Management Act (ROPMA), found at 10 USC 14001 *et seq.* Through ROPMA, it was the design of Congress to assist the several service secretaries in streamlining force management. ROPMA links accessions, assignments, promotions and separations under a single system. Although this suggests some economy of administration, ROPMA is extremely complex and requires careful scrutiny. Unlike ROPA, its predecessor, ROPMA is essentially a quota system and not a pure merit system.

## FEATURES

Here are some of the notable features of ROPMA:

### 1. Reserve-Active Status List

ROPMA establishes a Reserve-Active Status List (RASL) by rank and in order of seniority. This is a single list maintained by the secretary of each service for the armed force under the secretary's jurisdiction. Reserve components determine promotion quotas every year for each rank and competitive category. The competitive categories are specified by the service secretary. The quotas are based on current unit manning requirements, force structure changes and anticipated gains and losses.

### 2. Parallel Promotion System

The Air National Guard continues to benefit from the existence of parallel promotion systems.

a. **Mandatory Promotion Consideration:** First lieutenants, captains and majors not promoted through position vacancy are considered by a Central Selection Board convened periodically by the Air Reserve Personnel Center.

b. **Position Vacancy Promotion:** Officers who have demonstrated high potential and exceptional abilities may have an opportunity for accelerated promotion through the unit to which they are assigned. An officer must be promoted into a vacant position and cannot be under consideration for promotion by a Central Selection Board.

c. **Competitive Categories:** The old competitive categories remain the same for line officers, judge advocates, chaplains, and medical professionals. New under ROPMA is that Air National Guard Officers in each category are considered for promotion separately from Air Force Reserve Officers.

### 3. Time In Grade

ROPMA incorporates new time-in-grade provisions both for promotion and retirement.

**Promotion:** Minimum and maximum time-in-grade under the mandatory system for promotion to the grades of Captain through Colonel are as follows:

		Minimum	Maximum
To:	Captain	2	5
	Major	4	7
	Lt Col	4	7
	Col	3	None

Retirement: Majors and below must serve for six months in grade to retire at that grade. Lieutenant Colonels and above must serve a minimum of three years to retire at that grade. Exception is made for involuntary retirement on account of reaching maximum age or service time. The exception does not apply in the event of selective non-retention.

#### 4. Mandatory Separation Dates

Officers in the grade of 1<sup>st</sup> Lt and Captain will be separated if twice passed over for promotion. Majors twice passed over will be separated once they have reached twenty years of service. Lt Colonels must separate the first day of the month after the month in which 28 years of commissioned service (TFCSO) is completed. Colonels must separate the first day of the month after the month in which 30 years TFCSO is completed.

### **DISCUSSION**

The weighted factors considered under the mandatory promotion system remain the same. Professional Military Education, Advanced Degrees, Awards & Decorations and Participation are the keys to successful consideration.

Commanders should periodically assess the configuration of their officer cadre. They should be aware of that window that exists from the time an officer first becomes eligible for promotion until the time when he or she must meet a mandatory promotion board on account of time in grade. By continuously updating the picture for out years, a commander can use both avenues of the promotion system to balance force structure and assure continuity. Remember, once an officer is listed for consideration by a mandatory promotion board he or she cannot be unit vacancy promoted.

### **RELATED TOPICS:**

### **SECTION**

Federal Commission Status Withdrawal  
Federal Recognition of Officers

1-16  
1-17

# Recruiting

**Updated by Major Jeffrey Knickerbocker, November 2008**

**AUTHORITY:** ANGI 36-2002, *Enlistment and Reenlistment in the Air National Guard and as a Reserve of the Air Force* (1Mar 04); ANGI 36-2602, *Air National Guard Recruiting Expenditures and Management of Recruiting and Retention Programs* (28 Mar 97).

## INTRODUCTION

The purpose of the Air National Guard Recruiting and Retention Program is to provide The Adjutant General and unit commanders with quality personnel resources. It also features tools and incentives to assist in the retention of quality members to meet unit readiness, force management, and diversity objectives.

## PROGRAMS

Several programs including PALACE CHASE, PALACE FRONT, and Project Capture have been developed to transition high quality officer and enlisted members and former members of the active Air Force into the Air National Guard. Other incentives like the Montgomery GI Bill, Career Motivation Program and Family and Employer Support Programs support the objective of obtaining 100% strength in all critical positions.

## PROGRAM MANAGEMENT

State recruiting and retention plans, together with funding requests, are prepared on a fiscal year basis and are submitted for approval to ANG/DPPA. Financial management is an important component in the overall success of the programs and a close relationship should be maintained by Recruiting and Retention Superintendents, base-level Comptrollers and the USPFO.

Recruiting and retention activities often interface with private, public and commercial activities. To that extent, it is important that contractual and risk assessment matters be coordinated with your Staff Judge Advocate (SJA), Public Affairs Officer (PAO) and Contracting Officer.

## STANDARDS OF CONDUCT

Commanders should be aware that special standards of conduct are prescribed for Air National Guard Recruiters. These standards are contained in Chapter 3 of ANGI 36-2602 and are designed to insure that the integrity and professionalism of the program and its employees are maintained at the highest level. In addition AGRs are subject to the ethical requirements in the Joint Ethics Regulation (DOD 5500.7-R)

***KWIK-NOTE: Recruiting and retention remain a challenge for the Air National Guard, and remain a priority with leadership.***

## RELATED TOPICS:

Palace Chase  
Relationship with Other Military Components  
Stop - Loss

## SECTION

1-26  
11-6  
20-6

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# Remission and Waiver of Indebtedness

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Updated by Lt Col Karen Hornsby and Lt Col Dennis O'Connell, June 2001

**AUTHORITY:** DFAS-DEM 7073-1 Chapter 73; DFAS-DEM 7073-2, Chapter 6; DoD 7000.14-R, *DoD Financial Management Regulation*, Vol. 4 and 5.

## INTRODUCTION

There are many instances in which an airman or officer may become indebted to the Air Force, due to overpayments from the Air Force or other indebtedness determinations. Collection by the withholding of the member's later earnings can create a real hardship.

There are certain statutory provisions which authorize the Air Force, in limited circumstances, effectively to overlook this indebtedness.

## REMISSION OF INDEBTEDNESS

When the Secretary of the Air Force (SAF) considers it in the best interest of the United States, the SAF may cancel any part of an enlisted member's indebtedness before or at the time of that member's honorable discharge. See 10 U.S.C. 9837.

### Criteria for Remission

Each remission request is considered on its own merits, under certain basic criteria established by the SAF. Application of the following criteria is flexible and not necessarily limited to evidence that would be admissible in court:

1. Has the member acted in good faith?
2. Did the member derive any direct benefit and to what extent?
3. Did the debt occur through any fault of the member?
4. Are there hardship or compassionate aspects of the case?
5. What are the member's grade, primary Air Force specialty code (AFSC), and number of years of service?
6. What is the Air Force's investment in the member, and is it desirable to retain the member in the service?

Detailed procedures for processing cases involving requests for remission are contained in DFAS-DEM 7073-1, Chapter 73.

The legal effect of SAF REMISSION action is to CANCEL, in whole or in part, the AMOUNT OWED.

## WAIVER OF CLAIMS FOR ERRONEOUS PAYMENTS OF PAY AND ALLOWANCES

In an effort to aid persons who had received erroneous payments in good faith and to reduce the number of requests for private acts of Congress seeking waiver of collection action for those payments, various waiver statutes were enacted by Congress. The SAF may waive, in whole or in part, a claim of the United States in an amount aggregating not more than \$1,500.00, without regard to any repayments that have been made. The SAF may deny an

application for waiver of a claim in any amount. In such cases, however, if the claim is more than \$1,500.00, the employee or member must be advised of the right to appeal the denial to the Comptroller General.

### **Conditions for Waiver**

In order for a claim arising from an erroneous payment to be waived, the following conditions must be met:

1. The waiver application must have been received by the General Accounting Office (GAO) or the Air Force within three years following the date on which the erroneous payment was discovered. It is the date of discovery of the error, not the actual date of the erroneous payment or the date the applicant is notified of the error, that is controlling. The date of discovery is that date when it is first determined by an appropriate official that an erroneous payment has been made;
2. Collection action on the claim must be against equity and good conscience and not in the best interest of the United States; and
3. There must be no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the applicant.

Detailed procedures for processing requests for waiver are contained in DFAS-DEM 7073-1, Chapter 73.

The Comptroller General may waive a claim of the United States arising out of an erroneous payment to a member in any amount, if the required criteria are met.

The legal effect of SAF WAIVER is that the government effectively SURRENDERS ITS RIGHT TO RECOVER the indebtedness.

### **REMISSION AND WAIVER COMPARED**

The statutes authorize waiver (5 U.S.C. 5584, 10 U.S.C. 2774 , 32 U.S.C. 716) and remission (10 U.S.C. 9837) which are both intended to be relief measures. However, there are a number of differences in the scope and application of the two remedies:

1. Remission is available for the relief of any outstanding indebtedness, regardless of how it arose. The waiver remedy applies only to erroneous payments of pay and allowances;
2. Remission is available only to enlisted members on active duty. However, officers and enlisted members of the ANG who are held liable for loss, damage, or destroyed government property (for example, as a result of a Report of Survey), may apply for remission or cancellation of such liability. See 32 U.S.C. 710(c). Waiver applies to all active and retired members of the uniformed services and National Guard and to civilian employees;
3. Remission applies only to uncollected portions of the debt. Waiver applies to the full amount of the original erroneous payment, regardless of whether any amounts had been collected;
4. With regard to remissions, the SAF may consider any financial hardship from the collection action as well as other factors personal to the enlisted member. Waiver determinations are based solely on the facts and circumstances giving rise to the erroneous payment, including the applicant's knowledge or fault, if any, in the matter. The applicant's personal and financial condition ordinarily has no bearing on the decision to grant or deny waiver;
5. Remission ordinarily suspends the collection of an indebtedness unless the unit Commander or the Accounting and Finance Officer directs the monthly withholding of a portion of the member's pay. On the other hand, a collection action is continued while a waiver request is being processed, unless the criteria for suspension of collection action are met. The determination for suspension of collection action while a waiver request is being reviewed is made on a case-by-case basis, with consideration given to whether:
  - a. There is a reasonable possibility that waiver will be granted;

- b. There is a reasonable assurance that the erroneous payment can be recovered if waiver is not granted; or
- c. The collection of the debt will cause undue hardship.

In the event of any question, you should consult with the servicing Judge Advocate.

***KWIK-NOTE: Requests for remissions and waivers of indebtedness should be assisted in by the Judge Advocate and included as part of the Legal Assistance Program.***

**RELATED TOPICS:**

**SECTION**

Debt Collections  
Legal Assistance Program  
Reports of Survey

23-9  
17-8  
25-19

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# Reporting Identifiers

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** AFI 36-2101, *Classifying Military Personnel (Officer and Enlisted)* (7 Mar 2006).

## INTRODUCTION

ANG members are assigned to particular tasks based upon their training and experience pursuant to Air Force and Air National Guard regulations and are awarded an Air Force Specialty Code (AFSC).

## NO AFSC

However, there are times when individuals do not have an AFSC, such as:

1. Before members are awarded their AFSC (for example, basic trainees);
2. When individuals need to be removed from a previously awarded AFSC and retrained and reclassified into a new AFSC (for example, an enlisted member selected for commissioning, or members who are no longer qualified for a previously awarded AFSC due to circumstance either within or beyond their control); or
3. When the previous AFSC has been modified or discontinued. However, these members still need to be identified in the training system.

These various conditions of members who are “in between AFSCs,” so to speak, cause these members to be temporarily classified with a special number called a “Reporting Identifier (RI).”

## **KEEP THE REPORTING IDENTIFIERS UNTIL NEW AFSC AWARDED OR ADVERSE ACTION BEGUN**

Reporting Identifiers are handled by the Training section of the MPF. It is important that individuals be properly classified with an RI, and be promptly removed from such classification upon obtaining the new AFSC, since members who either cannot or will not be retrained to qualify for the new AFSC must either be demoted to a grade calling for an AFSC for which they can qualify, or administratively discharged.

Since either of these two adverse actions will have as their basis the member’s inability or unwillingness to retrain, it is essential that the original reason for the retraining and assignment of the RI be properly justified.

MPF personnel should consult the Staff Judge Advocate with any questions that may bear on the proper justification of the assignment of the RI for a particular individual, before the individual is so classified, so that upon the individual’s failure to retrain and be awarded a new AFSC, any subsequent adverse actions will be based on legally sufficient grounds.

## **REPORTING IDENTIFIERS vs. SPECIAL DUTY IDENTIFIERS**

RIs should not be confused with Special Duty Identifiers which are special numbers used to classify certain positions such as Recruiters. The Special Duty Identifier numbers do not connote the “retraining” requirements of RIs, and unlike RIs, which are temporary classifications, Special Duty Identifiers are permanent classifications for as long as the member holds that position.

***KWIK-NOTE: Make sure your MPF keeps track of all members with RIs so that these members are either timely awarded new AFSCs or processed for appropriate adverse action upon their failure to timely be awarded their new AFSC.***

**RELATED TOPICS:**

**SECTION**

AFSC Reclassification and Training

1-3

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# Report of Facts and Circumstances of Death

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Updated by Major Jeffrey M. Knickerbocker, November 2008

**AUTHORITY:** AFI 36-3002, *Casualty Services* (25 Jul 2005); AFI 36-2910, *Line of Duty (Misconduct) Determination* (16 Apr 2002)

## PURPOSE AND USE

DD Form 1300 (*Department of Defense Report of Casualty*) and AF Form 1613 (*Statement of Service*) are the official Air Force documents prepared for deceased members while in a duty status.

The primary purpose of the DD Form 1300 and AF Form 1613 is to allow Government entities to resolve claims when the death resulted from a disease or injury incurred or aggravated during a period of military service, and in line of duty.

DD Form 1300 is prepared when a member of the Air National Guard dies from injuries received or aggravated while on active duty for training or inactive duty for training, or dies from injuries received while going directly to or from active duty for training or inactive duty for training.

## REQUIREMENTS

AFI 36-3002 contains complete guidance for advising next of kin (NOK) depending on the cause and circumstances of death. It is the Commander's responsibility to appoint a mature commissioned officer (First Lieutenant or above), or non-commissioned officer (grade E-7 to E-9), or civilian of comparable grade to serve as Casualty Assistance Representative (CAR) and advise next of kin of the circumstances of the member's death.

A detailed report is required when death is caused by:

1. Accident;
2. Wanton overindulgence in alcoholic beverages or use of drugs;
3. Any cause during a period of unauthorized absence or while the member was in a desertion status;
4. Suicide; or
5. Homicide.

The Commander should consult with the Staff Judge Advocate before a casualty report is prepared.

***KWIK-NOTE: Know when and how to prepare a casualty report.***

## RELATED TOPICS:

	SECTION
Benefits	4-2
Disposal of Personal Property	1-11
Investigations and Inquiries	16-11
Line of Duty Determinations	1-19
OSI and SF Reports	8-14
Status of National Guard Members	11-7
Veterans Benefits	4-8
Wills	23-20

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# Selective Retention in the Air National Guard

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**Updated by Major Jeffrey Knickerbocker, November 2008**

**AUTHORITY:** ANGI 36-2606, *Selective Retention of Air National Guard Officer and Enlisted Personnel* (28 Feb 97); ANGI 36-2002, *Enlistment and Reenlistment in the Air National Guard and as a Reserve of the Air Force* (1 Mar 04).

## INTRODUCTION

Each State Adjutant General (TAG) is responsible for maintaining a stable and viable force structure. The Air National Guard, as a reserve component of the Air Force, has developed a force management tool (ANGI 36-2606) that provides a vehicle to ensure a quality trained force, stable promotion opportunities for lower grade personnel, and a viable combat ready force in event of mobilization and/or contingency/peacetime commitments. A Selective Reserve Retention Board (SRRB) is appointed by The Adjutant General to recommend the retention or non-retention of officers and enlisted members in the ANG in accordance with (IAW) the policies and procedures provided in the instruction.

## DISCUSSION

All ANG officers (except adjutants general, assistant adjutants general and general officers) and enlisted members will be considered under the selective retention program if they are retirement eligible on or before 1 January of the year in which the board convenes and are not otherwise scheduled to be separated during the calendar year of the Board (*e.g.*, MSD, maximum age).

Officers who are retirement eligible will be considered under the program, even if they have not completed the minimum promotion service time to retire in the highest grade held.

AGRs who are eligible for reserve retirement will be considered, even if they have not attained eligibility for active duty retirement, unless they are in the “sanctuary zone” (between 18 and 20 years active duty anytime during the calendar year in which the board is held).

Members who are serving on a Title 10 statutory tour or extended active duty anytime between January 1<sup>st</sup> and the publication of the board results for that calendar year will not be considered under the selective retention program.

## SELECTIVE RETENTION REVIEW BOARD

The TAG appoints a Selective Retention Review Board (SRRB) to consider members for selective retention. Separate boards are conducted for officers and enlisted members. The ANGI sets forth requirements for board composition. All voting board members must be senior in rank to individuals being considered by the board.

The Board convenes for the purpose of evaluating the future benefits that can be expected to accrue to the Air National Guard from the continued service of each officer it considers. The Board reviews all documents IAW paragraph 2.4.2 of ANGI 36-2606. A member can submit letters for the board’s consideration IAW paragraph 2.2.6. Continued retention must be based on the combination of the unit commander’s recommendation and organizational force management requirements.

The recommendation of the Commander carries substantial weight in the ultimate determination of retention or mandatory retirement.

The State Adjutant General reviews the recommendations of the Board, including minority reports, and approves or disapproves all specific recommendations. Each member considered will be notified of the TAG’s decision by letter. An individual may request reconsideration of the board decision within 30 days of official notification or by

15 September, whichever is earlier, through his or her command channels. The request for reconsideration must be processed promptly to arrive in the TAG's office by 30 September.

## **TECHNICIANS**

If a Technician loses military membership, they will be terminated from the Technician program, but is not considered a separation for cause. There are some exceptions and waivers available for competent individuals who need to be retained in order to qualify for technician retirement. See ANGI 36-2002 for additional detail.

## **PRACTICAL TIPS**

Commanders should meet with their MPF Chiefs to ensure that as members of the unit approach 20 years of service, they review their status to maximize their input for favorable consideration for retention by the Board.

Commanders properly view this program as one of quality force management. However, the pitfall to avoid is a claim of discrimination or unfairness by the disgruntled member whom you are not recommending for retention. With members against whom you have taken adverse action - up to now, not enough to administratively discharge or courts-martial them - be sure to consult with your Staff Judge Advocate and MPF Chief BEFORE you submit the recommendations of these members to the Board. Document the record to be presented to the Board so that whatever recommendation you make is justified.

***KWIK-NOTE: Selective retention can be a valuable tool for Commanders to maintain a quality force within their units.***

## **RELATED TOPICS:**

## **SECTION**

Judicial Review of Military Administrative Actions	18-5
Quality Force Management Actions	24-12
Selective Enforcement	24-14
Officer Evaluation System	1-23

# Transfer to the Individual Ready Reserve (IRR)

Updated by Major Jeffrey M. Knickerbocker, November 2008

**AUTHORITY:** AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 05); AFI 36-2115, *Assignments Within the Reserve Components* (8 Apr 05); ANGI 36-2101, *Assignments Within the Air National Guard* (11 Jun 04).

## OVERVIEW

Commanders may transfer members of the unit to the Individual Ready Reserve for a number of reasons. This transfer to ARPC-IRR retains the member in the Reserve of the Air Force and allows the State HQ to cut orders discharging the member from the National Guard of the State.

A Commander should review the current policy requirements when any of the following events take place:

1. Unsatisfactory participation by a member when the member has an unsatisfied Military Service Obligation (MSO);
2. Unreasonable commute when a change in the member's residency places that member beyond a reasonable commuting distance; or
3. Unreasonable commute when the unit changes location and the member's residence is beyond a reasonable commuting distance.

Whether or not the member has an unsatisfied MSO is important. If a member has an unsatisfied MSO, that member may not be separated from the Reserve of the Air Force based on unsatisfactory participation alone. If the member's MSO has been completed, then the member may be discharged from both the National Guard of the State and as a Reserve of the Air Force. Similarly, depending on the event outlined above, the member may be entitled to an "Honorable" discharge.

## TRANSFER TO IRR FOR UNSATISFACTORY PARTICIPATION

Personnel with an unsatisfied MSO or periods remaining to serve on current enlistment contracts may be discharged from the National Guard of the State, but will not be discharged as a Reserve of the Air Force as unsatisfactory participants solely by reason of their having accrued excessive absences from scheduled training duty.

Unsatisfactory participants with MSOs, including Palace Chase personnel, must be transferred to the Air Reserve Personnel Center (ARPC) to complete their statutory military service obligation.

Any individual who has nine or more unexcused absences from scheduled training periods in a 12-month period is identified as an unsatisfactory participant. For example, a weekend UTA constitutes four separate training periods, and by the time a member has been absent without excuse from the first month's four training periods to the third monthly UTA weekend in a 12-month period, there will be nine unexcused absences. To qualify for transfer to ARPC, such members must be notified in writing after each unexcused absence, and should be demoted by nonjudicial punishment action or administratively, as appropriate, to the grade of at least E-2, and preferably E-1. After the ninth unexcused absence, unit Commanders may request approval of the member's transfer to ARPC by submitting the required documents to their State HQ.

If State HQ approves the transfer to ARPC, State HQ will then cut orders discharging the member concerned from the ANG of the State and reassigning the MSO member to ARPC-IRR (Individual Ready Reserve). Non-MSOs will be discharged from the ANG of the State and as a Reserve of the Air Force, except Palace Chase personnel who may also be returned to Active Duty or transferred to the IRR.

DoD policy is that individuals who are transferred to ARPC and have a characterization of service of other than honorable because of their unsatisfactory participation, shall be discharged by ARPC at the end of their statutory military service obligation, or period of enlistment, or service agreement, whichever is later with such characterization unless they obtain a waiver from NGB to upgrade their characterization of service.

## **TRANSFER TO IRR BECAUSE OF MEMBER OR UNIT RELOCATION**

### **Member Relocation (MSOs)**

MSO members of the ANG who change their residence may be transferred to the IRR if they reside beyond a reasonable commuting distance from a unit of their component. Their assignment to the IRR will continue until they are able to transfer to a paid drill position of another Reserve component or complete their statutory military service obligation. Unless other circumstances dictate, the characterization of service should be Honorable.

If MSO members change their residences within a reasonable commuting distance from a unit of their component and fail to report to such unit within 90 days of the relocation (assuming the member's ETS date will not come up during this 90-day period), they may be identified as unsatisfactory participants because of the requisite number of unexcused absences, and they may be transferred to the IRR. The characterization of service usually will be Honorable.

### **Contractual Obligors (Non-MSOs)**

Non-MSO members who move so that they are beyond a reasonable commuting distance from a unit of their component will be transferred to non-member, non-participating status (NNPS) upon request at the end of their enlistment, and will be discharged (usually Honorable), unless they have transferred to a paid drill position in another Reserve component before their enlistment expires.

Non-MSO members who move so that they are within a reasonable commuting distance of a unit of their component and fail to join such unit within 90 days of their relocation (assuming the ETS date will not run), may be identified as unsatisfactory participants because of the requisite number of unexcused absences and will be discharged. The characterization of service usually will be Honorable.

### **Unit Relocation Within Reasonable Commuting Distance**

If the unit moves so that the member remains within a reasonable commuting distance, the members required participation continues.

### **Unit Relocation Beyond Reasonable Commuting Distance**

#### MSOs

If the unit moves so that the member is beyond a reasonable commuting distance, the member may be discharged from the ANG of the State and transferred to ARPC-ORS (Obligated Reserve Section) where, at the end of the MSO, the member will be honorably discharged.

#### Non-MSOs

If the unit moves so that the member is beyond a reasonable commuting distance, the member may resign from the ANG of the State and be transferred to the USAFR for the remainder of the term of the enlistment, and from which the member will be honorably discharged.

***KWIK-NOTE: This area of personnel administration is subject to frequent policy changes from the NGB, and the latest NGB communications should be consulted when a problem arises.***

**RELATED TOPICS:**

**SECTION**

Absent Military Members	1-2
Administrative Demotion of Airmen	24-2
Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Conditional Release	1-8
Nonjudicial Punishment	24-11
Palace Chase	1-26
Quality Force Management Actions	24-12
Unsatisfactory Participation	1-40

## Unions - Military

Updated by Lt Col Karen Hornsby and Lt Col Baxter O. Elliot, III , July 2001

**AUTHORITY:** 10 U.S.C. 976; AFI 51-906, *Representational and Organizational Activities of Air Force Personnel* (21 Jul 94).

### DEFINITION

A military labor organization is an organization that engages in or attempts to engage in:

1. Negotiation or collective bargaining;
2. Representing members in connection with any grievance or complaint arising out of the terms or conditions of military service;
3. Striking, picketing, marching, or demonstrating to induce the National Guard to recognize the organization or the right to negotiate or bargain for the members; or
4. Changing the terms or conditions of military service.

### MEMBERSHIP IN MILITARY UNIONS, ORGANIZING MILITARY UNIONS, AND RECOGNITION OF MILITARY UNIONS ARE PROHIBITED.

A military labor organization is unlawful because it may impede the mission of the National Guard and present a clear danger to discipline, loyalty and obedience to the lawful orders of command.

Pursuant to 10 U.S.C. 976, it is unlawful to:

1. Enroll in a military labor organization;
2. Participate as a military labor organization as described above;
3. Recruit members for a military labor organization; or
4. Use any military installation for a military labor organization purpose.

Whoever violates this section as an individual may be fined up to \$10,000 or imprisoned not more than five years, OR BOTH, or in the case of an organization, may be fined from \$25,000 to \$250,000.

### PERMITTED ACTIVITIES OF AGRs

A member of the National Guard serving on full-time National Guard duty, in AGR status, may not be a member of a military labor organization. But a full-time member of the National Guard may:

1. Present complaints or grievances over terms or conditions of military service through established military channels;
2. Voice personal views through command-sponsored or authorized advisory councils, committees or organizations;
3. Petition or communicate with any Member of Congress;

4. Seek or receive counseling or information from any source;
5. Be represented by military counsel in any military judicial or administrative proceeding;
6. Join or be a member of any organization (not a military labor organization) which engages in representational activities with respect to terms or conditions of off-duty employment; and
7. Take such other actions as are authorized by applicable law or regulation.

Should any problem arise in this area, Commanders should consult with their Judge Advocate and Labor Relations Officer.

***KWIK-NOTE: There are no military unions.***

**RELATED TOPICS:**

**SECTION**

AGR Program  
Labor Relations

11-4  
5-5

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# USAF Instructions, ANG Supplements and Unit Instructions

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** AFI 33-360, *Publications and Forms Management* (18 May 06)

## INTRODUCTION

AFI 33-360 generally describes the applicability and provides for the issuance of publications throughout the Air Force. Paragraph 3.9.1 of that AFI sets out the rules for applicability of Air Force publications to the ANG. The general rules are:

1. Departmental publications (AFPDs and AFIs) apply to the Air National Guard only when coordinated with the appropriate ANG office. The ANG, not the OPR, determines whether a particular instruction applies to the ANG, and will provide the OPR with applicability or exception statement for inclusion in the “purpose” paragraph of the publication.
2. AFPDs and AFIs are not listed in the ANGIND 2; those which are not applicable, or are applicable only upon mobilization, are indicated by a “@” or “#” notation in the AFIND 2. If there is no marking in the AFIND 2, the publication is applicable, in its entirety and with no exception, to the ANG.
3. MAJCOM publications apply only if specifically stated to be applicable in the purpose paragraph. Applicable MAJCOM publications are listed in the ANGIND 2. Only those MAJCOM publications listed in the ANGIND2 by series and date are applicable to the ANG.

## ANG SUPPLEMENTS AND UNIT PUBLICATIONS

The Director, ANG, is authorized to publish supplements to both departmental and MAJCOM publications. ANG units have limited authority to issue policy directives, and are authorized to publish instructions to implement USAF, MAJCOM and ANG policy directives.

## VIOLATIONS

Article 92(1), UCMJ, and similar state code provisions, make it a crime to violate a lawful general regulation (*i.e.*, “instruction”). All formal, published regulations are deemed to be “general regulations” for this purpose. However, the Manual for Courts-Martial, 1984, limits the criminal applicability of a regulation as follows: “Regulations which only supply general guidelines or advice for conducting military functions may not be enforceable under Article 92 (1).”

Thus, not all general regulations are necessarily punitive in nature, and violating a general regulation that is not punitive in nature is not punishable under Article 92, UCMJ or a state military code equivalent. Therefore, if the goal in issuing a regulation is to make its violations punishable by court-martial, then it should be clearly stated in the text of the regulation that it “is a punitive regulation, punishable under Article 92 (1), UCMJ, (or state Code reference),” or words of similar import. Where appropriate, only important portions of the regulation should be designated as punitive, by reference to specific paragraphs in the regulation. In other words, all or part of a general regulation may be made punitive.

## DRAFT CAREFULLY

A government agency will always be held responsible for obeying its own regulations. Ambiguities in a regulation will almost always be construed in a third party hearing against the party that authored the regulation. Consequently,

serious thought and consideration should be given to whether to issue a regulation or supplement, and what to put in it.

***KWIK-NOTE: Every unit publication should be reviewed by a Judge Advocate for legal sufficiency and form before it is issued. It may be wise to ask your Judge Advocate to work with the OPR in the drafting stage.***

**RELATED TOPICS:**

**SECTION**

Judicial Review of Military Administrative Actions  
Sources of Commander's Authority

18-5  
2-7

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# Unsatisfactory Participation

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 05); ANGI 36-2503, *Administrative Demotion of Airmen* (1 Mar 04).

## WHAT IS "UNSATISFACTORY PARTICIPATION?"

AFI 36-3209, paragraph 3.13.2, defines "Unsatisfactory Participation as a member who has missed nine or more Unit Training Assemblies (UTAs) within a 12-month period or who fails to report to the ANG unit of assignment within 90 days after the date of release from active federal service. Members may be separated or discharged when it is determined, that they are unqualified for further military service by reason of Unsatisfactory Participation. This reason shall NOT be used if the member is in Entry Level Status. For demotion purposes, "unsatisfactory participation" is defined as six or more unexcused absences from scheduled UTA periods in any continuous 12-month period.

## COMMANDER'S DUTIES

1. Send a written notice to the member after each scheduled UTA missed. As a practical matter, send one letter at the end of the monthly drill weekend citing the UTAs missed. One four-hour UTA counts as one absence. Attachment 1 to this topic is a sample form letter for this notice. Up to the sixth unexcused absence, the letter need only be sent by regular mail.
2. Many commanders use demotion action as a rehabilitative tool before initiating discharge proceedings. You may initiate demotion action after the sixth unexcused absence. Use the inserted paragraph 4 in Attachment 1 (notification of absence letter), if demotion action is being initiated. After the sixth but before the ninth unexcused absence, send Attachment 1 by certified mail, return receipt requested. Also, use the inserted paragraph 4 in Attachment 2 to this topic, if after the ninth unexcused absence, you choose to proceed with further demotion action.
3. After the ninth unexcused absence, use Attachment 2 as the notice to be sent to the member. The unit Commander may initiate separation action recommending that the member be separated from both the ANG of the state and as a Reserve of the Air Force, or that the member be separated from the ANG of the state and transferred to the Individual Ready Reserve (IRR), depending upon whether or not the member has an existing service obligation. See also the topic in this Deskbook entitled "TRANSFER TO THE INDIVIDUAL READY RESERVE (IRR)."

## WHAT HAPPENS TO INDIVIDUALS TRANSFERRED TO THE IRR?

Individuals who are transferred to the IRR because of unsatisfactory participation, and have a tentative characterization of service of other than honorable, will be discharged by ARPC at the end of their statutory military service obligation or period of enlistment or service agreement, whichever is later, with such characterization of service unless the individual has taken affirmative actions to qualify for a higher characterization of service. Such actions may include, but are not limited to, rejoining a unit of the Air National Guard, or other selected Reserve, and satisfactorily participating for a period of not less than 12 months, or volunteering for and completing a tour of active duty for training of not less than 45 days. When necessary, the individual's term of enlistment or service agreement may be extended to complete the affirmative action described above to qualify for a more favorable characterization of service.

## FORMS

Many units, through their MPF and Judge Advocates, have developed form letters and procedures to expeditiously process unsatisfactory participants. Remember, this area requires close coordination among unit Commanders, their first sergeants, MPF and the Staff Judge Advocate to ensure timely communication of unexcused absences from the

unit to the MPF, and timely sending of the required correspondence to the member. It is easy to push this aside with all the other training requirements you face. If you establish these procedures as just another one of your duties, you will find that the process works smoothly. SJAs should review all adverse actions based upon unsatisfactory participation.

***KWIK-NOTE: Timely processing of unsatisfactory participants is a high profile item for inspection teams.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Absent Military Members	1-2
Administrative Demotion of Airmen	24-2
Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Admonitions and Reprimands - Administrative	24-5
Barring Reenlistment	24-6
Judicial Review of Military Administrative Actions	18-5
Legal Reviews	17-11
Mailing or Delivery - Affidavits and Certificates of Service	24-10
Palace Chase	1-26
Quality Force Management Actions	24-12
Selective Retention in the Air National Guard	1-36
Weight and Body Fat Management Program	24-15
Dropping ANG Officer from the Rolls Instead of Administrative Discharge	24-8
Nonjudicial Punishment Transfer to the Individual Ready Reserve (IRR)	24-11

Attachment 1

(Unit Letterhead)

MEMORANDUM FOR (Name and Address of unit member)

Date

FROM: Unit Commander

Subject: Notification of Unexcused Absence from Scheduled Training Duty

1. You are advised that your unexcused absence(s) from the scheduled training period(s) of \_\_\_\_\_ (has) (have) been recorded.

2. You are aware from previous briefings and/or counseling of your requirement to attend all scheduled inactive duty and other required training periods.

3. PALACE CHASE ONLY: As a Palace Chase member your failure to satisfactorily participate in unit training assemblies (UTAs) and your other unit training requirements is a violation of your Palace Chase contract and may result in recommending your involuntary recall to Extended Active Duty under AFI 36-3205 for the period of time remaining on your Active Duty Service Commitment (Officers) or Term of Enlistment (Airmen) at the time of your release from active duty, or for 12 months, whichever is longer.

[If demotion action is being initiated, use: "4. You are advised that an action which could result in your demotion in grade is being initiated at this time, and of which you will receive separate notice." If this paragraph is used, renumber the remaining paragraphs].

4. These unexcused absences from scheduled training also subject you to nonjudicial punishment action, administrative demotion action, and other adverse administrative actions, including initiation of separation and discharge action from the Air National Guard under other than honorable conditions.

5. You may have a valid excuse for one or more of these unexcused absences because of illness, injury, emergency or other circumstances beyond your control. If such is the case, you must furnish this office not later than 15 days from the date of this letter, appropriate documentation, such as a doctor's certificate, affidavit, etc. supporting your written request to be excused. If documentation is not readily obtainable, indicate in your request the date it will be furnished. All requests for unexcused absences are subject to approval. The denial of the request to be excused or failure to submit a written request within the time limits, may result in initiation of a separation action with a recommendation for you to receive a discharge under other than honorable conditions, nonjudicial punishment, administrative demotion, or other adverse administrative action.

6. If I accept your explanation and consider your unexcused absence(s) as excused, you may be required to make up the training. If the make-up training is not performed, as ordered, it will be recorded and counted as an unexcused absence.

7. You are ordered to report for duty at the next scheduled Unit Training Assembly on \_\_\_\_\_, beginning at \_\_\_\_\_ hours, place of duty: \_\_\_\_\_.

8. If you have any questions, you are to contact \_\_\_\_\_ at \_\_\_\_\_.

\_\_\_\_\_  
Commander Signature Block

Attachment 2

(Unit Letterhead)

MEMORANDUM FOR (Name and address of unit member)

Date

FROM: Unit Commander

Subject: Unsatisfactory Participation

1. You are advised that your unexcused absence(s) from the scheduled training period(s) of \_\_\_\_\_ (has) (have) been recorded.

2. You are aware from previous counseling and/or correspondence of the serious nature of your absence.

3. PALACE CHASE ONLY: As a Palace Chase member your continued failure to satisfactorily participate in unit training assemblies (UTAs) and your other unit training requirements is a violation of your Palace Chase contract and will result in recommending your involuntary recall to Extended Active Duty under AFI 36-3205 for the period of time remaining on your Active Duty Service Commitment (Officers) or Term of Enlistment (Airmen) at the time of your release from active duty, or for 12 months, whichever is longer.

[If demotion action is being initiated, use: "4. You are advised that an action which could result in your demotion in grade is being initiated at this time, and of which you will receive separate notice." If this paragraph is used, renumber the remaining paragraphs].

4. Based upon the number of your unexcused absences, I have the authority to recommend your separation from the Air National Guard. Such discharge may be under other than honorable conditions. This does not apply to PALACE CHASE members who are approved for recall to extended Active Duty.

5. You may have a valid excuse for one or more of these unexcused absences because of illness, injury, emergency or other circumstances beyond your control. If such is the case, you must furnish this office not later than 15 days from the date of this letter, appropriate documentation, such as a doctor's certificate, affidavit, etc. supporting your written request to be excused. If documentation is not readily obtainable, indicate in your request the date it will be furnished. All requests for unexcused absences are subject to approval. The denial of the request to be excused or failure to submit a written request within the time limits, may result in initiation of a separation action with a recommendation for you to receive a discharge under other than honorable conditions, nonjudicial punishment, administrative demotion, or other adverse administrative action.

6. If I accept your explanation and consider your unexcused absence(s) as excused you may be required to make up the training. If the make-up training is not performed, as ordered, it will be recorded and counted as an unexcused absence.

7. You are ordered to report for duty at the next scheduled Unit Training Assembly on \_\_\_\_\_, beginning at \_\_\_\_\_ hours, place of duty: \_\_\_\_\_.

8. If you have any questions, you are to contact \_\_\_\_\_ at \_\_\_\_\_.

\_\_\_\_\_  
Commander Signature Block

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# Withdrawal of Authority to Bear Firearms

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Updated by Major Jeffrey Knickerbocker, November 2008

**AUTHORITY:** AFI 31-207, *Arming and Use of Force by Air Force Personnel* (1 Sep 1999); DODI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (21 Aug 2007)

## WITHDRAWAL OF AUTHORITY TO BEAR FIREARMS

A Commander has the ability, under certain circumstances, to administratively withdraw a member's authority to bear a firearm. Typically, this issue will arise in the context of a security police squadron or flight. This action is appropriate when a member's behavior demonstrates that possession of a firearm would be a threat to safety, security, or the performance of the ANG mission for which the firearm was possessed. The goal of this action is to protect not only the member, but also other personnel at or near the military installation. Additionally, as is more fully discussed in the following chapter, certain convictions preclude the military from authorizing someone to bear a firearm. In those cases, the law imposes criminal liability not only on the member who bears the firearm, but also on personnel who issued the firearm to the member.

## DETERMINE RELIABILITY AND DOCUMENT YOUR DECISION

AFI 31-207, paragraph 2.6, requires that the member in question be evaluated to determine whether or not the member is reliable; that is to say, is the members' personality such that the member can be trusted with possession of a firearm.

A member's individual reliability can be called into question for a variety of reasons, including identified substance abuse, emotional or behavioral instability, using prescription medication that would impair their ability to use a firearm safely, or disciplinary problems. ***If you know or have reasonable cause to believe that a person under your command has a misdemeanor conviction for a crime of domestic violence, you must take affirmative action to withdraw and prevent the individual's access to firearms.*** (See Deskbook Topic entitled "Lautenberg Amendment," Section 1-42).

Commanders deciding to withdraw a person's authorization to bear arms for more than 72 hours *must* notify the individual in writing of the withdrawal action and the reasons for such action pursuant to AFI 31-207, para. 2.6.6.

On the issue of reliability, it is important to thoroughly document the pertinent duty history of the member as to both the current assignment and past assignments. This information will assist a Commander in the initial decision regarding the withdrawal of authority to bear firearms, as well as any subsequent decision in the matter. A member may question a Commander's decision to take such an action, or, at a later date, the member may apply for a reinstatement of the authority to bear firearms. Thus, it is essential to properly document the basis for this type of action. A Commander should check with the Staff Judge Advocate before instituting this action. The SJA will assist a Commander in reviewing the legality of the proposed action and in supplying the necessary documentation of the action.

***KWIK-NOTE: Act promptly to withdraw a member's authority to bear firearms if the member's behavior demonstrates that possession of a firearm would be a threat to safety, security, or the performance of the ANG mission.***

## RELATED TOPICS:

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Lautenberg Amendment	1-42

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# Lautenberg Amendment

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**Updated by Major Jeffrey Knickerbocker, November 2008**

**AUTHORITY:** 18 U.S.C. §§921 and 922; Memorandum, Under Secretary of Defense for Personnel and Readiness, *Department of Defense (DOD) Policy for Implementation of Domestic Violence Misdemeanor Amendment to the Gun Control Act for DOD Military Personnel* (27 Nov 02); Memorandum, HQ USAF/DPP, *Air Force Policy for Implementation of Domestic Violence Misdemeanor Amendment to the Gun Control Act (Lautenberg Amendment) for Military and Civilian Personnel* (20 Feb 04); DODI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (21 Aug 2007).

## **BACKGROUND**

The Gun Control Act of 1968 (“GCA”) established a comprehensive scheme to regulate the manufacture, sale, transfer, and possession of firearms and ammunition. Section 922(g) delineated certain classes of individuals prohibited from shipping, transporting, possession, or receiving firearms or ammunition in interstate commerce. Some examples of individuals targeted by this provision include persons convicted of a crime punishable by a term of imprisonment exceeding one year; fugitives from justice; unlawful users/addicts of controlled substances; persons committed to a mental institution, illegal aliens, and persons dishonorably discharged from the Armed Forces. The GCA contained a public interest exception and allowed the possession of firearms in an official capacity (e.g. by law enforcement officials and military members )

As part of the Omnibus Consolidated Appropriations Act of 1997, Congress amended the GCA and added an additional disqualification category. Commonly referred to as the Lautenberg Amendment (after its sponsor Senator Frank Lautenberg of New Jersey), this provision makes it unlawful for “any person...who has been convicted of a misdemeanor crime of domestic violence” to ship, transport, possess, or receive firearms or ammunition in or affecting commerce. It also prohibits the knowing sale or other disposition of any firearm or ammunition to an individual convicted of a domestic violence misdemeanor. Further, the amendment alters the traditional public interest exception to the firearms disqualification provisions, since it did not include a public interest exception. A violation is punishable by imprisonment for up to 10 years and a maximum fine of \$250,000. Military departments (including security forces personnel) are not exempt from this law.

## **DOD GUIDANCE**

DoDI 6400.06 expanded, as a matter of policy, the prohibition and included those individuals previously exempted under the public interest exception. Because the policy could not be applied retroactively it is still possible for someone with a felony conviction prior to the 2002 policy implementation date to serve in the military and carry a weapon.

## **AIR FORCE AND AIR NATIONAL GUARD GUIDANCE**

In March 1998, the Air Force issued a message providing that individuals convicted of domestic violence may not be administratively discharged solely for the conviction, but may be administratively discharged if there is a legal basis on other grounds. All individuals with qualifying convictions who are retained must be reassigned to duties which do not include access to firearms or ammunition and may not deploy to areas for which small arms training is required. If the individual’s AFSC requires that the individual be qualified to bear a firearm, the AFSC must be withdrawn.

ANGRC guidance reiterates AF guidance and states that individuals with qualifying convictions may not be enlisted in the Guard and that such convictions are not subject to waiver. Members already in the Guard with qualifying convictions are ineligible for direct commission or entry into a program leading to commission.

As the DoD has recently issued an instruction, you should look for an Air Force implementing instruction soon.

### **THE LAUTENBERG AMENDMENT: ELEMENTS OF AN OFFENSE:**

**Misdemeanor:** A non-felony offense under federal or state law, punishable by a fine and/or up to one year in jail.

**Conviction:** A final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere. It does not include an arrest, or a final judgment which has been expunged, pardoned, reversed, set aside, or otherwise rendered null. Moreover, it does not include the situation where an individual has had his/her civil rights restored, unless the terms of any such action expressly prohibit the individual from possessing firearms or ammunition. Additionally, the underlying misdemeanor conviction may not be used as a predicate to a violation unless: 1) the individual in question was represented by counsel in the case, or knowingly and intelligently waived the right to counsel and 2) in the instance that the individual was entitled to a trial by jury, the case was indeed tried by jury, or the individual in question made a knowing and intelligent waiver of the right. The statute applies to anyone who has ever been convicted of such an offense, even if the conviction occurred before the effective date of the Lautenberg Amendment (30 Sep 96).

**Domestic Violence:** A misdemeanor conviction triggers the firearm possession prohibition only if the offense has as its elements the use or attempted use of physical force or the threatened use of a deadly weapon; committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person “similarly situated” to a spouse, parent or guardian of the victim. This provision appears to cover an exhaustive range of domestic relationships, except that the text prevents children from being classified as offenders in the event that they commit a misdemeanor offense against a parent or guardian. The Bureau of Alcohol, Tobacco and Firearms (BATF) has helped to further clarify the statute, stating that the “similarly situated” language does not require the establishment of a common law marriage; rather the individuals must simply be involved in more than a “dating” relationship. 27. C.F.R. § 178.11; *See also* Bureau of Alcohol, Tobacco and Firearms, “Federal Firearms Regulations Reference Guide,” AFF P 5300.4, p. 152 (2000).

### **27 NOV 2002 DOD POLICY: ELEMENTS OF AN OFFENSE**

In essence, DOD Policy incorporates all of the aforementioned definitions, yet clarifies the law’s applicability to the military and broadens its reach.

**“Qualifying conviction:”** a state or federal conviction for a misdemeanor crime of domestic violence; a state or federal conviction for a felony crime of domestic violence adjudged on or after the date of the memorandum (27 Nov 02), and any general or special court-martial conviction for a UCMJ offense which otherwise meets the elements of a “crime of domestic violence,” even though not classified as a misdemeanor or felony. In effect, DOD policy expanded Lautenberg’s application to the military. Under this scenario, it is entirely possible to comply with the statutory requirements of Lautenberg (i.e. identification of misdemeanants) and not be subject to a fine or imprisonment; yet, still violate DOD policy (i.e. failure to identify felons). Obviously, military members must be cognizant of both. Further, the application of Lautenberg to special and general court-martials indicate the broadened application of federal law to crimes committed outside of the United States.

The term “qualifying conviction” does not include summary court-martial convictions, impositions of non-judicial punishment, or deferred prosecutions (or similar alternative dispositions) in civilian courts.

**Domestic Violence:** DOD policy uses the same definition as the Lautenberg Amendment, however it precedes the specific description with the following: “a crime of domestic violence means an offense that *has as its factual basis...*” Thus, the formal name of the offense of conviction is not governing—one must look further to the factual basis for the conviction. For example, if an individual pleads guilty to “disorderly conduct,” yet the factual basis is that he assaulted his wife and thus, caused a disturbance, this is a crime of domestic violence. The fact that the offense says “disorderly conduct” and has no domestic violence reference in its title does not matter. The

underlying facts of the offense are what count. However, consider the situation where an individual is charged with two offenses: DV assault (for hitting his wife) and disorderly conduct (for yelling at, and threatening the intervening neighbors). The individual pleads guilty to the disorderly conduct offense and the DV assault is dismissed. Although the police report may indicate a DV assault, the factual basis for the disorderly conduct was the actions toward the neighbors. In this instance, there is no factual basis of domestic violence for the offense of conviction. There is just other evidence of domestic violence.

## **CIVILIAN PERSONNEL**

DOD policy applies to all DOD appropriated and non-appropriated fund civilian employees, including those who work outside United States' territory. It does not apply to foreign nationals employed by DOD. Each DOD component must identify their "covered positions" (those whose responsibilities include selling, disposing, receiving, possessing, shipping, or transporting any firearm or ammunition), and ensure that no civilian is employed or retained in such a position if they have a qualifying conviction.

## **NOTIFICATION PROGRAM**

Each DOD component shall implement a program to inform personnel (military and civilian) in covered positions about the scope and consequences of the Lautenberg Amendment. Personnel should be informed of their obligation to report a qualifying conviction, and DD Form 2760 shall be used to report such convictions. Notices must be posted in all facilities where firearms or ammunition are stored, issued, disposed of, and transported. DOD components may now choose to require all or some of its covered personnel to certify that they do or do not have a qualifying conviction (use DD Form 2760). This option to canvass/survey members rests within the discretion of each component.

## **JUDICIAL REVIEW**

The Lautenberg Amendment has been attacked as violating several different constitutional provisions: the second amendment, the tenth amendment, the prohibition against bills of attainder, the commerce clause, the equal protection clause, and the ex post facto clause. Although the last three have received more measured consideration, none of the challenges have succeeded. In fact, several federal Courts of Appeals have upheld the constitutionality of the Lautenberg Amendment. See *United States v. Meade*, 175 F.3d 215 (1<sup>st</sup> Cir. 1999); *United States v. Napier*, 233 F.3d 394 (6<sup>th</sup> Cir. 2000); *Gillespie v. City of Indianapolis*, 185 F.3d 694 (7<sup>th</sup> Cir. 1999); *United States v. Lewis*, 236 F.3d 948 (8<sup>th</sup> Cir. 2001); *United States v. Hancock*, 231 F.3d 557 (9<sup>th</sup> Cir. 2000); *Fraternal Order of Police v. United States*, 173 F.3d 898 (D.C. Cir. 1999).

***KWIK-NOTE: If you know or have reasonable cause to believe that a person under your command has a misdemeanor or felony conviction for a crime whose underlying factual basis is one of domestic violence, you must take affirmative action to withdraw and prevent the individual's access to firearms. Notification programs will assist in the identification of persons with qualifying convictions.***

## **RELATED TOPICS:**

## **SECTION**

Withdrawal of Authority to Bear Firearms

1-41

# Chapter 2, Authority of Commander

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# Command Influence

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**Updated by Maj Beverly G. Schneider, January 2007**

**AUTHORITY:** Article 37, Uniform Code of Military Justice, 10 U.S.C. 837; applicable state law and regulations.

## **DEFINITION**

Unlawful command influence exists when Commanders impose their judgment as to the outcome or disposition of a case upon their subordinates who have the responsibility to exercise their own independent judgment in the capacities in which they are involved in the case.

## **UNLAWFUL COMMAND INFLUENCE PROHIBITED**

### **Military Justice Actions**

Improper command influence over military justice proceedings is prohibited by law. The exercise of improper command influence will result in the reversal of a conviction or the overturning of a sentence. In addition, the exercise of such influence is itself a crime under the federal Uniform Code of Military Justice and many state Codes of Military Justice.

### Specific Prohibitions

The law contains four specific prohibitions against command influence in military justice actions:

1. Commanders and convening authorities may not censure, reprimand or admonish any member of a military court-martial, military judge or military counsel with respect to the findings or sentence rendered by a court-martial;
2. No Guard member may attempt to coerce or influence the actions of any military court-martial or convening, reviewing or approval authority with respect to their judicial acts;
3. In preparing performance and efficiency reports and promotion recommendations and actions, and determining assignments, Commanders and supervisors are not allowed to consider or evaluate a member's performance as a member of a court-martial; and
4. In preparing performance and efficiency reports and promotion recommendations or actions, and determining assignments, military raters may not give less favorable evaluations because of the zeal with which a lawyer represents any accused.

### Examples of Prohibited Acts of Command Influence

These specific protections have been interpreted by the appeals courts over the years to prohibit a wide variety of command actions that might influence military courts-martial. Some examples of prohibited command actions include:

1. Briefing court members or prospective court members prior to a trial concerning the review of courts-martial and proper disposition of persons convicted of crimes;

2. A statement to court members that charges are sent to trial only after extensive investigation and the existence of a reasonable certainty that an accused had committed the crime;
3. Describing certain offenses to court members as reprehensible;
4. Reading a secretarial policy statement to court members on disposition of certain offenses;
5. Talking in a joking manner to court members over a drink at a bar and saying that the Commander did not care how long the trial lasted as long as the accused was convicted;
6. Creating an appearance of command influence by command actions concerning outcomes of trials; and
7. Suggesting that subordinate Commanders and NCOs should not testify, or refusing to allow them to testify, in favor of retaining someone who has been convicted of an offense.

### Consequences of Unlawful Command Influence

The consequences of unlawful command influence can be devastating. In 1982 and 1983, the Commander and a brigade command sergeant major in the 3rd Armored Division gave briefings and distributed letters on the subject of testimony in favor of persons accused at courts-martial. It was stated in these letters that it was inconsistent to recommend a person be tried by a court authorized to impose a punitive discharge and then appear as a character witness at trial and recommend retention. These command actions resulted in the review of hundreds of court-martial cases and some reversals and overturning of sentences. Those involved in these episodes, as well as their Staff Judge Advocates, all suffered adverse career consequences.

Also, the Commander may be personally liable for any adverse effects suffered by members who are victims of the Commander's unlawful command influence. There will be no government representation or indemnification from money damages for the Commander in such cases.

### Delicate Balance

There is a delicate balance in the military justice system. Commanders have a strong interest in seeing wrongdoers punished. At the same time, they exercise a quasi-judicial rule that requires them to maintain neutrality. Command influence strikes at the heart of the perception of fairness in the military justice system. Courts-martial, military judges and military counsel must be free to do justice as the facts and the law require without fear of command reprisals. Witnesses must be free to testify on behalf of accused members without fear of putting their military careers in jeopardy.

### **ADVERSE ADMINISTRATIVE ACTIONS**

Although nearly all the precedents with regard to command influence are cases arising in court-martial situations, the same principles of fairness apply to administrative discharge board and demotion board situations. Commanders and convening authorities should take care not to discuss the particulars of pending cases with potential board members. They should make sure that the military lawyers and witnesses who participate do so in an atmosphere free of any disincentives to actions favorable to the respondent.

Everyone would agree that it would be improper for a Commander to approach a board member in a particular case and tell the member about the facts of the case or the Commander's hopes that the respondent will be discharged or demoted, or that a recommendation favorable to the respondent will ensue. The harder cases arise when Commanders wish to make general policy pronouncements about certain areas. For example, the National Guard Bureau has written several policy letters stating that "drug abuse is incompatible with military service in the National Guard." Circulating this policy to subordinates outside the context of a particular board or pending case will probably create no legal problems. But taking the same action on the eve of, or at any time before a pending contested board hearing (even as a "reminder" of existing policy) when board members and potential witnesses may be influenced by it will probably cause legal problems.

## CONCLUSION

Commanders must ensure fairness in all administrative and disciplinary proceedings. The key to avoiding unlawful command influence is to be sensitive to these issues and to regularly consult with your Judge Advocate before issuing policy statements or taking other actions that might relate to pending or potential legal proceedings.

***KWIK-NOTE: AVOID UNLAWFUL COMMAND INFLUENCE.***

### RELATED TOPICS:

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# Command Succession

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Updated by Maj Beverly G. Schneider, January 2007

**AUTHORITY:** AFI 51-604, *Appointment to and Assumption of Command* (4 Apr 06); AFI 33-328, *Administrative Orders* (1 Feb 99); *United States v. Jette*, 25 M.J. 16 (C.M.A. 1987).

## INTRODUCTION

The subject of command succession usually arises in the context of the Commander's function as the command authority in the Wing or Group. During the temporary absence of the command authority, normally business continues as usual in the Commander's name. However, when the need for formal command authority action arises, apart from temporary absence, there must be a properly authorized Commander to act as the command authority. There are two ways an officer can succeed to command: ASSUMPTION and APPOINTMENT.

## ASSUMPTION OF COMMAND

Assumption of command is a unilateral act by the senior eligible officer authorized to assume command in the event of a prolonged absence of the Commander. Absence or disability of the Commander for short periods does not incapacitate that Commander from discharging functions of command and, except under unusual circumstances, does not warrant assumption of command by another officer.

The Commander's designated representative continues to act for the Commander in the Commander's name as is routinely done when the Commander is present, unless the duties to be performed are non-delegable. AFI 51-604 underscores that certain duties cannot be delegated. For example, duties specifically imposed on Commanders by law, such as those in the UCMJ, in state Codes of Military Justice, appropriations acts and other statutory provisions; duties that, by direction of higher headquarters, are non delegable; and duties of evident importance or arising in special existing local conditions.

Assumption, therefore, depends upon the types of decisions required to be made in the Commander's absence. Day-to-day operation of the unit may continue without formal transfers of command, especially where the Commander can be contacted by telephone or message. Some matters can wait until the Commander returns.

The person assuming command must always be the senior eligible officer assigned to the unit and present for duty. AFI 51-604 clarifies that an officer may assume command only of an organization to which that officer is assigned by competent authority. Assignment to a subordinate organization is an assignment to all superior organizations having the subordinate organization as a component.

AFI 33-328 defines how orders should be published. Appointment and assumption of command must be done through G series orders that follow the mandates of AFI 51-604.

Officers must be eligible to assume command under AFI 51-604. For example, Chaplains cannot exercise command and JAs can generally do so only if authorized by TJAG.

Vice Commanders and Deputy Commanders, when acting as such, are staff officers. The authority of staff officers is limited to assisting the Commander through planning, investigating and recommending action. However, staff officers assigned to the organization are eligible to assume command. There is no title or position of "acting commander." The term "acting commander" is not authorized.

Assumption of command can be temporary or permanent, but is normally temporary. It must be by published orders. When the assumption is temporary, upon the return of the senior Commander, that Commander is re-vested with command authority and no new orders are necessary for that re-vesting of authority.

### **APPOINTMENT TO COMMAND**

Appointments to command must always be authorized by higher authority. For example, Group Commanders cannot replace themselves; the action must be elevated to the next higher level of command.

Appointments to command may be temporary or permanent. This permits appointment of an officer junior in rank (not grade) to other eligible assigned officers during a temporary absence of the regularly assigned Commander. Upon return of the regularly assigned Commander, no new appointment orders are required to re-vest that returning Commander to command authority.

An officer can never be appointed Commander of one in a higher grade.

### **ASSUMPTION OF AND APPOINTMENT TO COMMAND - GENERALLY**

AFI 51-604 clarifies that there is no authority for an officer to command another officer of higher grade whether by assumption or by appointment. Thus, the former CE/SP exception which permitted an O-5 Deputy Combat Support Commander (CSG/CD) to take command even though an O-6 commanded a subordinate CE or SP squadron (as a separate unit on manpower documents), no longer exists. In such cases, it is necessary for the O-6 to take command, rather than the O-5. The term "grade" equates to the office held (Captain, Lieutenant Colonel, Colonel, etc). The term "rank" is generally used to denote seniority within a grade, although it also refers to the relative precedence among different grades.

ANG will use computer-generated orders when possible. Prescribed forms for orders are not applicable to the ANG. AFI 33-328, para 2.2.

AFI 33-328 underscores the basic principal that written G-Series orders serve only to announce and record command succession. An administrative defect is not fatal. This is consistent with the common sense approach to command succession taken in the Court of Military Appeals decision in the case of United States v. Jette, 25 M.J. 16 (C.M.A. 1987). The Court of Appeals for the Armed Forces has followed this principle in many other cases involving command succession.

It is especially important to insure accurate completion of orders when the officer succeeding to command is to perform duties as a court-martial convening authority or in adverse administrative actions. Actions in court-martial or adverse administrative cases could be invalidated if there is a defective assumption or appointment.

The succession of command must be authorized and done properly to validate the subsequent actions of the new Commander. Consultation with the Staff Judge Advocate is advised when questions in this area arise.

***KWIK NOTE: Know the differences between assumption of and appointment to command. Only the officer in the highest grade eligible to succeed to command may do so.***

#### **RELATED TOPICS:**

#### **SECTION**

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## Command by Non-rated Officer

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Updated by Maj Beverly G. Schneider, January 2007

**AUTHORITY:** AFI 51-604, *Appointment to and Assumption of Command* (4 Apr 06); OpJAGAF 1989/25, *Request for Waiver to Allow Non-rated Officer to Command* (3 May 89).

### COMMANDERS OF FLYING UNITS

Command is exercised by virtue of office and the special assignment of officers who are eligible by law to exercise command. Only line officers having clearance authority for manned aircraft may command flying organizations. These officers must be in active flying status, must hold a currently effective aeronautical rating, and must be qualified for aviation service.

### UNITS WITH A NONFLYING MISSION

Flying organizations are defined as units whose primary mission is flying manned aircraft, or planning for and directing the employment of manned aircraft. Certain types of units have multiple missions, which include responsibility for controlling and directing flying activities. These organizations may be commanded by non-rated officers provided the Commander of any subordinate flying organization is rated and in active flying status and clearance authority has been delegated.

### WAIVER TO COMMAND UNNECESSARY

In 1989, the Judge Advocate General of the Air Force had occasion to consider whether a non-rated officer could be appointed to command a National Guard aerospace defense group. The unit exercised operational control of flying units, but it also had a non-flying mission. The Judge Advocate General decided that no waiver was required to appoint a non-rated officer to command since the unit had a multiple mission. A rated officer was properly in command of the flying elements of the organization and was delegated clearance authority.

### STATE HEADQUARTERS

Certain positions have mandatory Aircrew Position Indicators (API) as reflected in ANGI 38-101 (15 Aug 05), see paragraph 2.1.4. All Officer requirements will be coded API 0, except the State Air Surgeon will be API 5 and the State Director of Operations will be API 8.

For more information about command issues, consult your Staff Judge Advocate.

***KWIK-NOTE: Units with non-flying activities as all or part of their mission may be commanded by non-rated officers.***

### RELATED TOPICS:

Command Succession  
State ANG Headquarters

### SECTION

2-3  
2-8

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# Jurisdiction

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**Updated by Maj Beverly G. Schneider, January 2007**

**AUTHORITY:** 10 U.S.C. 801, *et seq.* (Uniform Code of Military Justice); 10 U.S.C. 2683; 40 U.S.C. 3111 and 3112; applicable state law and regulations; TJAG Policy Letter 21, *Annexation of Air Force Installations* (4 Feb 98)(for reference only).

## INTRODUCTION

In large part, there are two major concepts that determine the scope and extent of a Commander's authority: (1) the status of the member over whom the Commander will exercise that authority, and (2) the jurisdiction where that authority will be exercised. The former is addressed in the topic in this deskbook entitled "STATUS OF NATIONAL GUARD MEMBERS." Jurisdiction is addressed here.

Generically, "jurisdiction" means the power or authority to act. To understand the control of a Commander over the installation, it is necessary to understand the basic concepts of title and jurisdiction.

## TITLE

The State usually owns the land on which the ANG and active duty installations sit. Some installations sit on leased land. Base Civil Engineers maintain the leases and deeds to Air National Guard and active duty installations. If there is a question about title to your installation, consult your base civil engineers if you are on an ANG installation. If you are on an active duty installation, consult the active duty base civil engineers. **ALWAYS CONSULT YOUR WING SJA IF YOU HAVE ANY QUESTIONS ON TITLE.**

## JURISDICTION

Jurisdiction is a question separate from that of title. Jurisdiction includes the right to legislate and to enforce laws on the installation. Thus, jurisdiction is sometimes called legislative jurisdiction. Title to the land does not necessarily include legislative jurisdiction over it. We will refer to legislative jurisdiction in this topic simply as jurisdiction.

There are different kinds of jurisdiction. The differences define the scope and extent of the authority of the holder of the particular kind of jurisdiction. However, jurisdiction defines the outer reaches of a Commander's authority. The extent of that authority, although permitted by principles of jurisdiction, may be further limited by instruction or policy.

Commanders and other key staff officers should possess a map of all areas on their bases, color-coded for any different kinds of jurisdiction that exist on various portions of the base.

Because the concept of jurisdiction is the starting point for all exercises of a Commander's authority, it has been set forth in some detail here as a source of reference. The Related Topics listed below contain subjects in which the concept of jurisdiction will determine, or at least be a factor in determining, the scope and extent of a Commander's authority to act.

## THE MEANING OF "JURISDICTION"

The term "jurisdiction", when used in connection with land areas, means the authority to enact general municipal laws for that area. "General municipal laws" govern the common things in life - wills, divorce, ordinary business transactions, traffic accidents, public health, and so on. The power to pass such laws is generally reserved to the States.

Congress can pass and enforce laws applicable to the entire country, including federal reservations, but only to the extent the Constitution authorizes Congress to do so. The above common matters are not within Congress' power. Congress, however, can exercise such general powers for specific land areas over which the United States has "federal jurisdiction" (exclusive, concurrent, or partial, as defined below). The U.S. does not exercise "federal jurisdiction" over most Government-owned property.

## **TYPES OF JURISDICTION**

If the federal government has title to the land, it will have one of the four types of federal jurisdiction listed below.

### **Exclusive Jurisdiction**

With exclusive jurisdiction, the U.S. possesses all of the legislative authority of the State over the installation, and the State has not reserved the right to exercise any of that authority concurrently with the U.S. Even where there is exclusive federal jurisdiction, the State usually reserves the right to serve civil and criminal process in the area for acts which occur outside the area. But if the State forgets to reserve such right, it may have been waived. Only Congress has authority to enact laws for, and the U.S. is solely responsible for, law enforcement on installations where there is exclusive jurisdiction.

NET RESULT: ONLY THE U.S. HAS JURISDICTION, AND THE U.S. HAS ALL OF IT.

### **Concurrent Jurisdiction**

Under concurrent or joint jurisdiction, the U.S. possesses all of the authority of the State, and the State has also reserved to itself the right to exercise, concurrently with the U.S., all of the same authority. This means both governments have total legislative authority over the same area, but in cases of conflict, the federal government wins because of the Supremacy Clause of the U.S. Constitution. In concurrent jurisdiction, the State acquires no power over federal activities. The Supremacy Clause immunizes these activities from State regulations regardless of the jurisdictional status of the land on which the activity is carried out.

NET RESULT: BOTH THE U.S. AND THE STATE HAVE ALL THE JURISDICTION.

### **Partial Jurisdiction**

Where there is partial jurisdiction, the U.S. possesses some of the State's authority but the State has reserved the right to exercise other authority, most commonly, the right to tax private property. For those powers not specifically reserved by the State, this is just like exclusive federal legislative jurisdiction. In other words, both the federal and state government have some legislative power, yet neither has total legislative power. It is like cutting a pie. Each government exercises some authority over some parts of the pie. In cases of conflict, the federal government wins by virtue of the Supremacy Clause. The allocation of powers is based on the State statute granting partial jurisdiction. Congress can return powers to the State (retrocede), but cannot add to them.

NET RESULT: BOTH THE U.S. AND THE STATE HAVE SOME SEPARATE JURISDICTION.

### **Proprietary Jurisdiction**

Proprietary jurisdiction is that jurisdiction exercised by any owner of property - the right to grant or deny entrance to the property, etc. It carries with it virtually no legislative authority. The federal government maintains supremacy and immunity for inherently governmental functions on the property. The only federal laws which apply are those which do not rely upon federal jurisdiction over the area, and include specific statutory federal crimes such as bank robbery, espionage, sabotage, and counterfeiting.

The U.S. has acquired ownership of an area, but has not obtained any measure of the State's legislative authority. Only the State has the power to enact general municipal laws over the area. The State may not regulate the federal government because of the Supremacy Clause of the U.S. Constitution, nor tax federal property.

**NET RESULT: THE HOLDER OF PROPRIETARY JURISDICTION (U.S. OR THE STATE) ONLY CONTROLS ACCESS TO THE PROPERTY.**

### **INSTALLATION COMMANDER'S JURISDICTION**

Different portions of the same installation within the same State may have different jurisdictional statuses, due largely to different State statutes at the time of acquisition of those portions.

Note, however, in proprietary jurisdiction situations as well as the other forms of jurisdiction above, the military Commander retains full authority to maintain physical security and prevent breaches of the peace on the base; to apprehend and temporarily detain civilian violators of either Federal, State or local law on the base and turn them over to the appropriate Federal or State authorities; and to have matters covered by federal law litigated in the federal court system. **DO NOT ASSUME THAT YOU ARE THE INSTALLATION COMMANDER, PARTICULARLY IF YOU ARE LOCATED AT AN ACTIVE DUTY BASE OR A JOINT RESERVE BASE. IF YOU ARE IN DOUBT ABOUT WHO CONTROLS YOUR BASE, ASK YOUR WING SJA.**

### **HOW JURISDICTION IS ACQUIRED AND RETURNED - SOURCES OF JURISDICTION**

The U.S. has or does not have jurisdiction by either:

1. Having kept it even when it gave the land to the State;
2. Buying the land back from the State;
3. The State giving the jurisdiction to the U.S.; or
4. Giving the jurisdiction back to the State.

The federal government may have retained jurisdiction over the land at the time of the original land grant to the State. This is very rare. Jurisdiction may be acquired by "purchase with the consent of the State" (Constitution, Article I, Section 8, Clause 17) or cession by the State. "Consent" is usually the result of a general State law agreeing to all purchases. If the State does not "consent," the U.S. can still buy the land, but the U.S. will not have exclusive jurisdiction. Usually the federal government gains jurisdiction over the installation by cession from the State. The cession of jurisdiction may occur at the time of transfer of title from the State, or it may occur separately at a later time. Cession of jurisdiction is accomplished through a deed to land. The State may opt to retain jurisdiction when it transfers title to the land. The federal government does not force a state to cede jurisdiction.

40 U.S.C. 3111 and 3112 provide that the head of the department having control over federal land must expressly accept jurisdiction. By arrangement with the DoJ, the U.S. Attorney for the area must also be consulted prior to accepting jurisdiction. The U.S. Attorney may need additional staffing to handle the criminal docket transferred from the State.

Legislative jurisdiction may be relinquished (retroceded) by:

1. The federal government (but only with the consent of Congress) through cession to the State;
2. An unrestricted transfer of land to private hands; or
3. Reversion of jurisdiction under state law.

10 U.S.C. 2683 provides for retrocession of jurisdiction by military departments. Some State consent or cession laws provide that Federal jurisdiction continues only so long as the property is used for specified purposes, and cessation of

the conditions results in reversion of jurisdiction to the State. A grant of minor interests in land to private hands does not result in loss of Federal jurisdiction.

The need for acceptance of retrocession by the State is unclear. Federal law (10 U.S.C. 2683) does not require State acceptance, but section 2683 defers to state procedures, which might.

### **PRACTICAL EFFECT**

Exclusive jurisdiction is rarely beneficial. The lack of State jurisdiction means that any criminal prosecutions, even misdemeanors, must be prosecuted by the federal government, or not at all. Crimes that violate state, but not a specific federal law, must be prosecuted through the federal assimilative crimes act. Exclusive jurisdiction or lack of it does not affect the military mission. For example, many ACC bases have never been under exclusive jurisdiction.

Concurrent jurisdiction creates a “primary jurisdiction” problem in criminal matters: which of two equals shall prosecute a criminal case? This question is usually resolved by custom and occasional bargaining over an individual case. Although prosecution by both sovereigns would not violate the double jeopardy provision of the Constitution, one sovereign will ordinarily defer to a prosecution by the other.

Partial jurisdiction just costs money--taxes are paid by contractors and passed on to the Air Force hidden in contract prices. Congress has consented in the Buck Act to imposition of income, sales and gasoline taxes on areas of exclusive, concurrent, or partial jurisdiction, so only property taxes are involved.

### **DoD/AF POLICY**

In 1956, an Attorney General’s Commission recommended that exclusive and concurrent jurisdiction should no longer be acquired, and unneeded jurisdiction should be retroceded. The report was approved and Federal administrators of real property were directed by President Eisenhower to follow it as a guide. The policy also provides that the head of a military department may still acquire exclusive jurisdiction under exceptional circumstances. In 1971, the Public Land Law Review Commission, a Congressional-Executive Branch body, came to the same conclusion. DoD has followed this policy since 1956, based on the Presidential endorsement. Federal law (40 U.S.C. 3112) authorizes acceptance of exclusive jurisdiction but does not require it. Prior to 1940, it was required.

Since 1956 the Air Force has acquired exclusive jurisdiction in only a few instances due to “exceptional circumstances.”

### **RELATIONSHIP BETWEEN MILITARY CRIMINAL JURISDICTION AND CIVILIAN LAW**

Some individuals have the impression that the military is totally separate and apart from the civilian community, and that the military is governed by laws and rules made by and for the military. This, of course, is not true. Although there is a substantial difference between military and civilian life, we are all a part of the same American community. An inter-relationship between the civilian and military communities exists in many areas, including the area of law enforcement. The purpose of this section is to point out the origin of military law and its operation in conjunction with civilian law.

The primary source documents for military law on active duty are the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM). For the ANG, the primary source document is the state Code of Military Justice, if your state has one.

The UCMJ is a law passed by the Congress of the United States. The MCM is an executive order promulgated by the President of the United States and contains the specific procedures to be followed in operating under the UCMJ. A State Code of Military Justice is a law passed by the State legislature of the state where the base is located.

The military has UCMJ court-martial jurisdiction over off-base offenses committed by Title 10 active duty military members. Whether the Guard has jurisdiction to court-martial an ANG member for an off-base offense depends upon the particular provisions of the state code and the status of the member at the time of the offense.

**ANG members in Title 32 status are not subject to the UCMJ even if they are on an active duty base.**

All ANG members are still subject to civilian criminal laws while in the military. Some offenses are violations of both civil and military laws and both civil and military authorities have concurrent jurisdiction. However, for some uniquely military offenses such as AWOL, only the military has jurisdiction. If one act violates both a civilian and a military law, as a matter of law, it is possible that an ANG member might be tried by both military and civilian authorities for the same offense. However, Air Force and ANG policy precludes court-martial prosecution by the military for an offense disposed of in civilian courts, regardless of the outcome in civilian court.

However, if an ANG member is convicted of an offense, particularly a felony offense, by civilian authorities, the ANG Commander should impose some form of quality force management action, *i.e.*, the administrative discharge of the member. SHOULD YOU BECOME AWARE THAT A MEMBER OF YOUR WING/SQUADRON/UNIT HAS BEEN ARRESTED/INDICTED OR OTHERWISE INVOLVED WITH THE CIVILIAN CRIMINAL JUSTICE SYSTEM, REGARDLESS OF THEIR STATUS AS A TRADITIONAL, AGR OR AIR GUARD MILITARY TECHNICIAN, YOU SHOULD IMMEDIATELY CONTACT YOUR WING SJA. YOU DO NOT WANT TO BE EMBARRASSED TO DISCOVER A CONVICTED FELON, WHO IS INCARCERATED, ON YOUR ROLLS AS A MEMBER.

**CONCLUSION**

The concept of jurisdiction affects the ability to enact laws, regulate conduct, prosecute crimes, and control activities.

It affects people and places. It governs the conflict between two sovereigns - the federal and state government - as to which has the power to pass and enforce laws affecting those people and those places.

Once Commanders know which sovereign's law governs and the status of their members in a particular situation, they will know the scope and extent of their authority over the people and places under their command.

***KWIK-NOTE: Jurisdiction defines the Commander's authority.***

**RELATED TOPICS:**

**SECTION**

Access to Military Installations – General Guidelines	3-2
Aircraft Accidents and Safety Investigations Off-Base	16-2
Airport Joint Use Agreements	25-2
Arrest by Civilian Authorities	8-6
Arrests Authorized by the ANG	8-7
Civilian Misconduct on Base	3-7
Counter-drug Support Program	6-5
Courts-Martial	8-15
Criminal Investigations, Prosecutions and Reporting – DoD and DOJ	8-12
Federal Government Property Furnished to the ANG	25-10
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Fire Protection Jurisdiction	25-11
Freedom of Expression – Restrictions on Military Members	14-9
Installations Jointly or Solely Occupied by the ANG	25-12
Leases and Armory Use Agreements	3-12
Military Justice Jurisdiction – ANG Members in Title 10 Status	8-2
National Defense Area	25-15
Real Property – Acquisition and Retention	25-18
Sources of Commanders' Authority	2-7
Status of National Guard Members	11-7

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# Problem Solving - ANG and USAF Commanders - Similar and Different Approaches

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Updated by Maj Beverly G. Schneider, January 2007

**AUTHORITY:** All federal and state authorities governing both components' Commanders; applicable state law and instructions governing ANG Commanders.

## INTRODUCTION

Conceptually, in the approach to and the resolution of problems that arise in a non-mobilized status, Air National Guard Commanders should understand that while there are many similarities between themselves and USAF Commanders, there are also many differences. The differences stem inherently from the state and federal responsibilities of the ANG which require adherence to the laws of and control by two sovereigns. As a result, there are Air Force instructions that are not applicable to the Air National Guard, Air National Guard instructions that are not applicable to the Air Force, and state laws that are only applicable to the Air National Guard of that state. It is this basic difference that ANG Commanders need to keep in mind at all times as they lead and manage their people to accomplish their missions and responsibilities.

## SIMILARITIES

*U.S. CONSTITUTION, FEDERAL STATUTES, INSTRUCTIONS, DoD DIRECTIVES AND SECRETARY OF THE AIR FORCE APPLICABLE DIRECTIVES, INSTRUCTIONS AND POLICIES*

ANG Commanders and USAF Commanders are both governed by and subject to the legal authorities listed immediately above, as these authorities impact the federal mission of both components.

*APPLICABLE AIR FORCE INSTRUCTIONS, MAJCOM SUPPLEMENTS AND MAJCOM INSTRUCTIONS*

Those Air Force instructions and MAJCOM publications that are applicable to the Guard govern both ANG and USAF Commanders, as these authorities also impact the federal mission of both components.

*INHERENT AUTHORITY OF COMMAND*

By nature of the position and the military structure, ANG and USAF Commanders have authority to govern the members under their command, limited only by applicable federal or state law. Generally, ANG and USAF Base Commanders have ultimate authority over all activities on their bases subject to applicable federal and state law, although for ANG Commanders the source of much of that authority is state law.

## DIFFERENCES

*STATE CONSTITUTIONS, STATUTES, AND STATE COURT DECISIONS*

USAF Commanders are subject to federal law, and often are not subject to state law, while ANG Commanders are subject to both federal and state law, and often must obey state law instead of federal law. This is partly due to the differences between Title 10 and Title 32 status, and whether a base is on exclusive federal land or state land. A review of the Table of Contents in this Deskbook will indicate the many topics which are also governed by or subject to state law. One example is that while the UCMJ governs military criminal conduct in the Title 10 Air Force, state law, whether the member is in military or civilian status, and not the UCMJ, governs the Title 32 Air National Guard.

Another example involves service clubs for NCO's and Officers. Federal instructions govern the operation of service clubs in the Air Force, and a state liquor license need not be obtained. Conversely, ANG service clubs not only must comply with applicable federal regulations and instructions governing their operation, but also must comply with state law requirements for obtaining liquor licenses and other aspects of their operations.

If the ANG is mobilized in the active service of the state, it often is governed solely by state law.

#### *AIR NATIONAL GUARD INSTRUCTIONS AND PUBLICATIONS*

While USAF Commanders are not subject to these authorities, ANG Commanders are. These authorities are tailored to the peculiar aspects of state control of the Guard in peacetime.

#### **EXCEPTIONS**

When the ANG is mobilized and in a Title 10 status, for the most part, all Air Force instructions are applicable to the Guard. Likewise, when ANG members deploy OCONUS or otherwise perform duty in Title 10 status, they are subject to all Air Force instructions. However, in these situations, and depending on a state's military law, ANG members may also be subject to state law to the extent it is not inconsistent with the federal law.

#### **COMMANDER'S APPROACH TO PROBLEMS**

When you, as an ANG Commander, are confronted with a problem, ask yourself the following questions:

1. Does federal law (including the AFIs, ANGIs) directly and exclusively govern this area?

If yes, get the law (or instruction) and proceed under that law (**and as with all steps in this approach, with the advice of your Judge Advocate**).

2. If no, do both federal laws (including AFIs, ANGIs) and state laws directly govern aspects of this area?

If yes, get both laws and proceed under those laws.

3. If federal law (including AFIs, ANGIs, ) does not govern this area at all, does the state law directly govern it?

If yes, get the state law and proceed under that law.

4. If no, proceed as indicated below.

To summarize, ask: Is it federal law only? Both federal and state law? State law only?

When a particular problem you have is not covered directly by a specific federal law, an applicable Air Force instruction, an existing Air National Guard instruction, or a specific state law, here are the questions you should ask yourself:

1. What do I want to do to solve or deal with the problem?

2. Even though there is no federal or state law directly governing the subject, are there federal laws (including AFIs, ANGIs) and/or state laws that authorize me to do what I want to do?

If yes, get them, and proceed as they permit.

3. If no laws (including AFIs, ANGIs) exist to permit me to do what I want to do, are there laws applicable to this situation that permit another solution?

If yes, get them, and consider whether that authorized solution is acceptable to you.

4. If no law exists which permits me to do what I want to do, or permits any other solution to the problem that is acceptable to me, is there anything that authorizes me to act pursuant to my inherent authority as the Commander?

If yes, act under your inherent command authority.

5. If nothing authorizes you to exercise your inherent authority or you are prohibited from acting, you probably cannot and should not act, since such action will be without authority, or may be illegal, and either may subject you to disciplinary or adverse administrative action, and/or personal liability for money damages.

While you may not always be able to do what you want to do to solve or deal with a problem that confronts you, with all the existing legal authorities and remedies at your disposal, and with the advice of your Judge Advocate, you should rarely confront a problem which is not capable of being resolved or dealt with satisfactorily.

### **BOTTOM LINE**

Because the decisions you make now often have legal ramifications which may later limit your adverse action options or flexibility, here is a suggestion which will help you RECOGNIZE when to seek the advice of your SJA before implementing that decision:

Before you act (whether command directing a urinalysis test, sending a letter, etc.) ask yourself the following question: **COULD WHAT I DO OR DECIDE LEAD TO ADVERSE ACTION AGAINST THE MEMBER OR TO LIABILITY AGAINST MYSELF?** If the answer is yes, **DO NOTHING AND MAKE NO DECISION UNTIL YOU HAVE CONSULTED YOUR SJA.** The fact that your SJA is a traditional/part time guardsman makes **NO DIFFERENCE.** **ALL WING SJAs ARE TRADITIONAL GUARDSMEN. THEY SHOULD BE CONSULTED EVEN IF YOU MUST DO SO BETWEEN DRILL PERIODS.**

### **CONCLUSION**

Using the approach suggested in this topic should enable you to more effectively deal with the problems with which you are confronted as a Commander.

***KWIK-NOTE: Know what you can and cannot do to solve your problems.***

### **RELATED TOPICS:**

	<b>SECTION</b>
Preventive Law Program	17-15
Sources of Commander's Authority	2-7
Status of National Guard Members	11-7

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## Sources of Commander's Authority

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Updated by Maj Beverly G. Schneider, January 2007

**AUTHORITY:** Federal statutes, directives, instructions and policy (too numerous to list); applicable state law and instructions.

### INTRODUCTION

The source of a Commander's authority depends upon the category and status of individual over which the Commander is attempting to exercise authority.

### MILITARY MEMBERS

The Commander's authority over military members extends to conduct of the members whether they are on or off the installation.

1. Commanders exercise authority by virtue of their status as a superior commissioned officer.
2. The member, whether enlisted or officer, took an oath upon enlistment or commissioning to obey the lawful orders of those appointed over the member.
3. State Codes of Military Justice (similar to the UCMJ, Articles 89, 90, and 92) may impose punishment upon those military members who fail or refuse to respect the Commander's authority.
5. Commanders need to be aware of the status of the member at the time of the alleged misconduct, and their status during duty (*i.e.*, traditional, AGR, Air Guard Military Technician) to be able to take appropriate actions.

### CIVILIAN EMPLOYEES

The Commander has authority over civilian employees on base.

1. The Commander acts as the employer of civilian employees.
2. The Commander can give promotions and bonuses, as well as sanctions.

### CIVILIANS - ON BASE

The Commander has less authority over other civilians on base.

1. As "mayor" of the base, under state statutes and regulations, the Commander has authority to maintain order and discipline, and to protect federal resources.
2. As a practical matter, this authority may be limited to detaining individuals for civilian law enforcement officials and barring them from the installation.
3. The Installation Commander may bar an individual from the base for misconduct, but must follow applicable procedural requirements under state law.

## **CIVILIANS - OFF BASE**

The Commander has almost no authority over civilians off base.

1. While Commanders still have the responsibility to protect federal resources off base, and even though the Posse Comitatus Act, 18 U.S.C. 1385, does not apply to the Guard in Title 32 or state active duty status, practical issues of specific legal authority for proposed actions, liability protection and policy may greatly restrict their ability to deal with civilians who flaunt their authority.
2. The Commander's authority is greater if the situation permits the Commander to declare a National Defense Area off base.
3. As a general rule, the Commander must defer to civilian law enforcement agencies to deal with all civilian misconduct which occurs off of the installation.
4. The major exceptions to the general rule are found in 10 U.S.C. sections 371 through 380 and under state law, which specify how the Commander may aid civilian law enforcement agencies, especially under the Counter-Drug Support Program in the area of combating violations of illegal drug laws..

The Related Topics listed below contain subjects bearing on the source and limits of the Commander's authority.

***KWIK-NOTE: Commanders should only act with authority and then only within the limits of that authority.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Access to Military Installations – General Guidelines	3-2
Aid to Civilian Authorities	6-2
Arrests Authorized by the ANG	8-7
Civilian Misconduct on Base	3-7
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Freedom of Expression – Restrictions on Military Members	14-13
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Investigation by Commander or Suspected Minor Offenses	16-10
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Jurisdiction	2-5
Labor Relations	5-5
Leases and Armory Use Agreements	3-12
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Personal Liability of Federal and State Officials	18-9
Political Activities	7-12
Posse Comitatus	6-7
Possession of Privately Owned Firearms on Base	3-15
Quality Force Management Actions	24-12
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Status of National Guard Members	11-7
Suspension of Base Driving Privileges	21-7
USAF Instructions, ANG Supplements and Unit Instructions	1-39
Use of Firing Range by Local Police, Bo Scouts and other Non-military Persons or Groups	3-17
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Weddings and Other Social Affairs on Base	3-18
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Workplace Searches	5-10

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# State ANG Headquarters

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Updated by Maj Beverly G. Schneider, January 2007

## INTRODUCTION

The state ANG headquarters provides legal advice to the senior staff that acts on behalf of the Adjutant General. It provides Air information and evaluation, issue resolution and action recommendations. Wing Commanders must be aware of the important role of ANG state headquarters. ANG state headquarters should be involved in and informed of all contacts with the National Guard Bureau or the active duty Air Force.

## OVERALL RESPONSIBILITIES

The state ANG headquarters:

1. Commands, controls and supervises all ANG units in the state;
2. Directs employment of ANG units during state emergencies;
3. Interprets Air Force and National Guard Bureau policies and coordinates implementation and compliance within the state;
4. Develops Air positions on major issues, including mission requirements and placement of units;
5. Is the point of contact and coordination with other state and federal legislative, executive and judicial agencies;
6. Provides Air liaison to the State Area Command;
7. Provides technical assistance and policy guidance to field units;
8. Provides personnel available for worldwide assignment;
9. Provides necessary post-mobilization support and supervision to ensure continuity of ANG operations; and
10. Issues instructions and directives and supplements applicable Air Force and National Guard instructions and directives.

## SPECIFIC FUNCTIONS

The ANG state headquarters is an experienced, compact staff unit designed along functional lines. Its members are senior personnel who carry out the policies and programs of the Adjutant General. The manning and grade limitations at state headquarters are determined largely by the size of the state ANG. Among the mandatory functions of state headquarters are:

1. Command.
  - a. Commands, controls and directs the state ANG
  - b. May be the appointing authority for investigations, inquiries, or boards, and for congressional and legislative inquiries and aircraft accidents.
  - c. Depending on state instructions, acts as the demotion authority of certain higher-ranking NCOs in nonjudicial punishment actions.

2. Operations.

Evaluates operational readiness of units and personnel, and oversees the operations area.

3. Personnel.

- a. Oversees personnel arena and develops policies and directives relating to promotion, retention, recruiting and separation.
- b. Is the discharge authority for enlisted members from the state ANG, and at times, also as a Reserve of the Air Force.

4. Executive support.

Provides administrative and executive services.

5. Enlisted advisor.

Reviews enlisted policies and procedures and conducts counseling and interview sessions through field visitations(Staff Assistance Visits).

6. Air Surgeon.

Oversees medical programs and reviews medical actions at state level.

7. Staff Judge Advocate.

- a. Provides appellate legal review on various administrative and military justice actions.
- b. Provides legal opinions and advice on command directed inquiries, investigations, inspector general and EEO complaints.
- c. Coordinates on appointment of all ANG Judge Advocates in the state.
- d. The SJA should be notified of all discharge boards so a legal advisor may be appointed to conduct the board.
- e. Should be notified of any potential conflict of interest of wing JAs so that conflict-free counsel may be detailed to represent the military member involved.
- f. Should be notified of all officer and other high profile/publicity cases.
- g. Coordinates on all litigation in state and federal courts involving the ANG and subordinate wings.

8. Recruiting and retention manager.

Oversees the state ANG recruiting and retention program.

## CONCLUSION

The state ANG headquarters is an important resource for guidance and information for units. Wings should never overlook or bypass this resource when seeking guidance or contacting higher headquarters. The state ANG headquarters Staff Judge Advocate is an important source for legal advice and information, but unit Commanders should first consult their unit Staff Judge Advocate for legal advice, and not have direct contact with the state headquarters SJA to seek that advice.

***KWIK-NOTE: Units should route all communication with higher headquarters through their state ANG headquarters.***

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# Role of the First Sergeant

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Updated by Maj Beverly G. Schneider, January 2007

**AUTHORITY:** AFI 36-2113, *The First Sergeant* (1 May 99, IC 1, 2 Oct 06); AFMAN 36-2108, *Airman Classification* (31 Oct 00).

## DESIGNATED REPRESENTATIVE OF THE COMMANDER

The position of first sergeant provides the Commander with a personal representative: an enlisted member who functions as an extension of the Commander in all matters relating to the enlisted force. The First Sergeant's authority is an extension of the Commander's authority. In order to fulfill the duties and responsibilities of the position, the First Sergeant exercises general supervision over all assigned enlisted personnel. In this role as representative, the First Sergeant acts as the Commander's voice, ensuring that the Commander's policies, goals and objectives are communicated, understood, and complied with.

## ADVISOR TO THE COMMANDER

In this role, the First Sergeant is responsible for advising the Commander on a wide range of topics, including the health, esprit de corps, discipline, mentoring and well-being of the enlisted corps. The First Sergeant does this by acting as the Commander's eyes and ears, and closely monitoring enlisted issues, morale, and quality of life. Through formal training, the First Sergeant develops an understanding of most enlisted personnel programs including enlistments and reenlistments; Promotion of Airmen; the Air National Guard (ANG) Fitness Program (FP); the ANG Fitness program; The Inspector General (IG) program; Military Equal Opportunity and Treatment (MEO); Awards and Decorations; Selective Retention; and Family Care Plans. In addition to these personnel programs, the First Sergeant also receives training and education in areas that impact enlisted force management, including: principles of diversity; protocol; formations and ceremonies; maintenance of discipline; and deployments. Observing enlisted personnel programs from a "macro" perspective, as well as monitoring overall enlisted personnel force management, the First Sergeant provides advice and feedback to the Commander, enhancing the Commander's ability to effectively manage and lead the enlisted force.

## MISSION READINESS

The First Sergeant is tasked with providing the Commander with a mission-ready enlisted force, capable of executing the unit mission. To do this, the First Sergeant must be familiar with the unit's mission, personnel (authorized and assigned), and training requirements. The First Sergeant works closely with fellow senior noncommissioned officers and supervisory personnel to ensure that enlisted members are prepared to deploy in support of mission requirements. This includes providing leadership and guidance which enables supervisors and members to resolve complaints/issues at the lowest level. The First Sergeant is charged with identifying and resolving issues that, if left unchecked, could adversely impact the readiness of enlisted members. To enhance the readiness of the enlisted force, the First Sergeant must ensure that training is provided on matters of leadership, customs and courtesies, dress and appearance, self-discipline, adherence to standards, drill and ceremony, safety, hygiene, and sanitation. To ensure that the enlisted force is prepared to fulfill the unit mission, the First Sergeant is tasked with the following responsibilities:

### - Assists Enlisted Personnel in Adapting to the Military Environment

The First Sergeant is tasked with monitoring the unit sponsorship program and is responsible for conducting the orientation program. During in-processing, the newly-assigned member meets with the First Sergeant and should receive a comprehensive briefing covering such topics as Family Care Plans, dress and personal appearance, attendance, fitness, FP, training, and deployments. This orientation helps ensure that the member is prepared to fulfill his or her military mission and that standards are understood. To further ensure that enlisted members are adjusting to the organization and their duty assignments, the First Sergeant frequently contacts unit members at

work, home, and recreation areas.

**- Assists the Commander in the Preparation and Execution of Unit Training and Information Programs**

The First Sergeant should be familiar with unit training requirements including specialty training, professional military education (PME), ancillary training, as well as continuing education. Although not specifically involved with specialty training, the First Sergeant assists the Commander with ensuring that training is appropriate, and that it supports mission requirements. The First Sergeant is tasked with promoting DE/PME, with an emphasis on in-residence attendance, as well as supporting and promoting ancillary training and promoting continuing education whenever possible. The First Sergeant should also work closely with supervisory personnel to promote participation in the Community College of the Air Force (CCAF). To fulfill these responsibilities the First Sergeant should communicate regularly with unit personnel; make frequent visits to work areas where training is being conducted; be familiar with the unit's On the Job Training (OJT) roster; and regularly communicate with the Unit Training Manager (UTM).

The First Sergeant assists the Commander with ensuring that information is communicated to all levels of the enlisted force. This is accomplished through regularly scheduled commander's calls, unit newsletters, shop visits, e-mail, etc.

**- Focal Point for Support Agencies**

The First Sergeant utilizes numerous support agencies, both on and off base, to ensure that the enlisted force can deploy free of distractions. The First Sergeant is tasked with being the vital link between the Commander, enlisted personnel, and support agencies. He or she must maintain liaison with base agencies to ensure availability of services for unit members. Maintaining a listing of agencies complete with points of contact, the First Sergeant can rapidly and effectively utilize the appropriate agency to address specific issues. On-base agencies frequently utilized by the First Sergeant include the Judge Advocate (JA) office; Military Personnel Flight (MPF); Financial Management (FM) office; Services; Medical Squadron (SG); Military Equal Opportunity and Treatment (MEO) office; and Family Support. The First Sergeant should also maintain a listing of available off-base referral agencies such as Red Cross; Employer Support of the Guard and Reserve (ESGR); Department of Labor (DoL); Legal Services; Domestic Violence Centers; Police Departments; Social Services and United Way.

**- Maintenance of Discipline**

While the supervisor is the front line in maintaining discipline, the First Sergeant is the focal point for ensuring that discipline is fairly and equitably maintained. To ensure a quality force, the First Sergeant works closely with the Commander and with supervisors to quickly correct conduct prejudicial to good order and discipline. The First Sergeant is trained in prevention, correction, and punishment options associated with maintenance of discipline, and is involved in all disciplinary issues regarding enlisted personnel. The First Sergeant's focus centers on preventive techniques which educate and inform the member of the importance of adhering to military standards. When prevention fails the First Sergeant uses, or provides expertise regarding, administrative actions designed to correct a member's sub-standard behavior or performance. Corrective actions include counseling; administrative reprimands; administrative demotions; and administrative separations. Punishment options include non-judicial punishment (NJP) and judicial punishment. To support punishment options, the First Sergeant is trained in rights of the accused; NJP; the Uniform Code of Military Justice (UCMJ); State Codes of Military Justice; and the Manual of Courts Martial (MCM). In addition, the First Sergeant must be versed in dealing with members in a variety of statuses. The First Sergeant, acting as the Commander's representative, maintains liaison with the legal office to ensure any adverse actions are appropriate and that each proposed action receives a legal review.

**- Supervises Administrative Actions Directed by the Commander**

To ensure that personnel actions are accomplished in an appropriate and timely manner, or to ensure a member's privacy, the Commander may direct that the First Sergeant supervise specific administrative actions. These actions could include items such as: promotions; demotions; letters of admonition, counseling or reprimand; fitness program actions; unsatisfactory participation correspondence; FP actions; and awards and decorations. The First Sergeant performs a quality force review to ensure that actions are appropriate, that they are accomplished correctly, and that all actions are completed in a timely manner. The first sergeant will also coordinate with the Staff Judge Advocate

with regard to any adverse administrative actions.

## **DEPLOYMENT RESPONSIBILITIES**

### **- Pre-Deployment**

During the pre-deployment phase, the First Sergeant ensures that unit personnel are prepared to deploy in support of operational requirements. The First Sergeant also works to ensure that deployed personnel will be cared for upon arrival at the deployed location. The First Sergeant will review personnel listings as part of a quality force check and ensure that potential problems are addressed prior to deployment. The First Sergeant, whenever possible, should deploy as part of the advon team. As part of the advon team, the First Sergeant is responsible for coordinating the support of deployed personnel. The location and type of deployment will dictate specific actions. This function alleviates distractions and ensures that personnel are prepared to focus their attention on mission requirements. The First Sergeant must inspect and assign billeting. The assignment of billeting will take into consideration operational requirements such as shift work and crew rest cycles. The First Sergeant contacts services personnel to coordinate billeting and to ensure that the aerospace dining facility is aware of increased requirements based on incoming personnel. The First Sergeant will also coordinate with other base agencies such as the hospital, Judge Advocate (JA) office, Morale Welfare & Recreation (MWR) office, and the Family Support Agency. The First Sergeant is the central focal point for ensuring that deployed personnel are cared for and fed. The First Sergeant gathers as much information as possible prior to deploying so that personnel are well informed and to ensure that the reception plan is executed as smoothly as possible.

### **- Deployment Phase**

At the beginning of the deployment phase, the First Sergeant ensures that the reception and bed down process is completed as smoothly as possible. Throughout the deployment phase the First Sergeant concerns himself or herself with actions that sustain the enlisted force. Specific actions will be dictated by circumstances at the deployed location. Examples of sustainment actions include: sanitation; hygiene; recreation; billeting; unit functions; information briefs; morale calls; awards and decorations; and commander's call. The First Sergeant should constantly be involved with ensuring the care of personnel. Frequent visits to work, billeting, and recreation areas help ensure that the First Sergeant is able to quickly identify and resolve issues that could impact mission accomplishment.

### **- Re-Deployment Phase**

In preparation to re-deploy to home station, the First Sergeant ensures that the unit's out-processing, along with its reception at home station, is planned in a manner which facilitates a smooth and orderly process. Areas to consider include: accomplishment of an out-processing briefing; the establishment of out-processing checklists; billeting turnover; equipment turn in; orders certification; travel pay; government travel card briefing; as well as any required home station actions that must be accomplished prior to release.

## **SELECTION AND UTILIZATION**

The Wing Command Chief Master Sergeant (CCM) is designated as the functional manager for first sergeants assigned to an installation. As such, the CCM is responsible for management of the first sergeant program at the installation level. The CCM is tasked with establishing a selection board process which meets the requirements set forth in AFI 36-2113. Through proper utilization of the selection board the Commander is provided with the best possible pool of candidates from which to choose the first sergeant. Because of the demanding responsibilities associated with the position of first sergeant, only the most dedicated and professional members should be considered for this Special Duty Identifier (SDI). Once selected, first sergeants must be utilized IAW AFI 36-2113 and AFMAN 36-2108. The First Sergeant will not be assigned additional duties other than those specifically outlined in AFMAN 36-2108. In addition, the First Sergeant must be provided with private office accommodations suitable for counseling, preferably co-located with the Commander. Although administrative assistance is required to perform these duties, the use of additional duty first sergeants within the ANG is expressly prohibited IAW AFI 36-2113 (exception: State Headquarters). First sergeants will support the enlisted personnel assigned to them IAW ANG/XPM Policy Letter dated 14 March 2001.

## **RELATED READING / REFERENCES**

AFI 36-2113, *The First Sergeant*

AFMAN 36-2108, *Airman Classification*

AFI 36-2109, *The Chief Master Sergeant of the Air Force and Senior Enlisted Advisor Program*

ANGI 36-2109, *The ANG Command Chief Master Sergeant Program*

CCM Pamphlet: *The ANG Command Chief Master Sergeant; Installation Functional Manager for Assigned First Sergeants*

***KWIK-NOTE: IAW current Air Force policy, the first sergeant is required to review all enlisted decorations and advise the Commander on Quality Force indicators which warrant consideration before the package is approved or forwarded for approval.***

## **RELATED TOPICS:**

To numerous to list. See particularly the topics in Chapter 23 (People Problems), Chapter 24 (Quality Force Management), Chapter 20 (Mobilization Matters), and Chapter 9 (Discrimination Matters).

# Chapter 3, Base Access, Conduct and Control

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## Access to Military Installations – General Guidelines

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Updated by Major Jeffrey Knickerbocker, May 2007

**AUTHORITY:** AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03); AFI 35-101, *Public Affairs Policies and Procedures* (29 Nov 05); AFI 31-101, ANGSUP1 (1 Mar 05); applicable state law.

### INTRODUCTION

The installation Commander exercises control over installation access subject to the provisions of applicable statutes, regulations and case law. The Commander's primary responsibilities are to protect and preserve order, and to safeguard persons and property on the installation. Each Installation/Wing Commander is authorized to grant or deny access to the installation, and to exclude or remove persons whose presence is unauthorized.

This topic will highlight the general guidelines for the proper exercise of that authority regarding civilians on the base. Other topics in this Deskbook entitled "BASE TOURS," "CIVILIAN WARRANTS AND PROCESS - SERVICE ON BASE," "BARMENT" and "OPEN HOUSES AND FREE SPEECH" provide specific information regarding those subjects. This topic should be read in connection with those.

### GUIDELINES

#### Do Not Be Arbitrary or Capricious

The Commander must not act in an arbitrary or capricious manner in deciding questions of base access. "Arbitrary" or "capricious" means: to act on whim or caprice without a rational basis; inconsistent; unreasonable; or unpredictable. The reasons for granting or denying access to any person or group need to be carefully thought out. The Commander's action must be reasonable in relation to his or her responsibilities to protect and preserve order, and to safeguard persons and property on the installation. Commanders should coordinate with their Staff Judge Advocate and Public Affairs Officer.

#### Be Neutral

The Commanders must be NEUTRAL and cannot favor one group over another. Commanders cannot become entangled with ideological movements of any type. Allowing ideological expression on an installation may create a right of access for opposing parties. Some forms of ideological expressions are very clear, such as a speech by a political candidate. Other forms of ideological expression are less clear, such as presentations by government contractors or historical displays.

#### NO INHERENT RIGHT TO BASE ACCESS

Individuals do not have an inherent right of access to a military installation.

An open house does not create a public right of access that would allow previously barred individuals on base. Once individuals are permitted on the installation, they do not have an automatic or blanket right to express ideological beliefs. They are subject to the reasonable restrictions and limitations established by the Commander. However, the Commander should notify base visitors of these limitations, through handouts or letters given to them either at the gate or through a specific military member who will be with or responsible for the group on base.

#### Permissible Limitations

Commanders may impose limitations on installation access to:

1. Exclude individuals previously barred;
2. Limit the "open" areas of the base;
3. Limit the size of the group;
4. Limit the date and/or time of visitation;
5. Verify the identification of all visitors;
6. Search or restrict any hand-carried or transported items;
7. Provide transportation and/or escort service to all visitors;
8. Limit access depending on the interest of the group; and/or
9. Limit access based on mission and security considerations.

## **DEVELOP COMMUNITY RELATIONS**

AFI 35-101 encourages Commanders to develop a program to generate understanding, acceptance, and support of the ANG role in national defense. Community relations projects and activities are a way of telling the public about the Air National Guard and demonstrating that the base is a good neighbor. Open house and base tour programs are forms of community relations projects. Open Houses should not be (or convey the image of) a fair, carnival, circus, civilian air show, or display of commercial products, and should inspire patriotism and aid in military recruiting.

## **DEVELOP WRITTEN POLICY**

Commanders should develop NEUTRAL regulations governing the matter of access to military installations, including protest activities, demonstrations, open houses, and base tours. At a minimum, these regulations should:

1. Be impartially and objectively applied;
2. Accord equal treatment concerning base access to politically conservative and politically liberal groups;
3. Indicate that political activity on military installations is prohibited;
4. Provide notice to the public of prohibited activities, such as:
  - a. No entry into designated "keep out" or "off limits" or "Controlled or Restricted Areas";
  - b. No campaigning, distributing literature or conducting any demonstrations;
  - c. No commercial advertising or sales without prior written approval of the installation/wing Commander;
  - d. No solicitation of money, even for charitable purposes, without the prior written approval of the Installation/Wing Commander;
  - e. No purchasing, obtaining, possessing or consuming alcoholic beverages on the base by civilians under 21 years of age;
  - f. No driving or riding in a car on the base without a seatbelt; and
  - g. No carrying or transporting a loaded weapon, or having an unloaded weapon and ammunition in the passenger compartment of visitors' vehicles;
5. Provide notice to the public that all applicable federal, state and local laws must be obeyed; and
6. Be enforced consistently, to the extent necessary to prevent the limited or prohibited activities.

## **AFI 31-101 GUIDANCE**

AFI 31-101 provides additional guidance on base access. Normally, personnel possessing a valid military or civilian identification card are granted unescorted access. While as a basic policy Commanders should avoid placing undue restrictions on persons visiting the installation, controls are necessary for security purposes and to support the position that a military base is not a public area.

***KWIK -NOTE: Establish written guidelines and instructions for access to your installation for various reasons, and modify or update them as necessary. Check state law requirements. Develop these guidelines, regulations, policy and instructions with the help of your Staff Judge Advocate, Public Affairs Officer, Chief of Security Forces and other concerned base functions.***

## **RELATED TOPICS:**

Arrest By Civilian Authorities

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# Air Base Security Guards

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**Updated by Major Jeffrey Knickerbocker, May 2007**

**AUTHORITY:** AFI 31-207, *Arming and Use of Force by Air Force Personnel* (1 Sep 99); AFI 31-101, *Air Force Installation Security Program* (1 Mar 03); 50 U.S.C. 797 (Internal Security Act of 1950); ANG/DOF Message, Re: AFI 31-101, 141410Z May 01; applicable state law regarding "police" or "peace" officer status, permissible use of firearms and state firearms licensing requirements.

## INTRODUCTION

The concept of providing physical security for Air Force resources through security police forces, as contained in AFI 31-101, is applicable to the Air National Guard. Security forces may be made up of AGRs, technicians, traditional Guard members, state contract guards, civilian contract guards, or contracted civilian police authorities. In addition to security guard personnel, the Air National Guard is authorized to employ a Base Resource Protection Team. The Team may be made up of air technicians and AGRs to provide readily available personnel for protection of ANG facilities and federal property during civil disturbances or other emergency situations that pose a threat to assigned resources. Technicians are authorized to perform base defense duties in either their federal civil service status or in their ANG military status. Protection of federal property in the custody of the Air National Guard may also be provided by state contract security guards in their civilian status.

## REQUIREMENTS AND AUTHORITY

The arming of state contract guards while in the performance of on base duties is required and will be authorized under AFI 31-207 ONLY AFTER the following conditions have been satisfied:

1. The guard has received training and indoctrination in accordance with AFI 31-207. Proof of training must be on file in the office of either the air technician security supervisor or Chief, Security Forces; and
2. The guard has been authorized to bear firearms on base under AFI 31-207 by competent authority (Installation/Wing Commander).

In addition to federal regulations, state laws must also be complied with for the full and lawful use of Air Base Security Guards, since state law may govern such factors as proper designation of these individuals as police, peace, or public safety officers, lawful possession of firearms, and completion of any state required police training programs. For example, state law may (or may not) authorize Air Base Security Guards to be police or peace officers when they are designated as police or peace officers under military regulations promulgated by The Adjutant General and when performing their duties as air base security guards pursuant to orders issued by appropriate military authority. Also there may be state mandated age limitations for police, peace, or public safety officers carrying firearms.

Continuing the example, state law may (or may not) exempt Air Base Security Guards from criminal liability for possessing weapons when the Air Base Security Guards are duly authorized to possess the weapons by regulations issued by The Adjutant General. Further, the Air Base Security Guards may also be required to complete a training program in areas of laws of arrest, use of force, etc., prescribed by a local municipal police training council before the state military law or regulation will be implemented.

State law may also provide that pending completion of the training program; Air Base Security Guards do NOT have police or peace officer status. If such is the case, then under state law the powers of arrest and justifiable use of force of Air Base Security Guards acting in a nonmilitary status may be the same as for civilians. Their only protection from personal civil liability may be any indemnification they have under state law from liability for performing duties within the scope of their employment.

State law varies on these subjects. The foregoing examples have been given to acquaint you with the different considerations you may encounter in connection with Air Base Security Guards. The important point is that full and lawful use of your Air Base Security Guards most likely will depend upon compliance not only with the applicable AFIs and ANGIs, but also with your state's laws and rules. Check these with your Staff Judge Advocate.

***KWIK-NOTE: Air Base Security Guards must meet state statutory, regulatory and/or case law requirements to be protected from liability while armed. You may wish to supplement this topic with an analysis of your state law requirements.***

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## Base Facilities Board

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Updated by Major Jeffrey Knickerbocker, Oct 2010

**AUTHORITY:** ANGI 32-1003, *Facilities Board (FB)* (1 January 2005)

### PURPOSE AND STRUCTURE

The Base Facilities Board is established by the ANG Installation Commander. The primary responsibility of the FB is to ensure that facilities and infrastructure are able to fully support the assigned missions. The FB consists of the following voting and nonvoting members:

Voting:

- Wing or Installation/CC as the Board Chairperson.
- Base Civil Engineer as the recorder.
- Group Commanders, and Commanders of Geographically Separated Units (GSU) supported, if applicable.

Nonvoting or advisory:

- Environmental Manager.
- Assistant Base Civil Engineer.
- Facility Manager.
- Fire Chief.
- Real Property Manager.
- Safety Officer.
- Finance Officer.
- Communications Officer.
- Security Officer.
- Others as desired by the chairperson, (e.g., Commander of military organizations). Chairperson of the Facilities Board Working Group (FBWG).
- Commander or designated representative of each Tenant organization (ANG or NON ANG). Other agency advisory members: United States Property and Fiscal Office (USPFO) Contracting Officer.

The Board should meet when necessary, but working groups should be established to accomplish day-to-day liaisons with civil engineering and be cognizant of facility requirements of the major functional areas.

### SCOPE

The FB reviews, validates, and sets the priority order in which projects are to be designed and funded. This is the "Project Priority List" and, as a minimum, will contain the current and next four fiscal years (FY) for Sustainment, Restoration, and Modernization (SRM) projects. Military Construction (MILCON) projects can be projected out longer for MILCON projects the priority list should include all validated projects. The integrated SRM priority list will show three levels of projects; the locally approved and funded, locally approved and funded by ANG, Civil Engineer (ANG/CE), and those requiring ANG/CE or higher approval and funding. The last two levels will be forwarded to ANG/CEP.

The following real property management actions must be presented annually, as a minimum, for board approval and more often if needed. The attached calendar of major events will aid in scheduling the timing of the presentations:

1. All proposed changes in facility use and the annual facility utilization versus requirements survey (ANG/CEP 920 Report).
2. Proposed new host/tenant support agreements or changes to existing agreements affecting civil engineering resources.
3. Contractual services applicable to operation or maintenance of real property and buildings.
4. Proposed acquisition, disposal, in grant or out grant of real property.
5. Changes/renewals and expiration date of real estate agreements (lease, licenses, permit, easements, etc.).
6. Projects to be accomplished via Military Construction Cooperative Agreements (MCCA).
7. Building Disposal Programs (current FY plus three).
8. Temporary/Relocatable Facilities (how many, where sited, removal date).
9. Airfield waivers (how many, where, cost to remove each).
10. Explosive safety constraints (how many, where, cost to remove each).
11. Airport Joint Use Agreement expiration dates and actions during the renewal process.
12. Base master plan and/or space utilization studies.
13. Federal, state and locally required permits.
14. Facilities and projects “not in” compliance with AT/FP criteria.
15. Indefinite Delivery Indefinite Quantity (IDIQ) Architectural Engineering Design Contract, Military Task Order Contracting and similar type contracts.
16. Fire Safety Deficiency Programs (how many of each, cost to fix, program year).
17. DESC Programs.
18. Tenant funded projects and programs, if applicable.
19. Installation Readiness Report.

20. Facility Change in use: The FB will approve all facility change in use. The FB will NOT approve a change in use in a category code if the losing category code has a deficiency or the gaining category code has an overage of more than 10 percent of the minimum authorized space.

21. Siting approvals: the FB will approve all facility sitings to ensure compliance with the master plan and AT/FP standards as defined in the Unified Facilities Code (UFC).

22. If not accomplished in another meeting, (e.g., Financial Management Board) the Board should review and reconcile the Civil Engineer Program execution data by Program Element Code (PEC) and Element of Expense Investment Code (EEIC) from two perspectives; (1) From BCE data base and (2) Base Financial Management (FM) database. This review will be done at two required meetings or as often as necessary.

The BCE must prepare and maintain records of each meeting of the Board and send one copy to NGB/DEP. Commanders should consult their Staff Judge Advocates for further guidance on the purpose and composition of the Board, as well as specific inquiries regarding appropriate subjects for the Board to consider.

***KWIK-NOTE: Installation Commanders should actively participate in meetings of the Base Facilities Board.***

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## CALENDAR OF EVENTS

### OCTOBER

1. Facility Investment Metric (FIM) – Submission due at ANG/CEP.
2. Installation Readiness Report – Call letter sent to Bases, report due to ANG/CEP in November.
3. Temporary Facility Report – Call letter sent to Bases, report due to ANG/CEP November.

### NOVEMBER

1. Installation Readiness Report –Due to ANG/CEP.
2. Airfield Waivers – Call letter sent to Bases, report due to ANG/CEP in February.

### DECEMBER

1. MILCON - Base validates out-year MILCON priorities for Future Years Defense Plan (FYDP).
2. DESC - Due at ANG/CEP.
3. McKinney Homeless Quarter Report – Due to ANG/CEP.
4. ANG/CEP 920 report – Sent to the Bases for confirmation.

### JANUARY

1. SRM- Call Letters sent to Bases for final FB validated and prioritized FY+ 2 project list and draft FY+3 project list. Submissions are due at ANG/CEP in April.
2. Airfield Waivers –Due to ANG/CEP.

### FEBRUARY

None

### MARCH

1. SRM - Wings review their candidate Year-End (Y-E) and Advanced Procurement Program (APP) projects.
2. Demolition Program Report - Due to ANG/CEP.
3. McKinney Homeless Quarter Report – Due to ANG/CEP.

### APRIL

1. SRM - program due to ANG/CEP.

### MAY

1. SRM – ANG, Civil Engineer Construction (ANG/CEC) issues authority to Wings to advertise Y-E and APP projects.
2. MILCON Economic Analysis – Call letters sent to Bases, due to ANG/CEP in July.
3. MILCON (President’s Budget) Horror Stories – Call letters sent to Bases, due to ANG/CEP in July.
4. Defense Logistic Agency (DLA) MILCON – Due at ANG/CEP.

### JUNE

1. SRM – Review all validated Year-End and APP projects and Base Contracting end of year contracting policy.
2. McKinney Homeless Quarter Report – Due to ANG/CEP.
3. Energy Conservation Investment Program (ECIP) – Call letters sent to Bases, due to ANG/CEP in July.

## **JULY**

1. MILCON - Base develops out-year MILCON priorities for Future Years Defense Plan (FYDP) List.
2. Master Plan Tabs Update – review tabs for needed updates.
3. MILCON Economic Analysis –Due to ANG/CEP.
4. MILCON Horror Stories– due to ANG/CEP in July.
5. Energy Conservation Investment Program (ECIP) – due to ANG/CEP.
6. SRM – the entry of all validated Year-End and APP projects into ACES complete.
7. Defense Logistic Agency (DLA) MILCON – Call letter sent to Bases, due to ANG/CEP in September.

## **AUGUST**

None

## **SEPTEMBER**

1. SRM - All current FY funded requirements must be obligated by 15 September.
2. Demolition Program Report – Due to ANG/CEP.
3. McKinney Homeless Quarter Report – Due at ANG/CEP.
4. Facility Investment Metric (FIM) - Call Letter sent to Bases. CE's electronic project database must be updated with FB validated FIM ratings, priorities, and FY of planned execution for FIM. Report due in October.
5. Master Plan Tabs Update – update tabs and annotate review.
6. DD Form 1390, *Military Construction Program* - Call letter sent to Bases, due to ANG/CEP in August.
7. MILCON President's Budget – ANG/CEP submits to Air Staff.
8. USAF 7115 Report – Due.
9. DESC - Call Letter sent to Bases for FY+1 and draft FY+2 Fuels Maintenance, Repair and Environmental (MR&E) projects. Submission is due at ANG/CEP in December.

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# Installation Security Council

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Updated by Major Jeffrey Knickerbocker, May 2007

**AUTHORITY:** AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03); AFI 31-101, ANGSUP1 (1 Mar 05);

## INTRODUCTION

AFI 31-101 and AFI 31-101, ANGSUP 1 establish the requirement for the Installation Commander to establish an Installation Security Council.

## THE INSTALLATION SECURITY COUNCIL

The Installation Security Council (ISC) is charged with recommending policy to the Installation/Wing Commander on the protection of resources, mainly from sabotage. The ISC is the single governing body responsible to the installation commander for installation security. The ISC is responsible for implementing programs that include the protection of personnel (Antiterrorism/Force Protection) and protection of Level 1, 2, 3, and 4 resources (anything from critical weapons systems and aircraft to funds, weapons, explosives, and spare parts).

At ANG installations the senior full-time security forces representative assigned to the unit is the primary advisor for the installation security program. This position ensures the full-time continuity of the force protection mission.

## GENERALLY

The ISC is responsible for determining what the risks are in their respective areas, and for developing plans to reduce the risk and protect the resources and personnel involved. The ISC must meet at least semi-annually.

**KWIK-NOTE:** *The Council should be actively responsive to the unit's needs.*

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# Base Tours

Updated by Major Jeffrey Knickerbocker, May 2007

**AUTHORITY:** AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03); AFI 35-101, *Public Affairs Policies and Procedures* (29 Nov 05); AFI 31-101\_ANGSUP1 (1 Mar 05); applicable state law.

## INTRODUCTION

Tours of a military installation are a recognized community relations activity, and are generally handled by the wing Public Affairs office. Tours should be tailored to coincide with the interests of different groups. Some bases have one set of rules for family tours and define "family," and another set of rules for all other tours. That is your option. Protection of classified information and equipment must be a matter of prime concern in any tour program. AFI 35-101 provides a detailed checklist for the wing Public Affairs office to use in preparing for a base tour (Figure 8.2).

## COMMANDER'S DUTIES

In establishing a program for installation tours, the Commander must be neutral. The Commander may not become entangled with an ideological movement or offer support to one movement and not another.

## COMMANDERS MAY REGULATE BASE TOURS

The Commander may impose limitations on installation access during tours. However, Commanders must be consistent in their actions. The Commander may consider the following matters in limiting access:

**Mission requirements** (including availability of facilities and personnel and security concerns):

- (1) Do we need to cancel or reschedule training missions to permit the tour?
- (2) Is the tour scheduled during normal duty hours?
- (3) Do we have to reschedule mission functions at awkward hours for the time lost during the tour?
- (4) Are adequate personnel available to provide for security, tour guides, etc.?
- (5) Is the installation in an exercise or actual scenario requiring increased security requirements?

## Visitors for a Base Tour

- (1) Currently barred individuals may be excluded and the size and makeup of the group may be limited (for example, no more than 20 people, with none under 10 years of age).
- (2) Geographic access to the installation may be limited. You may provide transportation from the main gate or from a designated reception area or escort all vehicles and persons to limited areas only.
- (3) The time of tours may be limited; such as no weekend or holiday tours.
- (4) All visitors may be required to provide proper identification. Identification may be required in advance to verify that the individual has not previously been barred.
- (5) Visitors may be required to leave all packages at the gate or other designated location. If the security risk indicates, people could be checked for weapons by a metal detector.
- (6) Photographs or recordings (audio or video) may be prohibited.
- (7) Do not allow a tour to become an intelligence gathering opportunity. When visitors ask questions, ensure that answers do not reveal protected information. Review the areas open to tours to ensure we are not revealing information that will increase the opportunity for undesired access to or damage of a military facility.

## FOREIGN NATIONAL VISITORS

Foreign nationals from non-communist countries may be given standard community relations base tours provided to U.S. citizens without approval from higher headquarters. However, in the event of unusual or questionable

circumstances, case-by-case approval must be requested through command channels and NGB/IA (DSN 327-1591)(Foreign Liaison Office) to SAF/PAN and HQ USAF/CVAII (International Relations Division). Foreign nationals from communist countries may NOT be given base tours without prior approval.

***KWIK-NOTE: Your best protection in this area is to establish WRITTEN GUIDELINES for conducting base tours. Also check state law requirements.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Access to Military Installations	3-2
Base Security Council/Resource Protection Committee	3-5
Civilian Misconduct on Base	3-7
Classified Material	14-2
Community Relations Programs	6-4
Barment	3-11
Facilities - ANG	25-9
Installations Jointly or Solely Occupied by the ANG	25-12
Jurisdiction	2-5
Media Relations and the Public Affairs Office	14-8
Motor Vehicle Rules -- Military Bases	21-6
Open Houses and Free Speech	3-13
Relationship with Other Military Components	11-6

# Civilian Misconduct on Base

Updated by Major Jeffrey M. Knickerbocker, May 2007

**AUTHORITY:** AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03); AFI 31-101\_ANGSUP1 (1 Mar 05); AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (1 June 1998).

## INTRODUCTION

Even though civilians in the CONUS are not subject to prosecution in the military justice system, they are still subject to a wide variety of administrative actions and even prosecution in federal or state court. Both administrative actions and prosecution when necessary provide for effective control of civilians on Air National Guard installations.

## ADMINISTRATIVE ACTIONS

Because Installation Commanders are charged with the responsibility for law and order on the installation, they have the authority to take administrative action against those civilians (often dependents) who jeopardize the safety of people or property on the base. Command options in this area are:

1. Issuing warnings or letters of concern;
2. Revoking base privileges, such as driving on base; and/or
3. Barment (sometimes called debarment). The Installation Commander can actually prohibit a civilian from entering any part of the installation. See the topic in this Deskbook entitled "BARMENT" for further guidance in this area.

## PROSECUTION IN FEDERAL OR STATE COURTS

Additionally, whenever a civilian commits a criminal offense on base property, the matter may be prosecuted in state or federal court. The most common areas of prosecution involve shoplifting, drunk driving, all traffic offenses, and the wrongful use of military identification cards. Generally, civilians committing such offenses may be detained by military authorities until civilian law enforcement personnel arrive to effect any necessary arrests. However, your specific state law should be researched and understood prior to taking any such action. The Chief of Security Forces should work closely with the legal office and local civilian authorities to establish protocols for violators.

After the civilian has been removed from the base, it is important to cooperate with civilian officials in the prosecution of the civilian who has committed federal or state civilian offenses on base. Make your personnel available for interview sessions with the local police and prosecutors, and for any necessary court appearances. The needs of the mission are paramount, but if there is a conflict where you both "need" the member concerned at the same time, your call to the civilian official should resolve it to your mutual satisfaction. Failure to provide this cooperation may cause local law enforcement officials to not respond as quickly the next time civilian misconduct occurs on base.

**KWIK-NOTE:** *Develop memoranda of understanding with local law enforcement officials to deal with civilian misconduct on the base.*

## RELATED TOPICS:

	SECTION
Aid to Civilian Authorities	6-2
Air Base Security Guards	3-3
Arrest By Civilian Authorities	8-6
Arrests Authorized by the ANG	8-7
Barment	3-11

Deadly Force	8-18
Driving While Intoxicated and Other Offenses Involving Intoxication	8-17
Federal Magistrate Judges	8-3
Inspections and Searches	8-16
Installations Jointly or Solely Occupied by the ANG	25-12
Jurisdiction	2-5
Motor Vehicle Rules -- Military Bases	21-6
Open Houses and Free Speech	3-13
Personal Liability of Federal and State Officials	18-9
Posse Comitatus	6-7
Suspension of Base Driving Privileges	21-7
Memoranda of Understanding (MOUs)	6-6

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## Civilian Warrants and Process – Service on Base

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Updated by Major Jeffrey M. Knickerbocker, May 2007

**AUTHORITY:** Applicable state law; AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial* (20 Oct 06)(for reference only as it is only applicable to ANG in federal status).

### INTRODUCTION

Although state and/or federal law enforcement authorities have jurisdiction over an ANG base for the purpose of execution of civil or criminal process, the Installation Commander may prescribe reasonable rules, dictated by military considerations, for the entrance on the base of civilian officers executing warrants or other lawful process, for their identification, and for avoidance of undue interference with the accomplishment of the military mission. This is based on the Installation Commander's overall charge and control of the base.

### CIVILIAN WARRANTS

An Installation Commander may deliver military members to civilian authorities or permit search and seizure activities on the base pursuant to lawful civilian warrants.

#### Arrest Warrants

An arrest warrant is a written order of a court made on behalf of a state, or the United States, based upon a complaint issued pursuant to statute and/or court rule, which commands a law enforcement officer to take a person into custody. Members may be delivered to civilian authorities upon request when the request is accompanied by an arrest warrant or when the requesting official represents that such a warrant has been issued. Delivery of military members to federal or state civilian authorities should be accompanied by a form, signed by the official taking the member into custody, reciting the authority for the arrest and indicating that the Commander will be advised of the disposition of the charges and/or notice of the member's release. Commanders should also request a copy of the warrant and the charges on which it is based. ANG Commanders have no authority to arrest one of their members on the authority of a civilian arrest warrant unless state law provides otherwise. It is important to require proper positive identification of the law enforcement officer executing the warrant prior to allowing the arrest of the member from the installation.

#### Search Warrants

A search warrant is an order in writing issued by a judge or other magistrate, in the name of a state or the United States, directed to a police officer, authorizing a search for and seizure of things criminally possessed or property intended for use or used as the means of committing a crime. Civilian authorities conducting search activities on base pursuant to a valid warrant should be accompanied at all times by one or more military escort personnel knowledgeable of the area being searched. Commanders should request a copy of the search warrant and an inventory of all items seized. The items seized will likely be of no military value or unrelated to military activities. But if the item is military property, do not permit it to be removed from the base without permission from higher headquarters. DOD Classified information must be protected from unauthorized access at all times. Only those individuals with a proper DOD Security Clearance and need to know will ever have authorized access to classified information.

### PROCESS SERVERS

"Process" is the means by which a court notifies individuals of, and enforces their obedience to, its orders. Typical kinds of process you will encounter are summonses and complaints or notices of petitions which indicate a lawsuit has begun, and subpoenas, which command the subject of the subpoena to appear in court, with or without documents. Process servers, in essence, deliver such notices. Process servers are rarely law enforcement personnel

and do not function pursuant to warrants even though they sometimes refer to themselves as Officers of the Court. These individuals also should not normally be granted unrestricted access to the base or to base personnel. A good practice when confronted with a process server is to determine whether the person to be served is willing to voluntarily accept the process involved. If process will be accepted voluntarily, you should keep the process server at the gate, your office or another appropriate location and permit the member to go to the gate to receive the process there. If the member will not voluntarily accept the process (and you have no authority to order the member to do so), deny installation access to the process server and advise that service will have to be effected off-base after duty hours. To do otherwise presents an unnecessary risk of disruption of normal base activities.

### **MOTOR VEHICLE REPOSSESSORS**

Depending on the laws of your state, motor vehicle reposseors may or may not be operating pursuant to a lawful court order (sometimes called a replevin order) when attempting to seize a vehicle on your installation. These individuals are rarely law enforcement officials and they do not function pursuant to warrants. Given the inherent potential for disruption of both ANG members and their activities, motor vehicle reposseors normally should not be granted access to vehicles on an installation without a valid court order, and then only under strict control of Security Forces Personnel.

### **CONCLUSION**

In general, it is best to cooperate to the extent possible with civilian authorities in the execution of lawful, civil or criminal process, although you have no authority to "order" your member to accept service of the process. But your main concern is to minimize the disturbance to base activities. In cases of doubt, your Staff Judge Advocate or state headquarters legal personnel should be contacted at once to render advice and assistance.

***KWIK-NOTE: While you should not allow your base to be a "safe haven" for your members from service of valid civilian process, you must not allow such service to disrupt your military activities. You must balance the two.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Access to Military Installations	3-2
Arrest By Civilian Authorities	8-6
Arrests Authorized by the ANG	8-7
Classified Material	14-2
Inspections and Searches	8-16
Installations Jointly or Solely Occupied by the ANG	25-12
Jurisdiction	2-5
Lawsuits Against National Guard Personnel	18-6
Subpoenas and Consensual Release of Records	14-6

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## Commercial Solicitation on Base

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Updated by Major Jeffrey M. Knickerbocker, May 2007

**AUTHORITY:** DoD 5500.7-R, *Joint Ethics Regulation (JER)*(30 Aug 93, C4, 6 Aug 98); AFI 36-2909, *Professional and Unprofessional Relationships* (1 May 99)(paragraphs 3.7 and 5.1.5); AFI 34-223, *Private Organization (PO) Program*; applicable state law or regulation.

### COMMANDER'S AUTHORITY AND RESPONSIBILITY

The Installation/Wing Commander has the primary responsibility of controlling commercial activities on the installation as well as inherent authority to do so. Although the powers of an Air Force Base Commander are not clearly bestowed by regulation on ANG Installation Commanders, and state law may be applicable, certain prohibitions may generally be enforced.

### PROHIBITED ACTIVITIES

Typical activities a Commander may PROHIBIT are:

1. Allowing solicitation of military personnel who are in a duty status;
2. Allowing solicitation in dormitory or BOQ common areas;
3. Supplying squadron rosters or lists for commercial solicitation;
4. Allowing solicitation by one military member, or the member's spouse, of another military member who is in a lower grade;
5. Allowing unit facilities that have not been previously so designated to be used as a showroom or store for the sale of goods or services;
6. Any representation which suggests or gives rise to the appearance that the Department of Defense or any of its components sponsor the company, its agents or its goods or services, including but not limited to allowing solicitors to identify with your unit by using the title "Unit Advisor", etc.;
7. Allowing solicitations at mass formations or before "captive audiences;"
8. Offering unfair or deceptive inducements to purchase or trade;
9. Using any manipulative, deceptive, or fraudulent device, scheme, or artifice, including misleading advertising and sales literature;
10. Representation and solicitation by DoD personnel for the sale of any type of insurance on a military installation;
11. Use of an agent as a participant in any military sponsored insurance or orientation program;
12. Agents using titles such as "squadron insurance counselor;"
13. Assignment of desk space for an interview for other than a specific prearranged appointment;
14. Use of base bulletins announcing the presence of agents and their availability; and
15. Distribution of literature to persons other than the person being interviewed.

If the ANG unit is a tenant on an active duty installation, the ANG Commander must coordinate with the active duty Installation/Wing Commander who retains primary responsibility for these types of activities.

### THINGS TO WATCH FOR

If solicitors request the opportunity to solicit unit members, it should be cleared with the Installation Commander. The solicitor should be duly licensed by the state and other applicable local licensing authorities, and the proposed activities must not violate federal, state or local laws. Since members of the unit are on duty for training for only short periods of time during the month, the Commander should be alert to solicitation of members in their off-duty status. While this conduct is difficult if not impossible to monitor, the morale of the unit can be harmed significantly if members use their National Guard status to coerce others for their personal gain. DoD personnel (which includes

unit members) may not act as a liaison for the solicitor, either directly or indirectly becoming the private company's agent, for purposes of on-base commercial solicitation.

Unit members should be advised that if they suspect that any solicitation violations are occurring on base, they should report the information to their First Sergeant, Commander or Security Police. Likewise, any questions you may have about on-base solicitation practices or any requests made to you concerning on-base commercial practices should be referred to the Staff Judge Advocate.

The problems in this area include unit members using their Guard positions, or seeking to have those they know take advantage of the unit member's Guard position, to make commercial solicitations on base. Even if the unit member may not directly benefit or the solicitation is made to all unit members for a seemingly excellent product or service, the risks the Installation Commander runs by permitting this include having to permit other solicitors on base to avoid charges of favoring one or more solicitors over another (which could lead to the base becoming a shopping mall), and later becoming involved in a lawsuit if a unit member buys a defective product which the Commander permitted to be sold on base.

### **COMMON SITUATION**

A common and recurring situation at many bases involves the Installation Commander permitting various conveniences on base primarily enjoyed by full-time unit members, but which also benefit all unit members. Such conveniences may include private commercial vending machines and the mobile "coffee" truck. Many state laws grant Installation Commanders broad discretion in permitting activities on the base of which they are in charge and control. The problem here is to have a method to select one of the sometimes many local businesses which would like to do business on the installation. You may encounter oversight and control problems if you grant permission to every provider of similar goods or services to do business on the installation. Conversely, charges of favoritism may be encountered when you select one business among many. A selection method -- such as competitive bidding -- that is fair to all concerned, usually works.

In these situations, if your installation or unit has established a civil association or military corporation pursuant to your state's law, such entities, may, if allowed under your state law, be the ultimate recipient of any profits generated from granting these businesses permission to solicit on the installation. Even though the Installation Commander is often the head of such civil association or military corporation, care must be taken to strictly follow state law and all applicable regulations. Close coordination with your Judge Advocate is strongly recommended.

***KWIK-NOTE: This is a "hot" area, fraught with "appearance of impropriety" problems for Commanders. Some solicitations on base may be welcome, but recognize the factors to consider before approving them.***

### **RELATED TOPICS:**

### **SECTION**

Access to Military Installations	3-2
Barment	3-11
Ethics	7-3
Installations Jointly or Solely Occupied by the ANG	25-12
Jurisdiction	2-5
Open Houses and Free Speech	3-13

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# Day Care Centers

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Updated by Capt Edward Cousineau, May 2001

**AUTHORITY:** AFD 34-7, *Child Development Programs* (4 Oct 93)(for reference only); AFI 34-276, *Family Child Care Programs* (1 Nov 99)(for reference only); applicable state law.

## INTRODUCTION

Air National Guard members, whether full-time or part time, who have small children, frequently need the use of day care centers or other facilities to care for their children while they are working. Commanders may want to accommodate these members since the provision of these facilities benefits their members' welfare and may aid recruiting and retention.

Currently, however, there is no authorization for the Air National Guard to fund construction of child care facilities on Air National Guard bases. While the active duty Air Force has specific regulations governing child care centers as well as individual child care programs held in base housing, there is nothing similar available in the Air National Guard.

In absence of federal funding for a unit of the Air National Guard to construct day care facilities on an ANG base, there are two alternatives where Guard members may enjoy the benefits of such facilities.

## PARTICIPATE IN AN EXISTING ACTIVE DUTY FACILITY

AFI 34-276, which authorizes and governs the operation of child care centers on active duty Air Force installations, permits reserve component members to use a base child development center during periods of scheduled UTAs when the training is performed at that base.

Appropriate written agreements for ANG use of active duty child care facilities may be necessary. After you determine the need for ANG use of these facilities based upon numbers of personnel and children and time of usage, there should be coordination among the active duty base Commander, ANG Commander, and the Staff Judge Advocates of both.

## ESTABLISH A NEW FACILITY WITH STATE OR LOCAL UNIT FUNDS - ISSUES

If using a local active duty base's day care center is not an option, the other alternatives are to build and operate your own facility, or convert an existing building on your ANG installation for use as a day care center. This is doable, but involves resolving many potentially complex issues since there are no federal funds available.

First, you must determine the jurisdiction over the land on the base where you want to build, or over the existing building to be used. Most of the time, the state will have either concurrent or exclusive jurisdiction either because it owns, leases or licenses the land and buildings. Obtain and review copies of applicable deeds, leases and licenses.

Second, assuming the state has at least some control over the land and building, you must, in coordination with your Judge Advocate, research various state law requirements for establishing the child care facility.

Most, if not all states, through their department of social services, education or similar departments have licensing, application, permit and other requirements.

Third, the county or municipality where your base is located may also have requirements for building or operating such a facility. Most likely before you may construct any building or convert an existing building where structural work is necessary, your state, county or municipal government may require plans and specifications to obtain a building permit, as well as requiring an inspection once the facility is constructed, before the government will permit occupancy of the facility for its intended use.

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## Day Care Centers

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**Updated by Ms Sandra Mason & Mr Lou Proper, August 2007**  
**Maj Jeffrey M. Knickerbocker, May 2007**

**AUTHORITY:** AFD 34-7, *Child Development Programs* (4 Oct 93) (for reference only); AFI/ANG Sup 34-276, *Family Child Care Programs* (1 Nov 99, 15 July 2007); applicable state law.

### INTRODUCTION

Air National Guard members, whether full-time or part time, who have small children, frequently need the use of day care centers or other facilities to care for their children while they are working. Commanders may want to accommodate these members since the provision of these facilities benefits their members' welfare and may aid recruiting and retention.

Currently, however, there is no authorization for the Air National Guard to fund construction of child care facilities on Air National Guard bases. While the active duty Air Force has specific regulations governing child care centers as well as individual child care programs held in base housing, up to now, there has been nothing similar available in the Air National Guard.

In absence of federal funding for a unit of the Air National Guard to construct day care facilities on an ANG base, there are three alternatives where Guard members may enjoy the benefits of such facilities.

### PARTICIPATE IN AN EXISTING ACTIVE DUTY FACILITY

AFI 34-276, which authorizes and governs the operation of child care centers on active duty Air Force installations, permits reserve component members to use a base child development center during periods of scheduled UTAs when the training is performed at that base.

ANG use of active duty child care facilities, (Extended Duty Care) where available, should be included in the Memorandum of Agreement between the ANG and the active duty host. After you determine the need for ANG use of these facilities, based upon numbers of personnel and children and time of usage, there should be coordination among the active duty Installation Commander, ANG Commander, and the Staff Judge Advocates of both, to include ANG use in the MOA. The Extended Care Program is an Air Force initiative. Program supports mission related duty beyond normal day-to-day needs. This program provides temporary care at licensed Family Child Care (FCC) homes. ANG/AFR members may use during primary UTA (drill) weekends, during secondary UTA weekends and replacement UTA weekends. Annual (2 weeks) provided on a space available basis only.

### PARTICIPATE IN HOME COMMUNITY CARE

AFI/ANG Sup 34-276, authorizes and governs the operation of the Home Community Care (HCC) in the Air National Guard. As of this update, there are 14 installations participating in this federally funded program to provide child care to eligible ANG members during UTA's, RUTA's, SUTA's and Annual tour (2 weeks) (provided on a space available basis only). Three more units are expected to be added during CY07. The ANG Services Division (NGB/A1S) provides oversight for this program.

### PARTICIPATE IN OPERATION MILITARY CHILD CARD

Established in October 2004, OMCC is a DoD-funded child care subsidy program designed to assist ANG members with the child care costs – in their communities, in state-licensed, off installation Family Child Care Homes. This program assists all activated Air National Guard members, regardless of location or purpose of activation. The only stipulation is the ANG member must be deployed from his/her work unit.

Airmen seeking child care referral services should contact Child Care Aware at 1-800-424 2246 or via the web at [www.childcareaware.org](http://www.childcareaware.org).

## RECENT AND HISTORICAL DEVELOPMENTS

In 2000, the Director of the ANG chartered an Integrated Process Team to study the need for childcare for ANG members. As a result of that IPT, two test programs were created to assist ANG members. First, ANG members were authorized to use any active duty day care center or family day care provider on an active duty installation regardless of where they perform their duty. It is still on a priority basis, however, many bases do have openings available. Additionally, there is some availability of “extended care” (off traditional hours) for shift and UTA periods at these bases.

The second day care test involved the contracting of off installation childcare services. NGB/A1S (Services) was the OPR for this test, 13 ANG bases volunteered to participate and 5 were funded. Specific published criteria had to be followed and funding continued to be an issue for this program.

In 2005, however, the funding line became a reality and installations on the waiting list are being considered for participation as funds becomes available. Information concerning ANG HCC Program is available on line. The Child Care website is on the NGB/A1S AF portal site at: <https://www.my.af.mil/gcss-afp40/USAF/ep/globalTab.do?command=org&channelPageId=-929388&pageId=681742>

## CONCLUSION

The practical effect of all these requirements and issues continues to point to ANG HCC as the prime method to provide regulated, quality child care to eligible ANG members. The above has been discussed so that you, as the Commander, know what is involved and can make an informed decision before you proceed.

***KWIK-NOTE: Air National Guard units on state-controlled land are not exempt from state civilian law requirements in establishing and operating child care facilities.***

## RELATED TOPICS:

## SECTION

Airport Joint Use Agreements	25-2
Base Facilities Board	3-4
Private Organizations and Unofficial Activities (Civil Associations and Military Corporations)	22-2
Environmental Duties at Base Level	12-3
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Morale, Welfare and Recreation (MWR) Programs, Activities and Facilities	22-4
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# Barment

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Updated by Major Jeffrey M. Knickerbocker, May 2007

**AUTHORITY:** 18 U.S.C. 1382, *Entering Military, Naval, or Coast Guard Property*; AFI 35-101, *Public Affairs Policies and Procedures* (29 Nov 05); AFI 31-101\_ANGSUP1 (1 Mar 05); DoDD 3025.12, *Military Assistance for Civil Disturbances* (4 Feb 94); *United States v. Albertini*, 472 U.S. 675 (1985); *Greer v. Spock*, 424 U.S. 828 (1976); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); OpJAGAF 1998/69, *Commander's Power to Delegate Debarment Authority* (29 Jun 98); OpJAGAF 1997/25, *Barment* (14 Feb 97); OpJAGAF 1984/60, *Authority of Base Commander in Air Reserve Technician Status* (6 Nov 84); OpJAGAF 1982-60, *Barment/Installations/Command* (22 Dec 82); applicable state law.

## INTRODUCTION

Installation Commanders are responsible for protecting personnel and property under their jurisdiction, and for maintaining order on the installation to ensure the uninterrupted and successful accomplishment of the military mission. Pursuant to AFI 31-101, DoDD 3025.12, and applicable state law making the Installation Commander in charge and control of all activities on the installation, each Installation Commander is authorized to grant or deny access to the installation, and to remove or exclude persons whose presence is unauthorized. This denial of access, removal or exclusion is called "barment."

In addition to any authority granted to the Installation Commander under state law, ANG Commanders may also have authority under federal law to issue a barment order. ANG installations throughout the United States each have, as part of their underlying real property chain of title, at least a leasehold interest in favor of the federal government as lessee. (There may then be a subsequent license back to the state Adjutant General to operate the ANG of the state there). This leasehold interest is probably sufficient to bring the installation within the federal debarment authority statute, 18 U.S.C. 1382, and make it applicable as it is to Air Force bases. However, no court has yet decided this issue with respect to an ANG installation. Consequently, a barment order pertaining to an ANG installation may or may not be enforceable pursuant to the criminal provisions of 18 U.S.C. 1382. See OpJAGAF 1997/25 (a leasehold interest by the United States is a property interest sufficient to allow prosecution under the statute; optimal situation would combine a "clear exclusive right of possession and a strong exercise of that right."). Note that under 18 U.S.C. 1382, authority to bar an individual rests with the Installation Commander and may not be delegated. The Installation Commander may be in technician status.

## CONSTITUTIONAL CONSIDERATIONS

Installation Commanders may reasonably act within their discretion and summarily bar anyone from a military installation by the simple issuance of a BAR LETTER stating a sound reason for their action. The action must be consistent and evenhanded and the Commander must remain neutral. A bar letter is effective upon delivery. This action provides sufficient constitutional due process, which requires providing notice to the barred individual before action may be taken against him or her for failure to adhere to the terms of the barment. The barred person does not have a right to be heard before the barment is effective.

However, the barment action may not be arbitrary, capricious, or discriminatory against a constitutionally protected status (race, religious, sex, age, etc.). Also, at times, the Commander's authority to bar individuals from an installation becomes entangled in issues concerning constitutionally protected freedom of speech. Commanders cannot bar individuals from an installation for properly exercising the right of freedom of speech (for the Commander's limited authority to control the exercise of free speech on base, see *Brown v. Glines*, 444 U.S. 348 (1980), AFI 51-903, *Dissident and Protest Activities* (1 Feb 98) and AFI 31-101).

## **JUDICIAL REVIEW OF DEBARMENTS**

Because of the Commander's summary power to debar and the issues of arbitrariness, capriciousness, discrimination and free speech, the decision to remove or exclude a person from the installation is subject to judicial review. The facts of each debarment are examined on a case-by-case basis.

## **CONSEQUENCES OF WRONGFUL BARMENT**

A general policy to exclude a certain group or classification of individuals is probably arbitrary and capricious. Improper or illegal barment may subject the Commander to personal civil liability in a lawsuit alleging a constitutional tort based on an alleged violation of the barred person's constitutional right to free speech. The best defense to such a lawsuit is a properly articulated reason for the barment to show that it was not arbitrary, capricious or discriminatory.

## **BARMENT PROCEDURES**

Barment procedures can be found in AFI 31-101.

***KWIK-NOTE: Do not ORALLY bar anyone, and only take debarment action after consulting with your Staff Judge Advocate.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Air Base Security Guards	3-3
Arrests Authorized by the ANG	8-6
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Sources of Commander's Authority	2-7

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## Leases and Armory Use Agreements

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Updated by Major Jeffrey M. Knickerbocker, Sep 2007

**AUTHORITY:** ANGR 87-1, *Acquisition and Retention of Real Property* (14 Nov 75); AFI 32-9003, *Granting Temporary Use of Air Force Real Property* (19 Aug 97); applicable state law.

### FEDERAL CONTROL OF ANG BASES

ANG installations have underlying real estate authority totally different from Army National Guard (ARNG) armories. ANG installations always have as their basis for federal construction authority maintenance of the significant real estate interest in the federal (not state) government. Although there may be a license to the state to operate the state ANG at the installation, this does not usually compromise the federal control. This is so regardless of the type of jurisdiction (which is discussed in the topic in this Deskbook entitled "JURISDICTION") that exists over the property.

As a consequence of this, ANG installations are generally not appropriate for leasing out or for other non-military use agreements.

Questions on particular circumstances can be referred to NGB/A7C.

***KWIK-NOTE: ANG bases may not generally be used by non-military groups under federal law. This topic should be supplemented by state law requirements that do not conflict with federal authority.***

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# Open Houses and Free Speech

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Updated by Major Jeffrey M. Knickerbocker, Sep 2007

**AUTHORITY:** AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03); AFI 35-101, *Public Affairs Policies and Procedures* (29 Nov 05); AFI 31-101\_ANGSUP1 (1 Mar 05); AFI 51-903, *Dissident and Protest Activities* (1 Feb 98)(for reference only); applicable state law.

## INTRODUCTION

An open house is a community relations activity which invites members of the public to see the operation of a military installation. It is supportive of the military mission. It does not create a “public forum” where people can enter the installation and engage in protest or dissent activities, nor does the Commander thereby relinquish control of the base. This topic should be read in conjunction with the topic in this Deskbook entitled “FREEDOM OF EXPRESSION - RESTRICTIONS ON MILITARY MEMBERS” (Section 14-09). Much of the legal justification for the Installation Commander's limitation on the expression of civilian visitors on the installation is contained in that topic.

## PURPOSE

The purpose of an open house is to show the mission, equipment, facilities, people, skills, and professionalism required to operate the Air National Guard. Open houses should not be (or convey the image of) a fair, carnival, circus, civilian air show, or display of commercial products. Opening dining halls, maintenance shops, classrooms, flight simulators, and other unclassified facilities for public inspection is encouraged.

## AVOID CREATING A “PUBLIC FORUM”

Even though an open house does not, as such, create a “public forum,” you may unintentionally create one by your actions or inaction. This is the biggest danger with open houses, and you must be careful to avoid it. The rules for you to follow, and pitfalls to avoid concern regulating expression on, and access to, the installation. They are:

### Expression

1. The ANG must remain NEUTRAL in all matters of ideological expression;
2. The ANG cannot become entangled with ideological movements;
3. The ANG cannot influence public opinion by endorsing or supporting civilian groups whose ideologies it favors;
4. ALL partisan political activities must be excluded from the base; and
5. Prohibit distribution of all ideological leaflets, circulars, etc., on base.

### Access

If an open house places no controls on the general public for access to the base or its facilities, the installation may become a public forum because the lack of controls may show an intent to abandon the right to exclude civilian traffic from, and to regulate expression on, the base.

### Practical Tips

For every “open house,” use a detailed operation plan reflecting concern for security, traffic flow, and personnel, as

it is a clear expression of no intent to abandon control of access to the base, even temporarily. Some suggestions to prevent a military installation from becoming a public forum (which by no means are all inclusive) are:

1. Use security police for crowd control;
2. Establish strict geographical limits for visitors;
3. Open the installation for a “Visitors Day” or “Family Day” rather than an “Open House.” Make it specific;
4. Invite the public for a specific event, such as the Thunderbirds;
5. Hand out letters or leaflets at installation entry points which notify persons they are guests of the Commander, the purpose of the invitation and the limiting conditions on any other activity. Proposed limitations are:
  - a. No political activity;
  - b. No demonstrations or protest activity;
  - c. No leafleting;
  - d. No speeches;
  - e. No activity considered detrimental to good order and discipline of military personnel;
  - f. No activity considered detrimental to health, safety, and welfare of persons on the installation; and
  - g. Violators may be ejected from the base, and in appropriate cases, barred from future reentry;
6. Do not have booths providing information that could be considered “political” in nature. This may preclude such groups as the VFW, MIA/KIA organizations, or other groups which lobby for a strong military; but if you do otherwise, anti-military groups may also be permitted to have booths. Avoid this, and:
  - a. Review the planned display and handouts for all booths to determine if the activities are permissible;
  - b. Limit booths to those community organizations directly involved with installation activities (such as scouting, sports, and volunteer organizations) or public safety concerns;
  - c. If DoD contractors are included, limit them to current contractors supplying factual information on those current products which play an integral role in the function of the military. No information relating to the company as a whole may be provided. No information may be provided on future products;
  - d. Displays of various military organizations and their functions are permissible. Examples may include other units’ recruiters, and static displays of aircraft and other equipment; and
  - e. If an ideological group wants to sponsor a fund-raising booth selling a neutral product, approval will probably “open” the installation to similar fund-raising efforts by other groups. Be careful here; you probably should avoid this; and
7. Review any leaflets or signs that will be displayed. This requires coordination with the displayer before the open house. The point is to always ask to review any leaflets or signs that will be displayed by a group or person with a booth.

## CONCLUSION

Conducting an open house involves a team effort with all Commanders and key staff officers. Your Staff Judge Advocate should be an integral part of the overall planning and coordination effort.

***KWIK-NOTE: The key to not turning your installation into an open forum is whom you allow on base and what you permit them to say. Be CAUTIOUS, be CONSISTENT, and be CONSERVATIVE.***

## RELATED TOPICS:

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Access to Military Installations	3-2
Civilian Misconduct on Base	3-7
Community Relations Programs	6-4
Installations Jointly or Solely Occupied by the ANG	25-12

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## Pass and Registration

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Updated by Major Jeffrey M. Knickerbocker, Sep 2007

**AUTHORITY:** AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03); AFI 31-101\_ANGSUP1 (1 Mar 05); AFI 36-3026(I), *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (20 Dec 02); applicable state law.

### INTRODUCTION

The base Pass and Registration Office handles various matters ranging from personal identification cards and restricted area badges to vehicle registration. See the topic VEHICLE REGISTRATION in this Deskbook for a discussion of vehicle registration procedures.

### ID CARDS

Active Guard/Reserve (AGR) personnel and their dependents, as well as traditional Guard members and their dependents are entitled to identification cards. The entitlements of each category of ID cards vary.

Forms DD2S (ACT) and DD2S (RES) are Armed Forces Identification Cards. Green cards are issued to both AGR personnel and traditional Guard members. The member's current duty status (ACTIVE or GUARD) is indicated in the upper right-hand corner of the ID card. Before the card can be issued, the Guard member must go to MPF to get an application. Only the personnel in MPF can verify the information used to issue the card and an authorized signature must be on the application before the card will be issued at the Pass and Registration Office.

DD Form 1173S, Dependent Identification Card. This tan card is authorized primarily for dependents of military personnel on Active Duty for over 30 days. Dependents of AGR personnel fit this category. The military member (in some cases the dependent) must go to MPF to get the application and have the information verified before the card will be issued at the Pass and Registration Office.

Air Reserve Forces Dependent Identification Card. This card is primarily for dependents of military personnel who are not on Active Duty. Dependents of traditional Guard members fit this category. As with the other ID Cards, the application must be picked up from, and information verified by, MPF personnel before the card will be issued at the Pass and Registration Office.

NOTE: At many ANG units, identification cards are issued by the MPF rather than by the Pass and Registration office.

### RESTRICTED AREA BADGES

Certain areas on base such as the flight line and command post may require badges for entry. These are specialized identification badges authorizing access into the restricted area. AFI 31-101 contains further instructions regarding the issuance of restricted area badges.

**KWIK-NOTE:** *Make sure all members and their dependents have the proper ID cards. Issue restricted area badges only to these who need them.*

**RELATED TOPICS:**

Access To Military Installations - General Guidelines  
Barment  
ID Card Retrieval  
License Plates  
Motor Vehicle Rules - Military Bases  
Suspension Of Base Driving Privileges  
Vehicle Registration

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## Possession of Privately Owned Firearms on Base

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Updated by Major Jeffrey M. Knickerbocker, Sep 2007

**AUTHORITY:** AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03); AFI 31-101\_ANGSUP1 (1 Mar 05); AFI 31-207, *Arming and Use of Force by Air Force Personnel* (1 Sep 99); applicable state law and regulations.

### COMMANDERS AUTHORITY

Installation Commanders may ban the possession of privately-owned weapons on their installation by virtue of their inherent command authority over all base activities. Such a ban is often advisable, as problems involving privately-owned firearms can quickly develop.

This is an area that should have applicable state laws and regulations. Many states' laws and regulations provide that this prohibition of possession of firearms applies even though the person may have a state pistol permit or be a police or peace officer otherwise authorized to possess firearms.

Air National Guard bases are secure facilities providing significant protection for the persons and property located within their boundaries. Members requiring firearms for use during the course of their ANG duties, such as the security police, will be issued them. There is no valid reason for anyone other than designated security police persons to possess a firearm on base. The only exception to this might be state regulations authorizing the unit's marksmanship team members to possess such weapons pursuant to competent written orders.

Commanders are advised to issue an appropriate base regulation or policy letter concerning a ban on privately-owned firearms possessed or stored on base. Coordinate all efforts in this area with the Office of the Staff Judge Advocate and Chief of Security Police to ensure such a policy, if implemented, will be valid and enforceable.

***KWIK-NOTE: Policy letters banning private firearms on base must be tailored to each Commanders needs and discretion, and must be consistent with applicable state law and regulations.***

### RELATED TOPICS:

### SECTION

Air Base Security Guards

3-3

Sources of Commanders Authority

2-7

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# Smoking in Air National Guard Facilities

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Updated by Major Jeffrey M. Knickerbocker, Sep 2007

**AUTHORITY:** DoD Directive 1010.10, *Health Promotion* (22 Aug 03); DoDI 1010.15, *Smoke-Free DoD Facilities* (2 Jan 01); AFI 40-102, *Tobacco Use in the Air Force* (3 Jun 02); Executive Order 13058, *Protecting Federal Employees and the Public from Exposure to Tobacco Smoke in the Federal Workplace* (9 Aug 97); applicable MAJCOM and local base supplements; applicable state law.

## INTRODUCTION

Nonsmoking is the acceptable organizational norm. Excluding dormitory sleeping rooms and military family housing, Air National Guard personnel must not smoke in facilities except in “designated areas” that non-smokers do not have to frequent.

## COMMANDERS AUTHORITY AND GUIDELINES

Unit Commanders must identify any smoking areas for buildings under their control. Designated areas may include outdoor areas away from building entrances and exits and not near building air intake ducts. The areas should be reasonably accessible to employees and provide some protection from the elements. Although DoD permits indoor smoking areas under certain stringent conditions, the Air Force prohibits indoor smoking in all Air Force facilities except in specified areas in recreation facilities designated by the Installation Commander. Even in recreational facilities, the smoking area must be separate from common areas that non-smokers must use.

For civilian personnel purposes, the right to smoke is considered to be a “condition of employment.” Therefore, Installation Commanders must not unilaterally change the rules on smoking (including designation of smoking areas) without first satisfying all requisite collective bargaining obligations at the local level. The base Labor Management Relations Specialist (Civilian Personnel Office) and the SJA should be consulted for this purpose.

The Installation Commander has the authority and should, unless prohibited by a host-tenant agreement, apply the nonsmoking policy to all buildings on base, which include those occupied by other military components and civilians. Advance coordination with Commanders of other military components and managers of civilians on base should eliminate many, if not all, of the problems in implementing the new policy.

## IMPLEMENT NEW POLICY

Any new command policy should be in writing with a reasonable advance effective date, giving reasons for the new policy, and should be widely publicized and disseminated within the base community.

DoD and Air Force directives are designed to create a social environment that supports abstinence and discourages use of tobacco products, and Commanders at all levels must provide smokers with encouragement and professional assistance in quitting. Education programs, including lectures, films, pamphlets and posters should be made available.

Should you have any questions or problems in this area, contact your Staff Judge Advocate.

**KWIK-NOTE:** *Within applicable directives, Installation Commanders set the smoking policy for their base. Commanders may and should exclude smoking inside of all buildings on base.*

**RELATED TOPICS:**

**SECTION**

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# Use of Firing Range by Local Police, Boy Scouts, and Other Non-Military Persons or Groups

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Updated by Major Jeffrey M. Knickerbocker, Sep 2007

**AUTHORITY:** AFI 36-2226, *Combat Arms Program* (26 Feb 03); ANGP 50-36, *A Guide To Unit Marksmanship Qualification Training, Competition and Youth Outreach* (2 Apr 84); applicable state law.

## AUTHORITY TO USE

The use of Air Force ground weapons ranges for non-military purposes and by non-military users is permitted by AFI 36-2226. Authority to use such ranges is granted by the Security Forces Commander. Such use may be granted only during those times when the ranges are not required for Air Force or other military needs. The users must follow good housekeeping policies and procedures, including all clean-up duties. They may be held responsible for any damage done to the premises from improper conduct or safety violations. Your state law and regulations may require or advise that a lease or armory use agreement be executed by the user.

## ANG ASSISTANCE

When feasible and within personnel limitations, ANG personnel should assist with these marksmanship activities. However, care must be taken that ANG personnel are properly qualified and competent to assist in such activities.

AFI 36-2226 does not speak specifically to use of Air National Guard ranges. It is recommended that any ANG personnel assisting in such activities be placed on duty orders pursuant to Title 32 U.S. Code, Section 316, so as to place them within the protection of the Federal Tort Claims Act. Should an incident occur, there is always the possibility of claims or lawsuits against the individual, the command, the state, and/or the United States.

## HOLD HARMLESS AGREEMENTS AND RELEASES

Additionally, all civilian participants in firing range activities should be required to sign a Release of Liability and Hold Harmless Agreement similar to the ones in Attachments 1 and 2 to this topic prior to being allowed to participate. Such agreements are helpful to warn the participants of potential dangers. However, the legal effect of such documents varies from state to state; consequently, signing such a document is not "ironclad" protection against a claim or suit. The range premises themselves must be safe, and the supervision provided must be competent. Alcohol must be strictly prohibited.

## RULES FOR USE

Commanders should publish written rules for appropriate use of their firing range which should be handed out and signed by each individual user acknowledging its receipt; and Commanders should maintain these signed copies for their protection.

Your Judge Advocate should be consulted with respect to specific state law involving firearms or firing ranges, and to the effect and appropriate wording of a Release of Liability and Hold Harmless Agreement.

**KWIK-NOTE:** *Allowing use of your firing range by non-military persons or groups is encouraged as part of your Community Relations Program; but make sure you protect yourself and your unit by obtaining from each individual user signed Releases, Hold Harmless Agreements and acknowledgments of receipt of copies of the rules of conduct at the range.*

## RELATED TOPICS:

## SECTION

Access to Military Installations – General Guidelines

3-2

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Attachment 1

**CONSENT AND HOLD HARMLESS AGREEMENT AND RELEASE OF LIABILITY (ADULT)**

The undersigned hereby requests to participate in the following activities of the \_\_\_\_\_ National Guard, which may be in conjunction with other agencies, organizations, or sponsors:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date(s): \_\_\_\_\_

I understand the nature and scope of these activities.

I agree to not hold the United States of America, the State of \_\_\_\_\_, the \_\_\_\_\_ National Guard, any other agency, organization, or sponsor of these activities, or their officers, members, agents, or employees, responsible for any harm or injury, from any cause, which may befall me related to or arising out of participation in these activities or any transportation related to said activities, and hereby release said entities and persons from any liability relating thereto. I further agree to indemnify and hold said entities and persons harmless from the claims or causes of action asserted by any other persons on my behalf, or in their own right, arising out of said participation, activities, or transportation. I similarly agree to hold said entities and persons harmless from the claims of other persons arising out of any acts done by me. I agree that these conditions and agreements are binding on all my heirs, executors, administrators, representatives, assignees, and successors in action.

I have read and understand the above, and willingly agree to said terms and conditions.

SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

PHONE: \_\_\_\_\_

Attachment 2

**CONSENT AND HOLD HARMLESS AGREEMENT AND RELEASE OF LIABILITY (MINOR)**

The undersigned, parent(s) or legal guardian(s) of

\_\_\_\_\_, a minor child, do(es) hereby consent to the participation of said child in the following activities of the \_\_\_\_\_ National Guard, which may be in conjunction with other agencies, organizations, or sponsors:

\_\_\_\_\_  
\_\_\_\_\_

Date(s): \_\_\_\_\_

I (We) understand the nature and scope of these activities.

Said child is to abide by all reasonable rules and requirements of appropriate cooperation and conduct. Upon violation said child may be sent home at my (our) expense.

In the event of illness or injury, I (we) hereby consent to whatever medical treatment is deemed necessary by a licensed physician, surgeon or dentist for said child, and I (we) agree to pay the expenses related thereto.

I (We) agree to not hold the United States of America, the State of \_\_\_\_\_, the \_\_\_\_\_ National Guard, any other agency, organization, or sponsor of these activities, or their officers, members, agents, or employees, responsible for any harm or injury, from any cause, which may befall said minor child related to or arising out of participation in these activities or any transportation related to said activities, and hereby release said entities and persons from any liability relating thereto. I (We) further agree to indemnify and hold said entities and persons harmless from the claims or causes of action asserted by any other persons on behalf of said child, or in their own right, arising out of said participation, activities, or transportation. I (We) similarly agree to hold said entities and persons harmless from the claims of other persons arising out of any acts of said minor child. I (We) agree that these conditions and agreements are binding on all my (our) heirs, executors, administrators, representatives, assignees, and successors in action.

I (We) have read and understand the above, and willingly agree to said terms and conditions.

SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

PHONE: \_\_\_\_\_

## Weddings and Other Social Affairs on Base

Updated by Major Jeffrey M. Knickerbocker, Sep 2007

AUTHORITY: AFI 52-101, *Planning and Organizing* (1 May 01); ANGI 34-121, *Dining Social Club Organizations*, (1 Sep 2005); AFI 32-9003, *Granting Temporary Use of Air Force Real Property* (19 Aug 97); ANGR 87-1, *Acquisition and Retention of Real Property* (14 Nov 75); OpJAGAF 1982/55, *Military Personnel Sponsored Weddings of Non-Dependent Children* (29 Nov 82); OpJAGAF 1983/92, *Weddings* (22 Nov 83); applicable state law and regulations.

### PERFORMANCE OF CEREMONY

ANG Chaplains may perform wedding ceremonies for ANG members and their immediate family, provided they are qualified to do so under state law. All state requirements to contract a marriage must be met.

### USE OF FACILITIES

ANG chapel facilities, if any, may be used for such a wedding. Because few ANG installations have a formal chapel, and other space is normally utilized for chapel services, this space could be similarly used for the chaplain-officiated wedding.

However, the further use of installation facilities on a rental basis is probably not authorized. This is because all ANG installations (as contrasted with ARNG armories) are on land in which the federal government has the primary possessory interest. Federal law does not permit such rentals or leases as is common to armories, which are on state-owned land.

A notable exception is that where an ANG social club has been properly created and operates on the ANG installation with the Adjutant General's approval, it is generally permissible for the social club's governing body to allow a member's wedding reception to be held at the social club's location if such is within the scope of its by-laws or rules, and is consistent with state law. This is not a rental from the unit or the installation, but rather an event sanctioned by the social club.

If the event is permissible, closely coordinate with your Staff Judge Advocate for appropriate releases and hold harmless agreements, similar to that in Attachment 1 to the topic in this Deskbook entitled "USE OF FIRING RANGE BY LOCAL POLICE, BOY SCOUTS, AND OTHER NON-MILITARY PERSONS OR GROUPS."

Questions about a particular planned event and allowable use of ANG facilities may be addressed to NGB/A7C. Their website is located at <https://airguard.ang.af.mil/ce>.

***KWIK-NOTE: Scrutinize requests to use base facilities for non-unit social functions to ensure compliance with federal, and state law requirements. To this end, you may wish to supplement this topic with applicable state law.***

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# Chapter 4, Benefits

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- 4-5 Continued Health Care Benefit Program
- 4-6 Montgomery G.I. Bill
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- 4-8 ANG Veteran and Casualty Benefits
- 4-8(a) ANG Veteran & Casualty Benefits Chart

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# Benefits

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**Updated by Lt Col Meaghan LeClerc and David Jaffe, Sep 2007**

**AUTHORITY:** Air Reserve Personnel Center (ARPC) Fact Sheets

## INTRODUCTION

As we all know, members of the Air National Guard are entitled to certain benefits by virtue of their status, both while they remain active and upon retirement.

## ARPC FACT SHEETS

The ARPC annually publishes a series of “Fact Sheets” explaining the current status of the following:

- Veterans Benefits
- TRICARE & DEERS
- Space Available Travel
- Age 60 Retirement Benefits
- Assignments
- Point Credit
- Retired Reserve
- Reserve Component Survivor Benefit Plan
- SGLI & VGLI Insurance
- Retirement Benefits - Air National Guard/Air Force Reserve
- Guard/Reserve Officer Promotions
- Entitlements - Air National Guard/Air Force Reserve
- Survivor Benefits - Air National Guard/Air Force Reserve

These handouts, while not represented to be a guarantee of entitlement to listed benefits nor answers to all legal questions concerning those benefits, are excellent sources of information. The fact sheets are updated annually. You may obtain the most recent versions of these fact sheets by contacting the public affairs office at ARPC at (303) 676-6515 or toll-free (800) 525-0102, or you may download the fact sheets from the ARPC webpage (<http://www.arpc.org>) or <http://arpc.afrc.af.mil/pa/fact/factsheet.asp>.

## WIDELY DISSEMINATE

In addition to being a valuable tool for Recruiting and Retention, these handouts should be made available to all personnel at the Customer Service branch of your MPF. They can be locally reproduced, and should be included in your Newcomer’s Briefing, be the subject of base newspaper articles, and be part of your Legal Assistance Program. Encourage unit members with questions on the subjects covered in these handouts to contact your Judge Advocate’s Office for advice.

## CONCLUSION

Some of the subjects covered in these handouts are also covered in specific topics in this Deskbook as indicated in the Related Topics below. Other benefits of Guard membership, not in these handouts, are also listed below.

***KWIK-NOTE: Widely disseminate ARPC Fact Sheets and develop similar ones based on applicable state law benefits.***

**RELATED TOPICS:**

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# TRICARE and DEERS

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Updated by Lt Col Meaghan Q. LeClerc and Maj David M. Jaffe, Sep 2007

## TRICARE

### **I. General Description**

TRICARE is the Department of Defense's worldwide health care program for active duty and retired uniformed service members and their families. TRICARE consists of TRICARE Prime, a managed care option; TRICARE Extra, a preferred provider option; and TRICARE Standard, a fee-for-service option. TRICARE For Life is also available for Medicare-eligible beneficiaries who are age 65 and over.

TRICARE offers families 3 choices:

- A. TRICARE Prime** is an HMO-type source of care with low costs for active duty members and certain reserve and Guard members. Enrollees receive care through Military Treatment Facilities or a network of civilian providers who supply services at negotiated discount rates. The DOD views TRICARE Prime as the most efficient way to deliver healthcare services because it is the least costly option for those who require frequent care. Enrollees agree to coordinate their healthcare through a primary care manager (PCM). PCMs are responsible for ensuring enrollees obtain the right kind of treatment in the appropriate setting. TRICARE Prime offers less out-of-pocket costs than any other TRICARE option. Active duty members and their families do not pay enrollment fees, annual deductibles or co-payments for care in the TRICARE network. Retired service members pay an annual enrollment fee of \$230 for an individual or \$460 for a family, and minimal co-pays apply for care in the TRICARE network. TRICARE Prime enrollees receive most of their care from military providers or from civilian providers who belong to the TRICARE Prime network.
- B. TRICARE Extra and TRICARE Standard** are available for all TRICARE-eligible beneficiaries who elect or are not able to enroll in TRICARE Prime. Active duty service members are not eligible for Extra or Standard. There is no enrollment required for TRICARE Extra or Standard – no annual enrollment fees, no enrollment forms. Beneficiaries are responsible for annual deductibles and cost-shares. Beneficiaries may see any TRICARE authorized provider they choose, and the government will share the cost with the beneficiaries after deductibles.

TRICARE Extra is a preferred provider options (PPO) in which beneficiaries choose a doctor, hospital or other medical provider within the TRICARE provider network.

TRICARE Standard is a fee-for-service option. You can see an authorized TRICARE provider of your choice. Having this flexibility means that care generally costs more.

### **II. TRICARE And The Reserve/National Guard**

When on military duty, Reserve Component members are covered for any injury, illness or disease incurred or aggravated in the line of duty, including traveling to and from military duty, under line-of-duty procedures. Medical coverage (direct care at the Military Treatment Facilities) is available when the member is activated. When ordered to active duty for more than 30 consecutive days, Reserve Component members have comprehensive health care coverage under TRICARE.

Eligible Reserve Component members are entitled to up to 90 days of TRICARE benefits prior to mobilization.

Updated March 30, 2007

**A. “Early” TRICARE Benefit For Some Activated National Guard And Reserve Members and Their Families**

Some members of the National Guard and Reserve (collectively known as the Reserve Component, or RC), who are issued delayed-effective-date active duty orders for more than 30 days in support of a contingency operation, are eligible for “early” TRICARE medical and dental benefits beginning on the later of either:

1. the date their orders were issued; or
2. 90 days before they report to active duty.

**B. TRICARE Eligibility For RC And Family Members**

To be eligible for this early TRICARE benefit, RC members and family members must be registered and TRICARE eligible in the [Defense Enrollment Eligibility Reporting System \(DEERS\)](#).

The member’s Service personnel office is responsible for determining the member’s eligibility for the early TRICARE benefit. The Services will notify and advise eligible RC members of their TRICARE medical and dental benefits when their delayed-effective-date active duty orders are issued.

RC members may verify their eligibility for TRICARE through the secure Guard and Reserve Web Portal Web site at <https://www.dmdc.osd.mil/appj/esgr/index.jsp>. For assistance with an eligibility problem, members should contact their Service Point of Contact listed on the TRICARE Web site at [www.tricare.osd.mil/reserve/reservepoc.cfm](http://www.tricare.osd.mil/reserve/reservepoc.cfm).

If the RC member is issued delayed-effective-date active duty orders (for more than 30 days in support of a contingency operation) and the orders are cancelled prior to the member reporting to active duty, TRICARE coverage (eligibility) for the member and eligible family members terminates on the effective date the orders are cancelled.

Uniformed Services Employment Reemployment Rights Act (USERRA) protections for members that ensure an employer-sponsored health plan can be reinstated do not go into effect until the member actually reports for active duty. Therefore, members and their family members are strongly encouraged to consider retaining their employer’s health plan coverage until the RC member actually reports for active duty, at which time the RC member and family members are fully covered by USERRA protections.

**C. Filing Claims For Reimbursement**

Claims submitted to TRICARE for reimbursement must be for a covered TRICARE benefit received during the member’s period of eligibility. Members may validate their eligibility period on the secure Guard and Reserve Portal Web site as detailed above. TRICARE network providers and many non-network TRICARE-authorized providers (participating) will file claims on the member’s behalf. If a non-network TRICARE-authorized provider chooses not to participate on a particular claim, the member will be billed the normal charges. See the related TRICARE Fact Sheet, [TRICARE Reserve Family Demonstration Program](#).

For dental claims, RC members must contact the Military Medical Support Office (MMSO) at 888-MHS MMSO (888-647-6676). The MMSO cannot, however, process dental claims for family members. Family members who are enrolled in the TRICARE Dental Program (TDP) must follow normal TDP claims filing procedures for dental claims.

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# Disability of National Guard Members

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Updated by Lt Col Meaghan LeClerc and Major David Jaffe, Sep 2007

**AUTHORITY:** United States Code, Titles 10 (Chapter 61), 32, 37 and 38; AFI 36-2910, *Line of Duty (Misconduct) Determination* (4 October 2002); ANGI 36-2910, *Line of Duty Misconduct Determinations* (31 May 96); AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (30 Sep 99); ANGI 36-3001, *Military entitlements, AIR NATIONAL GUARD INCAPACITATION BENEFITS* (31 May 96) applicable state law.

## ENTITLEMENT TO BENEFITS

### Federal

When an ANG member sustains an injury or illness that appears duty-related, the situation generally calls for initiation of a Line of Duty (LOD) determination under AFI 36-2910/ANGI 36-2910 procedures. The LOD will consider whether the injury or illness is to be deemed “In Line of Duty” or whether it will, for some reason, be deemed “Not in Line of Duty.” Such reasons may be that the member was not in a recognized duty status when the injury or illness occurred, that it existed prior to service, or that it was due to the misconduct of the member. LOD is an extremely detailed and hard-to-comprehend area of administrative law, with many precedential cases having been decided by the courts and the Comptroller General of the United States. These cases are not always consistent with common-sense, due partly to frequent changes in federal law (having a developmental trend generally favorable to members). An individual case can turn on duty status (active duty vs. inactive duty), the occurrence (injury vs. illness), timing (stopping for gas vs. stopping at Mom’s for dinner), or behavior (Bud vs. O’Doul’s), to name a few. For a full discussion of LODs, see the topic in this Deskbook entitled “LINE OF DUTY DETERMINATIONS.”

Assuming a situation of “LOD-Yes,” and a temporary incapacitating condition exists, the right of the typical Guard member to compensation is similarly complex to determine. The right to and amount of incapacitation pay is determined by considering both the member’s civilian pay and military pay and whether the member is physically incapable of performing the civilian job duties, the military duties or both. Incapacitation pay extending beyond a six-month duration must be approved at the Secretary of the Air Force level.

If we assume, instead (or later), a permanently disabling condition and “LOD-Yes,” then the member should be processed to a Medical Evaluation Board (MEB). This is a board of medical officers who determine the medical nature of the member’s situation and whether the member is medically qualified for further service or must be separated. MEBs will be conducted at an active duty installation. See the topics in this Deskbook entitled “WORLDWIDE DUTY MEDICAL EVALUATIONS” and “MEDICAL EVALUATION (PROFILE CHANGE)” for further guidance in this area. If the determination is one of disqualification, then the member should be processed to a Physical Evaluation Board (PEB). The PEB is a personnel board with at least one medical officer, and is conducted at a larger Air Force medical center. It determines if the member can reasonably be expected to return to duty at some time in the future or is permanently disqualified. In the former case, a likely outcome is placement of the member on the Temporary Disability Retired List (TDRL) and periodic physical exams (at least once every eighteen months) for up to five years to determine improvement and return to duty. In the latter case the PEB determines a percentage of disability, in ten percent (10%) increments. Depending on the member’s percentage of disability and years of creditable service, the member may be entitled to either disability retired pay or disability severance pay. Sometimes this is a small sum for a reserve component member with little active service time. The PEB has significant impact on the member, and military legal representation before the formal board is authorized. There is an appeal process from a disputed outcome, generally with short suspense times to apply.

Once separated by an “LOD-Yes” injury or illness, the member is entitled to continuing Department of Veterans’ Affairs (DVA) medical coverage and benefits for that injury or illness and its future effects. DVA may review the disability percentage rating given by the Air Force and raise it for DVA purposes. The separated member may elect

DVA compensation in lieu of Air Force compensation in some circumstances. Generally, DVA compensation is non-taxable income in the same percentage as the disability percentage rating.

### **State**

Since the National Guard is generally under State control, disabled members may also be entitled to benefits from the State. The extent of State benefits should be reviewed to ensure that disabled members have the full measure of assistance available to them.

***KWIK-NOTE: Air National Guard members disabled in the line of duty are entitled to certain benefits.***

### **RELATED TOPICS:**

### **SECTION**

Active Duty - Air National Guard Members  
Active State Duty  
Line of Duty Determinations  
Medical Evaluation Boards  
Medical Evaluation (Profile Change)  
Status of National Guard Members  
Veterans Benefits

11-2  
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## Continued Health Care Benefit Program (CHCBP)

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Updated by Maj David M. Jaffe and Lt Col Meaghan Q. LeClerc, Sep 2007

**AUTHORITY:** 10 U.S.C. § 1078a; 32 C.F.R. § 199.20

### THE BENEFIT

National Guard members and eligible dependents may be entitled to participate in the Continued Health Care Benefit Program (CHCBP) when they are discharged from federal active duty under Title 10 or from full-time National Guard duty. CHCBP can act as a bridge between a member's military health benefits and the member's civilian job benefits. The CHCBP is a premium-based temporary health care coverage program that generally will not extend beyond 18 months after the member's separation from active duty. (In some cases, benefits may run for up to 36 months.) Although the program is not a CHAMPUS/TRICARE program, health benefits under the program mirror those available under the TRICARE standard program. Premiums are paid by the member directly to Humana Military Healthcare Services, Inc., and are relatively steep – as of May 6, 2007, the cost of coverage for an individual is \$933 per quarter and for families, \$1,996 per quarter. A member separating from active duty or full-time National Guard duty must elect the coverage within 60 days of discharge or release from duty.

Members may obtain pamphlets and information regarding the program by calling Humana Military Healthcare Services, Inc. at 1-800-444-5445 or visiting the informational website at: <http://www.humana-military.com/CHCBP/details.htm#basics>.

### COMMANDER'S RESPONSIBILITIES

Commanders should include information on this program in their mobilization plans and should ensure that potentially eligible members are informed of the availability of the program and the duration of the 60-day election period.

***KWIK-NOTE: Members leaving federal active duty or full-time National Guard duty may obtain health care insurance through the Continued Health Care Benefit Program.***

### RELATED TOPICS:

	SECTION
Benefits	4-2
TRICARE (Champus) And DEERS	4-3
Mobilization Of The Air National Guard (Federal And State)	20-2
Pre-Mobilization Legal Counseling	20-4

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# Montgomery G.I. Bill

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Updated by Lt. Col. James Itamura, July 2001

**AUTHORITY:** 10 U.S.C. 16131-16135.

## INTRODUCTION

Among the most valuable recruiting and retention tools available to the Air National Guard is the Montgomery G.I. Bill, an educational benefits program. Montgomery G.I. Bill benefits are authorized by federal law for eligible members of the Air National Guard and other components of the Selected Reserve.

## BENEFIT DESCRIPTION

The Montgomery G.I. Bill is named for its sponsor, Mississippi Congressman G. V. "Sonny" Montgomery, a longtime champion of National Guard interests on Capitol Hill.

The legislation was inspired by the famous post-World War II G.I. Bill, which ranks among the most successful statutes enacted by Congress during the entire history of the United States. Thousands of World War II veterans obtained college or university degrees under the G.I. Bill.

The Montgomery G.I. Bill, which traces its roots to 1977 legislation authorizing educational benefits for certain enlisted reservists, was first enacted in its modern form in 1984 as a part of Title VII of Public Law 98525. In recent years, Congress has amended the Montgomery G.I. Bill in order to broaden its coverage and to increase the educational benefits authorized thereunder.

The program was originally designed to provide financial assistance to members of the Selected Reserve, including the Air National Guard, pursuing a college or university degree. In 1989, by Section 642 of Public Law 101189, Congress expanded the program to provide financial assistance to personnel participating in vocational technical training programs.

The Montgomery GI Bill – Selected Reserve program may be available to members if they are a member of the Selected Reserve. The Selected Reserve includes the Army Reserve, the Navy Reserve, Air Force reserve, Army Corps Reserve and Coast Guard Reserve, and the Army and Air National Guard.

Members may use this education assistance program for degree programs, apprenticeship/on-the-job training, and vocational flight training programs. Remedial, refresher and deficiency training are available under certain circumstances.

Eligibility for this program is determined by the Selected Reserve components. VA makes the payments for this program.

Members may be entitled to receive up to 36 months of education benefits. Benefit entitlement ends: (1) 10 years from the date of eligibility for the program; (2) when all 36 months of entitlement have been used by the member; or (3) on the day the member leaves the Selected Reserve, whichever occurs first.

To qualify members must meet the following requirements:

- Have a six-year obligation to serve in the Selected Reserve signed after June 30, 1985. Officers must agree to serve 6 years in addition to their original obligation. For some types of training, it is necessary to have a six-year commitment that began after September 30, 1990.
- Complete initial active duty for training (IADT).
- Meet the requirements to receive a high school diploma or equivalency certificate before applying for benefits.
- Remain in good standing while serving in the Selected Reserve unit.

If the member's Reserve or National Guard unit was de-activated during the period October 1, 1991, through September 30, 1995, or the member was involuntarily separated (*e.g.*, reduction-in-force) from Reserve or National Guard service during this same period, the member will retain eligibility for the MGIB-SR benefits for the full 10- year eligibility period. One will also retain MGIB-SR eligibility if discharged from Selected Reserve service due to a disability that was not caused by misconduct. The eligibility period may be extended if the member is ordered to active duty.

The Montgomery G.I. Bill is set forth in Chapter 1606 of Title 10 of the United States Code and is codified at 10 U.S.C. 16131-16137. A helpful and readily understandable explanation of the benefits available under the Montgomery G.I. Bill may be found in VA Pamphlet 22-90-3, Summary of Educational Benefits under the Montgomery G.I. Bill Selected Reserve Educational Assistance Program (October 1994), or later editions thereof. This pamphlet may be obtained from the nearest office of the Department of Veterans Affairs, the federal agency which administers the Montgomery G.I. Bill.

Also, see the veteran's benefits and services web site at: [www.va.gov/vbs/index.htm](http://www.va.gov/vbs/index.htm)

## **BENEFITS**

As of October 1, 1998, monthly G.I. Bill benefits available to members of the Selected Reserve attending a college or university increased from \$170 to \$255 for full-time students (12 credit hours), \$128 to \$191 for three-quarter-time students (9 credit hours), and from \$85 to \$127 for half-time students (6 hours) and \$63.75 for quarter-time students (3 credit hours). Vocational technical students receive 75% of the full-time rate for their first 6 months, 55% of that rate for their second 6 months and 35% of that rate thereafter.

Members who are in critical AFSCs (as designated annually by ANGRC) and who agree to enlist, reenlist or extend for a period of six years may be entitled to a Montgomery GI Bill "Kicker" benefit. Members who qualify will receive an increased entitlement of \$350.00 per month based on full-time course work. The benefit will be prorated for those who are enrolled for fewer than 12 credit hours. Kicker benefits are paid by the VA in a lump sum at the end of each term.

The maximum number of months for which a student may receive benefits under the Montgomery G.I. Bill is 36 for a full-time student (or the equivalent thereof for a part-time student).

The law provides for monetary penalties for personnel who fail to participate satisfactorily or who fail to remain in good standing.

Air National Guard units are to provide all personnel eligible for Montgomery G.I. Bill benefits with a DD Form 2304, Notice of Basic Eligibility. Personnel applying for benefits should complete and file a VA Form 221990, Application for Education Benefits. An applicant's school or employer should complete and file a VA Form 221999, Enrollment Certificate. These forms may be obtained from the Base Education Office.

## **OTHER BENEFIT PROGRAMS**

There are other federal educational benefit programs for which members of the Air National Guard may be eligible. For example, see 10 U.S.C. 16301, which authorizes the Secretary of Defense to repay higher education loans obtained by members of the Selected Reserve, and 10 U.S.C. 16302, which authorizes the Secretary of Defense to repay educational loans for certain health care professionals who serve in the Selected Reserve.

Moreover, a number of states have enacted statutes providing state tuition assistance or other educational benefits for members of the National Guard. The Base Education Office can provide details concerning such programs.

## **CONCLUSION**

The Defense Manpower Data Center has reported that, as of 31 July 1995, 72,624 (or 65%) of the 111,765 assigned Air National Guard personnel were eligible for Montgomery G.I. Bill benefits. However, only 25,634 (or 35%) of the 72,624 eligible personnel were actually participating in the program.

The Montgomery G.I. Bill can substantially enhance recruiting and retention in the Air National Guard. It can help members of the Air National Guard improve themselves and increase their earning potential. The Montgomery G.I. Bill can improve the quality of the Air National Guard force. Commanders should be diligent in bringing the program to the attention of all eligible personnel and in encouraging them to apply for benefits.

The Base Education Office and the Base Retention Office can provide more complete information concerning the Montgomery G.I. Bill.

***KWIK-NOTE: Widely disseminate this information to aid recruiting and retention. Assist members in applying for and receiving these benefits.***

**RELATED TOPICS:**

**SECTION**

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Veterans Benefits	4-8
Enlistment and Reenlistment Bonus Programs	1-14

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## Payment for Healthcare Treatment of ANG Members

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Updated by Lt Col Jeffrey M. Knickerbocker, October 2010

**AUTHORITY:** AFI 36-2910 *Line of Duty (Misconduct) Determination* (4 Oct 02, Incorporating Change 2, 5 Apr 10); ANGI 36-3001, *Air National Guard Incapacitation Benefits* (31 May 1996).

The majority of instances where the Air National Guard will be responsible for payment of medical and dental treatment for its members involves injuries sustained or diseases incurred by members who were in a duty status at the time. As such, a Line of Duty (LOD) Determination should have been made. In these instances, the LOD determination will be the authority to pay or not pay the bill. A finding of "In Line of Duty" authorizes the payment. USAF/SG will settle any hospital or treatment bills from non-DoD providers pertaining to ANG members who are injured or become ill in the line of duty when on active duty to perform Air Force directed missions. Any questions concerning payment of medical bills should be directed to the unit Accounting and Finance Officer and Judge Advocate.

The member may receive medical care and treatment, including hospitalization and rehospitalization, only for the specific LOD disease/illness/injury. In addition, the member must request approval for civilian health care from the servicing active duty medical treatment facility through the servicing unit medical facility before receiving such medical treatment.

The Related Topics below concern areas which may involve authorized payment for medical and dental treatment expenses of your members.

***KWIK-NOTE: Promptly pay only authorized medical and dental bills of ANG members.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Active Duty - Air National Guard Members	11-2
TRICARE (Champus) And DEERS	4-3
Claims	18-2
Disability of National Guard Members	4-4
Line of Duty Determinations	1-19
Medical and Dental Care During Inactive Duty Training	19-8
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Veterans Benefits	4-8

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## Veteran and Casualty Benefits

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Updated by Lt Col Jeffrey Knickerbocker, January 2005

**AUTHORITY:** AFI 34-242, *Mortuary Affairs Program*, 2 Apr 2008; AFI 34-244, *Disposition of Personal Property and Effects*, 2 March 2001; AFI 34-1101, *Assistance to Survivors of Persons Involved in Air Force Aviation Mishaps and Other Incidents*, 1 October 2001; AFI 36-809, *Civilian Survivor Assistance*, 1 July 2003; AFI 36-3002, *Casualty Services*, 26 August 1994; AFP 36-3027, *Benefits and Entitlements for Family Members of Air Force Deceased*, 3 October 2002; AFP 36-3028, *Benefits and Entitlements for Family Members of Retired Air Force Deceased*, 3 October 2002; applicable federal law cited within the accompanying chart.; applicable state law.

### BACKGROUND

The United States has a long and honorable history of providing monetary and other benefits to veterans of military service and to their dependents and survivors. The nation's obligation to its veterans was most eloquently articulated by President Abraham Lincoln, who in his Second Inaugural Address spoke of the responsibility "to care for him who shall have borne the battle, and for his widow, and his orphan." According to historical evidence, veterans' benefits are paid for extended periods of time (perhaps more than a century) after the war in which a veteran served was officially terminated. For example, the last surviving veteran of the Revolutionary War (1775-1783) did not die until 1869, some 86 years after that conflict ended. The last surviving dependent of a Revolutionary War veteran did not die until 1906, some 123 years after the end of the American Revolution. As late as 1990, the United States government was still paying pensions to five spouses of Civil War veterans (four Union and one Confederate) some 125 years after the Civil War ended in 1865. Veterans' benefits will be paid to veterans of World War II and the Korean War and to their surviving spouses well into the middle years of the 21st century. Benefits will be paid to veterans of the Vietnam War and to their surviving spouses into the 22nd century.

The statutes governing the various veterans and casualty benefit programs are complex. Different programs have different standards for eligibility. In some instances, a person must have served on active duty for a continuous period of more than 30 days in order to qualify for benefits. Such a time requirement may disqualify members of the Air National Guard who did not serve on extended active duty from being eligible for certain veterans' benefits. Dishonorable or bad conduct discharges, or discharges under other than honorable conditions may, in some circumstances, preclude eligibility for VA benefits. Questions concerning eligibility should be referred to the Staff Judge Advocate.

Statutes also change over time. Until recently, for example, if a Guardsman suffered a heart attack while in inactive duty training (IDT) status (the typical status for a member performing a UTA), that Guardsman or his survivors were excluded from obtaining certain benefits. Now, that Guardsman will receive more of the benefits afforded to his or her active duty brethren. (38 U.S.C. 101(24)).

Even if a Guardsman and her survivors are not eligible for some benefits during her regular drill periods, more and more Guardsmen are being activated to serve on active duty. As that happens, more Guardsmen will, unfortunately, make the ultimate sacrifice. When that occurs, their survivors will be eligible for all of the benefits afforded to active duty members.

The following information details some of the more common veterans benefits, the key personnel with whom family members of deceased members will come into contact and a chart detailing over 50 casualty benefits.

### I. FEDERAL VETERANS PROGRAMS FOR ANG MEMBERS

#### Montgomery G.I. Bill

One of the most familiar programs is the Montgomery G.I. Bill, which provides educational benefits to members of the Air National Guard and other components of the Selected Reserve. The Montgomery G.I. Bill, which is

authorized by 10 U.S.C. 16131 -16137, is the subject of a separate topic of the same title in this Commander's Deskbook.

## **SGLI**

Members of the Air National Guard come within the coverage of the Servicemen's Group Life Insurance (SGLI) program administered by the Department of Veterans Affairs. The SGLI program is authorized by 38 U.S.C. 1965 - 1979. Congress has continually increased SGLI benefits to its current level of \$250,000. SGLI coverage protects a member of the Air National Guard on a full-time basis, not just during duty days. The coverage is automatic, unless a Guard member elects in writing not to be insured or to be insured for a sum less than \$250,000. 38 U.S.C. 1967 allows eligible members to apply for any lesser amount divisible by \$10,000. The low premiums for SGLI coverage are deducted from a Guard member's military pay each month. It is the responsibility of MPF personnel to prepare change of beneficiary forms (when requested by a Guard member to do so) and to attend to other administrative aspects of the SGLI program. Upon retirement, a member of the Air National Guard can continue SGLI coverage by arranging to pay the prescribed premiums, can convert this coverage to a commercial policy, or convert this coverage to the Veterans Group Life Insurance (VGLI) program.

## **Home Mortgage Loan Guaranties**

Certain veterans are eligible for home mortgage loan guaranties from the Department of Veterans Affairs. The home loan mortgage guaranty program is authorized by 38 U.S.C. 3701 -3714. It is commonly referred to as the "VA loan" program. Because the federal government is guaranteeing the repayment of a significant percentage of the home mortgage loan in case of default by the veteran, the program is particularly attractive for mortgage lenders. Veterans who are eligible for home mortgage loans guaranteed by the Department of Veterans Affairs can obtain lower interest rates on these "VA loans" than they can obtain on conventional loans from mortgage lenders. Lower interest rates translate to substantial savings in interest payments over the course of a home mortgage loan. Lenders sometimes will not require as large a down payment on "VA loans" as they do on conventional loans. Home mortgage loan guaranties currently are authorized under 38 U.S.C. 3702 for veterans who, amongst others, have served at least six years in the National Guard or were discharged from the National Guard with less than six years of service because of a service-connected disability.

## **Civilian Employment**

Title 38 of the United States Code protects the civilian employment rights of veterans returning from active duty. Title 38 also protects the civilian employment rights of reserve personnel, including members of the Air National Guard, who have not been called to active duty. The protection of civilian employment rights is discussed in the separate topic entitled CIVILIAN EMPLOYMENT AND GUARD MEMBERSHIP in this Deskbook.

## **II. CASUALTY BENEFITS**

The survivors of an Air Force member who dies must deal with a daunting array of issues. Fortunately, though, the survivors will have the assistance of a number of people in their Air Force family to help them navigate through many of them. Some of the key personnel with whom family members will come into contact are the following:

- **Casualty Assistance Representative (CAR)** – Upon learning of the death of a military member or retiree, the MPF commander will appoint a CAR. If the deceased is a Guard member and the servicing MPF does not have casualty assistance capabilities, then HQ AFMPC/DPMCAA will assign the casualty assistance responsibility to the nearest AF installation. The CAR will assist the family members of the deceased with informing them of their benefits, help with filling out forms to claim those benefits, and resolving complaints and problems.
- **Mortuary Services Officer (MSO)** – The MSO at the base mortuary affairs office will assist family members with burial arrangements including ensuring that proper military funeral honors are given to the deceased. The MSO will be the family's liaison with the funeral home and the National Cemetery System.

- Summary Court Officer (SCO) – The SCO will be a commissioned officer appointed by the deceased's commander to inventory, safeguard and deliver as directed by the next of kin all personal effects from the deceased's work place and/or living space.
- Chaplain – The chaplain will be available to the family, especially in the first few days after the member's death, to listen to, support and console the family.
- Family Liaison Officer (FLO) – This person most likely will be a "crew counterpart" of the deceased appointed by the commander. The FLO's aim is to reduce the stress on the survivors. He or she will act as a coordinator for the other services noted above and provides referrals for grief counseling. With the family's agreement, the FLO will be present at all meetings and briefings where benefits-related information will be provided.

In addition to the support given to the family members by the individuals above, survivors will be eligible for dozens of benefits – burial, financial, educational, and more. Over 50 of these benefits are detailed in the accompanying chart.<sup>1</sup>

### III. STATE VETERANS AND CASUALTY PROGRAMS FOR ANG MEMBERS AND SURVIVORS

Commanders should also be aware that certain states have enacted statutes providing various benefits and protections to veterans and their survivors. These state statutes may deal with such topics as education and housing benefits, civilian employment rights, tax exemptions, and distinctive automobile tags. Members of the Air National Guard may be able to take advantage of some of these state statutes. Commanders should consult the Staff Judge Advocate about the laws of their particular state. More detailed information in regard to veterans benefits may be obtained from the Staff Judge Advocate or the nearest office of the Department of Veterans Affairs.

Because of the great value of these veterans benefit programs to recruiting and retention, Commanders should obtain and maintain all available booklets and information on these programs (they are usually free) in sufficient quantities for unit members, and should widely disseminate current information, addresses, telephone numbers and points of contact concerning all federal and applicable state veterans programs and benefits available to members of their unit.

### CONCLUSION

Many veterans and casualty benefits are available to Air National Guard members and their survivors. Your Staff Judge Advocate will have access to the most up-to-date information available. All unit members should be briefed periodically on these benefits and recruiters and MPF personnel should work closely with the legal office to ensure the widest possible dissemination of benefit information.

***KWIK -NOTE: Widely disseminate to all unit members current federal and state literature on veterans benefits as a recruiting and retention tool, and help your members apply for them. Know your state's veterans benefits, and consider supplementing this topic with applicable state law.***

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<sup>1</sup> The death gratuity was raised to \$6,000 after the 1981 Gulf War, and was doubled in 2003. Never the less, the war in Iraq has called national attention to this issue such that immediately preceding the president's State of the Union Address on February 2, 2005, the administration proposed a nearly \$250,000 hike in the death payments for US troops killed in combat. The Pentagon is proposing increasing the death benefit to \$100,000 for families of US troops killed in Iraq, Afghanistan, or other designated war zones and a government paid \$150,000 increase in life insurance coverage to \$400,000 for members deployed in combat. As this article is being published the new benefit proposals have begun a budgetary battle between defense and other domestic spending which will not be resolved form many months.

**RELATED TOPICS:**

**SECTION**

Benefits	4-2
Civilian Employment and Guard Membership	23-8
Line of Duty Determinations	1-19
Montgomery G.I. Bill	4-6
Veterans' and Casualty Benefits Chart	4-8(a)

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>I. Burial Benefits</b>				
<b>1. Expenses Incident to Death: Military member</b>	<p>SecDef will pay or provide reimbursement for recovery and ID of remains; notification of next of kin; preparation of remains for burial; furnishing of uniform/other clothing; furnishing of casket/urn or both; hearse service; funeral director's services; transportation of remains; round-trip transportation and allowances for one escort; interment of remains; and, presentation of flag. Decedents covered are those who die while on AD, IDT, traveling to/from AD or IDT, hospitalized or undergoing treatment for injuries or illness incurred while on AD/IDT, performing funeral honors duty, ROTC members on duty, and any applicant accepted for enlistment. Also, if decedent was a retiree and died outside of U.S., or was outside of U.S. while a dependent of such a member, SecDef will pay for first 5 items mentioned above plus SpaceA transport of casket. Other services paid for on reimbursable basis only.</p>	<p>10 U.S.C. 1481, 1482; AFI 34-242, Chapters 2 and 4</p>	<p>None unless for reimbursement</p>	<p>Mortuary Services Officer (MSO) at base mortuary affairs office;  HQ AFSVA/SVPM  10100 Reunion Place  Suite 260, San Antonio, Texas 78216-4138  1-800-531-5803</p>

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>2. Expenses Incident to Death: Military member's family's travel &amp; allowances</b>	If member died while on AD or IDT, SecDef will pay for round-trip travel and allowances to burial service for spouse (including a remarried surviving spouse), unmarried children, or, if spouse/children are not provided w/travel, the parents of deceased. If none of the above is provided w/travel, person directing disposition of remains and two close family members may be provided w/travel expenses.	37 U.S.C. 411f; AFI 34-242, para. 2.31-2.34	None	MSO
<b>3. Expenses Incident to Death: Civilian employee</b>	SecDef will pay for round-trip transportation and allowances for one escort and presentation of flag to next of kin and parents when civilian employee dies in connection with war or terrorist incident.	10 U.S.C. 1482a	None	MSO
<b>4. Expenses Incident to Death: Dependent</b>	SecDef will pay for transporting remains of dependent if dependent of member dies while member is on AD and may, on a reimbursable basis, pay for mortuary services and supplies if that action is practicable and local services are cost prohibitive.	10 U.S.C. 1485; AFI 34-242, Chapter 4	None unless for reimbursement	MSO
<b>5. Expenses Incident to Death: Other U.S. citizen</b>	SecDef may pay, on a reimbursable basis, for mortuary services and supplies for the following citizens who die outside of U.S. if local mortuary services and supplies are	10 U.S.C. 1486; AFI 34-242, Chapter 4	None unless for reimbursement	MSO

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
	not available or cost is prohibitive: an employee of a humanitarian agency accredited to the armed forces (Red Cross, USO); any civilian performing a service directly for SecDef under contract; any officer/member of merchant vessel operating for SecDef; any person on duty with armed forces and paid from non-appropriated funds; any person specifically requested by SecState; and any dependent of person mentioned above if dependent is outside of U.S. with that person.			
<b>6. Transportation of remains of retired members or dependents who die in military medical facilities</b>	SecDef will transport or pay for transportation to place of burial the remains of member entitled to retired pay or dependent of such member, when that person dies while admitted to military medical facility.	10 U.S.C. 1490	None unless for reimbursement	MSO
<b>7. Funeral honors detail</b>	Funeral honors detail, including folding and presentation of flag and playing of Taps, will be provided for the funeral (1) of any member who dies on Active Military <sup>1</sup> status, or (2)	10 U.S.C. 1491; 38 U.S.C. 2301(f); AFI 34-242, para. 2.20	AF 1946	MSO

<sup>1</sup> "Active Military" means a person who served (1) on active duty, (2) any period of ADT (active-duty training) during which the individual was disabled or died from disease or injury incurred or aggravated in the line of duty, or (3) any period of IDT (inactive-duty training) during which the individual was disabled or died from the injury incurred or aggravated in the line of duty, or from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training, and who was discharged or released therefrom under conditions other than dishonorable. 38 U.S.C. 101(2), (24).

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
	for a member or former member of the Guard or Reserves who completed an enlistment or initial obligation of service or was discharged before completing initial commitment because of injury incurred in line of duty and their service was honorable, or for person who died while a member of the Guard or Reserves.			
<b>8. Flag</b>	Flag provided to next of kin or associate/friend of any Active Military <sup>1</sup> member who: (1) was in any war or served after 1/31/55 and served at least one enlistment unless discharged because of injuries incurred in line of duty, or (2) was entitled to retired pay or would have been but for not reaching age 60; or (3) for a member or former member of the Guard or Reserves who completed an enlistment or initial obligation of service or was discharged before completing initial commitment because of injury incurred in line of duty and their service was honorable, or for person who died while a member of the Guard or Reserves.	38 U.S.C. 2301; AFI 34-242, para. 2.18	VA 21-2008; DD 214	MSO; VA 1-800-827-1000; Post Office; Funeral home <a href="http://www.cem.va.gov/">www.cem.va.gov/</a>

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>9. Burial and funeral expense allowance</b>	\$300 to help cover funeral expenses of an Active Military <sup>1</sup> member eligible for retired pay, or who served in a war or was released from Active Military <sup>1</sup> service for a disability and body is not claimed or insufficient money is available for burial.	38 U.S.C. 2302, 2304	VA 21-530; DD 214; DD 1300 or state death certificate; copies of paid funeral/burial expenses	Casualty Assistance Representative (CAR) <sup>2</sup> ; VA 1-800-827-1000 <a href="http://www.cem.va.gov/">www.cem.va.gov/</a>
<b>10. Death in VA facility</b>	\$300 and transportation for burial of member who served on Active Military <sup>1</sup> status and who died in a VA hospital or nursing home or one in which the VA contracts or pays for.	38 U.S.C. 2303(a)	VA 21-530; DD 214; DD 1300 or state death certificate; copies of paid funeral/burial expenses	CAR; VA 1-800-827-1000
<b>11. Plot interment allowance</b>	\$300 for plot allowance in any cemetery for member who (1) is eligible for burial in a national military cemetery (see I.15. below) but member is buried in a non-federal military cemetery; or (2) is eligible for burial under (a) 38 USC 2302 (see I.9 above) or (b) 38 USC 2303 (a) (see I.10 above) or (c) was discharged from Active Military <sup>1</sup> service for a disability incurred in the line of duty, and person is buried in a non-military cemetery (if (2) (a) through (c), then \$300 will be offset by any amount paid by non-federal gov't agency or employer)	38 U.S.C. 2303(b)	VA 21-530; DD 214; DD 1300 or state death certificate; copies of paid funeral/burial expenses	CAR; VA 1-800-827-1000 <a href="http://www.vba.va.gov/VBA/benefits/factsheets/#BM7">http://www.vba.va.gov/VBA/benefits/factsheets/#BM7</a>

<sup>2</sup> See AFI 36-3002, Attachment 20 for casualty assistance areas of responsibility by zip code to determine which base to contact for a CAR. If the base has since closed since the publication of this AFI, contact the base nearest to you. Or, go to [http://www.afpc.randolph.af.mil/casualty/Assistance\\_Base\\_Locator.asp](http://www.afpc.randolph.af.mil/casualty/Assistance_Base_Locator.asp).

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>12. Headstones and markers</b>	Marker furnished for grave of any US military member eligible for burial in a national cemetery (see I.15 below) and any individual entitled to retired pay or would have been but for not reaching age 60 who is buried in a private cemetery even if headstone already furnished at private expense. Headstone or marker furnished for grave of Active Military <sup>1</sup> member or spouse who remains are unavailable.	38 U.S.C. 2306; AFI 34-242, para. 2.23	VA 40-1330; DD 214; Reserve Retirement Eligibility Benefits Letter (Guardsmen or Reservists only)	Memorial Programs Services (402E) Department of Veterans Affairs 810 Vermont Street, NW Washington, D.C. 20420-0001 Fax 1-800-455-7143 <a href="http://www.cem.va.gov/">www.cem.va.gov/</a> Or funeral home
<b>13. Burial and funeral expenses for death from service-connected disability</b>	Up to \$2,000 for burial and funeral expenses of a member who served on Active Military <sup>1</sup> service who died as a result of a service-connected disability. Paid in lieu of money available under I.9., I.10., and I.11, section (2) of summary, above.	38 U.S.C. 2307	VA 21-530; DD 214; DD 1300 or state death certificate; copies of paid funeral/burial expenses	VA 1-800-827-1000 <a href="http://www.vba.va.gov/VBA/benefits/factsheets/#BM7">http://www.vba.va.gov/VBA/benefits/factsheets/#BM7</a>
<b>14. Transportation of veteran to national cemetery</b>	Transportation to a national cemetery of member who served on Active Military <sup>1</sup> service and who died due to a service-connected disability or received/eligible to receive disability compensation. Paid in addition to any amount paid under I.9. and I.13. above.	38 U.S.C. 2308	none	MSO
<b>15. Internment in national cemeteries</b>	Internment in a national cemetery available to any member who dies on Active Military <sup>1</sup> service; any Guard or Reserve member who dies, under honorable conditions, of	38 U.S.C. 2402; AFI 34-242, para. 2.22	Proof of service letter, obtained from MPF	Funeral home; VA 1-800-827-1000; List of National Cemeteries: <a href="http://www.cem.va.gov/">www.cem.va.gov/</a> Burial eligibility in National

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
	injuries incurred while on ADT or IDT or hospitalization/treatment at U.S. expense; ROTC member under similar conditions as above; any citizen who served with an allied government during time U.S. was at war; any person entitled to retired pay or would have been but for not reaching age 60; spouse and minor child and, at VA Sec discretion, unmarried adult child, of any person listed above; and, anyone else in discretion of VA Sec.			Cemeteries: <a href="http://www.cem.va.gov/">www.cem.va.gov/</a> Arlington National Cemetery: Superintendent Arlington Nat'l Cem. Interment Services Branch Arlington, VA 22211 1-703-607-8585 <a href="http://www.arlingtoncemetery.org">www.arlingtoncemetery.org</a> State Cemeteries: <a href="http://www.cem.va.gov/">www.cem.va.gov/</a> and follow the cemeteries link.
<b>16. Presidential memorial certificate</b>	Certificate bearing the signature of the President and expressing the country's grateful recognition of the member's Active Military <sup>1</sup> service, who was discharged under honorable conditions, in the Armed Forces provided to next of kin or friend.	38 U.S.C. 112	DD 214; DD 1300 or state death certificate	Presidential Memorial Certificates (41A1C) Dept. of Veterans Affairs 5109 Russell Road Quantico, VA 22134-3903 (202) 565-4964 Fax (202) 565-8054 <a href="http://www.cem.va.gov/">www.cem.va.gov/</a>
<b>II. Financial Benefits</b>				
<b>1. Death Gratuity: Military member</b>	\$12,420 (calendar year 2005; cost of living increases thereafter) tax-free paid in about 24 hours of notification of death to living survivor of member highest on the following list: (1) spouse, (2) children, (3) parents, persons in loco parentis or siblings, when member was on AD, ADT, IDT, while member was traveling to/from such duty, to ROTC members under similar	10 U.S.C. 1475 et seq.; 38 U.S.C. 1317	DD Form 397; DD Form 93; Initial Death Report or death certificate	Casualty Assistance Representative (CAR); <a href="http://www.afpc.randolph.af.mil">www.afpc.randolph.af.mil</a>

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
	circumstances, to persons accepted into service while traveling to duty, or to members who die within 120 days after release from AD or IDT when death resulted from injury or disease incurred during such duty or travel to/from that duty.			
<b>2. Death Gratuity: Dependent of member &amp; employee assigned to intelligence duties</b>	Amount equal to annual basic pay or salary paid to surviving dependents of member or employee assigned to intel duties and whose identity as such was concealed, or was engaged in clandestine activities, when such person dies from injuries outside of the U.S. and death was from hostile or terrorist activities or occurred in connection with activity having substantial risk. Considered a gift and is in lieu of \$12,000 under 10 U.S.C. 1475.	10 U.S.C. 1489	Contact CAR	CAR
<b>3. Unpaid pay &amp; allowances</b>	Any unpaid pay, per diem, and bonuses, up to 60 days accrued leave, amounts due for travel, and household good shipments of member and dependents. Any amounts due are paid to designated beneficiary or SCP. <sup>3</sup>	10 U.S.C. 2771 (settlement of accounts); 37 U.S.C. 554 (HHG shipments)	Pay: SF 1174; DD 93; DD 2058 (State of Legal Residence Certificate); DD 1300 or state death certificate	CAR; TMO; DFAS-DE Building 444 6760 East Irvington Place, Denver, CO 80279 1-800-616-3775 <a href="http://www.dfas.mil">www.dfas.mil</a>

<sup>3</sup> “SCP” means that, if there is no designated beneficiary, or the law states that the payment will be made “by law”, any money due will be paid to the first eligible recipient in the following order: (1) The member’s lawful surviving spouse; (2) Child/children; (3) Parents in equal shares or to the surviving parent. For some benefits, if none of the above remain alive, then payment will be made to the first eligible recipient of the following: (1) duly appointed legal representative of the member’s estate (i.e. executor); (2) according to the state law in which member was domiciled.

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>4. Servicemember's Group Life Insurance (SGLI)</b>	\$250,000, unless another amount was selected. Tax-exempt. Paid to designated beneficiary or SCP. <sup>2</sup>	38 U.S.C. 1965 et seq.; 38 U.S.C. 1970; AFI 36-3008	VA SGLV 8283; certified copy of DD 1300 or state death certificate (if deceased was not a current member)	Office of the SGLI 290 West Mt. Pleasant Ave. Livingston, NJ 07039 1-800-419-1473 FAX 1-877-832-4943 <a href="mailto:osqli.claims@prudential.com">osqli.claims@prudential.com</a> VA 1-800-827-1000
<b>5. Dependency and Indemnity Compensation (DIC)</b>	Amount varies, starting at \$993 per month, paid to spouse, children, and/or parents of any Active Military <sup>1</sup> member who died while on Active Military <sup>1</sup> status or from a service-connected or compensable disability. Amount of DIC based upon number of children, educational status of children, disabilities of children, number of surviving parents, and parental income. <sup>4</sup> <i>Line of duty determination dependent.</i>	38 U.S.C. 1304, 1310-1318; 38 U.S.C. 1101 et seq.	VA 21-534 (for surviving spouse or child); VA 21-535 (for parents)	CAR; VA 1-800-827-1000 <a href="http://www.vba.va.gov/VBA/">http://www.vba.va.gov/VBA/</a>
<b>6. Non-Service-Related Death Pension</b>	Monthly payments of the difference between program's income limits and the recipient's actual income paid to the surviving spouse or child of a member who served 90 days or more of Active Military <sup>1</sup> service with at least 1 day during a war, or who was receiving compensation or retired pay for a service-connected disability.	38 U.S.C. 1541 et seq.	VA 21-534	VA 1-800-827-1000. <a href="http://www.vba.va.gov/VBA/">http://www.vba.va.gov/VBA/</a>

<sup>4</sup> No DIC shall be paid to the surviving spouse unless spouse was married to member (1) before the expiration of 15 years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated; or (2) for one year or more; or (3) for any period of time if a child was born of the marriage, or was born to them before the marriage. 38 USC 1304.

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>7. Survivor Benefit Plan (SBP)</b>	Automatic monthly annuity paid to spouse or children of deceased AD member who dies in the line of duty or qualifies or is eligible to receive retired pay. Also, an electable annuity for retired AD members. Terminates to spouse upon spouse's death or remarriage before age 55. If beneficiary will receive DIC, only amount in excess of DIC will be paid. <i>Line of duty determination dependent for automatic annuity.</i>	10 U.S.C. 1447-1455 (specifically 1448(d) and 1450); AFI 36-3006	DD 2656.7; IRS W-4P; SF 1199A	CAR; VA 1-800-827-1000; DFAS U.S. Military Annuitant Pay POB 7131 London, KY 40742-7131 1-800-321-1080 Fax 1-800-469-6559
<b>8. Reserve Component SBP</b>	Electable monthly annuity paid to spouse or children of deceased Guard or Reserve member who would have been eligible for retired pay but for not reaching age 60 and is married or has a dependent child when member elects to participate in the SBP.	10 U.S.C. 1447-1455; AFI 36-3006	Call contact number; send in applicable death, marriage, or divorce certificates; HQ ARPC will send required forms.	HQ ARPC/DPSSE 6760 E. Irvington Pl. Denver CO 80280-4020 1-800-525-0102 ext. 71228
<b>9. Air Force Aid Society emergency financial assistance</b>	The Air Force Aid Society (AFAS) offers interest-free loans and grants during personal or family emergencies to, amongst others, spouses and dependent age children of deceased AF members who died on AD or in retired status. Assistance is temporary and based on immediate needs.	n/a	AFAS 2	Family Support Center. If no AFAS nearby, AFAS has cross-servicing agreements with Red Cross and other service's relief societies. <a href="http://www.afas.org">www.afas.org</a>
<b>10. Social Security</b>	Paid to spouse or divorced spouse, age 60 or over; or, spouse or divorced spouse regardless of age if	42 U.S.C. 403 et seq.; 20 C.F.R. Part	None – call contact number	SS 1-800-772-1213 <a href="http://www.ssa.gov/ww&amp;os2.htm">www.ssa.gov/ww&amp;os2.htm</a>

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
	<p>caring for child/children of deceased and child is under age 16 or disabled. Divorced spouse must have been married 10 years. Payments to children and dependent parents also possible. Retroactive payments permitted for up to 12 months.</p>	404, Subpart D		
<p><b>11. Social Security lump sum death payment</b></p>	<p>\$255 to the surviving spouse if he/she was living in the same household with the worker when he or she died. If no eligible spouse, then all or part of \$255 to the workers' child who would have been entitled to worker's SS benefits.</p>	20 C.F.R. 404.390 et seq.	None – call contact number	<p>SS 1-800-772-1213  <a href="http://www.ssa.gov/ww&amp;os2.htm">www.ssa.gov/ww&amp;os2.htm</a></p>
<p><b>12. Income tax exclusion</b></p>	<p>Income tax will not be owed by the estate of any military or civilian U.S. employee who died from wounds or injuries incurred in a military or terrorist action for the year in which member died and any prior taxable year in which member had served in that combat zone. Tax forgiveness begins with the year before the year in which wounds/injury occurred. Any unpaid taxes will also be forgiven.</p>	26 U.S.C. 692	<p>IRS 1040 (return not yet filed) or 1040X (for refund for tax already paid). Write name of operation and "KIA" (i.e., "Enduring Freedom – KIA") in bold letters at the top of p. 1 and on the line for the total tax. If killed in a terrorist action, write "KITA – (event)". Also, write "DECEASED," decedent's name, &amp; date of death across top of return; IRS 1310; W-2; DD 1300</p>	<p>File at:          IRS          POB 4053          Woburn MA 01888</p> <p>For private delivery services:          IRS          Stop 661          Andover MA 05501</p> <p><a href="http://www.irs.gov/publications/p559/ar02.html#d0e1157">www.irs.gov/publications/p559/ar02.html#d0e1157</a></p>

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>13. VA home loan</b>	If an AD, Guard, or Reserve member died from a service-connected disability, surviving spouse will be eligible for a VA home loan. Surviving spouse who was a co-obligor on a VA loan with any veteran will be eligible to refinance the loan.	Title 38 U.S.C. 3701 (b)(2); 3710(e)(3); 3701 et seq.	VA 26-1817	Private lender; VA 1-800-827-1000 <a href="http://www.homeloans.va.gov/index.htm">www.homeloans.va.gov/index.htm</a> Send completed forms to VA Regional Office: <a href="http://www.vba.va.gov/VBA/">http://www.vba.va.gov/VBA/</a>
<b>III. Base Benefits</b>				
<b>1. Uniformed services identification and privilege card (ID card)</b>	Provides access to health benefits, base privileges, & morale, welfare, and recreation (MWR) activities to spouse and children. Must apply for new card after death of member.	AFI 36-3026	DD Form 1172; DD 1300 or state death certificate	CAR; MPF
<b>2. Medical &amp; dental benefits</b>	On a space-available basis, comprehensive medical and dental benefits at base facilities provided to dependents of members who died while on AD of more than 30 days, or died from illness/injury incurred on AD of 30 days or less, ADT or IDT or funeral honors duty, or traveling to/from such service. Dependents of member who was entitled to retired pay or would have been entitled to retired pay but for not reaching age 60 may also receive benefits above but not until date on which member would have attained age 60.	10 U.S.C. 1076, 1077	ID card	Medical/dental clinics <a href="http://www.tricare.osd.mil">www.tricare.osd.mil</a>
<b>3. TRICARE Medical and Dental Program</b>	Managed health care program in collaboration with civilian contractors for dependents of members who died while on AD of	Medical: 10 U.S.C. 1086; 10 U.S. 1079(g); 10 U.S.C. 1099;	ID card	Medical/dental clinics <a href="http://www.tricare.osd.mil">www.tricare.osd.mil</a> <a href="http://www.tricare.osd.mil/dental/default.cfm">www.tricare.osd.mil/dental/default.cfm</a>

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
	<p>more than 30 days, or died from illness/injury incurred on AD of 30 days or less, ADT or IDT, or traveling to/from such service, dependents of members who were entitled to retired pay or would have been entitled to retired pay but for not reaching age 60 (may not receive benefits until date on which member would have attained age 60), and certain unremarried former spouses. Survivors of member on AD for more than 30 days remain eligible for benefits for 3 years at no charge to them. If member on AD for more than 30 days died while eligible for hostile pay or from injuries/disease incurred while eligible for hostile pay, dependents receive care until age 21.</p>	<p>32 C.F.R. 199.17 Dental: 10 U.S.C. 1076(a); 32 C.F.R. 199.13</p>		
<p><b>4. CHAMPVA (Civilian Health and Medical Program of the Veterans Admin.)</b></p>	<p>If not otherwise eligible for TRICARE (i.e. widow(er) remarries and new spouse divorces/dies), health care program provided to spouse/widow(er) and dependents of Active Military<sup>1</sup> service member who is totally disabled, died on Active Military<sup>1</sup> service in line of duty and not from own misconduct, had total disability at death or from a service-connected disability. Ends at remarriage or age 65.</p>	<p>38 U.S.C. 1781</p>	<p>VA 10-10d; VA 10-7959c; DD 214; School certification to obtain benefits for children who are full-time students age 18-23.</p>	<p>VA Health Administration Center CHAMPVA Eligibility POB 469028 Denver CO 80246-9028 1-800-733-8387 Fax 1-303-331-7809 <a href="http://www4.va.gov/hac/forbeneficiaries/champva/champva.asp">http://www4.va.gov/hac/forbeneficiaries/champva/champva.asp</a></p>

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>5. Commissary &amp; exchange privileges</b>	Provided to dependents of member who died while on AD (any period of time), ADT or IDT or traveling to/from such training. Also provided to unremarried former spouse.	10 U.S.C. 1061, 1062	ID card	CAR
<b>6. Basic Allowance for Housing (BAH)/Overseas Housing Allowance (OHA)</b>	May continue to occupy gov't housing for up to 180 days at no cost. If vacated before, BAH paid for balance. If living off base or overseas, receive both for 180 days. Member's death must have been in line-of-duty.	AFPAM 36-3027, para. 8	none	CAR; finance office
<b>7. Transient quarters</b>	Available to dependents of deceased on a space available basis.	AFI 34-246, Table 1.1	ID card	Base billeting office
<b>8. Legal assistance</b>	Preliminary assistance in settling estate, making new will for spouse, taxation questions (initial tax returns), and other legal matters.	AFI 51-504	ID card	Legal office
<b>IV. Educational Benefits</b>				
<b>1. Montgomery GI Bill death benefit and Post 9/11 GI school benefits</b>	Up to \$985 (plus inflation adjustments) per month for up to 36 months provided to person(s) first listed below who is surviving on date of member's death: (1) SGLI beneficiary/ies, (2) spouse, (3) children, (4) parents. (Post 9/11 GI Bill benefits dependant on service.)	38 U.S.C. 3001 et seq. (specif. 3017)	VA 22-1990; certified copy of DD 214; marriage certificate/proof of relationship; DD1300 or state death certificate <a href="http://vabenefits.vba.va.gov/vonapp">http://vabenefits.vba.va.gov/vonapp</a>	VA 1-888-GIBILL-1 (1-888-442-4551) <a href="http://www.gibill.va.gov">www.gibill.va.gov</a> <a href="http://www.vba.va.gov/benefits/">www.vba.va.gov/benefits/</a> Or contact 1 Of 4 VA regional education processing centers: <a href="http://www.gibill.va.gov/education/contact.htm">www.gibill.va.gov/education/contact.htm</a>
<b>2. Veterans'</b>	The amount of member's unused	38 U.S.C. 3201	VA 22-1990; certified	VA

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>Educational Assistance Program (VEAP) death benefit</b>	contributions to fund to be paid to person(s) first listed below who is surviving on date of member's death: (1) SGLI beneficiary/ies, (2) spouse, (3) children, (4) parents. If no such person above is living, then to the estate. Member was eligible for this program only if member entered service between 1/1/77 and 6/30/85.	et seq. (specif. 3224)	copy of DD 214; marriage certificate/proof of relationship; DD1300 or state death certificate <a href="http://vabenefits.vba.va.gov/vonapp">http://vabenefits.vba.va.gov/vonapp</a>	1-888-GIBILL-1 (1-888-442-4551) <a href="http://www.gibill.va.gov">www.gibill.va.gov</a> <a href="http://www.vba.va.gov/benefits/rocontacts.htm">www.vba.va.gov/benefits/rocontacts.htm</a> Or contact 1 Of 4 VA regional education processing centers: <a href="http://www.gibill.va.gov/education/contact.htm">www.gibill.va.gov/education/contact.htm</a>
<b>3. Survivors' and Dependents' Educational Assistance</b>	Up to \$695 per month for 45 months of full-time training or equivalent part-time training. Available to spouse and children of member aged 18 to 26 years (with some exceptions) when member died from service-connected injury or illness, has total disability, or is MIA or a POW. Payments available up to 10 years after member's death; extensions are possible.	38 U.S.C. 3501 et seq.; 38 U.S.C. 3670, 3680 et seq.	VA 22-5490; school completes VA 22-1999 <a href="http://vabenefits.vba.va.gov/vonapp">http://vabenefits.vba.va.gov/vonapp</a>	VA 1-888-GIBILL-1 (1-888-442-4551) <a href="http://www.gibill.va.gov">www.gibill.va.gov</a> <a href="http://www.vba.va.gov/benefits/rocontacts.htm">www.vba.va.gov/benefits/rocontacts.htm</a> Or contact 1 Of 4 VA regional education processing centers: <a href="http://www.gibill.va.gov/education/contact.htm">www.gibill.va.gov/education/contact.htm</a>
<b>4. Scholarships</b>	Many universities and colleges offer scholarships for children of deceased members.	n/a	--	High School guidance counselor, local library, local schools
<b>4.1. Gen Henry H. Arnold Education Grant Program</b>	\$1,500 awarded to 5000 recipients; eligible recipients must be dependent of an AD, retired, or deceased AF member, or spouse of AD or deceased AF member.	n/a	The AFAS Grant Program application	AFAS Education Assistance Dept. 241 18 <sup>th</sup> St. South, Suite 202 Arlington, VA 22202-3409 1-800-429-9475 DSN 327-3072 <a href="http://www.afas.org">www.afas.org</a>
<b>V. Other Benefits</b>				

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>1. Civil Service job preference</b>	Unmarried spouse of veteran who served on AD during a war and the mother of such a veteran, under some circumstances, will receive 10-point preference for federal service employment.	Title 5 U.S.C. 2108, 3309	SF 15; official notice of death or DD 1300 or state death certificate; DD 214	Prospective employer; Office of Personnel Management 1900 E Street NW Wash DC 20415-1000 1-202-606-2532
<b>2. State benefits</b>	Varies but can include bonuses, educational assistance, employment opportunities, tax relief, and more.	State laws	--	VA, local vets groups, local government officials
<b>3. Lapel button</b>	Provided, upon request, to next of kin of members who died on EAD or while assigned to ANG/AFR in a drill status.	AFI 36-3002, para. 4.8.9	none	CAR
<b>4. Gold Star lapel button</b>	Provided to widows, parents, and next of kin of members who died in war or armed conflict.	10 U.S.C. 1126; AFI 36-3002, para. 4.8.9	none	CAR
<b>5. Support Groups</b>	Many organizations provide support to Air Force families who have lost a military member. Some of those organizations are listed below.	n/a	--	--
<b>5.1. Air Force Survivor Assistance</b>	DoD office available to meet family needs upon the loss of a military member, retiree, or civilian employee of the military.	AFPD 34-11	none	HQ USAF/ILVQ Suite 413 1111 Jefferson Davis Highway Arlington VA 22202-4306 1-877-USA-F-HELP (1-877-872-3435) <a href="mailto:USAFHELP@Pentagon.af.mil">USAFHELP@Pentagon.af.mil</a> <a href="http://survivorassistance.afsv.af.mil">http://survivorassistance.afsv.af.mil</a>
<b>5.2. Tragedy</b>	Non-profit organization providing	n/a	none	TAPS National HQ

BENEFIT	SUMMARY OF BENEFIT	LEGAL AUTHORITY	REQUIRED DOCUMENTATION	CONTACT INFORMATION
<b>Assistance Program for Survivors (TAPS)</b>	24/7 assistance to all survivors affected by a death in the armed forces.			1621 Connecticut Avenue NW Suite 300, Washington DC 20009 1-800-959-TAPS (8277) <a href="mailto:help@taps.org">help@taps.org</a> <a href="http://www.taps.org">www.taps.org</a>
<b>5.3. Gold Star Wives of America, Inc.</b>	Non-profit organization providing support to survivors of members who die on AD or as a result of service-connected disabilities.	n/a	\$25 per year membership; application form	Gold Star Wives of America, Inc. P.O. Box 361986 Birmingham AL 35236 1-888-751-6350 <a href="http://www.goldstarwives.org">www.goldstarwives.org</a>
<b>6. AF Village Foundation</b>	Located in San Antonio TX; provides furnished living space to spouse/children for up to 1 year after death of Air Force officers; provides living space for financially-needly widows/widowers of Air Force officers.	n/a	Contact AF Villages	Air Force Village Foundation 5100 John D. Ryan Blvd. San Antonio, TX 78245-3502 1-800-762-1122 <a href="http://www.airforcevillages.com">www.airforcevillages.com</a>
<b>7. AF Village West</b>	Military-oriented continuing care retirement community for retired officers, spouse, widow/widowers of all branches age 55 or older.	n/a	Contact AF Village West	Air Force Village West 17050 Arnold Drive Riverside, CA 92518 1-800-729-2999 <a href="http://www.afvw.com">www.afvw.com</a>

Forms available at Air Force Personnel Center website: [www.afpc.randolph.af.mil/](http://www.afpc.randolph.af.mil/) and [www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm](http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm)

Current as of: 23 Sept 2010

# Chapter 5, Civilian Personnel Matters

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# Civilian Employee Discipline

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**Updated by Col Julio R. Barron, June 2009**

**AUTHORITY:** 32 U.S.C. § 709; Technician Personnel Regulation (TPR) 700, 715, and 752; applicable state regulations; local collective bargaining agreements.

## INTRODUCTION

Commanders and supervisors must ensure that the work environment is disciplined and constructive in order to accomplish the mission. To achieve the proper environment, Air National Guard commanders must understand the civilian employee discipline system that applies to federal technicians. As your unit may also employ state employees, you will also need to understand the procedures applicable to them. However, this topic will focus only on federal technicians.

## AUTHORITY

The National Guard Technician Act, 32 U.S.C. § 709, provides that the Adjutant General employ and administer federal technicians. Thus, the Adjutant General is the final authority for the agency on adverse and disciplinary actions. An adverse action is a removal, suspension, furlough for 30 days or less, or reduction in grade or pay. Adverse actions may be for disciplinary reasons or non-disciplinary reasons. A disciplinary action is an action taken by management to correct an employee's delinquency or misconduct. Disciplinary actions include oral admonishments, reprimands, suspensions, removals, and reductions in pay or grade.

Disciplinary actions should be taken promptly, equitably, and only when necessary. Disciplinary or adverse action must not be taken against employees based upon their marital status, political affiliation, race, color, religion, sex, national origin, age, or disability.

## DUAL STATUS TECHNICIANS

Because the National Guard is not a full time active force, some National Guard members are employed in a full time status to meet the day to day administrative, training, and logistical needs of the National Guard. National Guard Federal Technicians are full time employees of the National Guard with responsibility for insuring the readiness of the National Guard. 32 U.S.C. § 709. Technician duties involve caring for material, armament and equipment of the National Guard as well as performing “such Guard functions as training, employment in State headquarters, air defense, military support of civil defense, and aircraft operations.” S. Rep. No. 1446, 90<sup>th</sup> Cong., 2d Sess. 4-5 (1968).

Title 32 U.S.C. § 709(d) provides that a technician “is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States.” This authority authorizes the supervision of technicians by state adjutants general under regulations prescribed by the Secretaries of the Army and Air Force. 32 U.S.C. § 709(a). Congress recognizes the unique status of technicians as federal employees in a State agency and provides for continuing administrative authority. Technicians constitute a special and distinct class of federal employees. *California National Guard v. Federal Labor Relations Authority*, 697 F.2d 874, 877 (9<sup>th</sup> Cir. 1983); *New Jersey Air National Guard v. Federal Labor Relations Authority*, 677 F.2d 276 (3<sup>rd</sup> Cir. 1982).

National Guard technicians serve concurrently in three ways: (1) they perform full-time civilian work in their units; (2) they perform military training and duty in their units; and (3) they are available to enter active Federal service at any time their units are called, or “federalized.” Technician employment is conditioned on current membership in the National Guard, and technicians must meet military compatibility requirements, “because the technician’s civilian and military functions are integrated.” *Simpson v. United States*, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979).

See also *AFGE, Local 2953 v. FLRA*, 730 F.2d at 1544-46; 32 U.S.C. § 709. National Guard dual-status technicians are federal civilian employees who wear their service uniform and adhere to the customs and courtesies of their service. They are mandated to maintain military status as an Army or Air National Guard servicemember as a condition of continued employment. 32 U.S.C. § 709(e)(1); See also *Watson v. Arkansas National Guard*, 886 F.2d 1004, 1005, n. 1 (8<sup>th</sup> Cir. 1989).

## REQUIREMENTS FOR DISCIPLINARY ACTIONS

A disciplinary action may be taken only if such action promotes the efficiency of the service. You must be prepared to support the factual basis for the disciplinary action by a preponderance of the evidence, if the matter goes to a hearing as discussed below. The following elements must be supportable:

1. The reason for the action taken, *i.e.*, that the alleged misconduct occurred;
2. A connection between the misconduct or adverse action and the employee's job, *i.e.*, that the action will in fact promote the efficiency of the service; and
3. That the penalty imposed is appropriate to the offense. (Appendix A-5, TPR 752, provides guidelines).

Progressive discipline is the general rule. That is, supervisors should move through the disciplinary options starting with the lowest appropriate sanction.

## DISCIPLINARY PROCEDURES

The following are the disciplinary procedures outlined in TPR 752. However, before using them, you should ensure that these procedures do not violate, and are consistent with your local collective bargaining agreement.

### Step 1: PREPARE AND SERVE PROPOSED NOTICE OF ACTION AND RESPONSE

1. Gather the facts.
2. Interview the employee, if necessary. (See below concerning *Weingarten* rights).
3. Consult with your Human Resources Officer (HRO), Labor Relations Specialist (LRS), and SJA to consider options and determine appropriate action.
4. With guidance from your HRO, LRS and SJA, the Proposing Official (normally the first or second level supervisor) should prepare a Notice of Proposed Action. This Notice must, at a minimum, inform the employee of the following:
  - a. Notice of the precise action being proposed, *i.e.*, suspension, removal, etc.;
  - b. The reason for the action (keep it factual, simple and straight forward);
  - c. Notice of the employee's right to review the material or evidence relied upon to support the reason for the action;
  - d. The date when the proposed action will take place;
  - e. The right to respond orally, in writing, or both, and to furnish documentary evidence;
  - f. The amount of official time allowed for preparation of a response; and
  - g. The right to representation (union representative, private attorney, or other person).

Note about representation: The union has a right to have a representative present at any investigative examination of a bargaining unit employee if the employee believes discipline will result and the employee requests union representation. *NLRB v. Weingarten*, 420 U.S. 251 (1975)

#### Step 2: RECEIVE RESPONSE FROM TECHNICIAN

Once the employee has been given notice of the proposed action, he or she must be given a reasonable amount of time, but not less than seven days, to answer orally and in writing and to present affidavits and other documentary evidence in support of the reply. The employee's answer must be considered in arriving at a decision.

#### Step 3: NOTICE OF DECISION

After the employee responds, the "Deciding Official" reviews both the Notice Letter and the employee's response. The Deciding Official is normally the next level supervisor above the Proposing Official, but it may in fact be the same person. Afterwards, the Deciding Official will make a final decision as to the appropriateness of the proposed action. The decision must be in writing and served on the employee. Again, the decision should be written with help from both the SJA, LRS and HRO.

Before making a final decision the Deciding Official must consider all of the appropriate Douglas factors (there are twelve) governing proper penalty selection (As is common in the law, "Douglas" factors are so-called because in a previous case involving someone named Douglas, these "factors" were formulated for the first time). These factors are:

- (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) The employee's past disciplinary record;
- (4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- (6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) Consistency of the penalty with any applicable agency table of penalties;
- (8) The notoriety of the offense or its impact upon the reputation of the agency;
- (9) The clarity with which the employee was on notice of any rules which were violated in committing the offense, or has been warned about the conduct in question;
- (10) The potential for employee's rehabilitation;
- (11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

See Appendix A-2 and A-5, TPR 752 for a guide to selecting an appropriate penalty.

The written decision must also inform the employee of appeal rights.

The reasons given in the notice of decision for the action taken must be the same as those stated in the notice of proposed action, since the employee's rights to minimal due process include the right to notice of the true reasons for an action. The employee is entitled to specific notice of the charges on which the adverse action is based, and the action cannot be adjudicated on the basis of charges that might have been, but were not, made. As a general rule, the deciding official is limited to considering the charges, reasons, and penalties proposed in the notice of proposed action. If the deciding official decides that action should be taken for different reasons or that the penalty should be more severe, a new notice of proposed action should be issued.

#### Step 4: APPEAL

If the employee is a bargaining unit employee, the employee may either file a grievance under the negotiated grievance procedure of the local collective bargaining agreement; OR take a direct appeal to the Adjutant General; OR have the appeal heard by a hearing examiner who will make a recommendation to the Adjutant General. The Adjutant General will make a final decision on such an appeal.

If the employee is not a bargaining unit employee, the employee may take a direct appeal to the Adjutant General; OR have the appeal heard by a hearing examiner who will make a recommendation to the Adjutant General. The Adjutant General will make a final decision on such an appeal.

Hearing Examiners usually come from another state and are trained and certified by the National Guard Bureau. Your HRO will make the administrative arrangements for a hearing. The hearing examiner will write a report and make a recommendation to the Adjutant General who will make the final decision.

Any employee may use Equal Employment Opportunity procedures, should the circumstances so warrant.

Failure to meet the burden of proof as outlined above (preponderance of the evidence), could result in not only having the action overturned or mitigated with the individual reinstated if the overturned action was removal, but also could result in an award of back pay and attorneys fees.

***NOTE: Because of the ultimate review of your decisions by the Adjutant General, civilian employee adverse action and disciplinary requirements and procedures must strictly be followed.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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# Employee Interrogation

Updated by Col Julio R. Barron, June 2009

**AUTHORITY:** AFI 90-301, *Inspector General Complaints* (30 Jan 01), para 2.38; *NLRB v. Weingarten*, 420 U.S. 251 (1975).

## GENERALLY

Two competing interests are involved whenever a dual-status technician, in a civilian capacity, or a civilian employee is questioned about criminal or other wrongful conduct that relates to the employee's National Guard employment. They are the National Guard's need for information from the employee and the employee's constitutional and statutory rights.

## CRIMINAL CONDUCT

The U.S. Constitution's Fifth Amendment offers protection to individuals suspected of committing crimes. *If the individual is subjected to a "custodial interrogation"*, the individual must be informed of the right to remain silent when the requested information would incriminate or tend to incriminate them. The person has the right to consult with an attorney and to have an attorney present during the interview. Also, if they start answering questions, they can stop answering questions at any time. These are the so-called "*Miranda*" rights. A rights advisement card is available from your Security Forces that you can use to read these rights in their full content to the employee. If the person being questioned is not subjected to a "custodial interrogation," no *Miranda* rights advisement need be given. State law may provide broader rights for individuals. Consult with your Staff Judge Advocate before any questioning of a person suspected of criminal conduct.

When contemplating questioning civilian public employees, also consult 8-9 "ADVISING SUSPECTS OF THEIR RIGHTS" and 16-11 "INVESTIGATIONS AND INQUIRIES."

## ADDITIONAL RULES FOR DUAL-STATUS TECHNICIANS AND CIVILIAN EMPLOYEES

### Right to Have a Union Representative Present

In 1975 the U.S. Supreme Court, in the case of *NLRB v. Weingarten*, established a right for an employee to have union representation if the employee believed disciplinary action could result from questioning by the employer and a union representative was requested. This right applies to state employees and technicians. In the federal sector, 5 U.S.C. § 7114 (a) (2) (B) established a right for a labor union as well to represent employees.

The union's and the employee's statutory right to union representation in connection with an INVESTIGATION is applicable when four conditions are present:

1. There is a meeting in which management questions a bargaining unit employee;
2. The examination is in connection with an investigation (it need not be an OSI or Security Police or even a formal investigation);
3. The employee can reasonably believe that discipline could result from the examination; and
4. The employee requests representation.

Note: While there is no federal statutory requirement to advise a technician of the right to union representation beyond the annual posting of notice of such right, the applicable collective bargaining agreement may so require. Additionally, state law may provide such a requirement as to state employees.

### **Limitations and Effect When the Right to Union Representation is Exercised**

Other guidelines concerning this rule are:

1. It does NOT apply to an actual counseling session;
2. The role of the union representative during the interview is to:
  - a. Clarify the facts;
  - b. Suggest other employees who may have knowledge of the facts; and
  - c. Ensure the employer does not initiate or impose unjust punishment;
3. Individuals being investigated may not serve as representatives for other employees being investigated until their own investigations are completed;
4. An employee may waive the right to union representation; and
5. Once an employee's request for a union representative is made, management may:
  - a. Grant the request; or
  - b. Suspend the interview; or
  - c. Give the employee the choice of having an interview without a union representative or having no interview.

### **Required Disclosure with Immunity**

Dual-status technicians, in their civilian capacity, and civilian employees also have a duty to account for the performance of their duties and failure to provide desired information can serve as a basis for disciplinary action or removal under certain circumstances.

Employees cannot be discharged simply because they invoke their Fifth Amendment right against self-incrimination. Statements coerced by a threat of discipline or removal cannot be used against the employee in a subsequent prosecution.

Employees can be removed for not replying if they are adequately informed both that they are subject to discharge for not answering and that their replies (and any evidence subsequently discovered from their replies) cannot be used against them in a criminal case. If you so inform the employee, you will be bound by this, so that if you, higher military authorities or federal or state civilian officials later decide to seek prosecution against that employee, any information the employee has been compelled to disclose, and any information derived from that disclosure, based upon your representation that no prosecution would be sought, will probably NOT be admissible in any prosecution - military or civilian - against that employee.

Note: Always check with the Department of Justice and/or U.S. Attorney through proper channels before making such a promise of immunity.

### **Consequences of Participating or Not Participating in an Interview**

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, etc.), and failure to do so can be an unfair labor practice by management. Basically, the employee must be advised:

1. Of the purpose of the interview;
2. That no reprisal will take place if the employee refuses to participate;
3. That participation is voluntary;
4. That the interview will not be coercive; and
5. Questions must not exceed the scope of the legitimate purpose of the inquiry and cannot otherwise interfere with the employee's statutory rights.

### **PRACTICAL TIPS**

When you interview public employees about their criminal or other wrongful conduct, usually one of two situations will arise:

1. After rights advisement, the employee will voluntarily and knowingly waive the rights and speak to you; or
2. After rights advisement, the employee will exercise the right to remain silent, or the right to have counsel or a union representative present (if the employee has not already exercised the right to remain silent or the right to counsel, the union representative will probably advise the employee to do so).

In the first situation, since the employee is voluntarily speaking to you, unless (a) either the atmosphere in which the interview takes place is inherently coercive (exaggerated example - four security policemen with guns drawn in your office during questioning), or (b) you have gratuitously told the employee that nothing will happen, and you just want to find out the facts, the information you learn will likely support, and be admissible in any subsequent adverse action taken against that employee.

In the second situation, the employee has exercised either the right to remain silent, or the right to have counsel or a union representative present. You must scrupulously honor the employee's exercise of these rights. Because of the potential later use of the evidence obtained, all Commanders are strongly advised to consult with their Staff Judge Advocates BEFORE questioning any civilian public employee about criminal or other wrongful conduct.

***NOTE: Check state law and the applicable collective bargaining agreement for expansion or modification of an employee's rights when questioned.***

### **RELATED TOPICS:**

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# Injuries to Civilian Employees

Updated by Col Julio R. Barron, June 2009

**AUTHORITY:** 32 U.S.C. 709; 5 U.S.C. 8101, *et seq.*

## INTRODUCTION

The following information applies to federal civilian employees and to Air National Guard dual-status technicians while they are in technician status. It does not apply to state civilian employees. Check with the state civilian personnel officer for information about injured state civilian employees.

## ENTITLEMENT TO COMPENSATION

Civilian employees are entitled to compensation under the Federal Employees Compensation Act for job-related injuries or illnesses. The employee may receive compensation for missed work and for health care costs.

An employee may receive compensation from the employer under the Continuation of Pay (COP) program and from the Office of Workman's Compensation Program (OWCP) for traumatic and disabling injuries or for occupational illness or disease. Traumatic injury is a wound or other condition caused by external force, including physical stress or strain. Occupational illness or disease is a condition produced over a period longer than one workday or shift. The following is a general comparison of the COP and OWCP.

### COP:

For traumatic, disabling injury.

Payment of regular pay for up to 45 calendar days.

Employee can choose COP or sick or annual leave.

### OWCP:

For traumatic injury or occupational illness.

Payment of up to 75 percent of pay, depending on extent of disability, for the duration of the disability.

Reasonable medical expenses paid.

Dependents paid compensation if employee dies.

## EMPLOYER'S RESPONSIBILITIES

The supervisor has the primary responsibility to ensure the employee is compensated for on-the-job illness or injury. The Injury Compensation Program Administrator (ICPA), who is appointed by the Human Resources Officer (HRO), assists the supervisor. The ICPA is responsible for informing supervisors of their responsibilities and employees of their rights. The ICPA also supervises the program to ensure that it is administered properly. The ICPA should be contacted immediately after a supervisor learns of an employee's injury or illness.

An employee must report injury or occupational illness and disease in a timely fashion; otherwise the employee may lose the benefits of the compensation programs. The employee must report a disabling injury within 30 calendar days of its occurrence. The employee must report occupational illness or disease within three years of the occurrence.

or of the time when the employee should have been aware of its occurrence. If there is doubt as to the legitimacy of a claim, the claim can be contested, but it should be done as soon as possible.

If the employee can continue to work, but not at full capacity, the employee should be assigned to light duties until the employee recovers. Many states have developed form letters to send to doctors to help the units decide the nature of the light duties the employee may perform without aggravating the injury or re-injuring the employee. If it becomes apparent that the employee will not recover sufficiently to perform the essential responsibilities of the job, the employee will be assigned a new position, if one is available for which the employee qualifies, or the employee will be separated from employment. The employer must make every effort to restore to employment a former employee who has partially recovered from a compensable injury or illness. This may require placing the employee in a different position from that which the employee formerly held.

For further information on this subject, contact your HRO.

### **EXCLUSIVE REMEDY**

The Federal Employee Compensation Act expressly states that it provides the exclusive remedy against the federal government for a job-related injury to a covered employee. 5 U.S.C. Section 8116(c). Therefore, a civilian employee or technician may not bring a lawsuit against the United States or any of its agencies to recover damages for a compensable job-related injury or illness. Additionally, claims for damages brought by national guard technicians against the United States, the state, or federal or state officers for injuries that are “incident to service” are barred by the *Feres* doctrine. (See discussion in Deskbook topic “*Feres* Doctrine.”)

***KWIK-NOTE: Technicians may receive compensation for job-related injuries, illnesses or diseases, subject to their being timely reported.***

### **RELATED TOPICS:**

### **SECTION**

*Feres* Doctrine

18-3

Lawsuits Against National Guard Personnel

18-6

# Labor Relations

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Updated by Col Julio R. Barron, June 2009

**AUTHORITY:** 5 U.S.C. §§ 7101 - 7135; AFI 64-106, *Air Force Industrial Labor Relations Activities* (25 Mar 94)(for reference only); applicable state law and regulations.

## CIVILIAN EMPLOYEE UNIONS

### Employee Rights

Dual-status technicians and civilian federal employees who are paid from appropriated or nonappropriated funds are eligible to form unions. State employees may or may not have authority to participate in unions. Check with your Staff Judge Advocate or Civilian Personnel Officer for information on union participation by state employees.

A union is an organization of employees who pay dues and participate together in management-employee relationships. The union can negotiate with management on behalf of its members and other employees within the defined bargaining unit over grievances and conditions of employment. Federal unions are prohibited from striking, but the union can picket if it does not interfere with the agency's operations (*e.g.*, the mission).

### How Organized

Federal employers must recognize a union as the exclusive representative of the employees in a unit when the union has been approved by a majority of unit employees. A unit is a group of employees who share a clearly identifiable "community of interest." An installation can have more than one unit and, consequently, more than one union.

### Who is Represented

The union represents all members of the unit regardless of their membership status. Thus, a union represents a unit employee who is not a dues paying member of the union.

## MANAGEMENT RIGHTS

(NOTE: President's Executive Order 12871 which established the National Partnership Council and required Federal Agencies to create labor-management partnerships was revoked by President's Executive Order 13203 in 2001 but is expected to be reissued before the end of 2009)

Certain prerogatives are reserved to management. The union cannot negotiate them. These prerogatives are:

1. To determine the mission, budget, organization, number of employees, and internal security practices;
2. To hire, assign, direct, layoff, and retain employees, or to suspend, remove, reduce in grade or pay, or to take other disciplinary action against employees;
3. To assign work, to make determinations with respect to contracting out, and to determine the personnel by which the agency's operations will be conducted;
4. To make selections to fill positions and promote employees in accordance with applicable rules; and
5. To take whatever actions are necessary to carry out the agency's mission during an emergency.

Even though the union cannot negotiate over the foregoing issues, it can negotiate the procedures management will use to exercise them. It can also negotiate the arrangements for employees adversely affected by management's exercise of these prerogatives.

Pursuant to a decision of the Federal Labor Relations Authority (FLRA) in Case No. O-AR-1013, June 4, 1986, 438 ABG, McGuire AFB, NJ and American Federation of Government Employees, Local 1778, 22 FLRA No. 3, under management's right to assign work (paragraph 3 above), civilian employees (technicians) can be assigned debris pick-up duties in the flight line area of the base so that Installation Commanders can better satisfy their obligations to ensure that no foreign object damage (FOD) threatens the safety of their personnel or aircraft. Thus, FOD walks are authorized work assignments for federal civilian employees.

## **UNION RIGHTS**

The union is the exclusive representative for unit members and is entitled to negotiate a collective bargaining agreement (CBA) for unit members. The CBA governs management actions involving unit members. The union is entitled to information reasonably available and necessary for a full and proper negotiation. No Freedom of Information Act request is required and the union cannot be charged for providing this information. However, management need not (and should not) release information if it contains guidance to management officials relating to bargaining.

A union representative must be present, if requested by a unit member, when the employee is questioned as part of an investigation and the employee reasonably believes the questioning may result in disciplinary action against the employee. This is referred to as the "*Weingarten* rights." Management must annually inform all employees belonging to the bargaining unit of this right to demand a union representative. However, the role of the union representative at the questioning session is limited. Note: Public employees also must account for the performance of their duties, and failure to provide the desired information can provide a basis for removal under certain circumstances.

A union representative is also entitled to be present during any formal discussion between management and one or more unit members. Before a formal discussion is held with a unit member, management must notify the union and give it an opportunity to be represented at the meeting. Discussion means meeting and does not require that there be a debate or argument. It is suggested you consult with your Labor Relations Specialist before conducting such discussion to see if the union should be notified.

Note the difference in the employer's duty between a questioning session and a discussion. Absent state law or a CBA requiring otherwise, in questioning sessions, the employer does not have to advise the employee of the right to have a union representative present (except for the annual advice). The employee must request it. In discussion sessions, the employer must notify the union before the meeting is held.

Union members have the right to receive wages when they are on official time to negotiate. The number of union representatives may not exceed the number of Air National Guard management representatives. Official time must be given for all negotiations; *i.e.*, ground rules for negotiations; CBA negotiations; mid-term negotiations; and impact and implementation bargaining. However, no official time is given for internal union business, such as collecting dues or soliciting new members. Official time for other purposes may be bargained and, if agreed to, should be in the CBA.

## **UNFAIR LABOR PRACTICES**

Certain management or union practices are illegal. They are called unfair labor practices (ULPs). The Federal Labor Relations Authority (FLRA) investigates ULPs. If the FLRA believes that a ULP was committed, it will issue a complaint against the offending party. The complaint is heard by an administrative law judge who determines whether a ULP was committed and the appropriate remedy.

There are many types of actions that may be ULPs when committed by management officials. Examples of management ULPs include:

1. Improperly encouraging or discouraging membership in a union;
2. Retaliating against an employee for filing a grievance;
3. Refusing to negotiate in good faith with the union;
4. Speaking to a union officer in a demeaning manner in the presence of employees;
5. Bypassing the union by negotiating with the employees directly;
6. Threatening the union;
7. Disciplining an employee without allowing a union representative to be present when requested by the employee;
8. Attendance by management at a union meeting;
9. Interrogating employees about filing a ULP;
10. Disciplining a union steward while not disciplining another employee equally culpable;
11. Sponsoring, controlling or assisting a union;
12. Failing or refusing to cooperate in impasse procedures or decisions;
13. Enforcing a rule or regulation which conflicts with a preexisting CBA; and,
14. Otherwise failing to comply with any provision of Title VII: Federal Service Labor Management Relations Statute (5 U.S.C. § 7101 *et seq.*).

There are many other areas in which management can commit ULPs. Management officials should be trained in these areas.

The union can also commit ULPs. Among them are calling strikes or work slowdowns and hindering an employee's work performance, and discriminating regarding union membership on the basis of race, creed, color, sex, age, handicap, marital status, national origin or political affiliation.

## **GRIEVANCES AND ARBITRATION**

Collective bargaining agreements must establish procedures for settling employee grievances. The procedure must be fair, simple and quick. It must allow the union, in its own right, or the offended employee to pursue the grievance. The CBA must also allow the grievance to be resolved by binding arbitration if it is not resolved through the grievance procedure. Arbitration decisions are usually final, but they can, in limited circumstances, be appealed.

## **STRIKES BY DUAL-STATUS TECHNICIANS AND CIVILIAN EMPLOYEES**

Federal labor unions are prohibited by law from calling strikes, work stoppages, or slowdowns. Picketing is also illegal if it interferes with an agency's operations. When a strike or other prohibited action is threatened or occurs, the Installation Commander must immediately notify the head of the local union. No action will be taken against the union if:

1. The union disavows or withdraws any threatening statements;

2. There is no evidence that the union ordered, approved, or authorized the prohibited activity; and
3. The union promptly orders its members to cease their participation in the prohibited activity.

If there is evidence that the union participated in the prohibited activity, or if the union fails to promptly disavow it, or fails to promptly order its members to cease their participation, the prohibited activity will be reported to the union's national affiliate. Management can also file an unfair labor practice complaint against the union, and it can take disciplinary action against the individuals who were involved.

### **STRIKES BY CONTRACTOR EMPLOYEES**

A non-federal union can call a strike that involves non-federal employees working on an installation. In such cases, picketing may occur. To avoid undue interference with normal base operations, the installation can designate a strike gate. The gate can be one that is used only in case of strikes or that is otherwise not normally used. Picketing can be limited to the strike gate if the employees of the employer being struck are required to use the gate. The Installation Commander should ensure that the employees do not use other gates. This may be done by posting a sign at each gate that directs affected employees to use the proper gate. If the employees use other gates, the picketers will be able to picket those gates as well.

The Commander and the Contracting Officer responsible for the contract under which the striking employees work have several responsibilities when a strike or picketing is threatened. These responsibilities are outlined in AFI 64-106 (for reference only).

The Staff Judge Advocate and Labor Relations Specialist in the HRO should be actively involved in all civilian personnel matters on your base.

***KWIK-NOTE: Commanders must scrupulously honor the rights of union members, but should not hesitate to fully exercise management's rights in operating their bases.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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## Unacceptable Performance by Dual-Status Technicians and Federal Civilian Employees

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Updated by Col Julio R. Barron, June 2009

**AUTHORITY:** 5 U.S.C. §§ 4301 - 4303; Technician Personnel Regulations (TPR) 430, 700 715, and 752; applicable collective bargaining agreements and state regulations.

### INTRODUCTION

Each state has its own regulations and statutes that apply to performance standards and appraisals of state employees. This topic will be limited to issues surrounding competitive and excepted civil service federal employees.

The Civil Service Reform Act of 1978 requires that the appraisal and rating of employees' job performance be based on written performance elements and standards, and that this performance appraisal rating be used as a basis for decisions to pay, reward, assign, train, promote 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 your state National Guard grievance system pursuant to TPR 700. In addition, disputes concerning the identification of the critical elements of a position and establishment of performance standards are not grievable and are not subject to arbitration under negotiated grievance and arbitration procedures.

Non-bargaining unit employees such as supervisors resolve disputes concerning ratings through the auspices of TPR 700 and any corresponding state regulations or procedures. Bargaining unit employees resolve disputes on ratings through the negotiated grievance procedure of the local collective bargaining agreement or through TPR 700, but not both.

Probationary competitive employees may appeal to the MSPB a decision to terminate them during a probationary period only on the grounds of partisan political reasons, marital status, or discrimination, and may not otherwise appeal the termination itself. Generally speaking, federal civilian employees of the National Guard are excepted service employees and not competitive service; hence this rarely applies in the ANG.

The non-receipt of a cash award or QSI may not be appealed or grieved under the auspices of TPR 700 or the negotiated grievance procedure. Allegations of discrimination may be processed under local or state procedures or the negotiated grievance procedure, but not both.

Consult your HRO to learn your local grievance procedures.

### PERFORMANCE AND APPRAISAL PROCESS

#### Performance Plan

The supervisor has 30 days after the technician's entry on duty to provide the technician with written performance standards and critical job elements (NGB FM 430-1). Most employees are required to have a performance plan. A performance standard describes how the element is to be accomplished and at what level it should be accomplished in order to be considered fully successful. It is the measure for job performance evaluation. Normally standards are expressed in terms of quality, timeliness or quantity.

## **Annual Review of Performance**

At a minimum, one progress review meeting must be conducted prior to the end of the appraisal period. This review must be documented. An employee must receive a performance appraisal annually.

## **Notice of Unacceptable Performance and Procedures**

If a supervisor determines that a technician is having trouble performing one or more critical job elements, the supervisor must so inform the employee and request improvement after explaining what is expected. If the employee does not improve, the supervisor must issue a rating of record and place the technician in a performance improvement period (PIP) for approximately 30-90 days by written notice. This notice should also provide the employee with a detailed explanation on each critical job element and what action(s) will be taken to assist the subordinate in improving his/her performance. The PIP can be extended for good cause if the employee's performance improves within the initial time period to a minimally successful level. Any extension should be afforded in good faith.

When appropriate, employees who are having performance problems should be referred to the Technician Assistance Program for counseling and further referral.

If performance improves to a fully successful level, the dual-status technician must be advised in writing. All documentation should be retained for one year. If the employee's behavior becomes unacceptable within this one-year period, then a reassignment, demotion, or removal action may be taken without giving the employee an additional opportunity to improve.

## **Action If No Improvement**

If unacceptable performance in one or more critical elements continues after the PIP has expired, reassignment, demotion or removal is authorized and the procedures below apply.

## **DUE PROCESS - NOTICE AND OPPORTUNITY TO BE HEARD**

For demotion or removal, a 30-day advance written notice of the proposed action to the employee is required. This notice must specify instances of unacceptable performance on which the action is based and the critical elements involved. The employee must be given ten calendar days to respond either orally or in writing and is entitled to representation by an attorney or other representative.

## **STATE IMPARTIAL REVIEW BOARD**

The Adjutant General will establish a State Impartial Review Board on an ad hoc or standing board basis. Board members cannot be in the chain of command of the subordinate requesting the review and should not be in a lower-graded position. Within 10 calendar days after receiving the final rating, requests must be submitted in writing to the Human Resources Office (HRO) specifying the element(s) challenged, the rating desired and why rating should be changed. The Board will notify interested persons of the date, time and location where the review will be conducted. Normally, the review will be closed to the public unless the subordinate and management agree to hold a public hearing. Each side makes opening and closing statements, and presents evidence and witnesses. Within 15 days after conclusion of the review, the Board will submit its recommendation to the Adjutant General with information copies to HRO and the subordinate. The Adjutant General will sustain or reject the Board's recommendation.

## **MEDICAL CONDITION**

If performance is suspected to be adversely affected by alcohol or drugs, the supervisor must ensure that the employee is referred to the Technician Assistance Program.

In all performance problem situations, including those where the demotion or removal process has begun, employees must be told that if they want management to consider any medical condition that may be contributing to the unacceptable performance, the burden is on the employee to provide documentation within a reasonable period of time. See 5 C.F.R., Part 339, Section 339.104 for the definition of "medical documentation." Employees must be told what exactly will be required and how much time they have to provide it. An extension may be granted if the supervisor wishes, or the process may proceed. The supervisor and a medical officer must review any documentation provided.

The National Guard does not have a fitness for duty examination; however, a dual-status technician must be militarily qualified in the corresponding AFSC before being hired for a position.

## **COORDINATION**

You should coordinate all actions based on unacceptable performance with your HRO. Any removal or demotion action should also be coordinated with your Staff Judge Advocate.

***KWIK-NOTE: Because of the adverse consequences to the employee, and the potential review of your decisions through the appeal process, the requirements and procedures of unacceptable performance actions must strictly be followed.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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# Unemployment Compensation

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**Updated by Col Julio R. Barron, June 2009**

**AUTHORITY:** 5 U.S.C. § 850, *et seq.*; 20 C.F.R. Part 609; FPM, Chapter 850; and applicable state statutes and regulations.

## INTRODUCTION

This topic will explain the right to unemployment compensation benefits by dual-status technicians and federal civilian employees.

## DUAL-STATUS TECHNICIANS AND FEDERAL CIVILIAN EMPLOYEES

Since 1955 federal employees who lose their jobs with the National Guard have been entitled to apply for and receive state unemployment compensation, if otherwise qualified, just like any other employees. Therefore, it is important for the HRO, SJA, and Comptroller to work closely together to defeat meritless claims.

Benefits are paid by the states using applicable state law. However, the U.S. Department of Labor (DOL) reimburses the states on a quarterly basis for unemployment compensation paid to federal employees, and since 1980, the federal agencies concerned reimburse the DOL.

Therefore, just because a federal agency is successful in removing an employee because of either misconduct or unsatisfactory performance, it does not mean that the individual will not continue to be paid. It takes a team effort to defeat meritless claims for unemployment compensation, and these matters should be considered an important part of all civilian personnel actions resulting in termination.

## Procedures to Obtain or Defeat Benefits

While the procedure may vary from state to state, the process generally proceeds as follows:

1. The former federal employee with the appropriate state agency files the claim;
2. The state agency sends the claim form to the federal agency concerned requesting "federal findings," i.e., the facts reported by the federal agency pertaining to an individual as to:
  - a. Whether the individual has performed federal civilian service for the agency;
  - b. The period of such service;
  - c. The individual's wages; and
  - d. The reasons for termination;
3. The federal agency has four workdays after receipt of the forms to return them to the state agency correctly completed or to give notice that the time limit cannot be met and an estimated completion date. Retired records must be retrieved by the federal agency;
4. If the federal findings are not received within 12 days, the state agency will make an entitlement determination without them, subject to a re-determination if the findings are subsequently received.

(NOTE that "federal findings" are NOT binding on the state agency and the forms should be completed by the federal agency in a manner that will maximize the likelihood, under applicable state law, that the federal agency's views with respect to eligibility, ineligibility, and disqualification will be adopted. Thus, it is important for you to

know the reasons why a person can be denied unemployment compensation benefits in your state, since it is very possible that the reason for which you fired the individual is not a permissible basis for denying unemployment compensation benefits. You need to review these reasons so that the notice you send to the state correctly reflects why you think that person should be denied benefits under the state's guidelines);

5. The state agency will make the initial determination. Either party (the former federal employee or the federal agency) may appeal and request a hearing. At the hearing, the federal agency may have to relitigate the basis for the termination, even if the Merit Systems Protection Board (MSPB) or an arbitrator has already sustained it. Witnesses are necessary. If either party fails to appear for the hearing, the other party MAY win by default, although some states do require the former federal employer to put on its case proving misconduct even when the claimant (former employee) fails to appear;

6. The state agency examiner issues a written decision;

7. An administrative appeal of the examiner's decision is available; and

8. Judicial review of the decision is available in the state court.

Appeal of the job termination is a separate proceeding from the proceeding to determine unemployment compensation benefits. You will have to repay the unemployment compensation to the state if your former employee successfully appeals the denial of unemployment compensation benefits. Success on the termination appeal entitles the employee to regain the job.

Time limits in state unemployment compensation cases are usually very short and strictly enforced. Communication and cooperation among the Civilian Personnel Officer, HRO, SJA, and Comptroller are essential.

## **NATIONAL GUARD MEMBERS**

National Guard members qualify for unemployment benefits after serving a minimum period of active duty of 90 days. There is no waiting period to apply for benefits, and benefits are payable for 26 weeks. National Guard members who live in high unemployment areas where unemployment compensation has been extended beyond 26 weeks also receive such extension of benefits.

## **STATE CIVILIAN EMPLOYEES**

A separated state civilian employee may file for and receive unemployment compensation benefits as any other civilian employee.

### **Procedures to Obtain or Defeat Benefits**

While the procedures may vary from state to state, the process generally proceeds as follows:

The claim is filed by former employee in an appropriate state unemployment compensation agency.

Agency sends employer request for separation to obtain dates of employment, average weekly wage, full-time or part time, availability of work, pension or annuity from employer, wages in lieu of notice citizenship and reason for separation.

Agency issues a decision based on investigation or hearing combined with review of employer statement and claimant's statement.

Agency's decision may be appealed to administrative law judge (ALJ) and ultimately to state appellate courts.

Each state likely has a set of procedural rules for presenting unemployment compensation cases, and a copy of the procedural rules can usually be obtained from the appropriate agency.

Time limits in unemployment compensation cases are usually very short and strictly enforced. As in federal civilian employee cases, communication and cooperation among the Civilian Personnel Officer, HRO, SJA, and Comptroller are essential.

### **Extended Benefits**

Claimants generally may receive 26 weeks of unemployment compensation benefits within a benefit year. Extended benefits may accrue for an additional 26 weeks if unemployment results from foreign competition or if a claimant lives in an area of unemployment. Extended benefits may also be given for participation in an approved training program or school.

***KWIK-NOTE: Even though the federal agency (you) may lose the state unemployment compensation case, that proceeding cannot be a basis to compel the federal agency to rehire the terminated employee.***

### **RELATED TOPICS:**

### **SECTION**

Civilian Employee Discipline

5-2

Labor Relations

5-5

Unacceptable Performance of Civilian Employees

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## Collective Bargaining Agreement Negotiating Team

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Updated by Col Julio R. Barron, June 2009

**AUTHORITY:** 5 U.S.C. §§ 7101–7135.

### DUTIES

A Labor Negotiating Team may be used to negotiate a collective bargaining agreement with a properly recognized and certified union representing dual-status technicians and other federal civilian employees of the Air National Guard. The agreement will have a grievance procedure, which will conclude with binding arbitration, and other terms to govern various aspects of the management-employee relationship.

### COMPOSITION

The team is composed of individuals appointed by the Adjutant General who can ensure that the interests of management are adequately represented. It should have someone from the Human Resources Office (HRO), preferably the Labor Relations Specialist, if there is one. It should also include a Judge Advocate, at least for consultation. Other members, as needed, should be appointed to the team. They should represent the major work functions that will be impacted by the agreement, and they should ensure that the interests of their offices are considered in arriving at the agreement.

### PROCEDURES

There are no regulations that identify the labor negotiating team or that direct how it will be organized. This is left to the discretion of the Adjutant General.

The Adjutant General should designate one member of the team as the Chief negotiator.

***KWIK-NOTE: Commanders should closely consult with the Labor Negotiating Team.***

### RELATED TOPICS:

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# Whistleblower Protection Act

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Updated by Col Julio R. Barron, June 2009

**AUTHORITY:** 5 U.S. C. § 1213, § 1215, § 1221, § 2302(b)(1-12)), § 7703; applicable state law.

## **AUTHORITY**

In 1989 Congress amended the Civil Service Reform Act of 1978 and passed the Whistleblower Protection Act. In 1994 Congress unanimously voted to strengthen it. This Act substantially strengthened the protection for whistleblowers in the federal government. The Act gives employees easier access to an individual right of action before the Merit Systems Protection Board (MSPB), alters the burden of proof for employees to prevail in reprisal claims, requires the MSPB to refer managers for disciplinary investigations whenever there is a finding that reprisal was a contributing factor in a personnel action, codifies an employee's right to obtain attorneys fees and costs associated with litigation, and makes the Office of Special Counsel (OSC) independent of the MSPB.

## **REQUIREMENTS**

### **Initiation of Complaint**

Employees, including former employees and applicants, who believe that they have been retaliated against for disclosing matters of waste, fraud, management, or abuse of management discretion, must first seek the assistance of OSC before bringing an individual action. However, if OSC notifies the employee that its investigation is over and OSC will not act, the employee has 60 days to file a complaint with the MSPB, or if the employee receives no notice from OSC within 120 days of filing the complaint, the employee may also file an individual action with the MSPB.

### **Burdens of Proof**

In order to establish a prima facie case of whistleblowing reprisal, the employee, or the OSC acting for the employee, must prove by a preponderance of the evidence that the whistleblowing was a factor in the personnel action taken. It is not necessary for the employee to prove retaliatory motives of the agency or that the whistleblowing was a substantial, motivating or predominant factor in the personnel action taken. If a prima facie case is established, the agency must prove, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the whistleblowing.

## **EMPLOYEE PROTECTIONS**

Increased employee protections have been established. Mere harassment and threats, even without any formally proposed personnel action, can constitute a prohibited personnel practice under the provisions of 5 U.S.C. 2302(b)(8) or (9) and thereby trigger the protection of the Act. Also, the Act protects employees in their right to refuse orders that require a violation of the law. Note that the 1994 amendment, created a new prohibited personnel practice that flatly outlaws retaliatory orders to take psychiatric fitness for duty examinations. This deviates from the prior law, which required employees to follow orders and then protest after the fact. Further, the Act provides stronger interim relief by providing that employees who prevail at the initial evidentiary hearing must be returned to the job, or at least the payroll, during the appeal process. In addition, employees who win their cases also get preference in transfers to new jobs.

## **OFFICE OF SPECIAL COUNSEL**

The OSC has been made an "independent arm" of the MSPB. The OSC must adhere to certain guidelines in handling cases, as follows:

1. It must provide status reports to employees seeking help;
2. It must refrain from leaking the employee's evidence to the agency without the employee's consent;
3. It must refrain from settling a case without the employee's comments;
4. It must explain its decision in closing a case; and
5. It is forbidden from intervening against an employee in any administrative hearing or independent action unless invited by the employee.

### **LIABILITY FOR VIOLATION OF THE WHISTLEBLOWER PROTECTION ACT**

The Act provides for INDIVIDUAL LIABILITY. Disciplinary action may be taken against an individual who has committed a prohibited personnel practice. The OSC files a written complaint with the MSPB and the individual is entitled to a hearing. If the individual is found to have committed a prohibited personnel practice, the MSPB may impose any of the following:

1. Removal;
2. Reduction in grade;
3. Debarment from federal service for up to five (5) years;
4. Suspension;
5. Reprimand; or
6. A civil penalty not to exceed \$1,000.00.

The individual may appeal any adverse decision to the U.S. Court of Appeals for the Federal Circuit.

The OSC may recommend disciplinary action to be taken against members of the Armed Forces. This recommendation is made to the head of the agency.

### **CONCLUSION**

This statute is designed to both encourage whistleblowers and protect them from reprisals. The rationale is to eliminate fraud, waste and abuse. Violators have been and will be severely disciplined.

Many states have similar statutes, which apply to state, county, municipal and private employees. Since many units have such employees, you should know what these statutes are and when they apply. Commanders should periodically consult with their Labor Relations Specialists and Staff Judge Advocates for the latest developments in this area.

***KWIK-NOTE: Employees should be encouraged to report instances of fraud, waste and abuse.***

### **RELATED TOPICS:**

Civilian Employee Discipline  
Evidence – Differing Standards and Burdens of Proof  
Fraud, Waste and Abuse  
Labor Relations  
Quality Force Management Actions

### **SECTION**

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# Chapter 6 Civilian Relations

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- 6-7 *Posse Comitatus*

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## Military Aid to Civilian Authorities

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Updated by Maj John W. Erickson, Jr., October 2008

**AUTHORITY:** 18 U.S.C. § 1385; 10 U.S.C. §§ 331-334; 10 U.S.C. §§ 371-382; DoDD 3025.12, *Military Assistance for Civil Disturbances (MACDIS)* (4 Feb 94); DoDD 3025.15, *Military Assistance to Civil Authorities* (18 Feb 97); DoDD 4500.56, *DOD Policy on the Use of Government Aircraft and Air Travel* (2 Mar 97, C1, 19 Apr 99); DoDD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials* (15 Jan 86, C1, 20 Dec 89); DoD 4515.13-R, *Air Transportation Eligibility* (Nov 94, C3, 9 Apr 89); DoDI 5525.10, *Using Military Working Dog Teams (MWDTs) to Support Law Enforcement Agencies in Counterdrug Missions* (17 Sep 90); AFI 10-801, *Assistance to Civilian Law Enforcement Agencies* (15 Apr 94); AFI 10-802, *Military Support to Civilian Authorities* (12 Apr 02); AFD 10-8, *Homeland Defense and Civil Support* (7 Sep 06); AFMAN 31-201V3, *Flight Operations* (14 May 03); NGR 500-2/ANGI 10-801, *National Guard Counterdrug Support* (31 Mar 00); NGR 500-1/ANGI 10-8101, *National Guard Domestic Operations* (13 Jun 08); applicable state statutes and regulations.

### INTRODUCTION

Cooperation between military and civilian authorities is highly encouraged as long as such support is consistent with the needs of national security and military preparedness, the tradition of limiting direct military involvement in civilian law enforcement activities (*Posse Comitatus*), and the requirements of applicable law.

The subject of military aid to civilian authorities off base can be broken down into four general areas:

- (1) Direct assistance to civilian law enforcement;
- (2) Counterdrug support;
- (3) State civilian emergencies such as disasters or civil disturbances (including federal laws that authorize military personnel to aid civil authorities); and
- (4) Local civilian emergencies.

### DIRECT ASSISTANCE TO CIVILIAN LAW ENFORCEMENT

As stated in the topic in this Deskbook entitled “*POSSE COMITATUS*,” the National Guard, in state status - either Title 32 or state active duty - is not subject to the *Posse Comitatus* Act’s (18 U.S.C. § 1385) prohibitions against direct military assistance to civilians in enforcing civilian law.

However, although not subject to the *Posse Comitatus* Act, commanders need to ensure that their actions in direct aid of civilian law enforcement are authorized or permitted and are not prohibited by other federal or state statutes, directives, or regulations. For example, even when the Guard is in active state service, the use of military aircraft, equipment or property may be subject to restrictions.

### COUNTERDRUG SUPPORT

National Guard participation in the counterdrug support program is governed by specific authority. See the topic in this Deskbook entitled “*COUNTERDRUG SUPPORT PROGRAM*” for a more complete discussion of the details and issues of this program.

## STATE EMERGENCIES

Traditionally, the National Guard has been utilized to aid civilian authorities during state disasters and in the control of other emergency situations within the state. These usually require participation by the Guard for a longer duration than that required for local emergencies discussed below. Your state probably has an emergency state plan that sets forth procedures to follow in these situations. Consult it. National Guard response to state emergencies can usually occur as a result of several different actions. The governor of the state can declare a particular situation an emergency (such as a flood, hurricane, or riot), or a “search and rescue” can be initiated in which Guard personnel, supplies, and equipment are needed. Normally, the governor calls up the National Guard in a state active duty status, rather than a Title 32 status, and missions are accomplished in accordance with state constitutional and statutory authority. Many states do not authorize the use of the National Guard unless an emergency situation has been declared by the governor. Whether persons are normally AGRs, federal technicians, state employees, or traditional Guard members, your personnel office, in conjunction with the SPMO, should ensure personnel are in the proper status and receive the appropriate orders before performing duty in these emergency situations.

Note: The Army Judge Advocate General has concluded, based on a change in the language used in the annual National Defense Authorization Act, that there is no longer any authority for AGRs to perform state missions. NGB/JA is preparing a proposed amendment to 10 U.S.C. § 12310 to address this problem. You should consult your staff judge advocate (SJA) regarding the status of this proposed legislation.

A person’s duty status determines what they are paid, who pays them, what benefits they have if injured, and also what protections they have from lawsuits. Persons in state active duty status are paid by the state, and receive whatever tort liability protection they have from the state. Personnel should not be utilized for state purposes while they receive benefits and pay from the federal government.

Depending on state law, it may be possible, for example, for individuals to perform their AGR/federal technician/state employee duty in the daytime, and also perform some state active duty at night so that their full-time pay is not affected.

Although the *Posse Comitatus* Act still prohibits the use of the military for law enforcement activities, National Guard troops in Title 32 status (or state status) may be used to perform law enforcement activities such as manning traffic control points and patrolling areas for security. However, ensure that appropriate authority has been obtained before engaging in these activities. See NGR 500-1/ANGI 10-8101.

NGR 500-1/ANGI 10-8101 provides detailed explanations for the use of National Guard personnel and property in support of civil authorities, and is applicable when National Guard personnel are not in a Title 10 status. Note that when federal property or federal funds are used by the Guard when responding to emergencies within a state, reimbursement for the costs incurred will be required.

## LOCAL EMERGENCIES

The use of military personnel for local civilian emergencies impacts on many areas of law which are referred to in the “RELATED TOPICS” section below. Local emergencies may involve the possible loss of life or the extensive loss of property in an emergency which has not been declared but which requires an emergency response. An example of the latter would be a vehicle accident that occurs near your installation to which your installation’s fire and police departments respond since you have the shortest response time. Other situations in which military personnel may be asked to participate off base include medical support (ambulance response) and firefighting. In rendering assistance, the keys to ensuring you and your unit members are fully protected if they are injured, or negligently cause injury or property damage to others, are to determine in advance of a civilian emergency:

- (1) What acts your personnel are or are not prohibited from doing; and
- (2) What acts your personnel are authorized or permitted to do.

Remember, although an act is not prohibited, it may not necessarily be authorized or permitted. To help you determine what you cannot do, what you must do, and what you may do, you should review the provisions of your state emergency plan, reciprocal fire protection agreements, hospital assistance agreements, airport joint use agreements, host-tenant agreements, and any memoranda of understanding (MOUs) your unit has entered into with local or airport police and fire departments and/or other local agencies. Also review applicable federal and state regulations governing the use of military personnel, federal equipment, and supplies. Some of these are listed in the "AUTHORITY" section of this topic. You should ensure that applicable agreements and MOUs conform to the regulations, are kept current, and are followed in emergency response situations. These agreements and MOUs may set forth the responsibilities, liabilities, and immunities of the parties. In emergencies requiring immediate participation of a short duration, such as off base ambulance responses or firefighting, personnel responding to the emergency should usually be protected in the duty status they are then in.

National Guard troops are usually utilized only after local authorities have been found unable to handle the situation alone, and then only for the minimum time needed to accomplish the mission. Military support is usually designed to supplement and not replace the civilian effort. Your state emergency response plan should contain further information about which government agency's resources pay for the utilization of the National Guard in these situations. Remember that such assistance by the National Guard must not affect military readiness or national security. In advance of an emergency, you should coordinate with your staff, including your judge advocate and state legal office, on the ramifications of using your personnel in civil emergencies.

Also be aware that new programs and new legislation may be developed concerning the use of the Guard to perform the mission of "homeland defense." Homeland defense is a new area that will combine many of the issues faced by the National Guard when responding to state emergencies, with issues faced by the Guard in the counterdrug program. All guidance in this area, whether statutory or regulatory, should be strictly construed.

***KWIK-NOTE: Know the provisions of your state disaster preparedness emergency plans and how to protect and cover your members who aid civilian authorities. Also ensure that your local MOUs/MOAs with local fire departments and airports (for example) are current.***

**RELATED TOPICS:**

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## Civic Organizations

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Updated by Maj John W. Erickson, Jr., October 2008

**AUTHORITY:** DoD 5500.7-R, Joint Ethics Regulation (JER) (30 Aug 93, Change 6, 23 Mar 06); 5 C.F.R. 2635 *et. seq*; *see also* Air Force General Law Website on Ethical Sources.

### PROHIBITIONS

All Air Force personnel, including all commissioned officers of the Air National Guard on inactive duty for training, who are members or officers of nongovernmental associations or organizations, must avoid activities for such associations or organizations that are not compatible with their official governmental positions. Air Force personnel must also not accept an honorary office or an honorary membership in any trade or professional association whose membership includes business entities that are engaged or are endeavoring to engage in providing goods or services to a DoD component, including any nonappropriated fund activity of DoD.

Air Force officials may not allow the use of their names or titles in connection with charitable or nonprofit organizations, although this prohibition does not preclude volunteer efforts on behalf of charitable or nonprofit organizations by individuals who do not use their official titles in relation to solicitations and who do not solicit from individuals or entities with whom they do business in their official capacity.

### GUIDANCE

Questions concerning membership by Air National Guard personnel in civic and other organizations should be directed to the Base Legal Office and the designated Agency Ethics Official.

***KWIK-NOTE: Be careful here: know the civic organizations in which you, as an ANG member, may and may not participate.***

### RELATED TOPICS:

### SECTION

Fund Raising	7-2
Civil Associations and Military Corporations	22-2
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## Community Relations Programs

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Updated by Maj John W. Erickson, Jr., October 2008

**AUTHORITY:** DoDD 1100.20, *Support and Services for Eligible Organizations and Activities Outside DoD* (12 Apr 04); DoDD 5410.18, *Public Affairs Community Relations Policy* (20 Nov 01); DoD 5500.7-R, *Joint Ethics Regulation* (JER) (30 Aug 93, Change 6, 23 Mar 06); 5 C.F.R. 2635 *et. seq*; see also Air Force General Law Website on Ethical Sources; AFI 11-209, *Aerial Event Policies and Procedures* (4 May 06); AFI 32-9003, *Granting Temporary Use of Air Force Real Property*, (19 Aug 97); AFI 35-101, *Public Affairs Policies and Procedures*, Chapter 8 (29 Nov 05); AFI 36-3101, *Fundraising Within the Air Force* (12 Jul 02); ANG Supplement to AFI 11-209, *Aerial Event Policies and Procedures* (6 Mar 08); ANG PAM 35-1, *National Guard Public Affairs Guidelines* (29 Jun 01).

### INTRODUCTION

Community relations programs and public events promote morale and readiness and demonstrate that the military is involved in the community which it supports. As such, community relations programs and events may occur on or off base.

Participation by National Guard members and units in community relations projects is essential to continued acceptance and success of the National Guard. Parades, airshows and sporting competitions are just some of the events which might be included in a community relations program. Please review Chapter Seven, Section 13-2, and Chapter 22 for more detailed guidance on the approval of such programs.

### APPROVAL

Generally speaking, commanders and state Adjutants General (TAGs) may approve the use of resources under their control for community related events. However, certain events require the approval of higher headquarters (NGB-PA or OASD-PA). These include:

1. International and national private organization events (Examples: AGAUS, NGAUS, and EANGUS conferences);
2. Continental United States (CONUS) based resources taking part in events outside of the United States;
3. Aerial and parachute demonstrations and equipment drops;
4. Nationally televised sports events within the CONUS;
5. Aerial reviews and flyovers for civic-sponsored public observances of official ceremonies for Armed Forces Day, Memorial Day, Independence Day, Veterans Day, and POW/MIA Day;
6. Tactical demonstrations off military installations; and
7. Other public events that require an exception to policy.

Armed Forces Day events are also coordinated by OASD-PA.

## RESTRICTIONS

National Guard support for an event may not directly or indirectly benefit or favor any person, group, corporation (profit or nonprofit), religion or religious sect or group, ideological movement, fraternal organization, political organization or commercial venture, or be associated with the solicitation of votes in a political election. There are exceptions to these general restrictions when the benefit to one of these entities is incidental to the main program, the primary focus of which is an advantage to the National Guard. See Chapter 8 of AFI 35-101 for specific guidance.

Federal property issued to the National Guard may be provided for use and loan in conjunction with approved support to private organizations in community relations programs; but, in considering requests for loans of military material and before loaning such material, TAGs and local Commanders must determine that similar material is not reasonably available from commercial sources.

Support may not be provided in competition with commercially available services, such as photography, public address systems, or construction equipment. Military musicians may only provide patriotic or military music, not simply entertainment, such as background, dinner or dance music. Military members may not function as guards, for crowd control or other menial duties in support of community relations public events conducted off base, nor can they be used to enforce local law, statutes, or ordinances except as permitted in the chapter concerning "MILITARY AID TO CIVILIAN AUTHORITIES."

Additionally, ANG units must rely to the maximum extent possible on local community programs, facilities and services for MWR activities and other community support.

National Guard members are protected from liability by the Federal Tort Claims Act when on duty, but the authorized duty status of members taking part in community relations programs may not be clear. For this reason, participation should not be authorized unless the sponsor of the event provides liability insurance in an amount satisfactory to the concerned TAG.

## ORIENTATION FLIGHTS

Orientation flights in the local flying area are intended to increase understanding of particular programs related to the roles and missions of the National Guard, not simply to improve relations and foster good will. Individuals participating in orientation flights must meet eligibility criteria and receive approval from NGB-PA. Flights for national youth organization members, ROTC and JROTC cadets, FAA employees and Civil Air Patrol cadets are approved by the TAG.

## COMMUNITY RELATIONS AIRLIFT

Community leaders and employers of National Guard members and other selected civilians may be invited to travel aboard ANG aircraft to visit military facilities. Travel outside the state requires approval by NGB-PA. The purpose of the trips is to enhance the participants' understanding of military missions and functions.

***KWIK-NOTE: ANG participation and support of community relations programs are encouraged; but, must be approved and conducted within specified limits.***

## RELATED TOPICS:

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Aid to Civilian Authorities	6-2
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# Counterdrug Support Programs

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Updated by Maj John W. Erickson, Jr., October 2008

**AUTHORITY:** 32 U.S.C. 112; 10 U.S.C. 124, 371-380; 18 U.S.C. 1385; NGR 500-2/ANGI 10-801, *National Guard Counterdrug Support* (31 Mar 00), as amended by All States Log Number P01-0019, *Changes to National Guard Bureau (NGB), National Guard Regulation 500-2/Air National Guard Instruction 10-801* (21 Mar 01); and applicable state law.

## INTRODUCTION

The involvement of the military in counterdrug and demand reduction support to civilian law enforcement agencies is an area of high visibility. It is of utmost importance that all counterdrug support be conducted in strict accordance with applicable laws and regulations. Ensuring that the state AGR JAG is involved in all matters is critical.

The authority for National Guard involvement in this area is 32 U.S.C. § 112. It basically states that the federal government will provide funds to the governor of a state to provide support to law enforcement in the counterdrug area in accordance with state law. The statutory reference to Title 10 is the basis for involvement of the active duty forces. These statutes are sometimes called “exceptions” to the *Posse Comitatus* Act (18 U.S.C. § 1385).

This topic will be limited to National Guard involvement in counterdrug support based upon 32 U.S.C. § 112. Law enforcement counterdrug support provided by your unit that is funded solely BY YOUR STATE (without federal government monetary contribution) need not necessarily meet the following guidelines and only needs to comply with state law, which should be thoroughly reviewed. Furthermore, NGR 500-2/ANGI 10-801 (31 Mar 00) does not apply to counterdrug support when personnel are in a Title 10 status.

The “Counterdrug Coordinator,” a full-time officer who is assigned to state headquarters, essentially manages the counterdrug program at the state level. As such, very few, if any, “missions” will be tasked to individual units without coordination with the Counterdrug Coordinator. Nevertheless, a basic understanding of this program is important for all commanders because the personnel who work for the counterdrug program are your unit members and sometimes your resources are tasked for these missions.

## THE GOVERNOR’S STATE PLAN

Every state and territory must submit a “counterdrug support plan” annually to the Secretary of Defense, through the National Guard Bureau, for approval and funding. The Counterdrug Coordinator submits the program for signature to the governor and the attorney general, with of course, coordination and approval of the Adjutant General. Your state USPFO should also be in the coordination process.

The counterdrug support plan is extremely important. It describes what type of support your state National Guard has been requested to provide, and intends to provide, to the federal, state and local law enforcement agencies within your state, and the funding your state needs to provide such support. The National Guard Bureau requires that this plan be reviewed and approved by your state attorney general (or equivalent) and governor before your state may receive any federal funds for this program. Your state attorney general (or equivalent) and governor must certify that the plan is “consistent with, and not prohibited by state law.”

After the plan is approved and the money is allocated, the state should provide support only for the operations for which funding was approved or for which approval was otherwise given. This is also important because these are the operations (and the plan) that have been approved by the attorney general and governor of your state as being consistent with, and not prohibited by, your state’s laws. However, different support may be approved by NGB on a

case-by-case basis. The information in the counterdrug support plan is only applicable to duty performed and paid for with the federal funds provided through 32 U.S.C. § 112. The plan does not apply to any support your National Guard performs in a state active duty status paid for with state funds.

## **ADMINISTRATION OF THE PLAN**

As noted previously, each state has one person who is primarily responsible for counterdrug support operations; this person is known as the “Counterdrug Coordinator.” This individual should be contacted if you have any questions about the counterdrug support program. This individual coordinates with local law enforcement agencies and ensures that they are supplied with whatever personnel and/or equipment is necessary to fulfill their requests. The coordinator is also responsible for ensuring that such operations come within the bounds of law and policy. Last but not least, the coordinator ensures that the military personnel working in the counterdrug program are properly trained.

## **GOVERNING POLICY**

NGR 500-2/ANGI 10-801 concerns counterdrug and demand reduction operations. One of the most important policy considerations set forth by the National Guard Bureau is the requirement that National Guard members involved with counterdrug support must not be involved with SEARCHES AND SEIZURES, in ARRESTING SUSPECTS, or as LINKS IN THE CHAIN OF CUSTODY OF EVIDENCE. These restrictions in many ways conform the National Guard to the “*posse comitatus*” restrictions that are applicable to active duty forces. Remember, this policy consideration does not apply to state active duty paid for with state funds for nonmilitary emergencies. In such event, only your state law governs. Remember, however, that the Federal Tort Claims Act does not protect members from liability when they are in a state active duty status. Your state may, however, have an equivalent law.

## **COUNTERDRUG SUPPORT BY NATIONAL GUARD PERSONNEL**

National Guard personnel who perform duty with the counterdrug support program must not allow this extra duty to interfere with their drill periods or their annual training. In other words, the counterdrug support duty must be in addition to the duty they perform as members of the National Guard. Although counterdrug support may be provided during drills and regular annual training periods as incidental to and compatible with such training, it must not interfere with this training, and the training should not be scheduled as a subterfuge only for purposes of counterdrug support. The latter is important since counterdrug support funds may not be used for non-counterdrug support activities, and non-counterdrug support funds should not be used for counterdrug support activities.

It is DoD policy that no federal or state civilian employees, military technicians, or “personnel service” contract personnel perform counterdrug duty pursuant to 32 U.S.C. § 112.

OCONUS counterdrug support must be performed in a Title 10 status.

## **URINALYSIS TESTING REQUIRED FOR PARTICIPANTS**

National Guard members that participate directly in counterdrug support operations (those personnel who would potentially come in direct contact with illegal drugs) must be tested by URINALYSIS for drug usage upon entry on active duty. Because members are advised of this before volunteering for duty, it is suggested that this urinalysis test is deemed to be on consent (not command-directed), so a positive result permits the recommendation of an “under other than honorable conditions” (UOTHC) discharge. Forms concerning the use of consensual urinalysis testing as a condition of participating directly in the counterdrug support program should be signed by the participants to acknowledge their agreement and understanding of the purposes of the test, that it is by consent, and the consequences of a positive result.

If these forms are not available, they can be developed with the assistance of the Staff Judge Advocate by using and/or adapting the “Consent Form” in Attachment 1 to the topic in this Deskbook entitled “CONSENT URINALYSIS TESTS” in Section 10-8.

## **APPROVED OPERATIONS**

There are presently six very specific missions authorized. These operations are described in NGR 500-2/ANGI 10-801. Some states provide support in each of these missions and some states focus on just a few of them. These operations range from providing translator support to the eradication of marijuana plants. You will need to examine your state plan to verify permissible operations in your own state. This is important since the attorney general of your state will have examined and approved only those operations submitted by your counterdrug coordinator. Those operations that have not been approved may not be permissible under your state law even though they are permissible in other states.

Note that there is very specific guidance concerning intelligence gathering, because it is extremely important that federal guidelines in this area be followed. Special training for personnel is also required.

NGR 500-2/ANGI 10-801 also contains information on the permissible uses of property and personnel. It also contains a valuable reference list of other related regulations and documents.

Your state plan will also contain references to, or copies of, the memoranda of understanding between various agencies and the National Guard that are applicable to your state. Remember that the National Guard only provides support to the various federal, state and local law enforcement agencies. Therefore, each specific activity or operation must be at the REQUEST OF A LAW ENFORCEMENT AGENCY. These memoranda of understanding must address specified areas and be reviewed frequently for compliance with state and federal law; the state attorney general must also review them.

Interstate counterdrug operations should be conducted only after coordination between the states involved, and should be based upon written memoranda of understanding. The instruction advises, at a minimum, coordination between the counterdrug coordinators of the involved states. Several states have passed an interstate compact in this area that should be consulted.

## **LEGAL ISSUES AND LIABILITY**

There are several legal issues that must be considered in the counterdrug support program. One of the issues is whether your state has the authority to use its Guard members in another state on a counterdrug support mission.

Loan and lease of federal property to other agencies is specifically addressed in NGR 500-2/ANGI 10-801. (Note that leases must be at fair market value.)

Property purchased with counterdrug funds will only be used for the counterdrug program, although NGR 500-2/ANGI 10-801 contains exceptions.

Asset sharing with law enforcement agencies may be approved if allowed by state law. However, these funds may not be used to augment counterdrug funding.

Aircraft cannot be used for routine aerial transportation missions or for purposes that would compete with private enterprise.

You, as the Commander, should ensure that your legal office (whether at the unit level or at the state level) is always involved in the approval of specific missions to avoid all possible problems. Because it is such a high profile and important mission, there is a natural tendency to want to provide all the support that is requested by civilian law enforcement. However, the work can sometimes be very dangerous, which puts our people in jeopardy. We must always keep in mind that our people are not trained in civilian law enforcement; and, therefore, avoiding dangerous situations should be a priority.

In addition, drug cases can involve a lot of litigation, litigation from which we wish to remain aloof. It is also in our best interests to avoid lawsuits involving tort claims, not only because of the financial and potential personal liability aspects, but also because of the adverse publicity.

NGB-JA must be advised about claims or lawsuits alleging liability of the Guard and its members for damages arising out of counterdrug activities, even if the claims or lawsuits seem apparently groundless. NGB-JA must also be advised about potential problems, which may lead to suppression of evidence in a criminal case. Information required by NGB-JA includes copies of claims or complaints, with supporting documents, the answer filed, and reports of the Guard members and law enforcement agencies involved.

General guidance is that the Federal Tort Claims Act covers our people while in a Title 32 status. Personnel should also be covered by state liability protection statutes while performing counterdrug support duty in a state active duty status. Since we do not want to place our members in situations in which they might incur personal liability, and this program has such high visibility, it is **IMPERATIVE** that the statutes, directives, regulations, National Guard Bureau policies, and your state's "plan" be strictly followed. Therefore, you are strongly urged to ensure that your legal office is involved in the process **BEFORE** the beginning of each operation.

Furthermore, a line of duty determination should be initiated for all injuries incurred by Title 32 or Title 10 personnel.

## **WEAPONS**

National Guard personnel will not possess or use personally-owned firearms or ammunition, or any firearms or ammunition that are not issued by the counterdrug program, while performing counterdrug duties. Carrying weapons must be specifically addressed in the state plan.

## **SUMMARY**

The military - active or Guard - in a Title 10 or 32 status may not engage in direct law enforcement activities such as search, seizure, and/or apprehension. DoD policy prohibits these activities outside the United States. *See DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials* (15 Jan 86, C1, 20 Dec 89).

The *Posse Comitatus* Act (18 U.S.C. § 1385) and 10 U.S.C. § 375 prohibit these activities by Title 10 personnel inside the United States; and, although the *Posse Comitatus* Act does not apply to the National Guard in Title 32 status, NGB policy prohibits these activities by the Guard inside the United States. State law should be consulted for similar prohibitions when the Guard performs state active duty.

***KWIK-NOTE: Because this area is ever-changing, close consultation with the state Staff Judge Advocate (or your servicing Staff Judge Advocate) and appropriate state officials is imperative.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Aid to Civilian Authorities	6-2
Arrest By Civilian Authorities	8-6
Arrests Authorized by the ANG	8-7
Lawsuits Against National Guard Personnel	18-6
Personal Liability of Federal and State Officials	18-9
<i>Posse Comitatus</i>	6-7
Quarters	25-16
Urinalysis Program	10-7
State ANG Headquarters	2-8

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## Memoranda of Understanding (MOUs)

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Updated by Maj John W. Erickson, Jr., October 2008

**AUTHORITY:** Customs of the service and command discretion (particular programs may have instructions that govern the use and content of a Memorandum of Understanding).

### WHAT ARE THEY?

Memoranda of Understanding (MOUs) are documents that are less formal, and not legally binding in the same manner as, contracts. Like a contract, which is synonymous with the term “agreement,” however, a good MOU will set out all of the mutual understandings and expectations of the parties. An MOU does not have to be written by the Judge Advocate (JAG), but it should be coordinated with the JAG to ensure that the language is clear and unambiguous and does not propose or promise anything contrary to regulation or law. For example, the ANG cannot commit itself to blanket “hold harmless” agreements in either contracts or MOUs whereby the ANG assumes liability for not only itself but for the other parties.

### WHAT SHOULD THEY ADDRESS?

These types of agreements should clearly express the intent of the parties. For example, they should address the purpose of the agreement and any limitations on activities. They should also set forth the authority the agencies have to engage in the activity described. They can address training issues, equipment use, responsibility for injured personnel or damaged property (usually, within the government, each agency accepts responsibility for its own personnel and property), command and control issues, public affairs responsibilities, and liability to others.

### WHEN ARE THEY USED?

MOUs typically are used between entities that cannot sue one another, such as the Air National Guard and another federal or state agency. They may also be used between the Air National Guard and other entities to express intent but not to establish a binding legal obligation. Examples would be MOUs for mutual firefighting aid, or procedures for detention and arrest between your Security Forces and local civilian law enforcement agencies. The situations in which MOUs can be used are not limited, since one of their purposes is to promote understanding between and among entities. Your JAG can tell you whether an MOU is the appropriate document to use or whether a contract would be more appropriate.

Many programs require agreements between agencies, such as the National Guard Counterdrug Program; and many instructions set forth specific requirements for the content and approval of such agreements. Always ensure that appropriate guidance is consulted to determine whether a MOU is required or to determine what must be addressed.

***KWIK-NOTE:*** Use MOUs when there is a need to clarify relationships, but no need to bind the parties.

### RELATED TOPICS:

### SECTION

Aid to Civilian Authorities	6-2
Aircraft Accidents and Safety Investigations Off Base	16-2
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Preventive Law Program	17-15
Relationship with Other Military Components	11-6

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## Posse Comitatus

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Updated by Maj John W. Erickson, Jr., October 2008

**AUTHORITY:** 18 U.S.C. § 1385; 10 U.S.C. §§ 331-334; 10 U.S.C. §§ 371-382; DoDD 3025.12, *Military Assistance for Civil Disturbances (MACDIS)* (4 Feb 94); DoDD 3025.15, *Military Assistance to Civil Authorities* (18 Feb 97); DoDD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials* (15 Jan 86, C1, 20 Dec 89); DoD 4515.13-R, *Air Transportation Eligibility* (Nov 94, C3, 9 Apr 89); DoDI 5525.10, *Using Military Working Dog Teams (MWDTs) to Support Law Enforcement Agencies in Counterdrug Missions* (17 Sep 90); AFI 10-801, *Assistance to Civilian Law Enforcement Agencies* (15 Apr 94); AFI 10-802, *Military Support to Civilian Authorities* (12 Apr 02); AFPD 10-8, *Homeland Defense and Civil Support* (7 Sep 06); AFMAN 31-201V3, *Flight Operations* (14 May 03); NGR 500-2/ANGI 10-801, *National Guard Counterdrug Support* (31 Mar 00); NGR 500-1/ANGI 10-8101, *National Guard Domestic Operations* (13 Jun 08); applicable state statutes and regulations.

### INTRODUCTION

This topic of the Deskbook deals with *Posse Comitatus* in general and those circumstances to which the *Posse Comitatus* Act does not apply. This subject is also referenced in the topic entitled “COUNTERDRUG SUPPORT PROGRAM” and “MILITARY AID TO CIVILIAN AUTHORITIES.” The topic entitled “AIRCRAFT ACCIDENTS AND SAFETY INVESTIGATIONS OFF BASE,” in this Deskbook, discusses the *Posse Comitatus* Act as it relates to preserving evidence at a crash site for the safety investigation.

Although the *Posse Comitatus* Act restricts use of the active duty military (see below) for civilian law enforcement purposes, it does not preclude all military support to civilian law enforcement agencies. This outline summarizes some of the types of support that may and may not be provided.

Violations of the act can result in a fine, imprisonment, the suppression of evidence, or the release of the accused (although the exclusionary rule has not generally been applied in this context.)

### BACKGROUND

The term “*posse comitatus*” is best defined with the familiar concept of the *posse* gathered by the frontier sheriff to track down and apprehend a criminal. The translation is “the power of the county.” The legal definition of *posse comitatus* describes a group of people, taken from the population of the county, over the age of 15, who, under the authority of a sheriff or police, are engaged in the search and arrest of a criminal. An important aspect of the definition is that the *posse comitatus* has the authority of search and arrest.

The *Posse Comitatus* Act is the common name of 18 U.S.C. § 1385, “Use of Army and Air Force as *Posse Comitatus*.” This statute essentially provides that:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a *posse comitatus*, or otherwise to execute the laws, shall be fined not more than \$10,000.00, imprisoned not more than two years, or both.

The statute was originally enacted in 1879, during the Reconstruction Era, to eliminate the direct use of federal troops by civil authorities to police state elections in ex-Confederate states where civil power had been restored. It was Congress’s reaction to the excessive use of federal troops, which undermined Congress’s policy of reuniting the war-torn country and guaranteeing the right to vote to all races.

## TO WHOM IT APPLIES

The statute applies to the active component (Title 10) Air Force, Army, and Reserves and to the National Guard while in Title 10 (federal) service. The Navy and Marines, pursuant to DoDD 5525.5, also adhere to the statute. The statute does not apply to the Coast Guard or to the National Guard while in Title 32 (state) status, because such personnel do not fall within the definition of “Army” in 10 U.S.C. § 3062. The statute also does not apply when the National Guard is performing active state service pursuant to state law.

Remember that the non-applicability of the *Posse Comitatus* Act to the National Guard in Title 32 status or while on state active duty does not end the matter. Although the *Posse Comitatus* Act states what is prohibited, and its various case law interpretations discuss what activities are prohibited and/or not prohibited, “NOT PROHIBITED” DOES NOT NECESSARILY MEAN “PERMISSIBLE” OR “AUTHORIZED.” THIS IS A CRUCIAL DISTINCTION.

## TO WHAT IT APPLIES

The statute generally prohibits the direct involvement of active duty forces in assisting civilian law enforcement officials in enforcing civilian laws, except when authorized by the U.S. Constitution or another federal statute. The statute also prohibits active duty personnel from:

- a) Pursuing and arresting civilians even though they have committed crimes; and
- b) Any active or direct assistance to civilian law enforcement officials to enforce civilian law (such as interdiction of a vehicle, vessel, aircraft, or other similar activity; a search or seizure; an arrest, apprehension, stop and frisk, or similar activity; and use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators). See DoDD 5525.5.

Three different tests have been applied by the courts to determine whether the use of military personnel has violated the *Posse Comitatus* Act.

- (1) Whether the action of military personnel was “active” or “passive.” See *United States v. Red Feather*, 392 F. Supp. 916, at 921 (W.D.S.D 1975).
- (2) Whether armed forces personnel’s involvement in the activities of civilian law enforcement officials was “pervasive.” See *Hayes v. Hawes*, 921 F.2d 100 (7th Cir. 1990).
- (3) Whether military personnel subjected citizens to the exercise of military power which was regulatory, proscriptive, or compulsory. See *United States v. Kahn*, 35 F.3d 426 (9th Cir. 1994).

## WHAT IS NOT PROHIBITED and/or EXCEPTIONS TO THE POSSE COMITATUS ACT (“PCA”)

1. PCA does not prohibit military personnel, who are permitted to patrol areas outside a military base, from removing *military* members from situations which could involve violations of civilian law.
2. PCA does not prohibit military personnel from actively pursuing and arresting military members.
3. PCA does not prohibit military personnel, pursuant to the inherent authority of the commander, from executing laws on a military base when the action is necessary to affect a military purpose, such as the protection of military personnel or property.
4. PCA does not prohibit military personnel from *detaining* civilians on military bases, who violate laws while on such bases, and from summoning and awaiting the arrival of civilian authorities, who are the only ones authorized to arrest or apprehend the civilian violator.

- (Advise security policemen to choose their words carefully, both orally and in written reports, and to avoid terms like “arrest” and “apprehension.” Use “detain” instead).
5. PCA does not prohibit military personnel from engaging in passive activities (such as traffic control, the passive use of observers, the loan of military equipment, and the use of military installations and facilities in the normal course of military activities) in aid of civilian law enforcement.
  6. PCA does not prohibit military personnel from participating in humanitarian acts, such as the search for a lost child, search and rescue, and disaster relief. However, the true purpose must be humanitarian and must not be a subterfuge to disguise prohibited activities under the statute.
  7. PCA does not prohibit off duty conduct, unless it is induced, required, or ordered by military officials to whom the statute otherwise applies.
  8. It is not a violation of PCA for civilians to receive an incidental benefit from some of the military activities described above (Military Purpose Doctrine), as long as the primary purpose of the activity was to further a military interest. *See* DoDD 5525.5.
  9. PCA does not prohibit military personnel from protecting classified military information or equipment, DoD personnel, DoD equipment, and/or official guests of the DoD, or other acts that are undertaken primarily for a military or foreign affairs purpose.
  10. The use of DoD personnel in civil disturbances is governed by DoDD 3025.12, which details special approval/coordination requirements for that type of support. Military resources may be employed in support of civilian law enforcement operations in the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. territories and possessions. Any employment of military forces in support of law enforcement operations shall maintain the primacy of civilian authority.
  11. DoDD 3025.15 governs *all* DoD military assistance provided to civil authorities within the 50 States, District of Columbia, Puerto Rico, U.S. possessions, and territories; and, provides criteria for evaluating all requests for support. Matters to be considered include the legality and lethality of the mission, its cost, and whether the mission impacts DoD’s ability to perform its own missions.
  12. The Secretary of Defense has reserved the authority to approve DoD support for civil disturbances, responses to acts of terrorism, and support that will result in a planned event with the potential for confrontation with specifically identified individuals or groups, or which will result in the use of lethal force.
  13. The Insurrection Act, 10 U.S.C. §§ 331-334, permits the President to use the armed forces to enforce the law to prevent the loss of life or wanton destruction of property or to restore governmental functioning, in cases of civil disturbances, if the duly constituted local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization, or when duly constituted state or local authorities are unable or decline to provide adequate protection for federal property or functions. However, the overarching policy of providing *support* to civilian officials should always be kept in mind. Active duty military personnel (other than Security Forces or similar personnel) are not trained in law enforcement. National Guard personnel may receive some law enforcement training. When possible, law enforcement duties should be left to state and local law enforcement authorities, and military forces reserved for tasks suitable to their training.

14. Loan/Lease of Military Equipment to Civilian Law Enforcement. Civilian law enforcement officials often request the loan of military equipment during civil disturbance operations. In light of the DoD goal to minimize the military presence in such operations, this practice is viewed as an effective means of accomplishing that goal. The details re providing this support to civilian authorities is discussed elsewhere.
15. Exercise of Authority over Civilians. Military personnel do have the authority to detain or take into custody rioters, looters, or others committing offenses, when necessary or in the absence of civilian police. Generally, however, searches should be conducted by civilian law enforcement because of their greater familiarity with search and warrant procedures.
16. Because military working dogs qualify as “equipment” and are thus subject to loan to civilian law enforcement agencies, DoD policy requires requests for military working dog support, if approved, to be filled with dogs *and* their handlers. MWD support may only be provided under circumstances that preclude confrontation between the MWDT and civilian search subjects. Accordingly, MWDTs providing civilian law enforcement support may not be used to search or track people, to seize or retrieve evidence, to search buildings or other areas for personnel, or to pursue, bite, and hold, or in any way assist in apprehending, arresting, or detaining persons. See DoDI 5525.10.

Remember that military personnel cannot execute or aid civilian authorities in *executing civilian laws*, directly or actively, *except in certain very limited circumstances*. PCA does not prohibit the use of federal property for such purposes, but be careful because other statutes or regulations may prevent the use of federal property for such purposes.

NGR 500-1/ANGI 10-8101 provides detailed explanations of the use of National Guard personnel and property in support of civilian authorities, and is applicable when National Guard personnel are not on Title 10 status. Note that when federal property is used by the Guard in responding to emergencies within a state, reimbursement for the costs incurred is required.

Also be aware that new programs and new legislation may be developed concerning the use of the Guard to perform the mission of “homeland defense.” Homeland defense is a new area that will combine many of the issues faced by the National Guard, when responding to state emergencies, with issues faced by the Guard in the counterdrug program. All guidance in this area, whether statutory or regulatory, should be strictly construed.

***KWIK-NOTE: Remember that the non-applicability of the Posse Comitatus Act to the National Guard on Title 32 status or while on state active duty does not end the matter. Although PCA states what is prohibited, and its various case law interpretations discuss what activities are prohibited and/or not prohibited, “NOT PROHIBITED” DOES NOT NECESSARILY MEAN “PERMISSIBLE” OR “AUTHORIZED.”***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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# Chapter 7, Ethics

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# Fundraising

Updated by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** 5 C.F.R. 2635.808 *et. seq.*; 5 C.F.R. 735.201; 5 C.F.R. Part 950; 32 U.S.C. 508; DOD 5500.7-R, *Joint Ethics Regulation (JER)*, Chapters 2 & 3 (30 Aug 93, C4, 6 Aug 98); DoDD 5410.18, *Public Affairs Community Relations Policy* (20 Nov 01); DoDD 5035.1, *Combined Federal Campaign Fundraising within the DoD* (7 May 99); DoDD 1344.7, *Personal Commercial Solicitation on DoD Installations* (13 Feb 86, C2, 2 May 91); AFI 34-223, *Private Organization Program* (8 Mar 07) ANG SUP 1 (1 Apr 08); DODI 1000.15, *Private Organizations on DoD Installations* (20 Dec 05); AFI 36-3101, *Fundraising Within the Air Force* ( 12 Jul 02); see also The U.S. Department of Defense Standards of Conduct Office at [http://www.dod.mil/dodgc/defense\\_ethics/](http://www.dod.mil/dodgc/defense_ethics/).

## INTRODUCTION

One of the most frequently encountered standards of conduct issues is the extent to which individuals and groups can conduct fundraising activities on Air Force and Air National Guard installations. In dealing with these issues, commanders and JAG officers face complex rules and diverse requests. .

## DEFINITION

Basically, “fundraising” is the solicitation of funds from military and civilian personnel through the requesting of monies or sale of items. Collection boxes for toys, clothing, canned goods, etc., in public areas are not considered “fundraising” and can be approved by the installation commander. See U.S. Office of Government Ethics Memorandum 93 x 19, 25 Aug 93, Memorandum from Director to Designated Agency Ethics Officials Regarding Fundraising Activities.

It is important to distinguish between the three types of fundraising discussed below. It is also important to distinguish between the status of the individual or group that proposes to conduct the fundraising and where it will take place.

## GENERAL RULES

Before any group (to include squadron booster clubs, private organizations, unit advisory councils, etc.) engages in a fundraising activity, either on or off base, prior approval must be obtained from the installation commander or his designee. Fundraising by private organizations (POs) and Unofficial Activities/Organizations (UAOs) is limited. POs and UAOs may not engage in continuous resale or operate amusement or slot machines. However, the installation commander (or his delegee, the Services Squadron Commander/Division Chief) may authorize continuous thrift-shop sales operations and occasional sales for fundraising purposes like bake sales, dances, carnivals, car washes, and similar occasional functions. “Occasional” is defined as not more than two (2) 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 UAOs so long as there is no actual resale. The occasional sales limitation does not apply to PO sales of unit souvenirs or memorabilia to members of a unit provided AAFES and Services resale activities elect not to provide this service and the PO chartering documents authorize this sort of resale. POs and UAOs cannot sell or serve alcoholic beverages. UAOs cannot conduct games of chance, lotteries, raffles, or other gambling type activities under any circumstances. Rules that address particular forms of fundraising are set forth in Table 1 and the accompanying notes of AFI 36-3101.

## TYPES OF FUNDRAISERS:

There are three types of fundraising:

- Official Fundraising
- Unofficial Fundraising
- Employee Organization Welfare Funds

## **OFFICIAL FUNDRAISING**

Official fundraising (“on-the-job fundraising solicitation”) includes officially endorsed campaigns conducted during duty hours by government personnel in their official capacities. The basic rule is that individuals who are asked to participate in a fundraising activity in an official capacity may do so only in accordance with a statute, executive order, regulation, or as part of their official duties. The authority to officially participate in fundraising activities is very limited: official support for a private fundraiser is not authorized unless you can find specific authority that permits it. The only two authorized on the job campaigns for the Air National Guard are the Combined Federal Campaign (CFC) and the Air Force Assistance Fund (AFAF). Dollar goals may be established for installations, activities, and units to support the CFC and AFAF, as long as individual confidentiality is maintained. 100 percent participation goals and individual goals, quotas, or assessments are prohibited. For these causes, employees may use government time, equipment, and supplies. These fundraising efforts may be officially endorsed and employees may use their government title and organization in support of these efforts. It is important to understand the term “participate in fundraising.” According to 5 CFR 2635.808(a), it refers to active and visible participation in the promotion, production, or presentation of the event and includes serving as honorary chairperson, sitting at the head table during the event, and standing in a reception line. The term does not include mere attendance at an event, provided the employees’ attendance is not used by the organization to promote the event.

## **UNOFFICIAL FUNDRAISING**

Unofficial fundraising (“off-the-job fundraising solicitations”) includes unofficial, off-duty solicitation of funds, by individuals or private organizations, away from their workplace (including quarters on a military installation, entrances, lobbies, or concourses of buildings). Basically, if the funds raised will go to an organization other than AFAF or CFC, then the event or effort is “unofficial fundraising.” (See DoD/GC Ltr, 14 Mar 96, para 2; 5 C.F.R. 2635.808(b)).

Unofficial fundraising solicitation conducted by ANG members must be done in their personal capacity, away from the duty section, and in a non-duty status unless it falls within the exception allowed for employee welfare organizations (see below). (JER section 3-300a) AFI 36-3101 now contains a useful, updated table (Table 1) to help mete out the varying forms of acceptable fundraising activities and approval authorities. ANG members must not use office supplies, such as postage, paper, or other equipment in support of the fundraising activities. Care should be taken to coordinate any such activities with your local SJA. (JER section 3-208, 3-209; 5 C.F.R. 2635.702(c); DoD/GC Ltr, 28 May 96). The e-mail system may be used if the member obtains approval from a supervisor who is a commissioned officer or civilian, GS-12 or above. (JER section 2-301; AFI 33-119, para 3.3).

A commander should take care not to grant fundraising requests unless he or she is willing to provide the same support to comparable events sponsored by similar non-federal entities. While base-affiliated private organizations, may have greater flexibility in fundraising, they must also comply with Air Force and DoD regulations. For example, private organizations cannot solicit funds for their organizations on base and may not engage in frequent or continuous resale activities. Occasional bake sales are permissible. Furthermore, they cannot conduct games of chance, lotteries, or raffles.

Off-base fundraising by base-affiliated private organizations must not discredit DoD or create problems for the local community. Any solicitations must clearly indicate they are for a private organization and not the base or any official part of the Air Force. Donor gift recognition may not be made publicly. These organizations cannot make it appear as if the installation is endorsing them or giving them special treatment. If they violate the rules, the commander can revoke their privilege to operate on base.

Even those organizations with special relationships (Girl Scouts, CAP, American Red Cross) pursuant to statute or regulations do not have an advantage over other private organizations when it comes to fundraising. Unless a particular statute gives guidance concerning fundraising, use the JER section 3-211(b) analysis for their fundraising also. This latter section applies to all organizations that are not listed in JER section 3-210(a), are not private organizations affiliated with the base, or do not have a special relationship with DoD.

## FUNDRAISING FOR AND BY EMPLOYEE ORGANIZATION WELFARE GROUPS

The JER also recognizes fundraisers by employee organization welfare funds. To fall under this category, the event must satisfy the following three conditions: 1) the fundraising is by an organization composed primarily of DoD employees (military or civilian) or their dependents, 2) the fundraising is conducted among the members of the organization, and 3) the fundraising is for the benefit of a welfare fund for the members of the organization or their dependents. (JER section 3-210(a)(6); DoD Directive 5035.1, para 3.6; Executive Order 12353, *Charitable Fund-Raising*, 47 F.R. 12785 (23 Mar 82), para 7). This includes most morale, welfare, and recreation programs, regardless of funding. The rules on fundraising for employee organization welfare funds are generally the same as for “unofficial” fundraisers. Use of government resources is still limited and must be done in an off-duty status. However, the employees under this category are allowed to officially endorse fundraising for their welfare funds. (JER section 3-210(a)(6)). Fundraising events for employee organization welfare funds are not allowed during CFC or AFAF if they will be held “at the workplace” (e.g. in offices, hangars, flight line, or other places where people actually work). However, if the event is held “away from the workplace” (e.g., in lobbies/concourses of buildings or in other areas where people generally are not working), then the event can be approved if it will not detract from CFC or AFAF. (AFI 36-3101, para 13.3, Rules 3 & 4 of Table 1). Control over on-base activities falls squarely within the installation commander’s authority to maintain good order and discipline on base.

Off-base fundraising by these groups must not discredit DoD or create problems for the local community. Any solicitations must clearly indicate they are for a private organization and not the base or any official part of the Air Force. Donor gift recognition may not be made publicly. These organizations cannot make it appear as if the installation is endorsing them or giving them special treatment. If they violate the rules, the commander can revoke their privilege to operate on base.

### *REMINDER: PERSONAL FUNDRAISING*

Whether on or off a military installation, a federal employee may not (1) personally solicit funds or other support from a subordinate or from any person known to the employee to be a prohibited source (as defined in 5 C.F.R. 2635.203(d)), or (2) use or permit the use of his or her official title or any authority associated with public office to further the fundraising effort, unless for official organizations recognized above. Personal solicitation is defined as one-on-one contact or the use of one’s name in correspondence or permitting its use by others. Mass-produced correspondence is permissible in some situations as long as it is not “targeted” at prohibited sources or subordinates.

***KWIK-NOTE: Before any group (to include squadron booster clubs, private organizations, unit advisory councils, etc.) engages in a fundraising activity, either on or off base, prior approval must be obtained from the installation commander or his designee who should consult with the SJA/Agency Ethics Official.***

### **RELATED TOPICS:**

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## Ethics/Standards of Ethical Conduct

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Updated by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** DoD 5500.7-R, Joint Ethics Regulation (JER)(30 Aug 93, Change 4, 6 Aug 98, Change 5, 25 Oct 05, Change 6, 23 Mar 06); 5 C.F.R. 2635 *et. seq.*; *see also* the United States Office of Government Ethics website at <http://www.usoge.gov/> and The U.S. Department of Defense Standards of Conduct Office at [http://www.dod.mil/dodgc/defense\\_ethics/](http://www.dod.mil/dodgc/defense_ethics/); 5CFR 3601 *et. seq.* (Supplemental Standards of Conduct for Employees of the Department of Defense)

### ETHICS/ STANDARDS OF ETHICAL CONDUCT

Civilian employees and members of the armed forces hold unique positions in the federal government: public service is often equated with holding the public trust. This means federal employees must place the interests of the United States above their own personal interests or private gain.

For many years, each agency within the executive branch of the federal government had its own set of rules concerning ethical standards of conduct. A commission of Federal Ethics Law Reform was put together to review all those regulations governing ethics. The Commission found more than one hundred different and often conflicting federal agency regulations. Accordingly, the Commission decided to consolidate all these regulations into one set of rules governing all Executive Agency employees. Thus was born the Joint Ethics Regulation (JER) in 1993. It applies to all DoD personnel: active duty, civilian, political appointees, reserve and guard members, part-time consultants, and even retired personnel. [Change 3 made the JER applicable to ANG and Reservists]. In sum, the JER is *the* single source of guidance on standards of ethical conduct and ethics guidance for DoD, serving as a complement to all other federal law already in existence.

Every federal executive agency has a Designated Agency Ethics Official (DAEO), who administers the provisions of the Ethics in Government Act of 1978. Within DoD, the responsibility for standards of conduct is as follows: The DAEO for DoD is the DoD General Counsel (DoD/GC). The DAEO for the Air Force is the SAF General Counsel (SAF/GC). Guidance to the field is provided through MAJCOMs and NAFs to installation staff judge advocates, who act as ethics counselors for their respective commanders. NGB has designated each state AGR JAG as the “Agency Ethics Official for that state. Commanders are responsible for ensuring that the standards of conduct are factored into day-to-day decisions and enforced consistently throughout the unit.

Prior to publishing the JER, the Office of Government Ethics (OGE) published in 1992, “The Standards of Ethical Conduct for Employees of the Executive Branch,” which is now codified in 5 C.F.R. § 2635. These Standards of Conduct applied only to officers and civilian employees. However, in August of 1993 DoD published the JER to govern all ethical issues. In the “General Policy” section of the JER, specifically paragraph 1-300(B), the following is set forth as “DoD policy:”

“Although OGE regulations, reprinted in this Regulation, do not apply to enlisted members of the Uniformed Services or Title 32 National Guard Members, the provisions of 5 C.F.R. 2634 (reference (m)) in subsection 7-100, below, 5 C.F.R. 2635 (reference (d)) in subsection 2-100, below, 5 C.F.R. 2638 (reference (g)) in subsection 11-100, below, 5 C.F.R. 2639 (reference (n)) in subsection 5-100, below, 5 C.F.R. 2640 (reference (o)) in subsection 5-200, below, and 5 C.F.R. 2641 (reference (p)) in subsection 9-200, below, are hereby determined to be appropriate for, and are made applicable to, enlisted members of the Uniformed Services and Title 32 National Guard Members to the same extent that these regulations apply to officers of the Uniformed Services. The following exception applies:

(1) Certain criminal statutes, 18 U.S.C. 203, 205, 207, 208, and 209, (reference (i)), and related provisions of OGE regulations, do not apply to Title 32 National Guard Members or enlisted members of the Uniformed Services. Provisions similar to those of sections 208 and 209 of reference (i) apply to enlisted members of the Uniformed Services and Title 32 National Guard Members as follows:

(a) Except as approved by the DoD Component DAEO, or designee, a Title 32 National Guard Member and an enlisted member of the Uniformed Services, including an enlisted special Government employee, shall not participate personally and substantially as part of his official DoD duties, in any particular matter in which he, his spouse, minor child, partner, entity in which he is serving as officer, director, trustee, partner, or employee, or any entity with which he is negotiating or has an arrangement concerning prospective employment, has a financial interest;

(b) A Title 32 National Guard Member and an enlisted member of the Uniformed Services, except an enlisted special Government employee, shall not receive any salary or supplementation of his Federal Government salary, from any entity other than the Federal Government or as may be contributed out of the treasury of any State, county, or municipality, for his services to the Federal Government.”

In other words, although the JER applies to Guard members on Title 10 status to the same extent as those on active duty only certain criminal sections apply to Title 32 Guard members. Specifically the Standards of Ethical Conduct (section 2-100); non-applicability of criminal statutes unless the member uses his or her official military position to influence matters where the member has a family or company financial interest (e.g. sections 5-100, 5-200); financial disclosure forms for 0-7s on Title 10 orders in excess of 60 days (section 7-100); post-government employment for those who left before 1991 (section 9-200); and the applicability of the ethics training programs (section 11-100).

Even a Title 32 member can be prosecuted for federal public integrity violations if they participate personally and substantially in any matter in which the member, their spouse or child, partner or business has a financial interest. Nor may the member personally and substantially participate, as part of his or her DoD duties, with any entity with which the member is negotiating with or has an arrangement with prospective employment without subjecting themselves to prosecution. (JER sections 5-301; 8-200).

As noted, Title 32 members are also prohibited from receiving any salary or supplementation of their Federal Government salary, from any entity other than the Federal Government or as may be contributed out of the treasury of any State, county, or municipality, for services to the Federal Government. (JER section 5-404).

In change 6, 23 Mar 06, the JER established guidance on acceptance of gifts by injured or ill service members and their family members. It specifies that certain enlisted members of the Reserve on inactive duty for training and all members of the National Guard who meet the specific criteria at subsection 3-401.b. and family members of such members, may accept unsolicited gifts from non-Federal entities in accordance with certain rules in JER section 3-400.

Furthermore, a DoD Employee, as defined in paragraph 1-211, includes:

Any active duty Regular or Reserve military officer, including warrant officers.

Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.

Any Reserve or National Guard member on active duty under orders issued pursuant to Title 10, United States Code.

Any Reserve or National Guard member while performing official duties or functions under the authority of either Title 10 or Title 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his Reserve or National Guard of the United States title or position, or any authority derived therefrom.

Paragraph 1-219 defines the “Head of DoD Component Command or Organization,” as “a commander, commanding officer, or other military or civilian DoD employee who exercises command authority within a DoD Component.” It further states that for purposes of JER sections 3-210(a)(6), 3-210(a)(7), and 3-211, the Adjutant General of each State and territory is the “Head of a DoD Component command or organization” regarding National Guard facilities, resources, and personnel of that State or territory. The “Head of a DoD Component Command or Organization” is responsible for appointing a Designated Agency Ethics Official (“DAEO”) and Alternate DAEO.

Paragraph 1-229 defines a “Reserve Military Officer,” as “an individual who currently holds an appointment in the Reserve of a Military Department, or is a military officer of the National Guard with Federal Government recognition.”

Therefore, all guard members are advised to avoid the even the appearance of impropriety in their actions.

The overall goal of the JER is to avoid two things: improper actions and improper appearances. In a perfect world, ethical dilemmas would fall into nice neat categories, with clear-cut guidelines and easy answers. Unfortunately, ethical questions are extremely difficult to research, categorize, and answer. Common sense and the ability to research the regulation prove of even greater value as one endeavors to answer “ethical” questions. Because the JER does not lend itself to summarization, frequently encountered issues are set forth in the remaining subsections of Chapter 7.

***KWIK- NOTE: Public service is a public trust; as such, employees of the government must place the interests of the United States above their own personal interests or private gain. Every request for action must be reviewed against the backdrop of the government’s ethical canons.***

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# Fraternalization and Professional Relationships

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Updated by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** AFI 36-2909, *Professional and Unprofessional Relationships* (1 May 99); DoD 5500.7-R Joint Ethics Regulation (JER); Manual for Courts-Martial, Article 134; OpJAGAF 1996/144; OpJAGAF 1996/88; OpJAGAF 1996/61; TJAG Policy Memorandum: Civil Law -1 (17 Aug 05).

## INTRODUCTION

Most violations of the Air Force policy on professional relationships stem from inexperience or unfamiliarity with the policy. Consequently, on 1 May 1999, the revised AFI 36-2909 went into effect. This revision was the result of a SECDEF memorandum directing the services to adopt uniform, clear, and readily understandable policies regarding good order and discipline and professional relationships. It applies to all active duty, reserve, and Air National Guard members.

## WHY SHOULD COMMANDERS CARE ABOUT PERSONAL RELATIONSHIPS?

The short answer is: because how well individuals relate to one another affects how well the military mission is performed. The Air Force and the Air National Guard are more effective when individuals work together and respect authority. The Air Force instruction on professional relationships sets out the standards of behavior for personal relationships. It accounts for the fact that the Air Force and the Air National Guard are organized in ranks and that the mission is accomplished through the giving and following of orders. Commanders and supervisors have the authority and responsibility to maintain good order, discipline, and morale. As such, they may be held accountable for failing to act in appropriate cases. Commanders and supervisors of Air National Guard units should tailor application and enforcement of principles to address unique situations arising from part-time service.

## PROFESSIONAL RELATIONSHIPS:

Some relationships contribute to high morale and good discipline. Others do not. Recognizing relationships that increase morale and discipline is important. "Professional relationships" is a term used to describe personal interaction that adds to morale, discipline, and respect for authority. Open communication about careers, duties, performance, and the mission is always encouraged. Participation in unit, base, or civic activities normally contributes to esprit de corps and has a positive effect on others. When relationships have the opposite effect, *i.e.*, when they begin to break down or destroy morale, discipline, or respect for authority, they become a matter of official Air Force and Air National Guard interest.

## UNPROFESSIONAL RELATIONSHIPS

"Unprofessional relationships" is a term used to describe personal interaction that results in or reasonably creates the appearance of favoritism, misuse of position or authority, or the abandonment of organizational goals for personal interests. Depending on the circumstances, every member is susceptible to entering into relationships that will hurt morale and discipline or respect for authority. Consequently, each member of the armed forces has an obligation to keep his/her own behavior within Air Force standards. In addition, we all have an obligation to correct the improper behavior or call it to the attention of the proper authority. Unprofessional relationships can exist between: officer and officer; officer and enlisted; enlisted and enlisted; and military personnel and civilian employees or contractor personnel. Dating and close friendships become matters of official concern when they adversely affect morale, discipline, unit cohesion, respect for authority, or mission accomplishment. Such relationships may come under scrutiny even when members are not in the same unit or chain of command. In addition, sharing living accommodations, vacations, transportation, and off-duty interests on a frequent or recurring basis can be, or be perceived to be, unprofessional. The key is the frequency of the activity or the absence of official purpose. Commanders should also be sensitive to the development of unprofessional relationships in other areas of interaction: recruiting, training, professional military education, and professional care and counseling services.

## FRATERNIZATION

The term “fraternization” is used in the Manual for Courts-Martial to describe a criminal offense. Basically, “fraternization” is an unprofessional relationship between an officer and an enlisted member that violates the customary bounds of acceptable behavior in the Air Force. It prejudices good order and discipline, discredits the armed services, or operates to the personal disgrace or dishonor of the officer involved. Consequently, the term fraternization is normally used in the Air Force to describe an unprofessional relationship between an officer and an enlisted member and not unprofessional relationships between officers or between enlisted members. Other services call all unprofessional relationships fraternization and use the terms interchangeably. In many respects there is really no difference. Unprofessional relationships between two enlisted members or between two officers can be detrimental to morale and discipline.

Because officers serve in higher levels of leadership and exercise considerable authority over those members junior to them, it is recognized that the potential harm from their unprofessional conduct can have a significantly greater impact. Officers will not do the following with enlisted members: gamble; lend money to, borrow money from, or become indebted to; engage in sexual relations or date; share living accommodations (except when military operations require); or engage on a personal basis in business enterprises with, or solicit or make solicited sales.

Officer/Enlisted marriages are not always the result of fraternization. When fraternization does occur, the subsequent marriage does not preclude appropriate command actions. Moreover, married members are expected to respect all customs and courtesies when on duty, in uniform and in public, or at official social functions.

## COMMANDER'S ROLE

AFI 36-2909 provides that commanders and supervisors WILL use their authority to maintain good order and discipline within their units. If professional good judgment and common sense indicate that a relationship is causing, or may reasonably result in, damage to morale, good order, discipline, unit cohesion or mission accomplishment, the supervisor MUST take corrective action.

Special considerations arise for traditional Guard members. AFI 36-2909, para 3.8, provides that when members are not on active duty, full-time National Guard duty, or inactive duty training, commanders and supervisors should tailor application and enforcement of the regulation to the unique situations that arise from part-time service.

Commanders should ensure that the principles set forth in this instruction are briefed at least annually (para 9).

## ACTIONS IN RESPONSE TO UNPROFESSIONAL RELATIONSHIPS

Actions should normally be the least severe necessary to terminate the unprofessional aspect of the relationship. As such, the full panoply of administrative actions should be considered. These include: counseling, reprimand, removal from position, reassignment, demotion, delay of promotion, adverse comments in performance reports, and even separation. More serious cases may warrant nonjudicial punishment and even trial by court-martial. When appropriate, an order to cease the relationship should be given. Instances of actual favoritism, partiality, or misuse of position may constitute independent violations of the UCMJ, state military justice codes, or the JER.

***KWIK-NOTE: In order to maintain good order and discipline, commanders must foster professional relationships and take affirmative action to quell those relationships that result in the appearance of favoritism or misuse of authority.***

## RELATED TOPICS:

Ethics  
Gambling, Lotteries, and Raffles

## SECTION

7-3  
7-5

## Gambling, Lotteries, and Raffles

Updated by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** 5 C.F.R. 735.201; AFI 34-201, *Use of Non-Appropriated Funds* (17 Jun 02), ANG SUP 1 (29 Nov 07); AFI 34-223, *Private Organization Program* (8 Mar 07) ANG SUP 1 (1 Apr 08); DoDI 1000.15, *Private Organizations on DoD Installations* (20 Dec 05); AFI 36-2909, *Professional and Unprofessional Relationships* (1 May 99); AFI 36-3101, *Fundraising within the Air Force* (12 Jul 02); DoD 5500.7-R, *Joint Ethics Regulation (JER)* (30 Aug 93, Change 4, 6 Aug 98); OpJAGAF 1995/68, *Private Organizations* (21 Aug 95); UCMJ Articles 133 and 134; *see also* Air Force Material Command Ethics Website (<http://afmcethics.wpafb.af.mil/>).

### GAMBLING

Authorized fundraising activities do NOT include gambling activities. In fact, gambling is not allowed on government owned or leased property, or while on duty, subject only to a few narrow exceptions. Those are as follows:

- 1) Activities necessitated by a DoD employee's law enforcement duties.
- 2) Activities by organizations composed primarily of DoD employees or their dependents for the benefit of welfare funds for their own members or for the benefit of other DoD employees or their dependents, subject to the limits of local law. An example of a "gambling" activity allowed is set forth in AFI 34-201 which permits the Clubs to host Bingo and occasional Monte Carlo (Las Vegas) events. Such activities may be conducted on an occasional basis, sponsored only by open messes, and for entertainment purposes only. No monetary gain to the participants is allowed, but the awarding of non-monetary prizes is allowed. The general rule is that some tangible item of value must be given in exchange for the money given by the donor.
- 3) Private wagers among DoD employees if based on a personal relationship and transacted entirely within assigned federal government living quarters and within the limits of local laws.
- 4) Purchase of lottery tickets authorized by any State from blind vendors licensed to operate vending facilities.

Private organizations may not conduct games of chance, lotteries, or raffles under AFI 34-223, with limited exception (set forth below). Unofficial activities/organizations may not conduct games of chance, lotteries, raffles, or other gambling-type activities under any circumstances. Be aware—in some instances gambling with a subordinate may be a violation of Articles 133 and 134 of the Uniform Code of Military Justice and it is clearly a violation of AFI 36-2909 (*Professional and Unprofessional Relationships*), for an officer to gamble with a subordinate.

### LOTTERIES/RAFFLES

"Raffles" are a form of fundraising. By definition, a "raffle" is a lottery in which a number of persons buy chances on a prize. Despite what a unit may call their fundraising endeavor, if it looks like a raffle, it is. A raffle and a lottery are essentially the same: the raffle sells tickets for a chance to win a prize; the lottery sells tickets for a chance to share in a pool of collected funds. The general prohibition on gambling is subject to an exception for agency-approved activities by organizations composed primarily of DoD employees or their dependents, for the benefit of their own members or of other DoD employees or their dependents. The central authority for raffles is OpJAGAF 1995/68, 21 Aug 95. Raffles must:

- 1) not violate the law of the city, county, state, or country where the installation is located;
- 2) be approved in advance by the local installation commander. Requests for raffle approval must be made in writing and include the following information:
  - a. detailed description of the proposed event
  - b. purpose of the raffle and the intended beneficiaries

- c. measures used to ensure funds will go to the appropriate beneficiaries;
- 3) raise proceeds to be used solely to serve charitable, civic, or other community welfare purposes that directly benefit DoD personnel or their family members. (*e.g.*, proceeds used to purchase playground equipment at a child development center, to fund scholarship programs for DoD personnel and family members, or to donate money for base scouting organizations). Raffles used to raise funds for purely social, recreational, or entertainment purposes that benefit individual PO members and/or family members will not be approved (*e.g.*, weekend ski trip, sightseeing trip, shopping excursion to Mexico). Furthermore, raffles may not be used to raise money for local or national groups such as regional or national heart or cancer associations;
  - 4) not be officially endorsed or supported;
  - 5) only be conducted on an infrequent bases; and
  - 6) not be conducted in the workplace, during duty time, or at any time by an active duty member while in uniform.

***KWIK-NOTE: Lotteries and raffles are subject to strict requirements. Commanders should ensure that all such activities are staffed through the appropriate agencies and supported, in writing, with detailed descriptions of the event(s).***

**RELATED TOPICS:**

**SECTION**

Ethics	7-3
Fundraising	7-2
On-Base Commercial Solicitation	3-9
Professional and Unprofessional Relationships	7-4

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## Gifts From Outside Sources

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Updated by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** 5 CFR 2635.203 *et. seq.*; 5 C.F.R. 2635.204(g)(2)-(6); AFI 51-601, *Gifts to the Department of the Air Force* (26 Nov 03); AFI 51-901, *Gifts from Foreign Governments* (16 Feb 05); AFI 84-101 *Historical Products, Services and Requirements* (30 Jul 09); DoDD 1005.13, *Gifts and Decorations from Foreign Governments* (6 Dec 02); DoD 5500.7-R, *Joint Ethics Regulation (JER)*, (30 Aug 93, Change 4, 6 Aug 98, Change 5, 25 Oct 05, Change 6, 23 Mar 06), Chapter 2; 5CFR 3601 *et. seq. Supplemental Standards of Conduct for Employees of the Department of Defense.*

### INTRODUCTION

In our society, gifts are usually an expression of gratitude for something done by the recipient. Gifts sometimes carry with them an unwritten obligation to return the favor. As such, gifts can create the appearance of a special relationship between the donor and the recipient. This can lead to even more undesirable appearances like bribery, favoritism, and corruption. This chapter addresses gifts from outside sources and foreign governments.

### GENERAL RULE AND DEFINITIONS

DoD employees may not directly or indirectly accept or solicit gifts from a “prohibited source” or given because of their official positions.

The term “gift” includes any item having a monetary value. A gift does not include modest items of food or refreshments, items with little intrinsic value (greeting cards, plaques, certificates, and trophies), or prizes in events open to the public.

“Indirect” receipt of a gift means a gift given with the employee’s knowledge and consent to the employee’s relatives because of their relationship to the employee. It also includes the situation where the employee directs the gift to be given to another person or charitable organization. If an employee cannot accept a gift, he/she cannot redirect it to family, friends, or charities.

A gift is offered because of one’s official position if, but for the employee’s position, it would not have otherwise been offered.

A “prohibited source” is defined as any person who: 1) seeks official action by the employee’s agency, 2) is doing/ seeking to do business with the employee’s agency, 3) is regulated by the employee’s agency, or 4) has interests that may be substantially affected by performance or nonperformance of the employee’s official duties. The most commonly encountered prohibited source is the DoD contractor. In addition, employees shall not solicit or coerce the offering of a gift or accept gifts from a source so frequently that a reasonable person would believe the employee is using his/her public office for private gain.

### EXCEPTIONS TO THE GENERAL RULE

Even if the item is a “gift” and it comes from a prohibited source or is given because of the employee’s position, it may fall into one of the twelve exceptions under 5 C.F.R. 2635.204, and may therefore be accepted. A few commonly encountered exceptions warrant discussion:

1. The *de minimus* gift. This is a gift of up to \$20 in value per occasion (not cash, stocks, bonds, or CDs), as long as the total value of the gifts from one source does not exceed

\$50 in a calendar year. The rule applies per source, per occasion. This is also called the “\$20/\$50 rule.” If the gift exceeds \$20, it may not be accepted. The employee may not accept the “first \$20 worth” and supplement the difference with his/her own money.

2. Discounts and similar benefits. Government employees may take advantage of certain discounts if the discount is offered to all employees equally. For example, if a local gym or restaurant offers a reduced price for all military members and federal employees, persons in those categories can take advantage of the discounted rate. On the other hand, if the establishment offers a discount only to the installation wing commander or to general officers only, the offer may not be accepted because the donor would be discriminating among government employees based upon position and rank.
3. Free attendance at widely attended gatherings (e.g. a dinner or conference). “Widely attended” indicates an event that is open to members from a given industry, profession, or diverse group. It also applies to situations where military officials are invited to attend social, civic, or entertainment functions because of their military position, often as guests of a private organization, professional association, or defense contractor. Free attendance includes a waiver of all or a part of the fee. It does not include travel expenses or lodging. Free attendance may be generally be accepted if it is determined that attendance is in the interest of the Air Force because it will further agency programs or operations. See 5 C.F.R. 2635.204(g)(2)-(6) for specific limitations.
4. Free attendance at events sponsored by a state or local government and certain civic organizations.
5. Gifts based solely on a family relationship, personal friendship, or outside business/employment relationship.

Before final approval is granted, an analysis of the five overriding considerations in 5 C.F.R. 2635.202(c) should be undertaken.

#### **WHEN A GIFT HAS BEEN IMPROPERLY ACCEPTED**

If an employee has received a gift that cannot be accepted, the employee may return the gift, destroy it, or pay its fair market value. If the gift is perishable and it is not practical to return, the gift may, with approval, be given to a charity or shared in the office.

#### **GIFTS TO AIR FORCE PERSONNEL FROM FOREIGN GOVERNMENTS**

Federal employees may accept certain gifts from a foreign government that would otherwise be illegal to accept from any other entity. By definition, a “gift” in these circumstances includes anything of tangible or intangible value that is tendered by or received from a foreign government, except for scholarships or medical treatment. Because Air National Guard personnel often are sent around the world, they may frequently encounter offers of gifts from foreign officials. One of the primary differences between gifts from outside sources and gifts from foreign governments is the definition of “de minimus”/minimal value for purposes of determining when employees may accept and keep proffered gifts. The de minimus value for gifts from outside sources is \$20.00; the “minimal value” for foreign gifts is currently \$305.00 (U.S. retail value). This value is set forth by the Administrator of General Services under 5 U.S.C. 7342 (b) and AFI 51-901. The burden of proving “minimal value” rests on the recipient of the gift. If the gift from the foreign government exceeds \$305.00, it must be refused, but only upon conferring with Department of State, via SAF/AA. If refusal of the gift is not practical, would offend or embarrass the donor, or could adversely affect US foreign relations, it may be accepted on behalf of the United States Government. The gift must then be given to the appropriate Air Force officials within 60 days of receipt.

Gifts of historical significance are processed according to AFI 84-101, *Historical Products Services and Requirements*.

***KWIK-NOTE:*** *Commanders should be concerned with both the reality and the appearance of any relationship created by a gift. In addition, it is really important to write an acceptance letter as outlined in AFI 51-601 to avoid being charged for the “gift” later.*

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Ethics	7-3
Frequent Flyer Programs	27-5
Gifts Among Employees	7-7

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## Gifts Among Employees

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Update by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** 5 C.F.R. 2635, Subpart C; HQ USAF/JA Memo, *Gifts to Employees Upon Retirement or Transfer* (9 Jun 97); HQ USAF/JAG Message, *JER Amendment- Gifts to Superiors* (10 Jan 97); DoD 5500.7-R, *Joint Ethics Regulation (JER)* (30 Aug 93, Change 4, 6 Aug 98, Change 5, 25 Oct 05, Change 6, 23 Mar 06), Chapter 2; OpJAGAF 1995/67, *Definition of Donating Group* (15 Aug 95) 5 CFR 3601 *et. seq.* Supplemental Standards of Conduct for Employees of the Department of Defense.

### INTRODUCTION

In our society, gifts are usually an expression of gratitude for something done by the recipient. Gifts sometimes carry with them an unwritten obligation to return the favor. As such, gifts can create the appearance of a special relationship between the donor and the recipient. This can lead to even more undesirable appearances like bribery, favoritism, and corruption. This chapter addresses gifts between employees.

### GENERAL RULES

1. Employees generally may not give gifts to their superiors or solicit a gift/donation from another employee to either employee's superior. A "superior" is any employee whose official responsibilities include directing or evaluating the performance of a subordinate's official duties or any other superior of the subordinate.
2. Employees may not accept a gift from any other federal employee who earns less than him or her, unless there is no superior-subordinate relationship and a personal relationship justifies the gift.

Notice that there is no equivalent rule regarding gifts from a superior to a subordinate. However, one of the basic tenets of the Air Force is that there will be no preferential treatment given to any other individual. Superiors need to keep in mind the need to avoid the appearance of impropriety and the potential for the development of an unprofessional relationship. In addition to this rule, coercion is never appropriate in gifts between employees. No one can ever be forced to give any other person a gift. Although these general rules sound restrictive, gifts are exchanged among employees all the time. This happens because the JER sets out reasonable exceptions to the general rule. There is no exception for the prohibition against coercion.

### EXCEPTIONS TO THE GENERAL RULE

#### Gifts Given on an Occasional Basis

An employee may give to his superior, on an occasional basis, any of the following:

- 1) Gifts, other than cash, with a value of \$10.00 or less
- 2) Food and/or refreshments shared among office employees
- 3) Personal hospitality provided at an employee's home, if it is of the kind normally provided to the employee's personal friends (*i.e.*, bringing the boss home for dinner)
- 4) Transferred leave, as long as it is not transferred to an immediate supervisor

Employees may solicit contributions for a gift on an occasional basis subject to limitations. Employees may solicit contributions for food and/or refreshments that will be consumed by everyone in the immediate office to mark the occasion for such a gift.

### **Gifts Given on a Special Occasions**

This category involves two categories of “special occasions.” The first are those in recognition of infrequently occurring occasions of personal significance, such as marriage, illness, birth, and adoption. This does not include recurring events like holidays, birthdays, or anniversaries. The second category includes those occasions that terminate the subordinate-superior relationship, such as retirement, resignation, or PCS moves. This category does not include promotion to a higher position within the same organization.

If the gift is from a group of subordinates (called a “donating group”), then the gift(s) from the group may not exceed a total of \$300.00. There is no limit on the number of donating groups, save that the number must be reasonable. Donating groups cannot pool their money to buy a gift over the \$300.00 limit. Employees may not be asked to contribute more than \$10.00 toward the gift and may not be in more than one donating group. If an individual contributes to the gift and is a member of more than one donating group, then the two groups will be considered one for purposes of the \$300.00 limit. The \$10.00 and \$300.00 limits do not apply to the food, refreshments, or entertainment at the event where the group gift is given. Gifts from a group may exceed the \$300 limit if the gift meets three criteria: 1) it is appropriate to the occasion, 2) it is given on a special, infrequent occasion that terminates the subordinate-superior relationship, AND 3) it is uniquely linked to the departing employee’s position or tour of duty, and commemorates the same. JER 2-203(a).

### **VOLUNTARY CONTRIBUTIONS**

Employees may solicit voluntary contributions of nominal amounts from other employees for a gift to a superior. A contribution is not voluntary unless it is made freely, without force, pressure, or coercion. Moreover, while those seeking contributions may “suggest” an amount, it is up to the contributing employee to give whatever amount, if any. Military rank may not be used as an inducement for donations. To avoid the appearance of impropriety, no lists of contributors should be maintained.

***KWIK NOTE: Commanders should be concerned with both the reality and the appearance of any relationship created by a gift.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Ethics	7-3
Gifts From Outside Sources	7-6
Professional and Unprofessional Relationships	7-4

## Honorary Memberships

Updated by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** 5 C.F.R. 2635 *et. seq.*; DoD 5500.7-R, *Joint Ethics Regulation (JER)*(30 Aug 93, Change 4, 6 Aug 98, Change 5, 25 Oct 05, Change 6, 23 Mar 06), Chapters 2 and 3; 5CFR 3601 *et. seq. Supplemental Standards of Conduct for Employees of the Department of Defense* (1 January 2009) .

### HONORARY MEMBERSHIP

Air Force personnel are occasionally offered free or “honorary” memberships from various private organizations such as golf, tennis, gun, health, or social clubs. Such offers usually waive initiation fees and all, or a portion of, membership dues, with the individual responsible for all other charges. Usually these memberships terminate on the individual’s reassignment or retirement and do not create an equity position in the club.

### THE RULES

Before publication of the Joint Ethics Regulation (JER), there was no prohibition on accepting a non-solicited honorary membership from a private organization. However, under the JER, military members and civilian employees are barred from accepting a free or discounted membership if the membership was offered because of the person’s government position. This is true even if the private organization contends that the membership is offered to the employee in a personal (instead of official) capacity or connects the membership to an “honorary” position in the management of the private organization (*e.g.*, board of directors, trustee, etc.).

A member or employee may accept an honorary membership if the offer is unrelated to government employment (such as through a spouse’s association with the organization), or is offered to all military members, regardless of rank or position (*e.g.*, military discount). For example, a golf club’s discount for all military personnel is acceptable; a golf club’s military discount for the installation commander alone, or for all O-6s and above, would not be acceptable.

***KWIK- NOTE: Military members and civilian employees are barred from accepting a free or discounted membership if the membership was offered because of the person’s government position.***

### RELATED TOPICS:

### SECTION

Ethics

7-3

Civic Organizations

6-3

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## Off-Duty Employment

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Updated by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** 18 U.S.C. 208; 5 C.F.R. 2635; DoD 5500.7-R, *Joint Ethics Regulation (JER)*(30 Aug 93, Change 4, 6 Aug 98, Change 5, 25 Oct 05, Change 6, 23 Mar 06), Chapters 1- 3; OpJAGAF 1996/75, *Propriety of Employment for Reserve Officer* (13 May 96); OpJAGAF 2001/14, *Off-Duty Employment- Air Guard Reserve Pilots* (9 Mar 01) ANGI 36-101, *Air National Guard Active Guard Reserve (AGR) Program* (2 June 2010).

### INTRODUCTION

Air Force and Air National Guard members may participate in off-duty employment, subject to the limitations and prohibitions set forth in the Joint Ethics Regulation (JER) and its lawfully promulgated supplements.

### WHO MUST OBTAIN APPROVAL FOR OFF-DUTY EMPLOYMENT

A common *misconception* is that the JER requires every DoD employee and military member to obtain pre-approval of any off-duty employment: that is not the case. The JER, section 2-206, requires pre-approval of off-duty employment only for DoD employees who: a) are required to file a financial disclosure report (the SF 278 or OGE 450) and b) wish to engage in a business activity or compensated outside employment with a prohibited source. A “prohibited source” is defined as: 1) any person who seeks official action by the employee’s agency; 2) does business or seeks to do business with the employee’s agency; 3) conducts activities regulated by the employee’s agency; 4) has interests that may be substantially affected by the performance of the employee’s official duties, or 5) is an organization comprised of members who fall into one of these categories. In those cases, the employee must obtain written approval from his/her supervisor or commander. Moreover, under JER 2-303, agency designees may require any DoD employee under their jurisdiction to report any outside employment or activity prior to engaging in it. The commander, head of the organization, or supervisor may then prohibit activity if it will: 1) detract from readiness, or 2) pose a security risk. As always, any activity that may reasonably be expected to bring discredit upon the government or DoD will not be allowed.

ANGI 36-101 paragraph 2-6 requires approval of off-duty employment by AGRs and specifically prohibits temporary or permanent employment by the State.

### “COVERED RELATIONSHIP” AND CONFLICTS OF INTEREST

In addition to the pre-approval requirement, there are a number of statutory provisions that may be triggered by off-duty employment with a prohibited source (*See* 5 C.F.R. 2635.801(d) and the JER, section 1-500 for a summary of these statutes). For example, 18 U.S.C. 208 prohibits a government employee from participating personally and substantially in an official capacity in any particular matter in which he has a financial interest if the particular matter will have a direct and predictable effect on that interest. An employee’s part-time employment with a person or company means that the employee has a “covered relationship” with that person or company for purposes of conflict of interest laws. An employee may not engage in outside employment if the employee would have to be disqualified from matters so central to the performance of his official duties that the employee’s ability to perform the duties would be materially impaired (5 C.F.R. 2635.802). Stated differently, if an employee’s proposed off-duty employment would involve conflicts of interest so great that he or she would be unable to carry out official duties, a supervisor or commander may disapprove that particular off-duty employment.

## TEACHING, WRITING, OR LECTURING

Personnel are encouraged to engage in teaching, writing, or lecturing. However, a member may not accept compensation for teaching, speaking or writing in their personal capacity, if any of the following five conditions apply: 1) the subject matter deals in significant part with any ongoing or announced policy, program or operation of the DoD or the Air Force; 2) the subject matter deals in significant part with any matter to which the employee presently is assigned, or to which the employee was assigned during the previous one-year period; 3) the circumstances indicate that the invitation to engage in the teaching, speaking or writing was extended to the employee primarily because of his/her official position, rather than his/her expertise on the particular subject matter; 4) the invitation to engage in the teaching/speaking, or writing (or the offer of compensation for the activity) was extended to the employee, directly or indirectly, by a person (or company) who has interests that may be affected substantially by performance or nonperformance of the employee's duties; and 5) the information conveyed through the teaching, speaking, or writing, draws substantially on ideas or official data that are "nonpublic information" as defined in 5 C.F.R. 2635.703.

Further, the JER 3-307 (a) sets out specific guidelines for required disclaimers where a DoD employee uses or permits the use of his military grade or who permits the inclusion of his title or position as one of several biographical details given to identify himself in connection with the teaching, speaking or writing if the subject deals in significant part with any ongoing or announced policy, program or operation of the DoD employee's Agency and the employee has not been authorized to present the material as the Agency's position. Public Affairs coordination and approval is recommended prior to publishing any writing that might involve disclosure of military duties.

## THE TRADITIONAL GUARDSMAN

The analysis becomes more difficult when applied to traditional guardsmen who, by their very nature, retain "full time" off duty employment. Obviously, their employment is not illegal, per se, but does warrant careful review. The JER does apply to National Guardsmen performing official duties or functions under the authority of either Title 10 or Title 32 of the United States Code because the National Guardsman meets the JER definition of "DoD employee. JER 1-211e. When deciding whether or not a covered relationship or conflict of interest exists, one must compare the civilian responsibilities with military duties. First, look to see if the guardsman is employed/seeking employment with an organization that provides services or sales to the Air Force/ANG community. Essentially, a Guard member may not participate on both sides of a transaction, *i.e.*, work for a company in a full-time civilian capacity and then make decisions on behalf of the AF/ANG that will affect that company's welfare. The conflict is obvious and the appearance of impropriety overwhelming and might require a change of military assignment or duties.

If a member's participation in a military capacity is tangential to other AF responsibilities, such that he/she could easily perform meaningful duties in another unrelated capacity, then the member may keep the civilian job and continue with the current ANG assignment. The decision as to whether or not his/her military duties can be separated from ties to the civilian work is left to the commander who should consult the SJA if there is any question. If military duties cannot be separated from activities involving the civilian duties, then the member may not maintain employment with that civilian organization under JER 2-100 (5 C.F.R. 2635.802), which precludes an employee (including a Reservist as a special government employee) from engaging in outside employment that conflicts with his/her official duties. An activity conflicts with an employee's official duties if it would require the employee's disqualification from matters so central or critical to the performance of his/her official duties that his/her ability to perform the duties would be materially impaired.

Under the JER 8-501(b), standards of conduct counseling is personal to the employee and does not extend to the employee's prospective employer.

***KWIK NOTE: Commanders should advise members that non-military employment might be subject to certain ethical restrictions.***

**RELATED TOPICS:**

**SECTION**

Conflicts of Interest	7-15
Contracting Pitfalls	25-8
Ethics	7-3
Outside Employment of Spouses	7-11
Standards of Conduct – Statement of Affiliations and Financial Interests	7-14

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## Organizational Emblems, Symbols, and Names

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Updated by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** United States Code, Titles 10 and 18; AFI 34-223, *Private Organization (PO) Program* (8 Mar 07); AFI 34-223 ANG SUP 1 Apr 08; AF/JAG “All SJA” Memorandum, 16 August 2002; DODI 1000.15, *Private Organizations on DoD Installations (20 Dec 2005)*; AFI 38-101, *Air Force Organization* (4 Apr 06); AFI 38-101 Air Force Guidance Memorandum (AFGM1), (1 Jun 09); AFI 84-101, *Historical Products, Services, and Requirements* (30 Jul 09); AFI 84-105, *Organizational Lineage, Honors, and Heraldry* (1 Feb 06); AFMAN 33-326, *Preparing Official Communication* (15 Oct 07); DoD 5500.7-R, *Joint Ethics Regulation (JER)*, (30 Aug 93, C4, 6 Aug 98, Change 5, 25 Oct 05, Change 6, 23 Mar 06); OpJAGAF 1996/130, *Use of AIM HIGH Logo by Civilian Aircraft at USAF Shows* (14 Aug 96).

### INTRODUCTION

Organizational emblems are encouraged because they promote unit pride and morale. There are specific requirements for their design, color and size. For instance, designs cannot infringe on any copyrighted designs; mottos in the emblem are optional, but if requested, should be in good taste, avoid use of words that may be offensive in nature or cause embarrassment to the unit and the Air Force, and should not infringe on a registered trademark (for example, a private corporate slogan or a well-known commercial phrase).

Unit emblems must be approved IAW AFI 84-101 and AFI 84-105. The Director of Air Force History (HQ USAF/HO) establishes policies concerning historical data and documentation, historical reporting, historical publications, and organization lineage, honors and emblems. Establishments and units as defined in AFI 38-101, *Air Force Organization*, may have organizational emblems. If they choose to display organizational emblems, they must use official designs registered with the Air Force Historical Research Agency. Chapter 3 of AFI 84-105 sets out the requirements for emblem designs. Commanders of Wings or Groups, in conjunction with their unit historian, must process requests for approval of new or modified emblems through their State Headquarters to the State Adjutant General, then to the National Guard Bureau (NGB-PAH), and finally to HQ USAF HRC/RI.

However, more important for Commanders is the question of proper use of their organization’s emblems, its symbols and name. This is where some potentially troublesome situations arise which could have Joint Ethics Regulation (JER) implications.

### UNIT USE OF ORGANIZATIONAL EMBLEMS, SYMBOLS AND NAMES

Approved organizational emblems may be used only by military personnel in that organization on flight, athletic and utility clothing, conservatively colored civilian blazers, organization aircraft and equipment, and personal stationery greetings, invitations and other similar items. Units frequently use their emblems on plaques, certificates and awards given to retiring military personnel, and to civilians to show the unit’s appreciation for their support in a special project.

Guard members may only use the unit’s emblem on their personal stationery, greetings, and invitations for military purposes. Non-military uses of the organizational emblem are not permitted and may raise the appearance of a Joint Ethics Regulation violation. For example, a traditional Guard member who has a private business cannot use the Guard unit’s emblem, motto, symbol or name on the member’s stationery used in connection with that private business.

No distinctive organizational emblems are authorized below the squadron level, and unit commanders are responsible for controlling the use of their unit’s emblem.

## **REQUEST FOR USE OF YOUR EMBLEM BY OUTSIDE PERSONS OR GROUPS**

### **Other Military Organizations**

Pursuant to AFI 84-105 para 3.5, an organization has exclusive use of its approved heraldic emblem. The organization's commander controls the use of its emblem. Emblems are approved for the exclusive use of the unit concerned. Hence, the approval process of an emblem can loosely be deemed a registering of a military trademark -- the emblem. This means that no other military unit may use another unit's emblem.

### **Civil Associations or Military Corporations within the Unit**

Fairly recent updates to AFI 34-223 (8 Mar 07) preclude any private organization, civil association, or military corporation duly formed and operating on base from using in its title or letterhead any name, abbreviation, seal, logo, insignia, or the like, used by any DoD component to identify any of its programs, locations or activities. This includes a prohibition against using the emblem in connection with advertising or sponsorship of activities. AFI 34-223 also requires a prominent disclaimer on all print and electronic media to clarify that they are not an official part of DoD. Specific language and display requirements for disclaimers may be found at AFI 34-223, Section C, para 10.

### **Non-military Persons or Groups**

Commanders may act upon requests for use of the unit emblem by hobbyists or collectors. If no commercial use will be made of the emblem, consider granting the request since it may enhance community relations. Units also customarily and properly hand out promotional materials showing the unit's emblem, motto, symbol, logo, name or aircraft likeness to civilian visitors to the base to further community relations.

Requests from toy manufacturers, advertisers, or similar commercial enterprises must be approved initially by the unit concerned, and then by higher headquarters, and should be submitted through the same channels as the original request for the emblem's approval. The standard for approval of the use is the "best interests" of the Air Force. Local Commanders can deny but cannot finally approve these requests.

In addition to requests for use of the emblem, commanders may receive requests from commercial enterprises for use for promotional purposes of a unit's motto, symbol, logo, name, or an illustration of the assigned aircraft or its name, or the words "Air National Guard" with or without the state as a prefix. The request may have as its basis a commercial arrangement favorable to your unit. The commercial enterprise may also want to pay the unit or base MWR corporation a licensing fee for use of these items. If this sounds like a Standards of Conduct quiz, it is. The JER imposes a positive duty to protect and conserve government property. A unit's emblem, motto, symbol, logo, name, and aircraft and its likeness are government property, particularly since government resources are responsible for their existence. Commanders cannot directly or indirectly use or allow the use of government property for other than officially approved activities or official government business. The one exception is using government property for approved activities that would further military-community relations, if such use does not interfere with military missions. Requests from the commercial enterprises should be denied if it would improperly imply official support of a commercial promotional enterprise.

The United States military is an institution respected around the world. The symbols associated with military service (titles, uniforms, flags, seals, crests, emblems, etc.) not only represent some of our country's best people, resources, and achievements, but also the proud tradition and heritage of our military services. Occasionally, people both within and outside the Air Force want to use these symbols to advance their own purposes. Commanders should be alert to instances of misuse and be prepared to intervene to protect the respect and dignity afforded Air Force symbols. The key JER provision in this area is found at JER 3-209. This provision applies to situations in which DoD employees attempt to use their official position for personal or private gain. It is also broad enough to prevent DoD employees from using any indicia of their official positions as an "implied" endorsement.

One of the most recognized symbols of military service is the uniform. Under 10 U.S.C. 771, no one except a member of the armed forces may wear the uniform, a distinctive part of the uniform, or a uniform any part of which is similar to the uniform of the armed forces. Violations can be prosecuted under 18 U.S.C. 702. An exception is provided for an

actor in a theatrical or motion picture production, who may wear a military uniform if the portrayal does not tend to discredit that armed force. Requests to use DoD materials (including uniforms and insignia) in commercial advertising or promotions are to be referred for approval through Public Affairs.

The seal of the Department of the Air Force is protected by 18 U.S.C. 506 and AFMAN Manual 33-326 *Preparing Official Communications*, Attachment 2. The AFMAN lists unauthorized uses of the Air Force seal (e.g., souvenir or novelty items, toys or commercial gifts and premiums, membership cards of military or quasi-military clubs) as well as any use that implies an Air Force connection or endorsement. SAF/AA is the custodian for the Air Force seal and is solely responsible for approving its use on official departmental documents and records.

## **USES WITHOUT REQUEST OR PERMISSION**

### **Other Military Organizations**

However unlikely this is, if another unit uses your unit's emblem, notify the emblem approval authority to take action to stop it.

### **Private Organizations, Civil Associations or Military Corporations within the Unit**

Since commanders control the use of the unit emblem, impermissible use of the emblem by base organizations is easily stopped by the commander's order.

### **Non-military Persons or Groups**

Impermissible use of a unit's emblem, symbol, name, motto, logo, or aircraft likeness may, in some instances, present some complex problems.

Preventing the impermissible use of emblems is relatively easy. Since federal regulations authorize exclusive use of the emblem, upon learning of an impermissible use of an emblem, have the Staff Judge Advocate contact the NGB through channels. The NGB will contact the Department of Justice, which will instruct the local U.S. Attorney to bring a civil or applicable criminal action in federal court to stop any impermissible use of your emblem.

Impermissible use by these non-military persons or groups of an official unit name or designation may similarly be dealt with through the same channels. Title 18, United States Code, a federal criminal statute, designates certain names and titles, such as the FBI, NASA, and military designations as prohibited from being used by other than those agencies.

Impermissible use of unit symbols, mottoes and logos is a bit tougher to deal with. For example, a unit has been in the community for 15 years and for much, if not all of that time, the unit has been known by everyone in that community - in and out of the military - by a certain logo or motto. The unit calls itself the "Boys from Boise." That logo is printed on the unit letterhead and unit promotional material, and everyone in that community knows the "Boys from Boise" is that particular guard unit. It is a source of tremendous unit pride and over the years has created much goodwill in, and excellent relations with, the community. Now the unit learns that a private non-military related group in the community has legally formed a corporation - profit or non-profit - under appropriate state laws, the stated purpose of which is to fight homosexual discrimination, enhance job opportunities for homosexuals, and provide educational programs to the public to gain general acceptance of homosexuals [Note that the example intentionally uses a non-military group whose purpose is contrary to military standards and requirements, but the analysis that follows is equally applicable to such groups whose purpose is purely commercial, and who may fairly be said to be trading off of your unit name to their financial advantage].

One can imagine the potential harm such an entity with the same name as that unit can, even indirectly, cause. People in the community may be confused and may believe the non-military organization is part of, or sponsored or endorsed by that unit. At the very least, a commander and his staff will spend time responding to questions about this, either in personal appearances, through the media, by telephone, or in writing -- time that could and should be spent otherwise performing the mission and enhancing community relations -- not fighting to prevent community relations from being diluted.

## How Can This Be Stopped?

Unfortunately, it may be too late once the outside corporation is formed, but certainly a commander should, with the assistance of the Staff Judge Advocate, immediately contact the State Headquarters Commander for consideration of appropriate action and further contact with higher headquarters for assistance.

To prevent this from happening, look to Title 18 of the United States Code. The legislative process allows for special bills (legislation) to be introduced in Congress, which prohibit the use of specified names - like the FBI and NASA - by outside agencies or groups. (See *e.g.*, 18 U.S.C. 2459b). It is possible that Congress will pass a special bill making it a federal criminal offense to use a unit's symbol, motto, and logo. If a unit symbol, motto, or logo is sufficiently well-known in your community, and the use of such symbol, motto or logo by an organization or person outside the unit may be "bothersome" to the unit, have the SJA contact the local Congressman for assistance in drafting and sponsoring such a special bill.

Because people and organizations are constantly devising new ways to trade upon a military connection, issues will always come up that are impossible to resolve with a definitive citation or reference. Good judgment and common sense will often dictate an appropriate result. For example, see the analysis involved in allowing a private company to use the Air Force Recruiting Service's "AIM HIGH" logo during air shows. (OpJAGAF 1996/130, 14 Aug 96).

***KWIK-NOTE: Know the permissible and non-permissible uses of organizational emblems, symbols and names, and act promptly to protect your unit's good name.***

### RELATED TOPICS:

### SECTION

Aerial Events, Flyovers, and Static Displays	13-2
Fundraising	7-2
Civic Organizations	6-3
Civil Associations and Military Corporations	22-2
Commercial Solicitation on Base	3-9
Community Relations Programs	6-4
Ethics	7-3
Morale, Welfare and Recreation (MWR) Programs, Activities and Facilities	22-4

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## Outside Employment of Family Members

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Updated by Lt Col Monique J. DeSpain, October 2010

**AUTHORITY:** DoD 5500.7-R, *Joint Ethics Regulation (JER)*, (30 Aug 93, C4, 6 Aug 98, C5, 25 Oct 05, C6, 23 Mar 06), applicable state law.

### RESTRICTIONS

National Guard members their spouses and family members often have employment with private firms in addition to their membership in the National Guard. Spouses and children of National Guard members may find that their employment violates State or Federal law. For example, spouses are bound by certain provisions of the Procurement Integrity Act (41 U.S.C. 423). A spouse employed by a firm that does business with the state or the federal government must take care to avoid a violation of state and federal regulations or even the appearance of a conflict of interest. A spouse whose firm benefits from a contract with the unit creates the appearance of a conflict of interest which challenges the integrity of the procurement process. While the employment history of a spouse should not affect the career potential of a member of the unit, disclosure and common sense must be used to avoid potential liability for the unit. Commanders should review these issues with their Staff Judge Advocate.

### AVOID CONFLICTS OF INTEREST

The entire issue of conflict of interest is complex. The following guidance can be given to members their spouses and children when the issue of conflict of interest is raised. Any action which might result in, or give the appearance of the following should be avoided:

1. Using public office for private gain;
2. Preferential treatment to any person or entity;
3. Impeding Government efficiency;
4. Losing independence or impartiality;
5. Government decision outside official channels; or
6. Adversely affecting confidence of the public in the integrity of the Government.

Identification of these potential conflict of interest problems will surface when members are required to file a SF 278 or a OGE SF 450. It is the responsibility of the Staff Judge Advocate, with the supervision and guidance of the Office of the Chief Counsel, NGB, to train members of the unit concerning conflict of interest and standards of conduct matters.

***KWIK-NOTE:*** *Commanders should advise their members that the jobs of non-military spouses of National Guard members may be subject to certain restrictions. You may need to supplement this topic with state law.*

### RELATED TOPICS:

	SECTION
Conflicts of Interest	7-15
Contracting Pitfalls	25-8
Ethics	7-3

Off-Duty Employment	7-9
Preventive Law Program	17-15
OGE Form 450: Statement of Affiliations and Financial Interests –	7-14

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## Political Activities

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Updated by Major Kerry L. Muehlenbeck, January 2003

AUTHORITY: 2 U.S.C. 441a, 441f, 441g, 441i; 5 U.S.C. 1216, 2302, 3303, 7321-7326 (The Hatch Act); 10 U.S.C. 888 and Articles 88 and 92, UCMJ; 18 U.S.C. 592-594, 596, 602-603, 606-609; 18 U.S.C. 1913 (The Anti-Lobbying Act); 49 U.S.C. 1507(a); DoD 5500.7-R, *Joint Ethics Regulation* (JER)(30 Aug 93), C4, 6 Aug 98); DoD Directive 1344.10, *Political Activities by Members of the Armed Forces* (15 Jun 90); AFI 10-1001, *Civil Aircraft Landing Permits* (1 Sept 95); AFI 36-3107, *Voting Assistance Program* (31 May 94); AFI 51-902, *Political Activities by Members of the US Air Force* (1 Jan 96); SECDEF Message, 18 September 02, *Department of Defense (DOD) Public Affairs Policy Guidance Concerning Political Campaigns and Elections*; TJAG Policy Letter 10, *Political Activities of Air Force Military Personnel*; DoD/GE Memorandum, 14 Apr 95, *Guidance on Lobbying and Public Relations Activities*; Department of Justice Memo, 18 Apr 95, *Anti-Lobbying Act Guidelines*. See also Air Force General Law Website on Ethics Resources.

### INTRODUCTION

In the United States, the constitutional tradition of a politically neutral military establishment under civilian control includes nonpartisanship by the military and the elimination of undue military influence on the political process. This principle of political neutrality is also applicable to federal employees under the Hatch Act. The Hatch Act protects the tenure of federal employees by separating political activity from employment, promotion, and dismissal actions, and removes federal employees from the arena of political activity.

The Joint Ethics Regulation tells us that DoD policy encourages civilian DoD employees and members of the Armed Forces to carry out the obligations of citizenship to the maximum extent possible consistent with the restrictions imposed by law. While members of the Air National Guard and its civilian employees are encouraged to carry out their responsibilities as citizens, they may be, in certain situations, limited or prohibited from engaging in partisan political activities. Thus, political activities are subject to certain statutory and regulatory restrictions, and violations may be chargeable under a state Military Justice Code provision for failure to obey a lawful order or regulation, which under the UCMJ (not applicable to Title 32 National Guard members), is Article 92.

As you read this topic, a few things should be apparent:

1. Traditional Guard members are not restricted in their political activities to the same extent as active duty Title 10 personnel;
2. The rationale for many of the restrictions on the political activities of traditional Guard members is the use of their position as Guard members while engaging in or supporting political activities;
3. There are more restrictions on political activities of federal technicians than on traditional Guard members; and
4. The restrictions on AGRs are probably closer to those on Title 10 active duty personnel than to those on traditional Guard members.
5. There are more restrictions on officers than enlisted personnel.

Since members of the National Guard may serve in a status under Title 32 and may also serve on active duty under Title 10, their participation in the political process creates a number of tough issues. Members of the National Guard may be active in local politics and some may even hold elected positions. As a result, a balance must be achieved. AFI 51-902 is a punitive instruction. If a member of the unit is serving under Title 10 orders in excess of 30 days, the rules are clearly restrictive. If a member of the unit is serving under Title 32, the rules are not so clear.

Reservists and guardsman on active duty/Title 10 for more than 30 days must comply with the active duty rules. (AFI 51-902, para 1). Those on active duty for less than thirty days follow the more general guidelines in para 8 of AFI 51-902. However, remember to check your state statutes to ensure there are no additional restrictions on political activities. Some general guidelines are provided below to assist Commanders in the implementation of policy concerning these issues.

## DEFINITIONS

Partisan Political Activity is activity in support of or related to candidates representing, or issues specifically identified with, National or State political parties and associated or ancillary organizations. A candidacy, declared or undeclared, for national or state office, is a partisan political activity, even if the candidate is not affiliated with a national or state party. (AFI 51-902, para 2.4).

Non Partisan Political Activity is activity in support of or related to candidates not representing, or issues not specifically identified with, National or State political parties and associated or ancillary organizations. (Issues relating to Constitutional amendments, referenda, approval of municipal ordinances, and other of a similar character, are deemed not specifically identified with National or State political parties) (AFI 51-902, para 2.3).

Active Duty is full time duty in the active military service of the United States without regard to duration or purpose, including full-time training duty, annual training duty, attendance while in the active military service at a school designated as a service school by law or by the Secretary of the military department concerned, and National Guard duty as defined in 10 U.S.C. 101 (42) (reference b). (AFI 51-902, para 2.1).

Civil Office is a specific nonmilitary position created by law whose incumbent has certain specific duties imposed by law and involving the exercise of some portion of the sovereign power of the United States or of a state. It may be either an elective or an appointive office under the United States, a Territory or Possession, or a State, county or municipality, or official subdivision thereof. The term "Civil Office" does not include offices to which military personnel may be assigned in a military status.

Full Time Service is any service in connection with a civil office that is likely to interfere with regular military duties.

## PERMISSIBLE ACTIVITIES

Air National Guard personnel are expected and encouraged to carry out their responsibilities as citizens of the United States. Accordingly, they retain the right to:

1. Register and vote in any election;
2. Express personal opinions as individuals citizens on candidates and issues, but not as a representative of the military;
3. Make voluntary campaign contributions to political parties or organizations, subject to certain limitations discussed later in this topic; and
4. Attend partisan and nonpartisan political gatherings as spectators when not in uniform;
5. Campaign for, and hold, elective partisan and non-partisan civil office if held in a private capacity which does not interfere with the performance of military duties as long as they are not serving on extended active duty (in excess of 270 days). (ANG personnel may not, however, use their military status as a political selling point, *e.g.*, no use of government facilities and no campaigning in uniform).

In the course of their private political activities, military members and federal employees may also:

1. Promote and encourage others in federal service to exercise the franchise, provided such efforts are not designed to influence or interfere with the outcome of elections;

2. Sign petitions for specific legislative action or place a candidate's name on an official ballot, provided the signing is not an obligation to engage in partisan political activity and is taken as a private citizen and not as a representative of the Air National Guard;
3. Write personal letters to newspaper editors expressing personal views concerning public issues. Provided those views do not attempt to promote a partisan political cause;
4. Write personal letters, not for publication, expressing preference for a specific political candidate or cause, provided the action is not part of an organized letter-writing campaign on behalf of a partisan political cause or candidate;
5. Join political clubs and attend meetings or rallies when not in uniform;
6. Serve as election officials and perform nonpartisan duties, provided such does not interfere with efficient performance of military or official duties and such services are performed while not in uniform;
7. Commanders may also appoint voting officers to provide voting information and applications for absentee ballots under AFI 36-3107; and may allow time off for members to vote;
8. Display political stickers on private vehicles or wear political badges or buttons when not in uniform and not on duty;
9. Serve in a local part-time nonpartisan civil office, either elective or appointive (examples are local school board or planning commission);
10. National Guard members may also hold certain federal, state, and local appointed or elected full-time civil offices (examples are U.S. Attorney and state judge) if not prohibited by federal or state statutes or regulations. Prior to seeking election or appointment to a civil office, the member should determine whether the holding of that office will adversely affect the member's ability to continue as a military member; and
11. Participate in local nonpartisan political campaigns (e.g. issues relating to constitutional amendments, referenda, municipal ordinances) when not in uniform and not interfering with military duties (see AFR 110-2, Attach 1 C3).

## **PROHIBITED ACTIVITIES**

Establishment of new polling sites on installations is prohibited. But pursuant to new statutory requirements, commanders must make pre-existing polling sites available for elections, if election officials choose to use them, unless the appropriate service secretary determines that security concerns override the site's availability.

Use of base facilities, clubs, and meeting areas to support partisan campaign activities is prohibited.

Members of the National Guard must not use their POSITIONS in the National Guard (such as by campaigning in uniform or using one's rank or grade) to assist them in obtaining political office or endorsing a political candidate or issue by:

1. Interfering with elections, election officials, or voters (military personnel must "remain clear" of on-base polling places, except to actually vote.
2. Authorizing government services or support to candidates (e.g. housing, meals, transportation);
3. Soliciting votes or contributions for a candidate or issue;
4. Selling tickets for, or otherwise actively promoting, political dinners and fundraising events;

5. During training periods when receiving federal compensation, soliciting or receiving campaign contributions from any other officer, employee or person receiving compensation for services from federal funds;
6. Authorizing any solicitation or campaign fundraising activities on base or in federal buildings;
7. Giving anything of value to any person in government service for the promotion of any political purpose;
8. Speaking before partisan political gatherings or participating in any radio or television programs or group discussions as an advocate of a partisan political party or candidate in their capacity as members of the National Guard;
9. While in uniform, endorsing a particular candidate or position, or attend partisan or non-partisan political gatherings;
10. Conducting political opinion surveys under the auspices of a partisan political group, or polling members on how they voted;
11. Participating in partisan voter transportation drives, or performing clerical or other duties for a partisan political committee during the campaign in, or on election day;
12. Participating in partisan political management, campaigns or conventions;
13. Attending, as an official Air National Guard representative, partisan political events, even without actively participating;
14. Serving in any official capacity or being listed as a sponsor in partisan political organizations;
15. Publicly advocating a partisan political party or candidate;
16. Distributing partisan political petitions, literature, badges or buttons;
17. Marching or riding in partisan political parades;
18. Publishing or causing to be published partisan political articles designed to solicit votes for a particular candidate or party; or
19. Displaying large political signs, posters or banners on private vehicles.

If a member of the National Guard is called to active duty, additional restrictions will apply. Examples include:

1. Active duty reserve officers and enlisted personnel who are elected or appointed to a civil office requiring full-time service generally will be retired, discharged, or released from active duty, as appropriate. This creates an obvious problem when members of the National Guard are called to extended active duty;
2. A commissioned officer on active duty may not utter contemptuous words against the President, or certain other public officials (10 U.S.C. 888, Art. 88, UCMJ);
3. Prior approval of the Secretary may be required to serve as an election official in a non-partisan capacity;
4. Prior approval of the Secretary may be required to serve in a local part-time non-partisan civil office, either elective or appointive;
5. Contributions cannot be made directly to a particular candidate or federal officer or employee; and

6. While the 19 activities described above are prohibited if done by Guard members using their official position, they are *per se* prohibited for members in Title 10 status, whether or not the member's official position is used.

### **CRIMINAL PROHIBITIONS**

Certain types of political activities are prohibited by federal statutes and carry criminal penalties for their violation. Some of the prohibitions listed also appear elsewhere in this topic but are repeated here because of the severe consequences of their being violated. For example, National Guard members and Federal employees of the United States may not:

1. Station troops at any place where an election is held, except to repel armed enemies;
2. During training periods when they receive federal compensation, solicit or receive contributions for any political purpose from any other officer, employee or person receiving compensation for services from federal funds;
3. Interfere with the manner or methods of political elections or election officials;
4. Intimidate voters or solicit political contributions from other officers and employees;
5. Poll members of the Armed Forces to determine the nature of their votes;
6. Make political contributions to any officer or employee for the promotion of any political object; or
7. Solicit or otherwise engage in fundraising activities in federal offices or facilities, including military reservations, for a partisan political cause or candidate.

### **LIMITATIONS ON POLITICAL CONTRIBUTIONS**

The law on campaign contributions is complex. While federal law permits the military member to contribute to political parties or election committees, the following restrictions apply:

1. The aggregate of individual political contributions in excess of \$25,000 is prohibited;
2. There can be no contribution directly to a partisan political candidate, another military member, or an employee of the federal government;
3. A military member may make monetary contributions to a political organization (political party or committee) which favors a particular candidate, but not political candidates or their organization directly;
4. Contributions of currency (does not include checks) for the benefit of any candidate for Federal office may not exceed \$100.00 in any calendar year (2 U.S.C. 441g); and
5. Contributions may not be solicited or received in federal buildings, offices, or military reservations (19 U.S.C. 603).

### **RETIRED MEMBERS**

Generally, no statutes or regulations prohibit retired military personnel from supporting political parties or becoming candidates for public office. Retired personnel may also hold elective or appointive civil office.

### **ACTIVITIES NOT EXPRESSLY ALLOWED OR PROHIBITED**

Some of the political activities not expressly prohibited would be contrary to the spirit and intent of governing regulations and directives. Accordingly, in determining whether or not any activity violates the traditional concept

that military personnel must not engage in partisan political activity, rules of reason and common sense apply. Any activity that reasonable could be interpreted as associating the Department of Defense, or any element thereof directly or indirectly with a partisan political cause or candidate must be avoided.

Members of the Air National Guard taking part in local partisan or nonpartisan political activity will not:

1. Wear a uniform while campaigning or use any property or facilities of the government in the campaign; or
2. Allow participation to interfere with or prejudice performance of military duties.

## **CAMPAIGNING AND CONDUCTING BUSINESS ON AF OR ANG INSTALLATIONS**

Just as military members and civilians are prohibited from undue involvement with political causes, Air Force and Air National Guard installations and resources must be protected from being used for improper political purposes.

### **CAMPAIGNING- PARTISAN POLITICAL ACTIVITY**

The question of whether political candidates have a constitutional right to campaign on military installations was resolved by the Supreme Court in the case of *Greer v. Spock*, 424 U.S. 828 (1976). The Supreme Court held that candidates for political office have no generalized constitutional right to make political speeches or distribute leaflets at a military installation. Furthermore, commanding officers may summarily exclude civilians from the area of their command (*Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886 (1961)). This authority to exclude civilians extends to candidates for political office and enables a Commander to deny a candidate permission to enter a base in order to distribute campaign literature or to hold meetings to discuss election issues with military personnel. However, if permission to campaign on the base is granted to one candidate, access cannot be denied to others (*Jenness v. Forbes*, 351 F.Supp. 88 (D.R.I. 1972)).

In 1996, the Secretary of Defense issued detailed guidance on the type of political activities that should be avoided on military installations. Installation commanders must be careful to avoid candidates (either incumbents or new office seekers) who want to use the installation for political meetings, media events (including speeches), funding events, press conferences, and any other activities that can be construed as political in nature. In addition, military newspapers may not carry “campaign news, partisan discussions, cartoons, editorials, or commentaries dealing with political campaigns, candidates, or issues.” Furthermore, candidates must be reminded by commanders that they cannot use their visits to the base as campaign vehicles. Special rules apply to visits from the President, Vice-President, and Speaker of the House in an election year. If they fly into a base to support a local candidate, that candidate cannot be present on the base, and the media can only cover the arrival and departure of the President, Vice-President, or Speaker. In addition, news media coverage of any portion of a political candidate’s activities while on a military installation is prohibited regardless of the purpose of the “visit.”

### **VISITS-NONPARTISAN BUSINESS**

Public appearances on base by state or federal officials must be unrelated to candidacy for political office or a partisan political cause. Thus, a request to engage in partisan political activity on a military installation may be distinguished from a Congressional request to conduct business of a non-partisan nature with military constituents, when such activity is unrelated to candidacy for political office or a partisan political cause.

It is well established that military personnel are entitled to free access to any member of Congress without fear of reprisal. This is guaranteed by the First Amendment to the United States Constitution and has been reaffirmed by Congress and the Department of Defense. (10 U.S.C. 1034, DoDD 1354.1, and DoDD 1325.6). Department of the Air Force personnel are expected and encouraged to carry out their responsibilities as citizens of the United States. The only prohibition is that they must not engage in partisan political activities. (DoDD 1344.10, AFI 51-902).

The Department of Defense encourages Armed Forces personnel to participate in all appropriate aspects of local community life. Neither Department of Defense nor Air Force nor Air National Guard policy prohibits a member of Congress from conducting business of a nonpartisan political nature with constituents on a military reservation. Such activity is not the “partisan political activity” prohibited by DoDD 1344.10 and AFI 51-902. Those directives

emphasize the time honored public concern with the preservation of traditional military neutrality and nonpartisanship; however, such restraints are to be construed with reason and common sense. Members of Congress, in discharging the functions of their elective office, have a responsibility to ascertain their constituents' needs, whether those constituents are civilian or military citizens of the representative's district. Political neutrality should not be construed as a denial of representation, nor should it be interpreted that military personnel must be quarantined from their elected representatives. Accordingly, it has been held that a request by member of Congress to temporarily park a mobile district office on a military installation, in order to conduct business with civilian and military constituents was a request unrelated to candidacy for political office or to a partisan political cause. The installation Commander, although not required to do so, may nevertheless grant such a request. If the current office holder is also a political candidate who, for legitimate reasons wants to visit the installation, permission can be granted with the express reminder that the candidate cannot use the visit as a campaign vehicle. For example, the candidate may not film campaign commercials in front of aircraft on the flight-line or solicit votes from Air Force personnel on base.

## **LANDING RIGHTS**

Landing rights at Air Force and Air National Guard installations by other than DoD aircraft are governed by statute (49 U.S.C. 1507(a)) and Air Force Regulation (AFI 10-1001). Air Force implementation of the statutory provision authorizes use of airfield facilities by major political party post-convention Presidential and Vice-Presidential candidates. Such use is permitted for SECURITY REASONS ONLY and the candidate must be on board the aircraft. In addition, the regulation sets forth guidelines for the Base Commander to follow:

1. Minimum officer welcoming party;
2. No special facilities need be provided;
3. No plans should be approved for on-base political rallies or speeches; and
4. No official transportation should be approved for unauthorized personnel (AFR 55-20, para. 8g (6)).

## **USE OF AIR NATIONAL GUARD PERSONNEL**

In the event Air National Guard bases are visited officially by the President or Vice-President or by major party candidates, base law enforcement personnel may be requested by the U.S. Secret Service to provide for military support. The U.S. Secret Service is responsible for the protection of the President or Vice-President and major party candidates under the law. The Secret Service is also authorized to seek assistance from other federal agencies. Consequently military (ANG) support of the U.S. Secret Service in the performance of its protective duties, on and off-base, is authorized and encouraged. Such military assistance does not violate the Posse Comitatus Act (18 U.S.C. 1385).

The AF/JAG Ethics Update entitled "Political Activities," which judge advocates may access in the Ethics section of the General Law website on Flite, contains an excellent list of references of the law in this area of political activities. Because of the complex and highly visible nature of this area of law, and because even the appearance of impropriety may be deemed a violation of statute or regulation, it is strongly recommended that Commanders exercise caution, review these issues with their Staff Judge Advocates and, when in doubt, seek written opinions on the permissibility of certain political activities from higher headquarters.

## **THE ANTI-LOBBYING ACT**

To "lobby" is to engage in personal contacts or to disseminate information with the objective of influencing public officials with regard to legislation and other policy decisions. To give federal employees unfettered discretion in contacting legislators on issues of special interest to their own agencies (direct lobbying) would result in governmental chaos. To invite public citizens to contact legislators on behalf of agency agendas (indirect/"grass roots" lobbying) would invite corruption and undermine our government hierarchy.

Recognizing these threats, Congress passed the Anti-Lobbying Act. The Act provides that appropriated funds may not be used to pay for any services or resources designed to influence a member of congress to favor or oppose legislation. In balance, Commanders must ensure that they do not improperly restrict a military member's right to communicate with their elected representatives, a right reinforced by 10 U.S.C. 1034. If the Anti-Lobbying Act were read literally, there could be no communication between DoD officials and Congress. Obviously, this is not the case. However, it is difficult to distinguish between legitimate communications and improper persuasion without carefully researching the law in this area. See DoD/GE Memorandum, 14 Apr 95, *Guidance on Lobbying and Public Relations Activities*. See also Department of Justice Memo, 18 Apr 95, *Anti-Lobbying Act Guidelines*. When any doubt arises, contact the Staff Judge Advocate for assistance.

***KWIK NOTE: Distinguish among permissible and prohibited political activities among traditional Guard members, AGRs and federal civilian employees. This topic may be supplemented by applicable state law and regulation, and has been written in a briefing format, which with minor adjustments, may be suitable for the needs of the members of your unit. Obtain the above-cited DoDDs for detailed guidance.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Access To Military Installations- General Guidelines	3-2
Commercial Solicitation On Base	3-9
Congressional And Legislative Inquiries	16-6
Barment	3-11
Ethics	7-3
Freedom Of Expression-Restrictions On Military Members	14-13
Open Houses And Free Speech	3-13
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## Job Hunting and Post-Government Employment

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Lt Col Kerry L. Muehlenbeck, September 2003

**AUTHORITY:** 18 USC 207-208; 5 CFR 2635 et. seq.; 41 USC 423; 37 USC 908; 10 USC 1149; DoD 5500.7-R, *The Joint Ethics Regulation*, (30 Aug 93, C4, 6 Aug 98) Chapters 1, 5, 8, and 9; The Federal Acquisition Regulations (FAR) 3.104-6.

### INTRODUCTION

Everyone's government service will eventually come to an end—either through separation or retirement. For most individuals, however, retirement (or separation) does not necessarily bring an end to their employment. Thus, government employees facing this milestone typically have two questions: “What can I do before I leave the government; and what can I do after I leave the government?” These questions appear simple on their face, but often generate significant case-specific issues that must be addressed.

Government employees who plan to leave government employment and return to the private sector need to know how federal ethics laws affect their actions—both while looking for a new job and after they have left the government. This discussion is intended to give a broad overview of the most salient restrictions on individual activities during two different phases: job hunting (pre-government departure) and post government employment. For a more detailed discussion, visit the following AFMC legal office website: <http://www.afmc-pub.wpafb.af.mil/HQ-AFMC/JA/lo/lojaf/ethics/updates/index.htm>. This site contains an absolute plethora of current ethics information in regard to job hunting and post government employment. Remember, all of these sources are designed to summarize the basic rules. Fact specific questions need to be addressed to a designated ethics counselor.

As an important aside, DoD employees should know that communications to and from the ethics counselor regarding job hunting and post-government employment are not protected by the attorney-client privilege. [5 CFR 2635.107(b); JER para 1-241, 9-500a].

### PHASE I: LIMITATIONS ON JOB HUNTING

In general, military personnel are not prohibited from negotiating for future employment while still employed with the government. However, while these negotiations are ongoing, members must disqualify themselves from taking any action on matters that involve the targets of their employment negotiations. The following rules limit a government employee's ability to send resumes to companies or to discuss post-government employment prior to leaving the government. What follows is not an exhaustive list of the limitations, but a discussion of the most topical:

1. *The Financial Interest Rule [18 USC 208(a); 5 CFR 2635.604; JER 8-200]:* In general, a government employee is banned from seeking employment with a company while he/she is “participating” personally and substantially in a government contract or other matter in which that company has a financial interest. This rule applies to officers, enlisted, and civilians. It is not limited to procurement officials; it applies to all personnel in any career field or occupation. “Participating” includes the following acts with regard to a particular matter: making decisions, giving advice to others, making recommendations to others, conducting evaluations, assigning work to others, giving approval/disapproval, or participating in an investigation. Employees may not contact a company regarding employment until he/she stops participating in the matter or receives written approval of disqualification from all duties involving the company.

2. *The Employment-Contact Reporting Rule [41 USC 423(c); FAR 3.104-3(c)]*: If an employee is participating personally and substantially in a procurement and he/she contacts or is contacted by, a bidder or offeror in that procurement regarding possible employment, he/she must immediately report the contact in writing to his/her supervisor and to the designated agency ethics official. Subsequent to the report, the employee must then either: (1) reject the possibility of employment or (2) disqualify himself/herself from further personal and substantial participation in the procurement. This rule applies to officers, enlisted, and civilians, but only applies to contracts in excess of the simplified acquisition threshold, which is generally \$100,000 [FAR 2.101].
3. *Reimbursement of interviewing expenses [5 CFR 2635.204(e)(3)]*: Employees may accept reimbursement from prospective employers for meals, lodging, transportation, and other benefits in connection with bona fide employment discussions if: (1) the employee does not have duties that affect the prospective employer, and (2) the benefits received are customarily provided by the prospective employer. This rule applies to officers, enlisted, and civilians.
4. *Ban on communicating inside information to a prospective employer[5 CFR 2635.703; JER 8-400b]*: Employees are prohibited from disclosing “non public information” to companies or other organizations with which they are seeking employment. This rule applies to officers, enlisted, and civilians.
5. *Prohibition on the use of government resources [5 CFR 2635.704; JER 2-100, 2-301]*: Another area of concern is the temptation to use government resources in personal job searches. The JER specifically prohibits the use of government property, time, and subordinates for other than official duties. Potential violations include using the office computing resources to draft and print resumes, asking a secretary to type cover letters, or using the phone for long distance phone calls to prospective employers.

## **PHASE II: LIMITATIONS ON POST GOVERNMENT EMPLOYMENT**

The primary post-government service restriction is found at 18 USC 207, as implemented by 5 CFR 2641 (JER Chapter 9). While the statute contains six substantive prohibitions, three from this particular statute are discussed below. The omitted rules apply mainly to “senior employees.”

1. *The lifetime representation ban [18 USC 207(a)(1)]*: Under this restriction, an employee is banned for life from attempting to influence the government regarding a government contract or other matter in which he/she participated in personally and substantially as a federal employee. The purpose of this rule is to keep individuals from “switching sides” and representing a company on a particular matter in which they worked on while employed with the government. This lifetime ban does not prevent an individual from giving testimony under oath, however, there are special rules for giving expert testimony. This restriction applies only to officers and civilians. Enlisted personnel are exempt.
2. *The two (2) year representation ban [18 USC 207(a)(2)]*: Under this rule, an employee is banned for two years from attempting to influence the government regarding a government contract or other matter, in which the employee did *not* personally and substantially participate in, but that was under his/her official responsibility during the last year of government employ. The rule disallows appearances before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, but does not preclude appearances before the US Congress. Like the lifetime representation ban, this restriction only applies to officers and civilians; enlisted personnel are exempted.
3. *The one (1) year ban on aiding/advising the “other side” in trade or treaty negotiations [18 USC 207(b)]*: For one year after leaving government employment, an employee is prohibited from knowingly representing, aiding, or advising any other person (except the United States)

concerning any ongoing trade or treaty negotiations in which, during their last year of government service, he/she participated personally and substantially. This rule applies only to officers and civilians; enlisted personnel are exempt.

4. *The Rules Against Foreign Activity [37 USC 908; JER 9-701]:* This rule concerns three issues. First, retired military members may not, without prior approval, work for a foreign government, or an educational or commercial institution owned/operated/controlled by a foreign government. The penalty is withholding/reclaiming retired pay. Second, serving in the armed forces of a foreign government will result in loss of retired pay as well. Third, retired military members who voluntarily renounce their US citizenship will also lose their retired pay. This rule applies to officers and enlisted personnel.

**KWIK-NOTE: “Switching of sides” undermines confidence in governmental fairness and creates the impression that personal influence, gained by government affiliation is decisive; individuals must avoid any activity that would affect the public’s confidence in the integrity of the federal government, even if such activity were not an actual violation of the law.**

**RELATED TOPICS:**

**SECTION**

Ethics

7-3

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## OGE Form 450: Statement of Affiliations & Financial Interests

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**Lt Col Kerry L. Muehlenbeck, September 2003**

**AUTHORITY:** Executive Order 12731, “*Principles of Ethical Conduct for Government Officers and Employees*, 17 October 1990; 5 CFR 2634.901-909, DoD 5500.7-R, *The Joint Ethics Regulation*, (30 Aug 93, C4, 6 Aug 98) paragraphs 7-100, 7-300 to 7-310; OGE Form 450 (1999); 31 March 1998 Federal Register (Volume 63, pages 15273-15274); OpJAGAF 2000/38, 22 May 2000, *Requirement for IMPAC Holders to File an OGE Form 450*. For issues involving the releasability of confidential financial disclosure reports, see *Meyerhoff v. EPA*, 728 F.Supp. 613 (N.D. Cal. 1990), affirmed 958 F.2d 1498 (9<sup>th</sup> Cir. 1992), and *Association for Women in Science v. Califano*, 566 F.2d 339 (D.C. Cir. 1977).

### INTRODUCTION

Individuals often wonder why the military spends so much time and effort collecting financial information and compiling annual reports. The reason is simple: conflict of interest rules would be ineffective without a way to collect and review the financial interests of key military members and civilian employees. The financial disclosure system is a tool for managing workflow and assignments, while at the same time avoiding any actual/perceived conflicts of interest. Conflicts cannot be prevented if no one knows where they are likely to arise.

The DoD uses two different financial disclosure forms, the SF 278, *Executive Branch Personnel Public Financial Disclosure Report* and the OGE 450, *Executive Branch Confidential Financial Disclosure Report*. Which form an individual must use depends on their rank/grade and responsibilities. The SF 278 is a public record of information filed by civilian presidential appointees, active duty general officers, reserve general officers who serve on active duty more than sixty (60) days in a calendar year, members of the Senior Executive Service (SES), and certain special government employees whose positions are above the GS/GM-15 level. The OGE Form 450, on the other hand, contains non-public information and is the subject of detailed analysis in this article.

The Joint Ethics Regulation (JER) lists who must file, outlines the required contents in the reports, and mandates filing times. The requirements are made applicable to the National Guard via the definition of “DoD Employee.” This includes any reserve or national guard member performing official duties or functions under the authority of either title 10 or 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his reserve or national guard of the United States title or position, or any authority derived there from. (JER, 1-211).

### WHO MUST FILE

Any individual who holds a “covered position,” as described in JER 7-300a, must file an initial and annual OGE Form 450. In general, required filers include all military members (O-6 and below) and all civilian employees (GS/GM-15 and below), when their official position requires them to participate personally and substantially in taking an official action for contracting or procurement, or if their supervisor determines their position requires such a report to avoid an actual or apparent conflict of interest. If an individual is directed at the local level to file an OGE Form 450, and he/she appeals the decision to the agency head (or designee), and the agency head (or designee) upholds that decision, then the decision on appeal by the agency head (or designee) is final, and not subject to administrative/negotiated grievances, arbitration procedures, or any other review or appeal, either within or outside the agency.

Identification of required filers should focus on those persons in key positions with significant responsibilities affecting outside parties. Generally, personnel engaged in the following activities should file an OGE Form 450:

- Commanding officers, heads and deputy heads, and executive officers of all installations, bases, air stations, or activities
- Contracting or procurement
- Administering or monitoring grants, subsidies, or licenses
- Regulating or auditing non federal entities
- Activities which will have a direct and substantial economic effect on a non-federal entity.

In addition, the following individuals must file: anyone whose supervisor determines that such a report is required to avoid an actual or apparent conflict of interest, or anyone serving under the Intergovernmental Personnel Act. The requirement to file does not simply apply to “decision makers.” Instead, it includes those who provide advice, make recommendations, investigate, or make similar contributions to a matter that has an economic effect on entities. An individual’s job title should not be the sole determinant of whether or not he/she must file an OGE Form 450. Look to the nature of their activities. Also, some employees perform additional/special duties (e.g. contracting officer’s representative, source selection committee member, technical evaluation team member, etc.). These activities may require filing even though their normal duties do not.

As a general rule, employees who are authorized to make government purchases with an IMPAC card are not automatically required to file an OGE Form 450. Under the JER, Para 7-300(b)(2), employees who are not employed in contracting or procurement, but who have decision making responsibilities for expenditures of less than \$2,500 per purchase, and less than the annual small purchase threshold, as defined in the Federal Acquisition Regulations (currently \$100,000), are specifically excluded from the filing requirement. However, that individual’s agency designee may require him/her to file an OGE Form 450 if he/she believes that the employee should file for some other relevant reason. Also, individuals with purchasing power above the card limit do not automatically file an OGE 450. The individual’s supervisor determines whether or not his/her purchasing activities involve a “direct and substantial economic impact” on the local economy.

Only those individuals who have served in a “covered position for more than sixty (60) days during the fiscal year are required to file an annual report. Individuals in a covered position should have filed a new entrant report within thirty (30) days of assuming their position, regardless if they file an annual report.

### **CONTENT OF OGE FORM 450**

The OGE Form 450 contains three pages of instructions on how to complete the report. Further guidance is available at 5 CFR 2634.907(a) and JER, 7-100. Detailed guidance can be found on the OGE website at [www.usoge.gov/pubs/oge450gd.pdf](http://www.usoge.gov/pubs/oge450gd.pdf). The specific requirements for the content of this report are set forth at Appendix C of the JER. Of special note are the following:

- No disclosure of specific values is required.
- A complete report is required for each filing period if changes have occurred since the last submission. A short version of the OGE 450, the OGE 450-A, may be used if there have been no reportable changes in an individual’s financial status since their last report.
- The report must provide sufficient information about the individual and his/her spouse and dependent children, such that an informed judgment can be made regarding compliance with conflict of interest laws.

### **WHEN TO FILE**

The OGE 450 must be filed within 30 days after assuming a covered position and annually thereafter. According to OGE, annual reports must be filed with the filer’s ethics counselor by 31 October

each year. The report covers a filer's financial status for the previous fiscal year. On most active duty Air Force installations, OGE 450s are forwarded to the servicing base SJA. In the national guard, traditional practice is a bit more centralized to the state headquarters level. Typically, NGB-JA sends an annual suspense dated memorandum to all state adjutant generals and state headquarters judge advocates, requiring each state to provide a list of all employees determined to occupy covered positions. Although the JER does contain some sample forms, most of these are outdated. Please contact the servicing SJA for the most current form versions.

***KWIK-NOTE:*** *Individuals whose official position requires them to participate personally and substantially in taking an official action for contracting or procurement matters should file an OGE Form 450.*

**RELATED TOPICS:**

**SECTION**

Ethics

7-3

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## Conflicts of Interest

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**Major Kerry L. Muehlenbeck, April 2001**

**AUTHORITY:** DoD 5500.7-R, Joint Ethics Regulation (30 Aug 93, Change 4, 6 Aug 98); Title 18, United States Code; TJAG Policy Letter No. 5, *Standards of Professional Conduct for Reserve Judge Advocates*; see also Air Force General Law Website on Ethical Sources.

### INTRODUCTION

A conflict of interest can arise for any federal employee. Stated simply, a “conflict of interest” is a situation where an employee’s (or family’s) personal interests conflict (or appear to conflict) with the faithful performance of official duties. The key for ANG members and commanders is to recognize the conflict in time to avoid it.

Several of the most basic conflict of interest rules are actually federal criminal statutes, such as bribery of public officials and witnesses (18 U.S.C. 201), acting as an agent or attorney for another person before any federal department, agency or court when the United States has a direct and substantial interest (18 U.S.C. 205), and accepting pay or pay supplements from any source other than the United States for the performance of official duties (18 U.S.C. 209). These statutes are implemented by 5 C.F.R. 2635, subparts D, E, and F (JER Chapter 2). Chapter 5 of the JER contains practical guidance on conflicts of interests involving Reservists. The analysis is analogous to that used when evaluating an ANG member. Supervisors must screen the training duties of their traditional guardsmen to ensure that no actual or apparent conflict exists between the guard member’s private interests and his/her duty assignments. Similarly, ANG members have a duty to reveal information to their supervisors as soon as they realize that there might be a conflict of interest between their private employment and the task they have been given as a military person.

### IS THERE A CONFLICT OF INTEREST?

In deciding whether or not a guard member has a conflict of interest, it is necessary to analyze their situation under two separate rules: the “basic conflicts rule” and the “impartiality” rule.

### THE BASIC CONFLICTS RULE

The “basic conflicts” rule is: A member may not work for the government on a particular matter that will affect his/her financial interest. Knowing key definitions will allow a careful analysis of the facts at hand.

A particular matter is something that involves deliberation, decision, or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons. Examples of a particular matter are a contract, an application, a claim, a request for ruling, or a judicial proceeding. A broad policy decision or legislation that applies to the public as a whole is not considered a particular matter.

His/her financial interest means not only the member’s financial interests, but also the financial interests of others with whom he/she has certain relationships. Those others include: a spouse, a minor child, a general business partner, an organization in which the member is serving, with or without compensation, as an officer, director, trustee, general partner, or employee, and any individual or organization with whom the member is negotiating or has made any arrangements for future employment.

## THE IMPARTIALITY RULE

Under the “impartiality” rule, a member may not work for the government on a particular matter if: (1) a person whom they know either has a financial interest that will be affected by that matter, or is or represents a party to that matter, and (2) the member’s impartiality in the matter would reasonably be questioned.

A particular matter under the impartiality rule is the same as that under the basic conflicts rule.

A person whom the member knows includes several categories of persons who automatically qualify as persons known. These include those people with whom the member has a personal relationship, a business/organizational relationship, or an employment relationship. A member has a personal relationship with members of their household (all those who live with the member, including significant others, adult children, and roommates), their relatives (family members by blood or marriage), and their friends. A member has a business relationship with any person with whom they have or seek a contractual or other financial relationship, other than a routine consumer transaction. A member has an organizational relationship with any organization in which they are active -- such as by serving as an official or a committee chairperson, or putting a lot of time into promoting a program for an organization. Merely paying dues is not active participation and participation in political parties is excluded. An employment relationship exists when the member, spouse, parent, or dependent child have or are seeking a job. The employment may be either compensated or uncompensated, and may include work in any status, including as an employee, consultant, independent contractor, or otherwise. A member also has an employment relationship with any person for whom they have worked within the last year, compensated or not.

A member’s impartiality is reasonably questioned when a reasonable person who knows the relevant facts would question the member’s impartiality in the matter.

## EXEMPTIONS

Just because an employee has a conflict of interest does not mean they are automatically barred from working on that matter. In fact, several exemptions are set forth in the statutes. Consult the Staff Judge Advocate to see if any apply.

## REMEDIES

If a conflict exists and no exemption applies, the member can remedy the conflict. In other words, when a conflict is remedied, it goes away. One remedy is disqualification. In this situation, the member does not work for the government on the particular matter in which they have a conflict. Disqualification must be practicable for the office in the specific case. Divestiture, or getting rid of an asset, is another remedy. Other possible remedies include reassignment or transfer to a new government position or resignation from an outside position.

***KWIK NOTE: Recognize the areas of danger in which conflicts of interests may arise.***

## RELATED TOPICS:

## SECTION

Contracting Pitfalls	25-8
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## Support of Non-Federal Entities

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Lt Col Cynthia Ryan & Major Kerry L. Muehlenbeck, January 2003

**AUTHORITY:** 5 C.F.R. 2635.101; 5 C.F.R. 2635.808; 5 C.F.R. 2635.704; 10 U.S.C. 2012; 32 U.S.C. 508; DoDD 5410.18, *Public Affairs Community Relations Policy* (20 Nov 01); DoDI 5410.19, *Public Affairs Community Relations Policy Implementation* (13 Nov 01); DoDD 5500.7-R, *Joint Ethics Regulation (JER)*(30 Aug 93), Chapter 3, C4, (6 Aug 98); DoDD 1344.7, *Personal Commercial Solicitation On DoD Installations* (13 Feb 86, C2, 2 May 91); DoDD 1100.20, *Support for Eligible Organizations and Activities Outside DoD* (30 Jan 97); AFI 32-9003, *Granting Temporary Use of Air Force Real Property*, (19 Aug 97); AFI 36-2250, *Civil-Military Innovative Readiness Training* (1 Mar 99); AFI 36-3101, *Fundraising Within the Air Force*, (8 Jul 94); NGB/CF Letter, All States Log Number P01-0034, *Non-Air Force Activities at Air Force Installations* (10 May 01); see also Air Force General Law Website on Ethics Resources.

### INTRODUCTION

One of the most frequently encountered standards of conduct issues involves determining when to allow DoD personnel and resources to be used in support of non-federal entities. The two main authorities for consideration are the JER and the DoD issuances. The rules governing this arena are based upon two basic principles of public service: employees shall protect and conserve federal property and shall not use it for other than authorized purposes (5 C.F.R. 2635.101(b)(9)); and employees shall act impartially and not give preferential treatment to any private organization or individual (5 C.F.R. 2635.101(b)(8)). In other words, Congress appropriates funds for the Department of Defense to ensure the protection of our nation and to carry out military operations in support of national defense. Ordinarily, this mission does not include lending assistance to private entities or functions, even for worthwhile activities or charitable events. Exceptions exist when assistance to the private entity can be reconciled with defense objectives or when Congress specifically authorizes use of DoD funds for non-defense purposes. This chapter addresses unit and individual support of non-federal entities.

### DEFINITION OF NON-FEDERAL ENTITY

JER section 1-221 defines a non-federal entity as a self-sustaining, non-federal organization established and maintained by individuals acting outside the scope of federal employment. These entities can operate on military installations if approved by DoD authorities under applicable regulations. Look to JER sections 3-210 and 3-211 for further amplification.

### GENERAL POLICY

It is DoD policy that fostering good relations with communities at home and abroad is in the best interest of the DoD. Well-planned activities help earn public support and foster a greater public understanding of operations, missions, and requirements of military service.

### AIR FORCE/ AIR NATIONAL GUARD SUPPORT TO NON-FEDERAL ENTITIES

#### Co-Sponsorship

DoD is not required to co-sponsor any event, and many times co-sponsorship will not be in the best interests of the Air Force or Air National Guard. However, co-sponsorships are permitted under JER section 3-206 if the DoD component develops the “substantive aspects” of an activity or provides “substantial logistical support” for an event. The non-federal entity must be a “recognized scientific, technical, educational, or professional organization” and CANNOT be a commercial business. The SAF/GC has delegated authority to recognize these entities under JER section 3-206(b)(3) to the local ethics counselor. In addition, there MUST be a written Memorandum of Understanding between the DoD entity and the non-federal entity that complies with JER sec 3-206(b)(4).

Approval procedures depend upon the activity. If it is a civic or community event that the head of the DoD component has determined is not related to the purpose or business of the non-federal entity, JER section 3-206(a) permits approval. If it is a conference or seminar, follow steps in JER section 3-206(b) to obtain approval.

### **Incidental Participation**

Except as otherwise provided, the ANG's participation in an event sponsored by a non-federal entity shall be incidental to the events (except for those events open to the general public, those events where there is no charge, and patriotic events).

### **Endorsement**

Undoubtedly, many organizations would like to have the Air National Guard's stamp of approval on their services, products, or enterprises. Connecting the DoD or military services to a private activity enhances its public image and encourages support of the event. One of the most often cited paragraphs in the JER is section 3-209. This provision states that direct or implied endorsement of a non-federal entity's event, product, service, or enterprise is prohibited in any sort of official capacity. This applies whether the event is co-sponsored or not. Titles, positions, or organization names may not be used to suggest official endorsement or preferential treatment of any non-federal entity, except the Combined Federal Campaign, emergency and disaster appeals approved by OPM, fundraising activities in support of the military service aid societies (Army Emergency Relief, Navy Marine Corps Relief Society, and the Air Force Assistance Fund), and other organizations composed primarily of DoD personnel or their families, when fundraising among their own members and for the benefit of their own members or family members, when approved by the head of the DoD component command

As a rule, official endorsement of private activities is prohibited. This is true even for non-profit groups and charitable organizations that exist solely to do good things for others. Although saying "no" to these groups may be harder than turning down commercial profiteers, the rule applies to both, except for the very short list of sanctioned charities. See JER section 3-210. No matter how worthy an entity or event may be, DoD must maintain neutrality with regard to non-federal entities and events. As such, all words of praise for any non-federal entity or event should be avoided. Because a Guard unit could not possibly endorse all worthy organizations equally, it must praise none of them.

### **Logistical Support**

A great many requests involve lending DoD employees, in their official capacities, and DoD facilities and equipment in support of private ventures. The general rule is that use of federal government resources, to include personnel, equipment, facilities, and property, is restricted to "official government use" only. However, the JER sets out a 7-part analysis to determine if the loan of DoD personnel and/or equipment is appropriate under the circumstances. The decision authority is the head of the DoD command or organization that has been asked to provide the support. The test to determine if DoD logistical support should be provided to a non-federal entity is found in JER section 3-211(a) and is as follows:

- 1) The support does not interfere with the performance of official duties and would in no way detract from readiness;
- 2) ANG community relations with the immediate community and/or other legitimate DoD public affairs, or military training interests are served by the support;
- 3) It is appropriate to associate with this event (*i.e.* neither the Guard unit nor DoD will be embarrassed).
- 4) The event is of interest and benefit to the local civilian community, the DoD component command, or the organization providing support;

- 5) The Guard unit is able and willing to provide the same support to other comparable events that meet the criteria of this subsection and are sponsored by other similar non-federal entities.
- 6) The use is not restricted by other statutes or regulations; and
- 7) No admission fee, beyond what will cover the reasonable cost of sponsoring the event, is charged for the event, the promotion of the event supported by DoD, or DoD support to the event is incidental to the entire event.

As noted above in #6, government support must also comply with all other statutes and regulations. When making a determination on whether to provide support to a non-federal entity, see if it can be justified because the event or activity furthers DoD public affairs or recruiting interests. Even if it does, the event or activity must still comply with JER requirements. (An example of an approved activity was the Winston Cup race where five vehicles entered in the race were painted to represent the five branches of service.)

These same rules also apply to Professional Military Organizations---however, since they “further military interests,” it is sometimes easier for them to satisfy the JER section 3-211(a) test. This test does not apply to fundraisers or membership drives which must comport with JER section 3-211(b).

Although the JER has significant coverage on the issue of logistical support, there are additional laws that come into play. The majority of these laws are usually triggered by the nature of the facility that the non-federal entity seeks to use. In addition to those site-specific authorities, the following legal authorities are emphasized below:

DoDD 5410.18, Community Relations

This directive sets forth guidance and policy for all levels and areas of interaction between the military and civilian community with a view toward achieving and maintaining good relations. The directive specifically sets forth policy that fosters “initiative, imagination, and judgment by every individual,” relying on commanders to exercise good leadership and judgment. Overall, the directive contains another checklist of sorts to determine when and if support of non-federal public events is permissible. Essentially, this checklist mirrors those factors set forth in JER section 3-211. Support is authorized and encouraged when the following requirements are satisfied:

- 1) Support is in the best interests of the Department;
- 2) The event is of *general* interest/benefit to the community;
- 3) The sponsor of the event is a government organization, broad-based civic organization, veterans organization, or an organization that promotes patriotism/national security/national heritage, or such support is specifically authorized by law;
- 4) There is no direct DoD endorsement of a private religious or political group;
- 5) Access is available to all without regard to race, creed, color, national origin, or gender;
- 6) DoD support is incidental to the overall program and not used for commercial interests (minor admission charge is allowed as long as the military is not the primary attraction);
- 7) Military members are not used for “menial” tasks (e.g., ushers, bag handlers, guards, escorts for beauty pageants, messengers, or parking lot attendants);
- 8) DoD support is not offered/provided in competition with resources commercially available; and
- 9) No money passes to the military for their support.

AFI 32-9003, Granting Temporary Use of Air Force Real Property

This instruction contains several chapters that explain procedures for granting temporary use of real property owned and controlled by the Air Force. The various chapters discuss authorization procedures for different kinds/lengths of real estate uses. Some uses may be authorized by the installation commander; some require MAJCOM approval. Of particular interest is paragraph 1.1. According to this paragraph, the installation commander can grant temporary use of Air Force property to others if:

- 1) The Air Force is not using the property or does not need it for military purposes now;
- 2) Such use does not interfere with the mission;
- 3) Use does not cost the Air Force much money;
- 4) Use is compatible with Air Force needs, security, and safety.

Under paragraph 1.4 MAJCOM approval is required when:

- 1) A lease/license/permit to use Air Force real property exceeds five years;
- 2) A lease or license to use Air Force real property has revenues/services that exceed \$200,000 per action, per year;
- 3) There is a waiver of the policy requiring competition;
- 4) A lease or license to use Air Force real property is done for a religious purpose.

NGB/CF Letter, All States Log Number P01-0034, Non-Air Force Activities at Air Force Installations (10 May 01)

This letter contains guidance regarding requests by non-Air Force entities for use of an ANG installation for more than a year. Requests for outgrants of Air Force property to any non-Air Force entity which exceed one year, or for a permanent bed-down, require notification of SECAF, through various Air Force channels, with specific instructions as to the accompanying information required. See the All States letter and its attachments for detailed guidance in these situations.

Civil-Military Innovative Readiness Training (IRT)

10 U.S.C. 2012, DoDD 1100.20, and AFI 36-2250 allow military units to provide certain types of civic and community assistance as “readiness training.” Healthcare, transportation, general engineering and infrastructure support, among other resources, can be provided to federal, state, and local governmental entities and youth and charitable organizations detailed in 32 U.S.C. 508(d) (see below). Procedural requirements in AFI 36-2250 must be satisfied and the support must be coordinated through SAF/MIR and approved by OASD/RA.

Some of the requirements: Requestor must be an “eligible entity,” responsible official must submit the request in writing, requestor must certify that the support is not reasonably available from a commercial entity (or entity impacted agrees), support must meet valid unit training requirements, quality of training cannot be adversely affected, member must perform tasks in his or her AFSC, no significant increase in cost of training. Although the approval process is cumbersome, and support to community appears more limited, guard members receive federal pay and protections from liability. The determination of “reasonably available” may take into account whether requesting entity can afford to address the need without assistance of military. The “valid unit training requirement” does not apply if unit provides primarily manpower that does not exceed 100 hours on a particular project. Use of military aircraft is prohibited and government vehicles should only be used to provide transportation for personnel.

Special funding may be obtained for these projects. See AFI 36-2250.

## **Charitable Fundraising**

First, determine if the non-federal entity is covered by JER section 3-210 or 3-211. Also look to DoDD 5410.18. However, note that the JER takes precedence over fund-raising activities in the DoDD when policy conflicts occur.

JER section 3-210 sets forth specific charities that the DoD can officially endorse. If the entity is not listed, see what the “unlisted” organization plans to do with the money. If it is giving all of the funds to “listed” agencies in JER section 3-210, support may still be authorized.

DoD resources may still be used to provide limited logistical support to the activity (remember, no endorsement!), if the requirements set forth in section 3-211(a) (1) – (6) above are met and the sponsoring non-federal entity is not affiliated with the CFC (including local CFC) or, if affiliated with the CFC, the Director, OPM, or designee, has no objection to DoD support of the event. OPM has no objection to support of events that do not fundraise on the federal government workplace. What constitutes the “workplace” is determined by the head of the DoD Component command or organization.

Certain agencies have statutory authority for fundraising support and are listed in JER section 3-212. These agencies include the Combined Federal Campaign, the American Red Cross, and the National Military Associations. Congress has also recognized a special relationship between the Air National Guard and the agencies set out in 32 U.S.C. 508. As such, Change 3 of the JER added those agencies in 32 U.S.C. to those agencies specifically eligible for support. These organizations include: The Boy Scouts of America, The Girl Scouts of America, The Boys Clubs of America, The Girls Clubs of America, The YMCA, The YWCA, The Civil Air Patrol, The United States Olympic Committee, The Special Olympics, The Campfire Boys, The Campfire Girls, The 4-H Club, The Police Athletic League, and any other youth or charitable organization designated by the Secretary of Defense.

Services and equipment can only be provided if:

- 1) The provision of such services does not adversely affect the quality of training or otherwise interfere with the ability of a member or unit of the National Guard to perform the military functions of the member or military unit,
- 2) The services to be provided are not commercially available, or any commercial entity that would otherwise provide such services has approved, in writing, the provision of such services to be by the National Guard,
- 3) National Guard personnel will enhance their military skills as a result of providing such services, and
- 4) The provision of the services will not result in a significant increase in the cost of the training.

## **INDIVIDUAL SUPPORT OF NON-FEDERAL ENTITIES**

### **Membership**

Military members, like any one else, may participate in non-federal activities in their personal capacities provided they act “exclusively outside the scope of their official positions. JER section 3-300. Except for references to official position in certain activities involving teaching, speaking, and writing, DoD employees may not use, or allow the use of, their official title, position or organization in connection with their participation, as this tends to suggest official endorsement or preferential treatment by the DoD.

Supervisors may permit excused absences for reasonable periods of time for employees to participate in non-profit professional associations and learned societies. The employee may also use government equipment or administrative support to prepare papers to be presented at such association events or to be published in journals when: the participation or paper is related to the employee’s position or to the DoD mission, the agency can derive some benefit from the participation or paper, and the participation or paper does not interfere with the performance of official duties.

## Fundraising

A DoD employee may undertake “purely personal, unofficial volunteer efforts” in support of fundraising activities outside the federal government workplace. JER section 3-300. Employees must be careful not to do anything that suggests DoD endorsement of their activities. Although the general rule is that personal fundraising should take place away from the workplace, certain limited fundraising activities may be conducted at designated areas on the military installation, with the advance approval of the commander. See JER section 3-300, DoDD 1344.7, and AFI 36-3101. Even when on-base fundraising occurs, there can be no official endorsement of the events unless the organization is listed in JER section 3-210(a). Remember also that 5 C.F.R. 2635.808 sets forth the parameters for fundraising for federal employees.

## Use of Government Resources

The basic rule is that government resources are to be used for official government purposes. 5 C.F.R. 2635.704(a). Therefore, government employees must be careful to avoid using federal resources in conjunction with their personal participation in non-federal entities. DoD personnel may not be used to support the unofficial activities of another DoD employee who is supporting a non-federal entity. However, under JER sections 3-305 and 2-301, if the appropriate level supervisor determines that a 5-part test is met, employees may make limited personal use of other types of government resources, such as typewriters, copiers, libraries, etc. The 5-part test is as follows:

- 1) The use does not adversely affect the duties of the employee or the organization;
- 2) The use is of reasonable duration and made only during the DoD employee’s personal time (after duty hours or lunch time);
- 3) The use involves a legitimate public interest;
- 4) The use would not reflect adversely upon the federal government; and
- 5) The use creates no significant cost to DoD. Note that the use of telephones, facsimile machines, e-mail, and the internet is addressed under JER section 2-301.

***KWIK NOTE: Resolving issues involving government support to non-federal entities requires careful analysis and painstaking attention to detail; when cooperative efforts can legitimately be supported, the results benefit both the DoD and the community at large.***

### RELATED TOPICS:

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# Chapter 8, Criminal Matters

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## **Military Justice Jurisdiction – ANG Members in Title 10 Status**

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**Updated by Lieutenant Colonel Robert L. Marconi, December, 2008**

**AUTHORITY:** 10 U.S.C. 802-803; AFI 51-604, *Appointment to and Assumption of Command* (4 April 2006)

### **INTRODUCTION**

Any member of the National Guard ordered to active duty under Title 10 U.S.C., is subject to disciplinary action under the UCMJ. This is true regardless of the section of Title 10 the member is serving under, and regardless if the Title 10 service is for Annual Training, Inactive Duty Training, EAD, an OCONUS deployment or mobilization. During Operation Desert Shield and Operation Desert Storm, members of the National Guard were on active duty under the authority of 10 U.S.C. 672(d), 10 U.S.C. 673 or 10 U.S.C. 673(b). All of these individuals were subject to the UCMJ for crimes committed while in Title 10 status.

A member of the National Guard may be retained on active duty after the termination date of the orders for action under the UCMJ. If released from active duty, the member may be ordered back to active duty for disposition of the offense, and must be ordered to active duty by the appropriate authority before military justice jurisdiction may be exercised over that member.

### **PRE-DEPLOYMENT**

As for pre-deployment status, members of the National Guard in an alert status but who have not been placed on active duty remain subject to the military code of the state in which National Guard membership is held. While in the continental United States on active duty preparing for a deployment, Guard members come under the jurisdiction of either the deployment station Commander or the parent support area Commander for UCMJ purposes, as determined on a case-by-case basis.

It should be understood that reserve component Commanders of the Air Force may not convene courts-martial unless they are properly designated or authorized pursuant to AFI 51-604. A member of the National Guard on Title 10 active duty in the continental United States will be subject to the UCMJ in the same manner as active component members of the unit the Guard member is serving with.

### **POST-DEPLOYMENT**

Once the member has been deployed, the active duty component will conduct military justice functions in the deployment area. Disciplinary cases will not be removed to the continental United States, except as circumstances warrant.

Remember, an officer serving under Title 32 U.S.C. may only discipline a Title 32 member under the state UCMJ. Unless the state UCMJ allows it, an officer serving under Title 10 may not discipline a member who is in Title 32 status.

### **BASIS OF UCMJ JURISDICTION**

The UCMJ has been extended to assume jurisdiction over members of the National Guard while in federal service (Title 10).

While these changes only affect ANG members in Title 10 status, they are set forth here to explain the applicable procedures if military justice jurisdiction is exercised over the ANG member by an active duty component.

Article 2 (a) (3) of the UCMJ (10 U.S.C. 802) was amended to extend jurisdiction to members of a reserve component while on inactive duty training, but in the case of members of the Air National Guard, only when in federal (Title 10) service. The requirement that reservists voluntarily accept orders stipulating amenability to UCMJ jurisdiction was eliminated. National Guard members may be involuntarily recalled to active duty IAW AFI 51-201 for prosecution of offenses committed while on Title 10 status.

The offense for which a National Guard member is recalled to active duty must have been committed while the member was either on active service or on inactive duty training in federal service. The member may be ordered to active duty only by a person empowered to convene general courts-martial in a regular component of the armed forces. The amendment further provides that Air Force reservists and National Guard personnel ordered to active duty under its provisions may not be sentenced to confinement or be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive duty training or active duty, unless the order to active duty was approved by the Secretary of the Air Force.

Finally, Article 3 of the UCMJ (10 U.S.C. 803) was amended to provide that a National Guard member who is subject to the UCMJ is not relieved from amenability to UCMJ jurisdiction for offenses committed during a period of active duty or inactive duty training by virtue of the termination of such period of active duty or inactive duty training while in Title 10 status.

Commanders are urged to consult with the Staff Judge Advocate for further questions related to this topic.

***KWIK-NOTE: The key to UCMJ jurisdiction is status. The ANG member MUST be in Title 10 status. There is NO UCMJ jurisdiction over ANG members in Title 32 status.***

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## Federal Magistrate Judges

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Updated by Lieutenant Colonel Robert L. Marconi, October, 2008

**AUTHORITY:** AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (1 Jun 98); 18 U.S.C. § 13; 18 U.S.C. § 3401

### INTRODUCTION

ANG members are subject to federal prosecution under the Federal Magistrate Judge program (referred to as “Magistrate Court”) for certain criminal offenses committed on federal military installations.

The Magistrate Court program is used on military installations which have federal jurisdiction to handle the disposition of certain minor federal criminal offenses committed by civilians over whom the Installation Commander has no military jurisdiction, when, in the Installation Commander’s judgment, administrative sanctions which may be imposed against the civilian to address the misconduct are inadequate or inappropriate.

### WHO ARE FEDERAL MAGISTRATES AND WHAT DO THEY DO?

The United States Magistrate Judge is appointed by the United States District Court for a term of years to assist with disposition of the criminal and civil caseload, including the trial of minor offenses. “Minor” means misdemeanor offenses for which the authorized penalty does not exceed one year’s imprisonment. U.S. Magistrate Judges can try federal civilian criminal misdemeanor or traffic offenses, and may also try juvenile offenders.

### WHO IS SUBJECT TO THE FEDERAL MAGISTRATE JUDGE’S JURISDICTION?

Installation Commanders are responsible for maintaining order on the installation. They must respond to the misconduct of civilians as well as military members. It is imperative that Commanders be equipped with alternative response options in order to effectively deal with and deter civilian misconduct. The term “civilian” is quite broad and includes dependents of military personnel, civilian employees, retired military personnel and their dependents, other civilian visitors on-base as well as Air National Guard members in Title 32 status, in a military or civilian status, in or out of uniform, who are on military installations where there is federal jurisdiction.

When it is available Magistrate Court may be an effective option for Commanders to use where civilians have engaged in misconduct on the installation. The Magistrate Court program applies to civilians over whom installation Commanders have limited options. While active duty Commanders have the full range of administrative sanctions, as well as criminal sanctions under the UCMJ, available when dealing with misconduct by a Title 10 military member, active duty installation Commanders may only administratively sanction their civilian employees, and may only suspend or revoke certain installation privileges of any civilian who commits misconduct on the installation. Where they have jurisdiction Federal Magistrates Court provides a forum for the disposition of minor criminal conduct by civilians on the military installation.

### HOW DO FEDERAL MAGISTRATES AFFECT THE AIR NATIONAL GUARD?

If your unit is co-located on an active duty installation with federal jurisdiction, or your members find themselves on such installation, while TDY , deployment, or even in civilian status shopping at that installation’s commissary or BX, any minor offense they commit on that base that is not strictly military (such as insubordination to a superior officer, AWOL, etc.), will, upon their consent, be prosecuted in the Magistrate Court at that installation or in the nearest off base Magistrate Court. The consent is not consent to be prosecuted but rather consent to be prosecuted in Federal

Magistrates Court rather than Federal District Court. A classic example is being TDY and speeding on the installation or driving under the influence of alcohol.

## **PREREQUISITES TO FEDERAL MAGISTRATE JUDGE ACTION**

### **Installation Commander's Referral**

The first thing that happens before the federal Magistrate hears the case is that the installation Commander refers it to the Magistrate Judge. (While the U.S. Attorney may choose to prosecute crimes occurring on the installation without the Commander's referral, this is unusual.) On installations which have federal jurisdiction, AFI 51-905 gives installation commanders authority to refer offenses to the Magistrate Judge for trial when administrative action is inadequate or inappropriate. Administrative action could include denial of shopping privileges (for shoplifting), loss of driving privileges (for traffic offenses), or barring one from entering the base (for serious or continued offenses). The administrative measures available will vary substantially depending on the particular status of the "civilian" offender, *i.e.*, civilian employee, dependent, guest, etc. Commanders may do this either on a case-by-case basis, or if safety, discipline or other considerations warrant, Commanders may make a blanket determination that administrative disposition of certain offenses committed by civilians on the installation is not appropriate and that all such offenses should be referred to the Magistrate Judge for trial.

### **Jurisdiction of Federal Court**

Even if the Installation Commander refers a case to Magistrate Court, that Court must have jurisdiction to hear it. Criminal actions committed by a civilian on a military installation which has federal jurisdiction may be addressed in federal court, including Magistrate Court. If there is no federal jurisdiction, the civilian will be prosecuted in a state court. There are two ways a federal court can have jurisdiction over offenses committed on a military installation: by the nature of the offense and by the ownership of the land where the offense occurred.

#### Kind of Offense

Violation of any federal statute which does not rely on territorial jurisdiction (*i.e.*, which government - federal or state - owns the land) may result in prosecution in federal court regardless of the status of the base. For example, federal statutes supersede state law and make counterfeiting, espionage, sabotage and bribery of federal officers a federal crime. If such an offense is committed on a military installation, including an Air National Guard base and the state owns the land, the offense may be tried in federal court. Where jurisdiction is based on the kind of offense, it is unlikely that the offense will be tried in Magistrate Court, unless it is a "minor" Offense, normally a misdemeanor or less.

#### Ownership of the Land

##### *Exclusive Jurisdiction*

If the installation is owned by the federal government, or the State where the installation is located has ceded exclusive jurisdiction to the federal government, the State may not prosecute for offenses committed on the installation. Federal courts provide the only remedy. Under exclusive federal jurisdiction, federal courts will prosecute crimes which violate a specific federal statute or only violate a state statute.

Unlike state criminal statutes, the federal statutes do not provide for every kind of crime; serious, minor or traffic. For example, there is no federal vehicle and traffic law. But there is a federal statute called the Assimilative Crimes Act, 18 U.S.C. 13, which makes violating a state statute a federal offense if the act was committed on federal land. It is by virtue of the Assimilative Crimes Act that civilians on active duty installations with exclusive federal jurisdiction can be tried in federal Magistrate Court for committing a traffic offense on the installation. The Magistrate Judge uses the state law to try the offense, and the authority that provides subject matter jurisdiction is the Assimilative Crimes Act.

### *Concurrent Jurisdiction*

If both the federal and state government have jurisdiction on the installation, either may prosecute offenses committed on the installation unless state law prohibits a state prosecution after there has been a federal prosecution. Usually, Commanders of installations with concurrent jurisdiction have developed a Memorandum of Understanding with state or local prosecutors covering which offenses will be tried in which court.

### *Proprietary Jurisdiction*

If the installation has only proprietary jurisdiction, federal statutes which rely on territorial jurisdiction resting with the federal government may not be enforced in federal court. All of these prosecutions must occur in state court. Violations of federal statutes that do not rely on territorial jurisdiction can be prosecuted in federal court.

### **Individual's Consent**

Assuming the installation Commander refers a case to Magistrate Court, and that Court has jurisdiction to hear it, the individual defendant must consent before being prosecuted in Magistrate Court. It is rare that individuals do not consent. If the individual refuses to consent, jurisdiction over the case properly rests with the U.S. District Court, not the state court. If the individual consents to be tried in Magistrate Court, any conviction may be appealed to the U.S. District Court.

In exclusive federal jurisdiction case where the offense is not "minor" (*e.g.*, the offense is a felony), the individual has no "consent" option, and will be prosecuted before a United States District Judge and not before a U.S. Magistrate Judge.

### **CONCLUSION**

Even though Title 32 ANG personnel are not subject to prosecution under the UCMJ for offenses committed on active duty installations, they may be, whether in military (Title 32) or civilian status, subject to being prosecuted before a United States Magistrate Judge for federal or state offenses committed on military installations.

***KWIK-NOTE: Consider including this topic in your Preventive Law Program.***

### **RELATED TOPICS:**

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## Evidence – Differing Standards and Burdens of Proof

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** Applicable state and federal law; Military Rules of Evidence; AFI 51-602, *Board of Officers* (2 Mar 94).

### INTRODUCTION

Every potential adverse action, whether punitive or administrative, has a standard of evidence or burden of proof which must be met before the action may be taken. The standards of evidence and burden of proof will vary based on the type of action being considered. This topic has been included in the Deskbook to acquaint Commanders with the terms used to permit or sustain the various kinds of adverse actions they may take.

The term “burden of proof” is the amount of evidence that is necessary to achieve a goal (*i.e.*, discharge, conviction, or search warrant) Before taking a particular action, your first question should always be: “Do I have the required amount of evidence to take the action?”

When we talk of the burden of proof in a court-martial, we use the term “beyond a reasonable doubt.” In administrative board proceedings, the burden of proof is “clear and convincing evidence” or a “preponderance of the evidence.” The term “reasonable suspicion” when considering command-directed urinalysis tests.

### STANDARDS OF EVIDENCE AND BURDENS OF PROOF

#### Reasonable Suspicion/Articulable Suspicion

Reasonable suspicion is defined as having a rational basis to feel that a person may have done something wrong. This standard of evidence is less than probable cause, and although it may be based on slight evidence, it defines the minimum amount of evidence which Commanders must have to take certain actions. Under the applicable military regulations, a command-directed urinalysis test may be ordered only if the Commander has a “reasonable suspicion” that the individual may have used illegal drugs, *e.g.*, if a member displays unusual or aberrant behavior under the circumstances.

#### Probable Cause

Probable cause are the those facts which would induce a reasonably intelligent and prudent person to believe that a particular act or crime has occurred.

Probable cause is more evidence than reasonable suspicion and is the standard that must be met to support a Commander’s authorization to conduct a search and seizure or to support an apprehension.

#### Preponderance of the Evidence

A preponderance of evidence is the greater weight of evidence. While “preponderance of the evidence” cannot be stated in terms of a mathematical formula, since “preponderance” means the scale tips ever so slightly in favor of one party’s evidence, it may loosely be analogized to a minimum of 51% to 49% in favor of one party’s evidence. Preponderance of the evidence is determined by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses for a particular side. The witnesses’ opportunity for knowledge, information possessed, and manner of testifying determines the weight of their testimony. Stated another way the evidence demonstrates that it

is “more likely than not” that a particular event occurred. This is the standard of evidence that must exist before there is a basis to propose an administrative discharge.

### **Clear and Convincing Evidence**

This is more evidence than “preponderance of the evidence,” but less than “beyond a reasonable doubt.” It is the degree of proof that will produce a firm belief or conviction and that is sufficient to convince ordinary prudent-minded people who are unbiased and unprejudiced. The proof need not be conclusive. This is the standard of evidence used to determine the validity of “consent” given to police when during a “consent search”.

### **Beyond a Reasonable Doubt**

This is the highest burden of proof and is usually reserved for criminal trials and court-martial where life and liberty are at stake. An accused person is entitled to an acquittal if, in the minds of the jury, guilt has not been proven beyond a reasonable doubt. A reasonable doubt is a doubt to which the decider can ascribe a good reason. While this burden of proof cannot be equated with a mathematical formula, it loosely can be analogized to 99% to 1%.

### **TYPES OF EVIDENCE**

A Commander should not confuse the standards of evidence and burdens of proof with the actual evidence the prosecutor (or recorder in an administrative proceeding) uses to PROVE the government’s case or “meet” its burden of proof. Although there are many types of evidence, such as documentary, demonstrative and testimonial, all types of evidence can be categorized into DIRECT and CIRCUMSTANTIAL evidence.

#### **Direct Evidence**

Direct evidence is that means of proof which tends to show the existence of a fact without the intervention of or proof of any other fact. Direct evidence means that witnesses can testify they know a fact because of the operation of any of their five senses: they saw it, they heard it, they smelled it, they tasted it, or they felt or touched it. Evidence based on the five senses is what is meant by the term “direct evidence” or “direct knowledge.” While direct evidence can be strong evidence, it inherently is subject to human fallibilities: for example, a person may not have been in a good position to see or hear something; or human emotions such as fear or anger may have affected perceptions.

#### **Circumstantial Evidence**

Circumstantial evidence includes all evidence of an indirect nature. It can also be considered as inferences drawn from facts proven. Circumstantial evidence involves coming to a conclusion based on other known facts. For example, it is winter, you live in the northeast part of the United States and as you look outside just before retiring for the evening, it is clear and dry outside. You sleep soundly through the night and upon awakening the next morning, and before speaking with anyone, reading the newspaper, watching T.V. or listening to the radio, you look outside your bedroom window. You see no precipitation, but see a blanket of white covering the roads, the ground, the buildings and the trees. What happened during the night? It snowed, of course. You did not see it happen, but you believe that it snowed and do not have a reasonable doubt about this fact. Your knowing that it snowed was based on the facts existing when you went to bed the night before, and the facts existing upon your awakening. You put “2 and 2” together. This is circumstantial evidence.

Another example is the use in a trial of a scientific test such as a breathalyzer, which measures the alcoholic content in a person’s body by chemical analysis of the breath. As a juror in a DUI or DWI case, you may consider the results of the breathalyzer test in the case against a defendant. Although you did not see or otherwise have direct evidence of the person’s consumption of alcoholic beverages, if the judge permits the test results to be provided to you in court, you may use this test result as circumstantial evidence that the person had a certain percentage of alcohol in the body at the time of the offense.

Circumstantial evidence can often be more reliable than direct evidence, because of the potential human weaknesses associated with direct evidence. The expression “a person can’t be convicted solely on circumstantial evidence” is not necessarily true.

## CONCLUSION

It is important for Commanders contemplating adverse action against one of their members to discuss the applicable standards of evidence and burdens of proof with their Staff Judge Advocate to ensure a successful result.

***KWIK-NOTE: Supplement this topic with applicable state law.***

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## Chain of Custody

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**Updated by Lieutenant Colonel Robert L. Marconi, December, 2008**

**AUTHORITY:** Military Rule of Evidence 901(a); S.A. Saltzburg, M. Martin, and D. Capra, *Federal Rules of Evidence Manual* (7th ed. 1998, Supp. 2000), Vol. 3, pp. 1990-91 (See also 9<sup>th</sup> Edition, 2006, LexisNexis and semiannual supplements); applicable state law.

### **DEFINITION**

The concept of “chain of custody” is integral to the safeguarding of evidence. Any evidence that is introduced in a proceeding must not be altered in any fashion from the moment it is found to the time it is viewed in that proceeding. To demonstrate that nothing has been altered during the intervening period, the steps utilized to store and safeguard an item must be established. From the finding of the evidence through its use at a proceeding, all persons who had possession, custody or control of the evidence may be required to testify about their involvement with the evidence and what they did or did not do to ensure the evidence is in the same condition as it was when it was found or obtained. This is called the “chain of custody”. The safest method of ensuring that the chain of custody is not broken is to use a form that will become the written record of all persons who have had possession, custody or control of an item from the time it is found until the time it is used.

### **IDENTIFICATION OF EVIDENCE**

Drugs, urine samples, blood samples, weapons, clothing and other items related to an alleged offense or violation of a regulation are **PHYSICAL** evidence of that offense or violation. Commanders must preserve and safeguard any physical evidence and should consult their Staff Judge Advocate on the best way to preserve the evidence. Physical evidence should be handled by as few people as possible, since all who touch it may be required to appear at the proceeding and testify about what happened or did not happen to the evidence while it was in their possession, custody or control. Physical evidence must be carefully marked to ensure later identification and everyone who handles the evidence should record that fact on a chain of custody document.

The first person who assumes custody of physical evidence must mark it immediately to ensure that it will be identifiable at the proceeding in which it is sought to be used. This person may place the mark on the item itself if it can be done easily and without damaging the evidence, but the better practice is to attach a tag or other marker that is separate but attached to the piece of evidence. The tag should include the name of the person who attached it along with the date and time and location where it was found and the date and time the tag was attached. The evidence should be placed in a sealed, suitably marked container. This container must be tamper-proof or sealed to demonstrate an absence of tampering. The tag or label on the container should be marked with the person’s initials, the date, the time, and a description of the evidence. Physical evidence should be turned over to professional investigators such as security police, as soon as possible after it is found.

### **PRESERVATION OF EVIDENCE**

Perishable and unstable items of evidence require special attention. They must be photographed or otherwise preserved, with the method of preservation depending on the type of evidence. Professional assistance is necessary, for example, to preserve a blood sample, a fingerprint, or a tire track in the dirt. The security forces personnel or local law enforcement officials should be asked to do this. Documentary evidence is preserved by ensuring the original is not altered, defaced or damaged. Photocopies of original documents are usually permissible substitutes for the originals at the proceeding in which they are to be introduced, but only if the original is available for comparison, or its unavailability is satisfactorily explained. The reason the original is required for comparison is that reported cases show

some people can and have performed “magic” with photocopy machines. Safeguard original documents, and watch the coffee stains.

***KWIK-NOTE: The chain of custody is an essential part of the base urinalysis program. Consult the Staff Judge Advocate for all chain of custody matters.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Counter-Drug Support Program	6-5
Courts-Martial	8-15
Driving While Intoxicated and Other Offenses Involving Intoxication	8-17
Inspections and Searches	8-16
Investigations and Inquiries	16-11
Urinalysis Program	10-7
Witness Preparation	17-19
Workplace Searches	5-10

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## Arrest by Civilian Authorities

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005); applicable state law, including Codes of Military Justice and nonjudicial punishment regulations.

### INTRODUCTION

As Commander, you may be notified or learn that one of the members of your command has been arrested for, accused of, or charged by civilian authorities with having committed a civilian criminal offense. The member may or may not be held by the civilian authorities for such offense. The member, at the time of the alleged commission of the offense, may have been on or off base, on or off duty, or in or not in the performance of military duty. Most often, though, the member will have been off base and not on duty. The member may be an AGR, technician, or traditional Guard member. The alleged offense may be anything from driving while intoxicated, shoplifting, or simple assault to more serious offenses.

When this information comes to your attention, by whatever means and from whatever source, the issue becomes what if anything **MUST**, **CAN** or **SHOULD** you do, as the Commander of that member. You should work closely with your SJA throughout this process.

### ACTION SEQUENCE

These actions apply to both enlisted members and officers unless otherwise specified.

### CONTACT CIVILIAN AUTHORITIES TO GATHER INFORMATION

Contact the civilian authorities and inform them the person is a member of the Air National Guard. This will enable the civil authorities to understand why you are calling them about this person. Obtain a copy of the police report if you can. Ask the civilian authorities what actual charges have been or will be brought against the member, the circumstances of the case, and the maximum punishment imposable. This information will help you determine whether the civilian offense is a “serious offense” under the “Misconduct” sections of AFI 36-3209. Commission of such a “serious offense” is grounds for administrative discharge.

### ACTION IF THE MEMBER IS DETAINED

The civilian authorities may ask your input regarding bond/bail or whether you would take responsibility for the member if he or she is released from custody pending trial. The ANG cannot post bond. The only thing you are permitted to do in your official capacity is to make a statement about the member’s character or prior record of reliability. However, you are not required to make such a statement. *Do not assume responsibility for the member in your official capacity.* If you wish to personally take such a responsibility, that is your choice; however, you should in no way involve the National Guard or the Air Force. Unless you are **PERSONALLY** willing to accept the potential adverse consequences of the member’s failure to appear, you should not post bond or personally guarantee any action by the charged member.

NOTE: Should the civilian authorities holding the member be foreign authorities, you should notify the servicing judge advocate immediately. Any applicable Status of Forces Agreement (SOFA) or bilateral treaties must be consulted. In addition, certain instructions such as AFI 51-703, AFI 51-705 and AFJI 51-706, set forth action requirements. See the topics in this Deskbook entitled “INTERNATIONAL OPERATIONS LAW - FOREIGN CRIMINAL JURISDICTION” and “INTERNATIONAL OPERATIONS LAW - STATUS OF FORCES AGREEMENT (SOFA)” for further guidance in this area.

### **QUESTIONING THE MEMBER**

You have NO AUTHORITY TO COMPEL MEMBERS, because of their military status, TO TELL YOU about THEIR INVOLVEMENT in the CIVILIAN CRIME, and YOU CANNOT TAKE ADVERSE ACTION against them for their failure or refusal to do so. Read the topics in this Deskbook entitled “ADVISING SUSPECTS OF THEIR RIGHTS” and “EMPLOYEE INTERROGATION” if you intend to question them.

### **ATTORNEY REPRESENTATION**

A judge advocate cannot be appointed to represent the member in a civilian criminal matter. The civilian authorities will tell the member that the member may hire a civilian attorney at the member’s own expense, or if unable to afford one, the member may request that the court appoint a civilian attorney to represent the member free of charge.

### **MILITARY ACTION PENDING OUTCOME OF CIVILIAN CHARGES**

As a practical matter, you may wish to wait until the civilian criminal offense has been finally adjudicated before deciding whether to take any adverse military action against the member. If the member is exonerated from all civilian charges, including any lesser charge(s) derived from the original charge(s), you may not be able to take any formal adverse military action, and you may have to “undo” any adverse military action taken while the civilian case was pending. This will depend on whether you have evidence, independent of any conviction, sufficient to support a basis for your adverse action.

While the civilian case is pending, you properly should consider whether to withhold promotion action, OPR comment or reenlistment options. These are justifiable exercises of your discretion while the civilian criminal case is pending, even if the member is later exonerated. Coordinate all these actions with your MPF Chief and Staff Judge Advocate.

### **OBTAIN CERTIFIED COPY OF DISPOSITION**

Before taking any military action based upon a civilian court conviction of the member, or officially deciding not to take action against the member, obtain a “certified” copy of the conviction or other disposition of the charge from the court (even if the member is found “not guilty” or the case is dismissed). You need this document as “official” evidence of the member’s commission of, or exoneration from, the charges for purposes of discharge action, other adverse action, or no action taken against the member. The certified copy of disposition is usually available at a nominal or no cost (to the ANG) from the court after the case is finally disposed of, *i.e.*, after the member has been sentenced, if convicted, or after the case has been dismissed or otherwise finally adjudicated under state law.

In addition to obtaining the certified copy of disposition, often civilian prosecutors or court personnel may, upon your request, provide you with investigative reports or statements, and which while not essential for you to take administrative action, may give you some useful background information surrounding the commission of the offense. If the civilian criminal case has been disposed of favorably to the accused, state law may provide that the records of the case are to be “sealed” and unavailable to anyone, including the ANG.

## **MILITARY ACTION AFTER DISPOSITION OF CIVILIAN CASE**

Once you have obtained the certified copy of the final disposition of the case, immediately contact your Staff Judge Advocate to discuss appropriate administrative and/or disciplinary action. If you do not act promptly, the Air National Guard may be bound by your inaction and be unable to discharge the member. Understand, we are not advising you to act without full consideration of the appropriateness of your action, or without obtaining necessary documents. Time, however, can be of the utmost importance.

## **ADVERSE MILITARY CONSEQUENCES DUE TO CONVICTION**

The member's absence due to having been sentenced to civilian confinement is not a bar to processing a discharge or other appropriate action.

### **Enlisted Members**

A member is subject to a discharge from the ANG under other than honorable conditions if the member is convicted (by either a plea of guilty or a finding of guilty) of a civilian crime which either:

1. Could be punished by a bad conduct or dishonorable discharge if it were prosecuted under the UCMJ (here, the UCMJ is used as the standard for discharge based on misconduct); or
2. Results in the civilian court actually sentencing the member to confinement of six months or more (without regard to suspension of the sentence or probation).

This applies to juvenile as well as adult proceedings. It also applies to actions tantamount to a finding of "guilty," as defined in AFI 36-3209, para 3.21.4.

### **Officers**

If an officer is found guilty of any offense by civilian authorities and is sentenced to confinement in a federal or state penitentiary or correctional institution, regardless of whether or not the sentence is suspended, the officer may be involuntarily administratively separated by discharge, having their federal recognition withdrawn or by being dropped from the rolls of the Air Force and Air National Guard in lieu of being discharged.

## **ADVERSE MILITARY CONSEQUENCES NOT DEPENDENT ON CONVICTION**

Ask your SJA or security police to obtain all the police reports and any other evidence available. If you find that the member has been arrested/convicted previously, review the member's enlistment/re-enlistment forms to see if they include these previous arrests/convictions. If they do not, you have an independent cause for discharge (fraudulent enlistment) apart from the current civilian charges.

Any evidence you gather regarding the member's conduct may permit you to proceed with discharge action pursuant to AFI 36-3209, whether or not the member is successfully prosecuted by a civilian court. A discharge action is not a criminal procedure. For example, a member could be caught dealing narcotics by civilian police but, for some reason, not be prosecuted or convicted. It could be because of suppression of evidence at trial or in exchange for the member's cooperation with the police in gathering evidence about other drug dealers. In those cases you may still proceed with an administrative discharge action based on evidence of the member's misconduct, assuming you have sufficient evidence. If you initiate a discharge action on the basis of the member's commission of a serious offense rather than on the basis of a civilian conviction, you won't be bound by whether or not the civilian authorities convict the member.

## CONCLUSION

This topic has been designed to advise you of your responsibilities and give you some suggestions on the kinds of things you need to do when one of your members is arrested or becomes a defendant in a civilian criminal matter. Upon learning of such a situation, consult with your Staff Judge Advocate before taking any action.

***KWIK-NOTE: Civilian crimes committed by military members may form the basis of military administrative or disciplinary action.***

## RELATED TOPICS:

## SECTION

Absent Military Members	1-2
Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Admonitions and Reprimands – Administrative	24-5
Barring Reenlistment	24-6
Civilian Warrants and Process – Service on Base	3-8
Commander’s One-on-One Meeting with Member – Precautions	16-5
Criminal Investigations, Prosecutions and Reporting – DoD and DOJ	8-12
Dropping ANG Officer from the Rolls Instead of Administrative Discharge	24-8
Foreign Criminal Jurisdiction	15-8
Status of Forces Agreement (SOFA)	15-14
Revocation of Security Clearance	24-13
Withdrawal of Authority to Bear Firearms	1-41

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## Arrests Authorized by the ANG

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Updated by Major George Asinc, July 2002

**AUTHORITY:** AFI 31-207, *Arming and Use of Force by Air Force Personnel* (1 Sep 99); AFI 31-201, *Security Police Standards and Procedures* (4 Dec 01); AFI 31-101, *The Air Force Installation Security Program* (1 Jun 00) (FOUO Instruction); AFMAN 31-201, Vol. 2, *Security Legal Considerations* (25 Jan 02); and applicable state law.

### DETENTION

Commanding officers of any ANG unit may, during the performance of official duty, detain or cause the detention of any person - military or civilian - who commits a crime or trespasses upon any base or other military facility (if such person interrupts or interferes with the discharge of military duties or threatens to do so). That person should be turned over to the civilian authorities as soon as possible. Rarely does the ANG have authority to detain anyone off the base.

### APPREHENSION

Any officer, warrant officer, noncommissioned officer, or other person designated by proper authority to perform guard, police, or criminal investigation duties may “apprehend” (the military equivalent of “arrest,” which is a civilian term) a violator if they have a reasonable belief an offense has been committed and the person apprehended committed the offense. However, most apprehensions in the ANG are made by security forces personnel.

### USE OF FORCE

When making an apprehension, personnel must always consider the degree of force used. AFI 31-207, *Arming and Use of Force by Air Force Personnel*, and AFI 31-201, *Security Police Standards and Procedures*, and AFMAN 31-201, Vol. 2, *Security Legal Considerations*, provide further guidance for security personnel.

Security police authority to arrest, apprehend or detain civilians is based on state law. Many states have civilian statutes authorizing only certain persons classified as “police officers” or “peace officers” under that state’s law to make arrests or apprehensions. Those same laws also prescribe the permissible use of force.

If an ANG member makes an arrest or apprehension without proper authority, or uses excessive force, the Commander, and that member may be liable - sometimes personally - for damages.

### COORDINATION WITH KEY STAFF IS ESSENTIAL

The circumstances under which civilians and military members who violate civilian laws are turned over to civilian authorities, and particularly the policies regarding their restraint and confinement beforehand, depend on the jurisdiction of the installation. Therefore, your Staff Judge Advocate should be consulted on these matters. Develop Memoranda of Understanding with local law enforcement officials for these situations.

This is an area where your Staff Judge Advocate and Chief of Security Forces must research the applicable state law as well as the applicable military regulations, and educate the security police personnel on authorized apprehensions and the proper use of force.

***KWIK-NOTE: Most of the time, ANG members will only DETAIN persons who violate the law on an ANG base and await the arrival of civilian law enforcement officials who will effect the arrest. This is an area that needs to be supplemented by state law.***

**RELATED TOPICS:**

**SECTION**

Access to Military Installations – General Guidelines	3-2
Aid to Civilian Authorities	6-2
Air Base Security Guards	3-3
Arrest by Civilian Authorities	8-6
Civilian Misconduct on Base	3-7
Deadly Force	8-18
Debarment	3-11
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Memoranda of Understanding (MOUs)	6-6
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Open Houses and Free Speech	3-13
Personal Liability of Federal and State Officials	18-9
Posse Comitatus	6-7
Pretrial Confinement or Restraint	8-8

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## Pretrial Confinement or Restraint

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** State Uniform Code of Military Justice and other applicable state law.

### **AUTHORITY TO CONFINE OR RESTRAIN**

For Air National Guard Commanders, this area is governed by the state Code of Military Justice or civilian state law. If there is no authority under the state Code or law, ANG Commanders cannot confine or restrain one of their members pending a court-martial. There is specific authority in the UCMJ for certain active duty Air Force Commanders to exercise pretrial confinement or restraint of active duty service members, but the UCMJ does not apply to ANG members in Title 32 status. You should consult your Staff Judge Advocate to determine what authority you have under the governing state law.

### **EFFECT OF ILLEGAL CONFINEMENT OR RESTRAINT**

Wrongful (without authority) confinement or restraint can result in a civil suit for false or wrongful arrest, imprisonment or confinement, the damages for which you could be personally liable so you should work closely with you Staff Judge Advocate.

### **FACTORS TO CONSIDER**

Should a situation occur in which you feel confinement or restraint is necessary, consult your SJA immediately. As a general rule, restraint prior to court-martial is appropriate in few cases. The factors which you must consider include:

1. Whether the member is a threat to others;
2. Whether the member is a threat to self; and
3. Whether there is a risk the member will flee the jurisdiction.

Since most Guard members perform their military duty close to their hometown, it may be difficult to prove they would leave a civilian job and their families over a problem at the unit. The biggest practical problem may be lack of appropriate facilities on the Guard base or in the civilian jail nearest the base to confine members prior to trial.

## **INTERACTION WITH CIVILIAN AUTHORITIES**

If the situation is serious enough to warrant pretrial confinement or restraint, you should also be aware that state or federal authorities may also wish to prosecute the member for the alleged offense(s) if the member has also violated state or federal civilian law. In this event, although the National Guard, as a separate entity, may still be entitled to court-martial the member for the same offense, the issue of your pretrial confinement or restraint of your member may be moot.

***KWIK-NOTE: Pre-trial confinement or restraint is rarely, if ever used by ANG Commanders over Guard members in Title 32 status.***

### **RELATED TOPICS:**

### **SECTION**

Absent Military Members	1-2
Arrest by Civilian Authorities	8-6
Arrests Authorized by the ANG	8-7
Courts-Martial	8-15
OSI and SF Reports	8-14
Status of National Guard Members	11-7

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## Advising Suspects of Their Rights

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Updated by Lieutenant Colonel Robert L. Marconi, September, 2008

**AUTHORITY:** Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Harcrow, 66 M.J. 154 (CAAF 2008); United States v. Miller, 64 M.J. 666 (A.F.Ct.Crim. App. 2007), petition denied, 66 M.J. 182 (CAAF 2008); United States v. Mitchell, 51 M.J. 234 (CAAF 1999); United States Constitution, Amendments V and VI; Article 31, UCMJ; Manual for Courts-Martial (MCM), Rule 305(e); AF Form 1168; applicable state and military law and regulations; collective bargaining agreement.

### WHEN, WHAT, AND WHOM TO ADVISE

As a Commander, First Sergeant or Supervisor, you have the inherent right and responsibility to counsel, admonish, reprimand, “chew-out” and hold discussions with subordinate military members. If YOU do all of the talking, the individual’s “rights” may not become an issue. However, any time that you or anyone conducting a formal or informal investigation, begin to question an individual about suspected wrongdoing that MAY lead to disciplinary action (whether punitive or administrative) it is necessary to provide the suspected employee with a “rights” advisement. In addition, if your session started out to be a counseling session but the subordinate says or does something that leads you to believe they might have committed an offense; you should stop the conversation and provide a proper “rights” advisement. An attorney will be appointed for military personnel who request counsel. If you find yourself in a situation where you have to advise a subordinate of their rights you should immediately consult your Staff Judge Advocate for advice on how to proceed with an investigation or other follow on action.

If your subordinate was on Title 10 duty (federal service) when the alleged offense occurred or when you question the member (even if you are not) you should provide the member with the Article 31, UCMJ warnings (see AF Form 1168) if there is a chance of court-martial under the UCMJ. If the subordinate could also be punished under your state Military Code of Justice or under state civilian criminal law, the member should also be given a state law rights advisement.

If your subordinate was on Title 32 duty when the alleged offense occurred or when you question the member, state law must be consulted to determine what type of rights advisement is appropriate. Check with your Staff Judge Advocate for the proper rights advisement for your state. If your state military law does not have a rights advisement or if your state law is similar to the Article 31 warnings, you can use Attachment 1 to this topic simply by deleting the words “Article 31, UCMJ.”

If your subordinate was a civilian employee at the time of the alleged offense or when you question the member, the employee needs to be given a rights advisement consistent with the Fifth Amendment to the United States Constitution. Although the “Miranda” warnings normally only require a rights advisement in the event of “official interrogations” in “custodial situations” it is better to err on the side of caution and provide the warnings. Attachment 2 to this topic may be used for this purpose.

If the civilian subordinate is also subject to a collective bargaining agreement, the employee may request that a union representative be present.

If you fail to give a required rights advisement, the information you may not be able to use the information you obtain in a punitive action or a court of law; you may also be prevented from using it in other administrative proceedings.

## **OBTAIN WAIVER OF RIGHTS**

Remember that giving proper advice of rights to a suspect is only the first step toward obtaining admissible evidence. The second requirement is for the suspect to freely and intelligently waive these rights. Care must be exercised so that the suspect is not coerced or unduly influenced into waiving these rights. A written waiver, after a written advice of rights, is the best way to preserve the transaction for further use. These are provided for in Attachments 1 and 2 to this topic and also in AF Form 1168 (Statement of Suspect). However, oral advice of rights and oral waivers are admissible in evidence as well. Using exactly the same procedure each time the warnings are given and keeping precise notes of what transpired (Memo for the Record or notebook), will help ensure that the person who gave the advice of rights and heard the waiver of rights can testify at a later date as to exactly what happened on the occasion in issue. If possible, the rights advisement should be given in the presence of a witness, who then may testify at any hearing. Some courts have ruled that there is a presumption against waiver of constitutional rights so make sure there is some evidence of a rights waiver.

## **FORMS TO USE**

Attachments 1 and 2 to this topic provide a script for a rights advisement which, when the advisory notes are removed, provides a form for use in documenting advisement of rights. As an alternative to Attachments 1 and 2 to this topic, AF Form 1168 may be used to take a statement from the suspect. As stated above, all these forms provide the rights and waiver of rights questions. Regardless of the forms used, after the advisement of rights and waiver of them, and before the statement is taken, the suspect should first be sworn and requested to sign the form. Again, having a witness present throughout the rights advisement, the waiver and the taking of the statement is another advisable method of establishing exactly what occurred at the time. You may also wish a member of your Security Forces to give the advice of rights and act as the other person present if any statement is given.

AF Form 1168 provides Article 31, UCMJ rights while Attachments 1 and 2 to this topic set forth civilian rights, and probably closely conform to most state military law rights.

## **RIGHT TO COUNSEL IN FIFTH AMENDMENT CONTEXT**

Under the Fifth Amendment to the United States Constitution, an individual has the right to have counsel present during an interrogation while “in custody.” In the military, a person has the right to have counsel present during questioning under circumstances that meet the “official questioning” test. In other words, the military counsel rights are broader than civilian rights due to the fact that questioning in the military can be inherently coercive due to the grade or command relationship between the questioner and the individual being interviewed.

## **REQUEST FOR ATTORNEY**

If the suspect requests an attorney during the rights advisement, no further questioning may occur about the matter at hand or about any other offense until counsel for the suspect is present at the interview. This applies to interviews held at a later date. If the commander knows (or even has good reason to suspect) that the member has talked to a lawyer on the matter at hand or anything related to it, the Commander or a delegate must call that lawyer before the member is interviewed. In this situation, even if the individual waives the right to counsel in the absence of counsel, the lawyer should be advised of the interview before it takes place and given a reasonable time to get there and be present during the questioning. If the lawyer is not available or does not respond, you should make “all reasonable attempts” to contact the lawyer. That does not mean sending a personal messenger from the base to the lawyer, but it may not mean only one phone call either. “Reasonable” means what is reasonable under the circumstances. If this requirement is ignored, the statement which is obtained and any evidence discovered as a result of it, may be useless for punitive purposes even though it possibly may be used for adverse administrative action purposes. In addition, this conduct may constitute a violation of the member’s constitutional rights (MCM, Rule 305 (e)).

A suspect may waive the right to have an attorney present during an interview by initiating an interview or requesting that an interview be held without an attorney present. However, you should contact your SJA if this occurs, since the validity of these waivers depends heavily upon the facts.

## **TAPE RECORD STATEMENTS WHEN POSSIBLE**

Recorded statements are preferred over written statements because they contain the tone of the conversation in addition to the substance. It prevents a suspect from later claiming that there was coercion or some type of promise or agreement in exchange for their statement. The recording can easily be transcribed if needed for use in any disciplinary proceeding. If the suspect appears to be intoxicated make sure to determine that they are capable of understanding their rights and your questions. Ask preliminary questions that can demonstrate that capability.

## **CHECKLIST OF PRACTICAL TIPS**

1. Make sure the suspect understands what you are investigating. Legal specifications are not necessary -- lay terms are okay.
2. A suspect may waive the rights. This waiver must be knowing, intelligent, and voluntary. A waiver **MAY NOT** be obtained by coercion, threats or promises of reward or benefit.
3. Obtain the waiver in writing. Use AF Form 1168 or this topic's Attachments 1 or 2, as applicable.
4. Have a witness present.
5. If the suspect requests counsel, stop all questioning until the suspect has had an opportunity to consult with counsel.
6. If the suspect indicates a desire to remain silent, cease questioning. This does not mean, however, that you cannot give the suspect orders or directions on other matters. Just be careful not to threaten.
7. If after electing to make a statement, the suspect changes his or her mind, stop questioning.
8. If the suspect consents to make a statement, try to get it in writing. Handwritten is best.
9. Prepare a memorandum for the record (MFR) immediately after the session ends. Include:
  - a. What and when you advised the suspect (oral session only).
  - b. What the suspect said (oral session only).
  - c. What activities took place (suspect sat, stood, smoked, drank, ate, etc.) (oral, handwritten or tape recorded sessions).
  - d. What the suspects attitude was (angry, contrite, cooperative, combative, etc.) (oral, handwritten or tape recorded sessions).
  - e. Duration of the session with inclusive hours (oral, handwritten or tape recorded sessions).
  - f. Where the session was held (oral, handwritten or tape recorded sessions).
10. Think twice before you advise an intoxicated person of rights. If the person is drunk, that person may be legally incapable of knowingly and voluntarily waiving rights.
11. Generally, once an individual has requested an attorney, no questioning should ever occur without the presence of the attorney.

12. Remember, an interrogation occurs any time you intend to elicit incriminating statements from a person OR incriminating statements are reasonably likely to be elicited. Commanders should always advise subordinates of their rights when questioning them about a suspected offense.
13. Ask the suspect, "Have you previously requested counsel?"
  - a. If the reply is negative, the interrogation may proceed.
  - b. If the reply is in the affirmative, the interrogation should cease, and the Staff Judge Advocate should be consulted.

***KWIK-NOTE: Know when and how to advise suspects of their rights. When in doubt, give the advice of rights. Failure to provide rights advisement likely will result in the inadmissibility of the evidence obtained.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Civilian Misconduct on Base	3-7
Commander's One-on-One Meeting with Member – Precautions	16-5
Confessions	8-10
Employee Interrogation	5-3
Investigation by Commander of Suspected Minor Offenses	16-10
Investigations and Inquiries	16-11

*Attachment 1*

**MILITARY SUSPECT SAMPLE ADVISEMENT OF RIGHTS**

I am , (Title, *e.g.*, Investigating/Inquiry Officer, Commander) of the (Wing, Group, Squadron, etc.), Base. I am investigating the offense(s) of \_\_\_\_\_ , of which you are suspected. Before proceeding with this (investigation/ inquiry/ interview), I want to advise you of your rights under (Article 31 of the Uniform Code of Military Justice and/or Section \_\_\_\_\_ of the State military law) (as applicable).

You have the right to remain silent; that is, to say nothing at all. Any statement you do make, either oral or written, or any act, may be used against you in a trial by court-martial or in other judicial, non-judicial, or administrative proceedings.

You have the right to consult with a lawyer before any questioning. The (ANG if in Title 32 status or state active duty) (Air Force if in Title 10 status) will appoint a military lawyer to represent you in this proceeding free of charge. You may also obtain a civilian lawyer of your choosing at your own expense.

You have the right to have such appointed military lawyer or retained civilian lawyer present during this (investigation/inquiry/interview). You may request a lawyer at any time during this (investigation/ inquiry/interview). If you decide to answer questions during this (investigation/inquiry/interview), you may stop the questioning at any time.

Have you previously requested a lawyer after being advised of rights? (If the answer is yes, stop. Consult your Staff Judge Advocate before proceeding. If the answer is no, continue).

Do you understand your rights as I have stated them for you?

Do you now wish to answer my questions without the presence of an attorney?

(If the member says yes, place the member (suspect) under oath or affirmation, ask the member to sign and date this form or the AF Form 1168, acknowledging and waiving the rights).

(If the member says no, STOP and do not proceed with questioning of the member until you have the permission of the member's counsel, and until you have further consulted with the Staff Judge Advocate).

Do you understand that you may end this interview at any time?

I have read and understand my rights as stated above, and knowingly, freely and voluntarily waive them and make the following statement or will give answers to the questions set forth below.

\_\_\_\_\_  
Date                      Suspect

\_\_\_\_\_  
Questioner

\_\_\_\_\_  
Witness

***NOW PROCEED WITH SUBSTANTIVE QUESTIONING***

Attachment 2  
Page 1 of 2

### **CIVILIAN SUSPECT SAMPLE ADVISEMENT OF RIGHTS**

I am , (Title, *e.g.*, Investigating/Inquiry Officer, Commander) of the (Wing, Group, Squadron, etc.), Base. I am investigating the offense(s) of \_\_\_\_\_ , of which you are suspected. Before proceeding with this (investigation/ inquiry/ interview), I want to advise you of your rights under the Fifth Amendment to the Constitution (and any applicable collective bargaining agreement).

You have the right to remain silent; that is, to say nothing at all. Any statement you do make, either oral or written, or any act, may be used against you in a trial or in other judicial, or administrative proceedings.

You have the right to consult with a lawyer before any questioning. You may also obtain a civilian lawyer of your choosing at your own expense. If you cannot afford a lawyer, you may request that one be appointed for you.

*NOTE: You should not give rights to or question civilian suspects who have no military affiliation. That should be done by civilian law enforcement officials. The civilian suspects you will give rights to, or question, will have a military affiliation. As such, since they will usually be employed, it is unlikely, as a practical matter, that these suspects will be qualified (i.e. be deemed poor enough) for free civilian counsel.*

You have the right to have this lawyer present during this (investigation/inquiry/interview). You may request a lawyer at any time during this (investigation/inquiry/interview). If you decide to answer questions during this (investigation/inquiry/interview), you may stop the questioning at any time.

Have you previously requested a lawyer after being advised of rights? (If the answer is yes, stop. Consult your Staff Judge Advocate before proceeding. If the answer is no, continue).

*NOTE: If the person being questioned is a federal technician or state employee, and is being questioned about a matter alleged to have occurred while in such status, AND if the results of that questioning may result in disciplinary action against that person in such status, federal law provides that that person, UPON REQUEST has the right to have a UNION REPRESENTATIVE present during questioning. Before questioning any such person, consult your Staff Judge Advocate to determine if federal or state law or regulation or any applicable collective bargaining agreement requires the questioner to ADVISE the suspect of the right to have the union representative present. If there is NO REQUIREMENT TO ADVISE of the right to the union representative's presence and no request for same is made, continue with the script. If there is NO REQUIREMENT TO ADVISE of the right to the union representative's presence and a request for same is made, stop, consult your Staff Judge Advocate and wait for the presence of the union representative.*

*If there is a requirement in state law or the collective bargaining agreement to advise of the right to have the union representative present, immediately before asking the suspect, "Do you understand your rights as I have outlined them for you?", the script should proceed:*

You have the right to have a representative from your union present during this (investigation/inquiry/interview). You may request the presence of a union representative at any time during this (investigation/inquiry/interview).

Do you understand your rights as I have stated them for you?

Attachment 2 - Page 2 of 2

Do you now wish to answer my questions without the presence of an attorney?

(If the person says yes, proceed).

(If the person says no, STOP, and do not proceed with questioning until you have the permission of the persons counsel, and until you have further consulted with the Staff Judge Advocate).

Do you now wish to answer my questions without the presence of a union representative? (ask only if advised of this right).

(If the person says yes, proceed unless the person has exercised the right to counsel. If there has been no exercise of the right to counsel or union representation, place the suspect under oath or affirmation and ask the suspect to sign and or date this form or an equivalent form (e.g., AF Form 1168), acknowledging and waiving the rights).

(If the person says no, STOP, and do not proceed with questioning until the union representative is present).

Do you understand that you may end this interview at any time?

I have read and understand my rights as stated above, and knowingly, freely and voluntarily waive them and make the following statement or will give answers to the questions set forth below.

_____	_____	_____	_____
Witness (questioner)	Date	Suspect	Date

\_\_\_\_\_  
Additional Witness(es)

***NOW PROCEED WITH SUBSTANTIVE QUESTIONING***

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# Confessions

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Updated by Lieutenant Colonel Robert L. Marconi, October, 2008

**AUTHORITY:** U.S. Constitution, Fifth Amendment; UCMJ, Military Rules of Evidence 301-306; Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988); Miranda v. Arizona, 384 U.S. 436; United States v. Miller, 64 M.J. 666 (A.F.Ct.Crim. App. 2007), petition denied, 66 M.J. 182 (C.A.A.F. 2008); United States v. Mitchell, 51 M.J. 234 (C.A.A.F. 1999); applicable state law.

## DEFINITION

Confessions, simply put, are self-incriminating statements, that may be used against a person in a criminal or administrative proceeding as evidence of the commission of an offense. A confession may be either oral or written. It may be voluntary or involuntary. An involuntary confession cannot be used against the individual in most cases.

Admissions are statements direct or implied, of facts pertinent to an issue and when combined with other facts, tend to prove guilt that the individual making the statement committed an offense.

## ADVISEMENT OF RIGHTS

Typically, a rights advisement precedes the taking of the statement. One exception to this is a person's spontaneous statement which was not made in response to questioning. The rights advisement generally consists of three parts. Suspects or accused individuals are advised of:

1. The general nature of the offense;
2. The right to remain silent; and
3. That any statement made can be used against them.

For an individual serving on Title 10 orders, these rights are contained in Article 31 of the UCMJ. Civilians refer to the rights advisement as "Miranda" warnings. National Guard members not on Title 10 duty (Title 32 or State Active Duty) will be read "Miranda" warnings and/or a rights advisement pursuant to their state Code of Military Justice.

Commonly, advising the member of the right to counsel is also included in the rights advisement. In the military, individuals have a right to assigned military counsel or civilian counsel at their own expense. Individuals advised of the right to counsel should not be questioned if they indicate that they want to speak to an attorney. Any statement taken or confession made after this request will likely be inadmissible.

**EVEN IF A SUSPECT INITIALLY DOES NOT EXERCISE HIS RIGHT TO REMAIN SILENT AND HIS RIGHT TO COUNSEL HE CAN CHANGE HIS MIND AND ASK FOR COUNSEL AT WHICH POINT QUESTIONING SHOULD STOP!**

## VOLUNTARY OR INVOLUNTARY

### Involuntary

A confession may later be held to be INVOLUNTARY IF the atmosphere in which it was taken was inherently coercive; or IF the required advisement of rights was not given or even if the rights were given, the individual did not knowingly or voluntarily waive those rights before confessing.

## **Voluntary**

A confession will only be held voluntary if the:

1. Atmosphere in which it was given was not inherently coercive; and
2. Required advisement of rights was given; and
3. Individual knowingly, intelligently, and voluntarily waived those rights before confessing.

***KWIK-NOTE: Before you question any unit member about that member's involvement in any kind of conduct which could lead to adverse action, consult your Staff Judge Advocate.***

### **RELATED TOPICS:**

### **SECTION**

Advising Suspects of Their Rights	8-9
Commander's One-on-One Meeting with Member – Precautions	16-5
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## Polygraphs (Lie Detectors) – Use in the Military

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Updated by Lieutenant Colonel Robert L. Marconi, October, 2008

**AUTHORITY:** Military Rules of Evidence (MRE) 707; AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005); AFI 51-602, *Boards of Officers* (2 Mar 94); AFI 71-101, Vol. 1, *Criminal Investigations* (1 Dec 99); United States v. Gipson, 24 M.J. 246 (CMA 1987); United States v. Scheffer, 41 M.J. 683, (A.F. Ct. Crim. App. 1995), *decision set aside*, 44 M.J. 442 (C.A.A.F. 1996), *decision of C.A.A.F. reversed*, 523 U.S. 303 (1998); United States v. Tyndale, 56 M.J. 209 (C.A.A.F. 2001); applicable state law.

### INTRODUCTION

The polygraph is an investigative tool which can aid in determining facts both past and present.

AFOSI is the single manager for the Air Force polygraph program. All polygraph requests should be coordinated with the unit Staff Judge Advocate and AFOSI. Polygraph personnel are assigned regionally and travel worldwide to each base on an “as needed” basis. Therefore, you should know the address and telephone number of the AFOSI office nearest your base if you need to conduct a polygraph examination.

### COURTS-MARTIAL

MRE 707 and the Manual for Courts-Martial prohibit admitting into evidence at a court-martial the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, a failure to take or the taking of a polygraph examination, notwithstanding any other provision of law. The US Supreme Court upheld this prohibition against a Constitutional challenge in United States vs. Scheffer, 523 U.S. 303 (1998). However, statements made during polygraph examination may be admissible into evidence if those statements are otherwise admissible independent of the fact they were made during the polygraph examination.

The active duty rule that polygraph evidence is inadmissible in a court-martial only applies to the Air National Guard in Title 32 status if the state where your ANG base is located has adopted the Military Rules of Evidence as part of its law. If your state has not adopted the MREs, then you must look to your state military or civilian law to determine the admissibility of polygraph evidence in a state court-martial.

### ADMINISTRATIVE BOARDS, NONJUDICIAL PUNISHMENT, AND INVESTIGATIONS AND INQUIRIES

While polygraph results will probably not play an important role in court-martial, they could assist in making determinations about nonjudicial punishment, investigations and inquiries, and may, under certain circumstances, be admissible in administrative board proceedings.

As a practical matter, Commanders will usually not initiate a request to a member suspected of misconduct to take a polygraph, because they will usually have sufficient evidence of the misconduct, or be able to obtain it through other investigative means, to take appropriate action.

The usual way the polygraph issue arises is that accused or suspected members will, through counsel, request Commanders to administer a government (AFOSI) polygraph to absolve them of any guilt. This is sometimes called an “exculpatory” polygraph. Upon receiving such request, your questions will be:

1. Can I grant the request?
2. Should I grant the request?

3. Will the polygraph evidence be admissible in any pending or upcoming administrative board proceeding?

### **CAN I GRANT THE REQUEST?**

*THERE IS NO LEGAL REQUIREMENT FOR YOU TO GRANT A MEMBER'S REQUEST TO TAKE A POLYGRAPH.* You can grant the request, but before you do, you should have your Staff Judge Advocate check with the AFOSI to see if they will do one.

### **SHOULD I GRANT THE REQUEST?**

This is the BIG QUESTION. You are wise not to answer this question without first consulting with your Staff Judge Advocate. If your Staff Judge Advocate advises that you have enough reliable and credible evidence to be successful at the board proceeding or to take appropriate action as a result of the investigation or inquiry, and you really have no reasonable doubt the member requesting the polygraph has committed the misconduct, **YOU HAVE NOTHING TO GAIN** by granting the request.

One of the considerations in answering this question in the context of a pending administrative board proceeding is whether the polygraph evidence will be admissible in that proceeding. This is further discussed later in this topic.

Also, know this: most members who request a government polygraph, will have already taken and passed a civilian administered polygraph that you were not a part of. It is rare indeed, that members, especially if they are represented by military or civilian counsel, will offer to take a government polygraph and risk the results and statements made during the examination being used against them in a later adverse action proceeding, unless they know or are reasonably assured, they will "pass" the government's polygraph. This knowledge or reasonable assurance comes after having passed a previous polygraph test, given by a competent polygrapher concerning the matters in issue, since passing one polygraph in most cases means the member will pass a second one (your test) concerning the same subject matter. This prior test may not matter to you, especially if you have a reasonable doubt of the member's guilt and wish to provide the member every opportunity to be absolved of any guilt; but you should be aware of the likelihood of an earlier test when the member requests to take a government polygraph.

In most board proceedings - and it often surfaces in urinalysis boards - you usually have sufficient evidence to sustain the allegations, and probably should not grant the polygraph request. If the available evidence is conflicting with no clear indication either way of the commission or non-commission of the misconduct, you may consider granting the request, although you are not required to.

Although the scientific reliability of the polygraph has not sufficiently been established to permit its use in evidence at a criminal trial or court-martial, polygraphs are widely used by civilian and military law enforcement officials in investigations and inquiries.

Assuming it is ultimately determined that the polygraph evidence will be admissible at a board proceeding, as a condition of your granting the request, the member and the member's counsel should sign an appropriate statement before the government test is administered, that the decision to take the polygraph examination was voluntary and on the advice of counsel, that anything the member says or does during the examination and its results will be admissible in evidence against the member, and that the member will submit to the examination under the procedural rules of the AFOSI. Your Staff Judge Advocate should prepare this statement.

### **WILL THE POLYGRAPH EVIDENCE BE ADMISSIBLE?**

As previously mentioned, before answering the question "Should I grant the request?" you should determine whether the polygraph evidence will be admissible in a pending administrative board proceeding. If it will not be admissible in that proceeding, it makes no sense to grant the request.

The rules of evidence in administrative board proceedings are more relaxed than they are in a court-martial. Pursuant to AFI 36-3209 the legal advisor has discretion to admit or refuse to admit polygraph evidence. Pursuant to AFI 51-602 the legal advisor has discretion to admit all evidence that is relevant, reasonably available and is not cumulative. Polygraph evidence is hearsay, but in board proceedings, the rules against hearsay are relaxed if the legal advisor

determines that the nature of the hearsay evidence presents adequate safeguards of its truthfulness. As a practical matter, a legal advisor will probably determine a civilian-administered polygraph test does not have sufficient indicia of truthfulness, but may find a government administered test is of sufficient truthfulness to warrant its admission into evidence. That distinction is often based on the military's unfamiliarity with the methods used by, and qualifications of civilian polygraphers, especially when the prior test was given without the military's participation.

Also, pursuant to AFI 51-602, para 2.1.6 Air Force and Air National Guard policy is that polygraph test results are not admissible except on the consent of the legal advisor, recorder and the respondent, *i.e.*, the member accused of misconduct. Thus, if the polygraph result is unfavorable to the member, the member can prevent its use in the board proceeding.

***KWIK-NOTE: Before granting a unit member's request to take a polygraph examination, Commanders should discuss all the ramifications with their Staff Judge Advocates.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Boards – Investigative	16-4
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Nonjudicial Punishment	24-11
OSI – Air Force	8-13

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# Criminal Investigations, Prosecutions and Reporting – DoD and DOJ

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** 28 U.S.C. 535; Title 18, United States Code; DoDD 5505.1, *DoD Criminal Investigation Standards, Policies and Procedures* (17 Apr 00) and DoDD 5525.7, *Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes* (22 Jan 85); AFI 31-206, *Security Police Investigations Program* (1 Aug 2001); AFI 71-101, Vol. 1, *Criminal Investigations* (1 Aug 01).

## INTRODUCTION

The Department of Defense and the Department of Justice have entered into Memoranda of Understanding (MOU) for the coordinated handling of criminal matters of mutual concern. The DoD and its agencies have issued directives and regulations to implement these MOUs.

## DoD POLICY

DoD Directive 5505.1 states: “It is DoD policy to improve the efficiency and effectiveness of the DoD criminal investigation activities through development and implementation of consistent standards, policies and procedures.” Within that broad directive the DoD Inspector General has oversight responsibility.

## OSI AND SP RESPONSIBILITIES

The jurisdiction of your base will determine which police agency will investigate offenses. Normally, the OSI should initially be contacted for offenses that are military or that affect the mission or installation. It will either take the case or refer you to the FBI or other federal agency. The local police will normally investigate civilian offenses. Your Judge Advocate should be contacted for referral advice.

AFI 71-101 (“Criminal Investigations, Counterintelligence, and Protective Service Matters”) and AFI 31-206 (“Security Police Investigations”) provide guidance. In general terms, at an active duty installation the more serious criminal allegations are investigated by AFOSI, and the less serious by Air Force Security Police. An Investigative Decision Guide containing particulars on specific types of criminal offenses and their referral is found at AFI 31-206 Attachment 2. Most ANG security police do not serve the same law enforcement or investigation function as do their active duty counterparts.

## ANG - DUTY TO REPORT CRIMINAL ACTIVITY

Criminal offenses having a connection with Air National Guard functions should be investigated thoroughly so that a proper disposition can be made. Outcomes can vary widely depending on the type of offense, the status of the perpetrator, the skill with which the investigation is conducted, and the notoriety of the offense, to mention but a few. Members of the ANG always have an obligation to appropriately report suspected criminal activity, and persons receiving such information have an obligation to thereafter proceed appropriately. Commanders must ensure that any information, allegation or complaint related to criminal offenses under Title 18 of the United States Code involving government officials or employees is reported to the AFOSI who in turn is responsible for notifying the Department of Justice. A Judge Advocate should ALWAYS be consulted at the outset to assist the Commander in guiding the investigation in the proper direction. Cooperation between investigative agencies and prosecutorial agencies should be maintained at all times.

## **DoDD 5525.7**

DoD Directive 5525.7 establishes a DoD policy of maintaining effective working relationships with the Department of Justice in the investigation and prosecution of crimes involving the programs, operations, or personnel of the Department of Defense. The 1984 MOU (attached to this DoDD) acknowledges that DOJ has primary responsibility for enforcement of federal laws in the United States District Courts, and that DoD has responsibility for the integrity of its programs, operations and installations and for the discipline of the Armed Forces. It encourages joint and coordinated investigative efforts and sharing of information. It provides specific guidance for investigation and prosecution of cases involving:

1. Corruption, fraud, theft and embezzlement in DoD operations;
2. Crimes committed on military installations by persons who are, and who are not subject to the UCMJ; and
3. Crimes committed off military installations by military members.

This directive does not affect the investigative authority fixed by a 1979 “Agreement Governing the Conduct of the Defense Department Counter-Intelligence Activities in Conjunction with the Federal Bureau of Investigation,” and by a 1983 MOU among DoD, DOJ, and the FBI concerning “Use of Federal Military Forces in Domestic Terrorist Incidents.”

***KWIK-NOTE: Commanders should coordinate with their SJAs and promptly report federal criminal activity to the AFOSI.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Arrest by Civilian Authorities	8-6
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## Air Force Office of Special Investigation (AFOSI)

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** AFI 71-101, Vol. 1, *Criminal Investigations* (1 Dec 99); AFI 31-206, *Security Police Investigations Program* (1 Aug 01)

### ORGANIZATION

The Air Force Office of Special Investigation (AFOSI) was established on August 1, 1948 to provide an independent centralized organization to conduct unbiased factual investigations. The mission of the AFOSI is to provide to the Commander (including Air National Guard) complete service concerning investigation into matters of a criminal nature, fraud or counterintelligence. Their offices are located on active duty Air Force installations.

### INVESTIGATIVE SERVICES PROVIDED

The AFOSI can provide investigative services to an Air National Guard Commander in the following areas:

1. Alleged major crimes such as: arson, bribery, homicide, counterfeiting, sex offenses, impersonation, improper use or diversion of federal government property or employees, forgery, robbery, housebreaking, drug abuse, and other crimes that violate the Uniform Code of Military Justice or other federal laws and directives;
2. Treason, sedition, subversion, major security violations, terrorism, espionage, and other clandestine intelligence activities;
3. Crimes against the United States that involve contracting matters, appropriated and nonappropriated fund activities, computer systems, pay and allowance matters, and acquiring or disposing of U.S. Air Force property;
4. Other crimes (major or minor) or matters that need full or specialized investigation;
5. Investigative surveys to detect unlawful and improper acts, fraud and counterintelligence; and
6. Other specialized areas of investigation listed in AFI 31-206, attachment 2.

### REFERRAL OF INVESTIGATION TO AFOSI

The Commander may refer matters for investigation to an AFOSI unit, but has the discretion NOT to refer an investigation to the AFOSI. For practical purposes, Commanders should use the AFOSI unit closest to their ANG base. Commanders and their Chief of Security Forces and Staff Judge Advocate should know and maintain current liaison with the AFOSI unit nearest their base.

Depending on the alleged offense, the AFOSI may also work concurrently with other agencies such as your security forces, and federal, state, or local law enforcement officials.

If the AFOSI conducts an investigation, Commanders should contact their Staff Judge Advocate before any AFOSI investigative documents are released.

## **SPECIALIZED FUNCTIONS**

The AFOSI has specialized functions which may be of valuable use to an Air National Guard Commander. For instance, the AFOSI is the sole manager of the USAF polygraph program, has specially trained mental health professionals for forensic hypnosis to aid a witness or victim's memory enhancement, can provide computer crime investigative assistance, forensic specialists to aid in aircraft accident investigation boards, technical surveillance countermeasures, and protective services (including assessments and estimates on terrorist and foreign intelligence threats to Air National Guard deployments, exercises, weapons facilities, and other base facilities), can investigate all non-routine security violations, and can also provide undercover agents for investigations at your base.

## **POLICY MATTERS**

AFOSI agents, as Title 10 active duty members, are governed by the Manual For Courts-Martial, and hence may only apprehend people subject to the UCMJ. They cannot apprehend a Title 32 National Guard member.

The AFOSI Report of Investigation contains information learned by the AFOSI as a result of the investigation, and will not have recommendations or suggestions on appropriate command action. AFOSI reports may be released in whole or in part but only to persons who require access pursuant to their official duties; and only HQ AFOSI may authorize release of information in their reports outside the Air Force or Air National Guard, or determine whether to release or deny the release of information in those reports under the Freedom of Information or Privacy Acts pursuant to the law enforcement records exemption.

Examples of recent AFOSI involvement with the ANG include the investigation of theft of government property of a National Guard unit; the briefing of Air National Guard members on terrorism, security matters, and traveling to communist countries; and the investigation into whether improper items were taken from Kuwait to the United States.

Commanders are well-advised to consult and coordinate with their Chief of Security Forces and Staff Judge Advocate both before and during any AFOSI investigation into activities on their installations.

***KWIK-NOTE: The AFOSI can be a valuable resource for Air National Guard Commanders.***

### **RELATED TOPICS:**

### **SECTION**

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Aircraft and Missile Accident Investigations and Reports	16-3
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Releasing Information in Litigation	14-14
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## OSI and SF Reports

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** AFI 51-301, *Civil Litigation* (1 Jul 02); AFI 71-101, Vol. 1, *Criminal Investigations* (1 Dec 99); AFI 31-401, *Information Security Program Management* (1 Nov 05)

### INTRODUCTION

The Air Force Office of Special Investigations (OSI) and unit Security Forces (SF) supply reports to Commanders for information and action. When Commanders receive these reports they must establish proper internal control to ensure the reports are adequately safeguarded and promptly referred to appropriate authorities with the responsibility to begin action.

### PROMPT ACTION - WHY?

Prompt action on OSI and SF Reports of Investigations (ROIs) facilitates the administration of discipline within a unit.

Often, but not always, such reports are accurate and can be relied upon.

Your first obligation is to read the report.

Your second obligation is to consult the Staff Judge Advocate to determine:

1. If further investigation is required;
2. What offense has been committed; and
3. A proper course of action and who can and should take it.

Do not let the report sit on your desk without prompt action, but do not take action on the report without consulting the SJA. Since the Report of Investigation (ROI) has taken time to prepare, and a higher level of command may have to initiate action, you need to act promptly to prevent the matter from becoming stale. Remember also, that the suspects of ROIs usually have been under the strain of knowing they are being investigated, and are entitled to know if you or another authority are or are not taking action.

### PROTECTION, HANDLING AND RELEASE

AFI 31-401 sets forth detailed responsibilities for action authorities upon their receipt of these reports. As soon as practicable, action authorities are required to:

1. Determine who must receive the reports, or parts thereof;
2. Determine who may receive the reports, or parts thereof;
3. Provide enough copies to proper recipients;
4. Protect, control and destroy, as appropriate, copies of the reports;
5. Determine when extracts or summaries of reports are appropriate, and prepare and release them to authorized recipients;
6. Prevent unauthorized disclosure of reports which might jeopardize a confidential matter; and

7. Coordinate with the OSI or SF Commander when in doubt about exercising these responsibilities.

### **RELEASE OF REPORTS - MILITARY REPORTS**

After notice to, and unless specifically prohibited by the OSI or SF, the action authority may release the entire ROI to government and defense attorneys (military or civilian) during the adjudication process of judicial or administrative actions in accordance with AFI 51-301. Always coordinate with the Staff Judge Advocate before releasing any ROI or portion thereof.

As a rule, do not give witnesses access to reports, or extracts or summaries of investigations. However, persons who have furnished written statements during an investigation may be given copies of their own statements upon request. This does not apply if the statements are classified or if the report stipulates the statements cannot be released without the prior concurrence of the OSI or SF. Also, be sure to coordinate any release with the Staff Judge Advocate.

In certain situations, it may become necessary to prepare an extract or summary rather than release an entire ROI. Commanders may prepare extracts or summaries from such reports for release when command action has not been taken. See AFI 71-101, Vol I for examples of situations appropriate to preparing an extract or summary.

As federal records, OSI and SF reports, and summaries or extracts of reports are controlled by the Freedom of Information Act. Law enforcement records are subject to an exemption under the Privacy Act. Each request for information under these Acts receives full consideration. Exemptions permitted under the Acts are invoked when considered appropriate and may result in all or parts of an ROI being withheld. Release of an AFOSI ROI or extract or summary outside the Air Force requires the approval of Headquarters AFOSI. Seek this approval through the servicing AFOSI unit and coordinate with your Staff Judge Advocate.

### **RELEASE OF REPORTS - CIVILIAN REPORTS**

If you should receive a civilian police report concerning one of your members, **DO NOT UNDER ANY CIRCUMSTANCES, RELEASE OR DISCLOSE THE CONTENTS OF ANY PART OF THIS REPORT TO THE SUSPECT OR TO ANYONE WHO DOES NOT HAVE THE "NEED TO KNOW" WITHOUT COORDINATING WITH THE SJA AND THE POLICE DEPARTMENT INVOLVED.** Failure to adhere to this guidance could jeopardize an ongoing investigation as well as the personal safety of those involved. In addition, your relationship with the civilian police department could be adversely affected by such inadvertent release.

***KWIK-NOTE: Promptly act on OSI and SF reports. Coordination with the Staff Judge Advocate in this area is recommended to avoid improper release of information and potential personal liability.***

#### **RELATED TOPICS:**

#### **SECTION**

Arrest by Civilian Authorities	8-6
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OSI – Air Force	8-13
Privacy Act	14-12
Releasing Information in Litigation	14-7

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## Courts-Martial

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**Updated by Lieutenant Colonel Robert L. Marconi, December 2008**

**AUTHORITY:** Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801-940; Manual for Court-Martial (2008 Edition); 32 U.S.C. 326-327 (As amended Dec. 2, 2002, P.L. 107-314, Div A, Title V, Subtitle B, § 512(a), 116 Stat. 2537); applicable state law.

### STATUS OF OFFENDER

Jurisdiction over an accused and over a particular offense under a state Code of Military Justice, or the Federal Uniform Code of Military Justice (UCMJ), is determined by the duty status of the accused at the time the alleged offense was committed, and by the offense itself. The place where the offense occurred does not exclusively determine jurisdiction, but the place of offense may determine if the member is also subject to civilian criminal laws.

The federal UCMJ ONLY APPLIES TO MILITARY MEMBERS WHO WERE IN TITLE 10 status at the time the alleged offense was committed. If a military member was in Title 10 status at the time he/she allegedly committed an offense, the member may be prosecuted by court-martial under the federal UCMJ. If a member was in a Title 32 or other status such as State Active duty, the accused member may be prosecuted by court-martial under state law or regulations or by civilian courts under applicable state law.

### PROCEDURES

Under the Federal UCMJ there are three types of court-martial: Summary, Special, and General. A Summary court-martial can impose only minor punishment, and is reserved for minor offenses and cannot result in a separation or discharge. A Special court-martial is generally used for intermediate grade offenses and can impose more severe sentences up to a year imprisonment and a bad conduct discharge. A general court-martial is reserved for the most serious offenses and can impose the maximum punishments authorized by law, including the death penalty for certain offenses.

The federal UCMJ specifically delineates who the convening authority is. The level of convening authority is generally dependant on the severity of the offense charged and the level of the court-martial contemplated. The convening authority in a state military prosecution can range from the local Commander level, to the Adjutant General. State law should be scrupulously consulted to determine the appropriate convening authority. The appropriate choice may impact review and appellate functions within a state military justice system.

Under the federal UCMJ an accused is entitled to a free (“detailed”) military defense counsel in General and Special court-martial proceedings. Along with the military judge and trial counsel (“prosecutor”), the military defense counsel must be certified as defense counsel in compliance with specific requirements. There also may be similar certification provisions under various individual state military justice laws or regulations.

Participants in a federal court-martial include the military judge, trial counsel and defense counsel. The accused may elect to be tried by a “Panel” (acting like a jury) that will be comprised of officers. If the accused is enlisted the panel may also include an enlisted member at the accused election. The military judge, trial counsel, and court members (“Panel”), must be free to perform their respective responsibilities in a fair and impartial manner. In this regard, the UCMJ and many state military justice laws and regulations make it unlawful for either a convening authority, or any other military member to use command influence or to attempt to coerce or influence the actions of a court-martial or any other military tribunal in reaching the findings or sentence in any case.

Consistent with the ethical responsibilities of all attorneys, the defense counsel must be free to defend the accused in compliance with applicable Rules of Professional Responsibility. It is also unlawful for a superior military member to adversely evaluate a defense or trial counsel in efficiency reports or otherwise, because of the manner in which such counsel performed their duties, or because of the outcome of a court-martial proceeding.

The Military Rules of Evidence (MRE) and the Manual for Court-Martial are applicable and used for all federal UCMJ matters, including court-martial in a Title 10 status. The MREs may also be applicable to courts-martial under your individual state military justice law. Each state military justice law or code should be carefully reviewed to determine what rules of evidence are apply.

## **PRACTICAL REALITIES**

As a practical matter, few courts-martial are conducted against a member in the Air National Guard while not in Title 10 service. This trend is a result of many factors, many of which are inherent in the specific individual state military codes. Other factors that curtail the use of state courts-martials are:

1. Limitations of Types of Offenses Punishable by Court-Martial - most state military justice codes proscribe purely military offenses (examples, AWOL, insubordination, etc.), unlike the UCMJ, which proscribes both military-type and traditional civilian offenses (examples, murder, rape, robbery, etc.). A military member in Title 32 status who commits a civilian offense is usually not prosecuted by court-martial, but by the local federal, state, county or municipal civilian prosecutors for a violation of the civilian law. Depending upon the results of that prosecution, the member may then be administratively discharged from the Air National Guard.
2. Fiscal, Budget and Manpower Constraints: At least three Judge Advocates are needed for a court-martial; trial counsel, military judge and defense counsel. Court members (the jury) and a stenographer are also necessary along with any witnesses. Since Air National Guards JAGs are traditional guardsmen, the length of time it takes to conduct a trial may be significant, and may require the unit to devote a significant number of additional military days to all the participants. As an alternative to court-martial, ANG Commanders often choose the administrative discharge proceeding which is a more expedient, less expensive alternative method of removing a member from the Guard. This procedure may or may not require a board and usually results in what the Commander wants most: removal of the member from the unit and the Air National Guard with minimal drain on a unit's resources.
3. Since passage of the FY03 National Defense Authorization Act, the limitations on the maximum authorized punishments in courts-martial for National Guard members not in federal service (see 32 U.S.C. 326-327) have been repealed. The states are now able to establish a maximum punishment table that is more realistic and effective. Prior to this repeal, the states punishments were extremely limited and unrealistic. Pursuant to the FY03 Act, Congress mandated that the Secretary of Defense provide a Draft Model State Code and Manuel for Congress. The Model State Code follows the UCMJ format as much as possible. However the drafters recognized and upheld state sovereignty. The Model State Code is available for introduction to state legislatures as the basis for revision or replacement of state military justice codes in order to align them with the current joint forces environment and total force concept. See below for more on the Model State Code.
4. Age of current state military justice codes: Most states military justice codes have not been reviewed or rewritten since the 1960's. The Uniform Commission of Model State Laws drafted a Military Justice Code Act of 1961. Twenty-three states adopted that proposed legislation. The committees that drafted that particular piece of legislation had no National Guard JAG input. It was based purely on the federal UCMJ. In 1968 the federal UCMJ underwent a major overhaul. But most states' did not incorporate those changes into their military laws that had been adopted back in 1961. Thereafter many states adopted portions of similar or newly drafted codes. None are uniform. Many state codes lack strong non-judicial punishment procedures. This weakness creates an ineffective military justice system for many states. The age and lack of uniformity in the state codes is another factor in the low usage of the courts-martial.

5. 2003 Model State Justice Code Highlights:
  1. Institutes strong non-judicial punishment procedures and punishments
  2. Follows the federal UCMJ format for uniformity purposes
  3. Mirrors the federal UCMJ procedures to the greatest extent possible
  4. Creates 24/7 jurisdiction by the establishment of jurisdiction over purely military offenses and shared jurisdiction over non military, traditional civilian crimes
  5. Creates a permissive (not automatic) appeal procedure that adopts the specific state criminal appeals procedures.
  6. Provides for cross component and inter states utilization of Jags and convening authorities
  7. Has extra territorial application
  8. Establishes Judge Advocates' qualifications to mirror those of the federal UCMJ to the greatest extent possible. The State Judge Advocate has significant discretion in this area.
  9. Simplifies courts-martial procedures
  10. Provides for the establishment and funding of individual state military justice funds to bear the costs of courts-martial

The Model Code was presented to Congress in December 2003. The adoption of the Model Code by each state legislature is the necessary key to ensure uniformity and success of the Model State Justice Code. The adoption of the Model Code provides the military commander with a current and viable military justice tool, establishes credibility with the active duty component, effectuates mission success, provides uniformity in the increasingly mixed ARC environments and provides the military justice training that Air National Judge Advocates desperately need. Finally the adoption of the Model Justice Code supports the Chief of the National Guard Bureau's three primary goals for the National Guard; homeland security, the war on terrorism, and remaining a ready, reliable and relevant fighting force.

Your Staff Judge Advocate should be consulted whenever you consider convening a court-martial.

***KWIK-NOTE: Court-Martial under state law may not always be the best forum to deal with problem personnel. You may wish to supplement this topic with state law requirements.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Active Duty – Air National Guard Members	11-2
Active State Duty	11-360
Command Influence	2-2
Evidence – Differing Standards and Burdens of Proof	8-4
Military Justice Jurisdiction – ANG Members in Title 10 Status	8-2
Pretrial Confinement or Restraint	8-8
Status of National Guard Members	11-7
Witnesses – Obtaining	17-18
Witness Preparation	17-19

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# Inspections and Searches

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**Updated by Lieutenant Colonel Robert L. Marconi, December, 2008**

**AUTHORITY:** Fourth Amendment to the U.S. Constitution; AFI 31-201, *Security Police Standards and Procedures* (4 Dec 2001); AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Reserve Members*, (14 Apr 05); Military Rules of Evidence, Rules 311-316; Manual for Courts-Martial; applicable state law; AFI 36-3209 (14 April 2005).

## INTRODUCTION

The Fourth Amendment to the U.S. Constitution provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

As a Commander, general military law gives you the authority to direct inspections and authorize probable cause searches of persons and property under your jurisdiction. However, military law requires that the Commander authorizing a search be neutral on the facts. In order to separate the Commander gathering facts and responsible for discipline from the search authorization Commander, at many bases the authority to authorize searches and seizures has been centralized with the Wing or Group Commander. You should consult your Staff Judge Advocate before requesting or authorizing a search or seizure. Incriminating evidence obtained in violation of proper search procedures can still be able to be used, in a limited way, in an administrative action. For example, see AFI 36-3209, paragraph 1.16.4, permitting evidence from a command-directed urinalysis to be used to establish a basis of discharge, but not on the issue of characterization of discharge.

Failure to appreciate the difference between inspections/inventories and searches may result in the exclusion of evidence at a court-martial or administrative proceeding. Searches are evidence-gathering acts for law enforcement activities. Inspections, on the other hand, have the primary purpose of determining and ensuring the security, military fitness, or good order and discipline of your command. Motive is often the test. If particular evidence from a particular person(s) is sought, from a particular place(s), an it is a search and an “Authorization to Search” is required. The authorization must be based upon a belief that the person(s) or place(s) to be searched will produce the particular evidence sought. By contrast, the “Inspection” is conducted for health, welfare, safety and morale purposes without targeting in advance a particular person(s), item(s) or place(s). If you are considering either an inspection or search make sure and speak to your Staff Judge Advocate.

## SEARCHES

A search may be authorized for:

1. Person or property situated in a place under your command and control;
2. Military property or property of a nonappropriated fund; and/or
3. Property situated in a foreign country which is owned, used, occupied by or in possession of a member of your command.

A search may be conducted for the following types of property:

1. Contraband, *i.e.*, drugs, unauthorized government property;

2. Fruits of a crime, *i.e.*, stolen TV, money; and/or
3. Evidence of a crime, *i.e.*, bloody T-shirt, weapon.

## **KINDS OF SEARCHES**

### **Probable Cause Searches**

The basic rule is short: When probable cause exists, a Commander, acting as a neutral and detached magistrate, can authorize searches of persons or places subject to the Commander's military control. That relatively short rule, however, carries an abundance of legal baggage. The military written "Authorization to Search" by the Commander pursuant to AFI 31-201 (AF Form 1176) is equivalent to the civilian Search Warrant by a Judge. In either case, the issuer of the authority to search must be neutral and detached. Attachment 1 to this topic is a checklist provided to assist the Commander to determine whether and to what extent search authorization based upon probable cause, should be granted.

*BECAUSE OF THE EVER-CHANGING LAW IN THIS AREA, A COMMANDER SHOULD ALWAYS CONSULT WITH THE STAFF JUDGE ADVOCATE BEFORE AUTHORIZING A PROBABLE CAUSE SEARCH.*

Remember, the Commander authorizing a search may be called upon weeks or months later to testify at a trial or other proceeding (civilian or military) regarding the conclusion that probable cause existed prior to the search. It is a good idea for the Commander to take and keep notes, on a copy of the attached checklist or elsewhere, that can be used later, if necessary, to refresh the Commander's memory.

Probable Cause To Search: For there to be probable cause to search particular premises, it must be more likely than not that the specific items to be searched for are connected with criminal activities and these items will be found in the place to be searched.

Probable cause may arise from:

1. Your personal knowledge;
2. Oral or written information from others; or
3. A combination of personal knowledge and information from others.

The search authorization may rely on information from others, as long as it is determined that the information is credible. An anonymous telephone call, by itself will never justify a probable cause search. In the case of drug dogs, the search authorization Commander must have observed and be personally aware of the dog's successful training exercises as well as the dog's actual record of success in search situations. Drug dogs are not usually used in the Air National Guard.

For the authorization to search, you should place the person providing the information to you under oath.

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

When information comes to your attention that may justify a search authorization:

1. Refer the source of the information to the Security Police who will investigate or refer the source to the AFOSI;
2. Do not personally investigate;

3. If the Commander discovers the information:
  - a. Secure the premises with an NCO;
  - b. Notify Security Police Investigators or the AFOSI; and
  - c. Note any incriminating evidence or statements; and
4. Coordinate with the Legal Office on probable cause facts to be presented to the search-authorizing Commander.

### **Non-Probable Cause Searches**

#### Consent Searches

If an individual consents to a search you do not need search authority.

1. Prior to requesting authority to search an individual's body or premises, a request for consent should be made. For example, "Will you allow me to obtain blood to determine the amount of alcohol in your body?" Try to have consent acknowledged in writing (AF Form 1304, Consent for Search and Seizure) or at least have one witness present.
2. Consent must be knowledgeable and genuinely voluntary. It cannot be the result of threats or coercion. Advise of the right to refuse to consent.
3. Mere acquiescence to a search is not sufficient to justify a search based upon consent.
4. The individual giving consent must have either an exclusive or joint interest in the premises to be searched.
  - a. An assigned occupant of a dormitory room can consent to a search of the joint or common areas of the room.
  - b. 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.

See Attachment 1 to the topic in this Deskbook entitled "CONSENT URINALYSIS TESTS" for a sample consent form used in these searches.

There is no requirement to read an individual his Article 31 Rights when asking for consent to search. You are requesting blood, urine, or the ability to look inside the person's car. You are not asking the person to produce incriminating statements.

#### Other Non-Probable Cause Searches

Most searches require probable cause (reasonable grounds) or consent to be valid. There are unique situations where you do not need probable cause to search, such as searches upon entry to or exit from U.S. installations, aircraft or vessels or searches within jails.

### **Adhere to the Search Rules**

Evidence seized from an illegal search cannot be used as evidence against an accused.

While these rules and the checklist in Attachment 1 to this topic may appear detailed and time consuming (they are) and unnecessary (they aren't), your adherence to them will either "make" or "break" your case; and if things are done correctly from the outset, it will ultimately save you and the government much time, aggravation and money, and lead to the swift and appropriate adjudication of offenders.

## INSPECTIONS

An inspection is an examination of the whole or part of a unit, organization, installation, ship, aircraft, or vehicle. Commanders have the inherent authority to ensure their command is equipped and functioning properly, maintaining proper standards of readiness, sanitation and cleanliness and that personnel are present, fit and ready and ready for duty. An inspection is conducted for the primary function of ensuring mission readiness. The purpose of an inspection cannot be to obtain evidence for use in a court-martial or other disciplinary, administrative or criminal proceedings. If, however, such evidence is a product of a legitimate inspection, it may be used in any such proceeding. No probable cause is needed for an inspection because inspections are not considered “searches” within the meaning of the Fourth Amendment. Nor is there a need to give notice of an inspection.

Common examples of inspections are: requesting random urine samples from members, requesting identification of each and every individual at the base entrance gate, and checking military readiness mobility kits.

The key to a valid inspection is that the inspection must be of all people in a definable group who are subject to it, and no one person may be singled out in advance.

Commanders should prepare a written memorandum prior to conducting an inspection to outline the purpose of the inspection. Guidance for permissible inspections is found in Military Rule of Evidence 313.

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.

Attachment 2 to this topic is a sample letter with rules for a gate inspection.

## CONCLUSION

The above discussion is only intended to be general overview of the Commander’s rules in searches and seizures and inspections. Because there are many legal considerations and technical aspects involved in this area, which may vary because of unique factual settings, **REMEMBER, BEFORE CONDUCTING ANY SEARCH OR INSPECTION, CONSULT WITH YOUR STAFF JUDGE ADVOCATE TO ENSURE COMPLIANCE WITH THE THEN APPLICABLE LAW AND REGULATIONS.**

***KWIK -NOTE: Inspections and Searches are valuable tools for Commanders to maintain discipline and proper standards of readiness. Because the law in this area is always changing - both in the federal and state sectors - Commanders should ALWAYS consult with their SJA before conducting a search or inspection. Remember, state law must also be consulted before conducting a search since state law may be more restrictive than federal law in permitting a search.***

## RELATED TOPICS:

	SECTION
Advising Suspects of Their Rights	8-9
Chain of Custody	8-5
Command Directed Urinalysis	10-9
Consent Urinalysis Tests	10-8
Installations Jointly or Solely Occupied by the ANG	25-12
Jurisdiction	2-5

Attachment 1  
Page 1 of 2

Date: \_\_\_\_\_

#### COMMANDER'S SEARCH AUTHORIZATION CHECKLIST

YES/NO

1. Has this search request been coordinated with the SJA?
2. Am I the person with command authority over the person(s) or place(s) to be searched?
3. Am I sufficiently detached from the set of facts presented to me to be able to render an objective, unbiased determination whether probable cause exists? (If not, someone higher up the command chain must decide probable cause).
4. Do I know the name and organization of the requester of the search?
5. Do I know the name and organization of the suspect (target of the search)?
6. Do I know what or who is to be searched?
7. Do I know what is to be seized?
8. Is it probable (better than 50-50) that the items to be seized are located in the place or on the person to be searched?
  - a. Does the information provided to me suggest more than mere suspicion, conjecture or rumor?
  - b. Is there a linkage between the information provided to me and the place or person to be searched?
    - (1) Did someone see the item(s) to be seized in the place or on the person to be searched?
    - (2) Did the suspect say that the item(s) to be seized was (were) in the place to be searched or on the suspect's person?
    - (3) If "no" to both of the above, can I articulate another probable linkage?
  - c. Is the information fresh (has it occurred recently)?
    - (1) Do I know when (date and time) the observations supplying the linkage in 8(b)(1)(3) above were made?  
(If so, note this)
    - (2) Considering the passage of time, is it nonetheless probable that the items to be seized are still located in the place or on the person to be searched?
  - d. Am I able to distinguish the ultimate (original) source of the information from the "middlemen" who are passing the information?

Attachment 1  
Page 2 of 2

Date: \_\_\_\_\_

YES/NO

- e. Does the source of the information have the capability to make the conclusions he/she has made (for example, how does the source know what marijuana looks or smells like or did the source see the illegal evidence)?
  - f. Is the source of the information reliable?
    - (1) Do I know the source personally and believe the source to be reliable?
    - (2) Has the source previously provided information that has proven to be accurate?
    - (3) Has someone in a position of trust or authority (for example, Commander or first sergeant) provided me with facts (not conclusions) sufficient for me to make my own conclusions that the source of the information is reliable?
    - (4) Is the source of the information a law enforcement officer?
  - g. Are the “middlemen” reliable and, if so, am I able to articulate why?
  - h. Have the persons providing information to me been placed under oath? (See sample oath below).
    - (1) Once that person(s) has been placed under oath, have I received or recorded the information in writing and had that person sign it? (A signed statement under oath is called an affidavit).
9. There is probable cause for this warrant (authorization to search) because I have checked “yes” to all of the above (for 8(b), 8(c) and 8(f) -- “yes” to at least one of the subquestions in each).
10. If I granted this warrant (authorization to search) on oral approval, I have signed AF Form 1176 on or before the next duty day following my oral approval to search and seize.
11. If I granted this warrant (authorization to search), I have retained this checklist and taken sufficient notes to be able to refresh my memory and testify at trial if necessary, regarding the factors that convinced me that probable cause existed.

***SAMPLE OATH: “Do you (insert search requester and/or source’s name), swear (or affirm) that the information you are about to relate to me as probable cause for the issuance of search authority is true in fact to the best of your knowledge and belief, so help you God?”***

*Attachment 2*

**SAMPLE INSPECTION LETTER**

(Unit Letterhead)

MEMORANDUM FOR Security Forces Flight Commander

Date

FROM: Base Commander

Subject: Gate Inspection

1. On July 25, 200\_\_\_ between the hours of 0700 and 0900, members of your flight will conduct a gate inspection of motor vehicles entering this base.
2. Every fifth motor vehicle will be stopped and subject to this inspection.
3. Your personnel will be inspecting for illegal drugs in such motor vehicle.
4. Your personnel will inspect the interior, glove compartment and trunk of each vehicle stopped (every fifth vehicle).
5. If during the inspection of the vehicle, you see in plain view, other contraband, you will seize it.
6. Notify me immediately of any illegal drugs or other contraband found. Safeguard the evidence seized. Coordinate procedures for preserving the chain of custody of any seized evidence with the SJA before the inspection begins.
7. Before the inspection, also coordinate with the SJA procedures for (a) detention of individuals from whose vehicle contraband is seized, until civilian law enforcement authorities arrive; and (b) searches of the person of those persons detained.

SIGNATURE BLOCK  
RANK  
ANG BASE COMMANDER

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# Driving While Intoxicated and Other Offenses Involving Intoxication

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** Applicable state law (civilian or military); *Fishbein v. Kozlowski*, 252 Conn. 38, 743 A.2d 110 (1999); Uniform Code of Military Justice, Article 111 (for reference only).

## INTRODUCTION

Alcohol-related driving offenses committed by military members, whether they are “on” or “off” duty and alcohol-related non-driving offenses while a member is on duty, pose special problems for a Commander. The duty status of the member (Title 10 or Title 32, or “off duty”), the place of the offense, and the law of the state are factors which will determine what courses of action are available to a Commander to deal with those special problems.

## DRIVING OFFENSES

### Civilian

Depending on state law, the offense may be Driving While Intoxicated (DWI), Driving Under the Influence (DUI), Driving While Ability Impaired (DWAI), or similar term, and the offense may be either or both: (1) a function of alcohol concentration in the blood measured by a chemical test of the breath, blood, urine or saliva; or (2) a function of the opinion of the investigating or arresting law enforcement officer or other eyewitness, that the offending driver is intoxicated, under the influence or impaired. In the first stated offense, the blood alcohol concentration of .08% to .10% is usually, under state law, the cutoff for DWI or DUI. In the second stated offense, the blood alcohol concentration may create a presumption or inference of intoxication, being under the influence, or impairment, to aid the prosecution in its proof of the charge. Many states have laws that require an administrative suspension of a driver's operator's license if his blood alcohol level is above a certain level or if he refuses to take an offered test. (These statutes are often called “implied consent” laws.) Even if there is an illegal initial stop that prevents a criminal prosecution, the evidence may be used in an administrative suspension proceeding in some jurisdictions. See *Fishbein v. Kozlowski*, 252 Conn. 38, 743 A.2d 110 (1999).

### Military Title 32 Status

The UCMJ does not apply to members in Title 32 or civilian status. Most state military laws or regulations do not specifically address these alcohol-related driving offenses, leaving their prosecution to state civilian authorities. If your state's military law or regulation specifically covers these offenses, it will usually govern when a member is in Title 32 status, and is on base when the offense is committed. Civilian alcohol related misconduct can form the basis of

### Military Title 10 Status

The UCMJ (Article 111) applies. However, under the UCMJ, “intoxication” is defined not in terms of a percentage of alcohol concentration but in terms of impairment. Specifically, “intoxicated” for military justice purposes is defined as the presence in the blood of any amount of alcohol, however small, sufficient to sensibly impair the rational exercise of the mental and physical faculties (required for vehicle operation). Thus, the alcohol concentration percentage (via breathalyzer, blood test, or urinalysis) is not determinative in and of itself. Rather, results of these chemical tests should be considered together with other evidence of intoxication (manner of driving; behavioral/sobriety test; observations of investigating police and other witnesses). Thus, it is entirely possible for a person to be DWI even though a breathalyzer or BAT (blood alcohol test) eventually discloses a blood alcohol concentration considerably below .10%.

## **SPECIAL PROBLEMS**

Here are some special problems with which a Commander may be confronted involving these offenses and military members, and the courses of action available.

1. Member in Title 32 status or state active duty and on ANG base at time of offense. Unless state military law or regulation specifically applies, the member will be prosecuted by civilian authorities for violating the civilian law. Security forces should detain the member and call civilian authorities for further processing of the member. A Commander may take disciplinary or adverse administrative action against the member either pending the outcome or after the disposition of the civilian charge. Suspension of base driving privileges may be authorized. Before taking any action, however, the Commander should consult the Staff Judge Advocate.
2. Member in Title 32 status and on Air Force base or other active duty installation at time of offense. The UCMJ does not apply because of the member's status but the Installation Commander of the place of offense can suspend or restrict the member's driving privileges on that installation, as well as on other active duty installations. If there is a federal magistrate court on the installation the member may be prosecuted there and could be sentenced to a suspension of driving privileges and a fine. The member's Commander should consider appropriate disciplinary or administrative action depending upon the provisions and applicability of the state military law or regulation of the member's unit's state. Consult the Staff Judge Advocate before action is taken.
3. Member in non-duty status at time of offense. Whether the member commits the offense on civilian or military land, and is or is not subject to prosecution for violating that jurisdiction's DWI, DUI or DWAI laws, the member's Commander may be able to take appropriate disciplinary or administrative action, if the state military law or regulation provides that simply because the member is a part of the organized militia of the state, the member is therefore always subject to state military law or regulation. Consult the Staff Judge Advocate before action is taken to see if your state's law so provides.
4. Member in Title 10 status and on active duty installation at time of offense. The UCMJ applies. If security forces suspect a person is DWI, DUI or DWAI, due to erratic driving, alcohol on the breath, presence of an open container in the vehicle, etc., then the security forces officer may require the vehicle operator to take a field sobriety test, the results of which are documented on DD Form 1569. If the performance on the sobriety test reasonably suggests alcohol caused impairment, the operator will be asked to take a breathalyzer test. If the driver cannot or will not consent to the breathalyzer test, the base Commander may issue an "authorization to search" for an involuntary BAT. That may not be necessary however if the SF's observations of the driver are well documented. If the suspect refuses the test, the Installation Commander may suspend or revoke installation driving privileges regardless of the outcome of the charges, and may also prosecute the suspect for failure to obey a lawful order. Furthermore, if there is suspicion the driver is under the influence of chemicals or drugs other than alcohol, then depending on the level of suspicion, a command directed urinalysis or "authorization to search" to take a BAT may be issued. Note also that state military law or regulation may have a special provision governing Guard members in Title 10 status, so that both the UCMJ and state law may apply. Consult the Staff Judge Advocate in this situation.

## **ADVERSE CIVILIAN CONSEQUENCES**

In addition to any adverse military effects on the member, upon conviction of an alcohol-related driving offense the following adverse civilian consequences will likely befall the member:

1. Restriction of the Offender's driving privileges or a temporary suspension of the Offender's driver's license (even if the offender was not convicted – see earlier reference to administrative suspension laws);
2. Substantial increase in automobile insurance premiums or cancellation of insurance;
3. No medical or lost wage coverage under the member's automobile insurance policy if the member is injured and/or is disabled from employment due to an alcohol-related accident;

3. Substantial private attorneys fees in the civilian proceeding; and/or
4. Suit against the member for any personal injury or property damage caused to third persons if there was an accident:
  - a. The member may be sued individually if not in a duty status at the time of the offense; and
  - b. Both the member and possibly the State (if state active duty) or the U.S. (Title 10 or Title 32 status) may be sued if the member was in a duty status at the time. In such case, however, the member will not likely be indemnified by the State or U.S. since the member will likely be deemed not to have been acting within the scope of employment while DWI, DUI or DWAI. The state and federal government may not be found liable where the person was not acting within the scope of employment.

## NON-DRIVING OFFENSES

### Civilian or Military Status

The typical non-driving alcohol related offense is drunk on duty. If a Commander reasonably believes a member is drunk on duty, based upon either the Commander's personal observation or the reliable report of another person who observed the member, a BAT or urine sample is not required to prove intoxication. If the observer was in a position to observe the breath, eyes, stance, walk or speech of the suspected intoxicated member, and is able to form an opinion that the member is intoxicated, that may be sufficient to take appropriate disciplinary or administrative action. The type of action permitted depends upon the status of the member at the time of the offense: whether the individual is on Title 10, 32 or state active duty or was in the status of a federal technician or state employee.

The reliability of the observer is enhanced if the observer has previously seen the currently suspected intoxicated member in a non-intoxicated state. As stated earlier, although a BAT or urine sample is not required to prove the offense, if one is desired by the Commander, either to enhance the proof of intoxication or to prove intoxication from drugs of a member in a military status at the time of the offense, a Search Authorization (military equivalent of a civilian Search Warrant) is probably necessary before the BAT can be ordered, if the Commander wants to have the results admissible in any applicable disciplinary or administrative proceeding. The observations of the witness supporting the claim of suspected intoxication, as well as those of a doctor (to whom the suspect may be ordered to report to also be observed) should be written in affidavit form to support the Search Authorization.

Those same affidavits should be prepared as written evidence of the commission of the offense, even if a BAT is not ordered for the military member.

The Search Authorization should not be used to order a BAT for federal technicians or state employees. Federal regulations, or state law and regulations, or any applicable collective bargaining agreement will govern persons in such status at the time of the commission of such offense. Drunk or intoxicated on duty is usually not a civilian criminal offense but may be punishable as work related misconduct. A BAT or urine sample is not required to prove intoxication; the personal observations and opinion of a reliable person are often sufficient. The Staff Judge Advocate should be consulted before ordering any BAT or urine sample, or before issuing a Search Authorization in these cases.

***KWIK-NOTE: DWI offenses committed on ANG bases by Title 32 personnel should be referred to local civilian law enforcement officials. BATs are usually not necessary to prove non-driving alcohol related military offenses. You may wish to supplement this topic with state law requirements.***

### RELATED TOPICS:

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Alcohol Abuse	10-3
Civilian Misconduct on Base	3-7
Command Directed Urinalysis	10-9

Consent Urinalysis Tests	10-8
Courts-Martial	8-15
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# Deadly Force

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** Applicable state law; AFI 31-207, *Arming and Use of Force by Air Force Personnel* (1 Sep 99); DoDD 5210.56, *Use of Deadly Force and the Carrying of Firearms by DoD Personnel in Law Enforcement and Security Duties* (Change 1, 24 Jan 02)

## INTRODUCTION

Deadly force is normally defined as that use of force that is reasonably calculated or likely to cause death or serious bodily injury to another. Any use of a weapon is usually viewed as the use of deadly force.

The use of deadly force by members of the Air National Guard is a matter of great significance and potential liability. As a Commander you should consult your Staff Judge Advocate well in advance of any potential hostility or need to use force. Now is the best time to do training that will lay the foundation for later “Rules on the Use of Force” (RUF) or “Rules of Engagement” (ROE). “Rules of Engagement” is the term used to describe the rules on use of force in a combat environment. “Rules on the Use of Force” is the terms used to describe those same rules in a non combat support to civil authorities’ context.

This topic will provide a brief and general overview only, and should not be relied upon without consultation with your Staff Judge Advocate. The law governing the use of deadly force varies from state to state and definitive advice cannot be provided without referencing specific state laws. Ultimately, the substantive law of your state will govern and will be used to determine whether the acts of your ANG members were within the law or outside it. This is so regardless of whether your members are ordered to duty under Title 32 orders and funding, or are in a state active duty status. The Air Force’s guidance and position on the use of deadly force is found at AFI 31-207, paras 1.4 and 1.5. It should be given great weight in your planning, but must be regarded as secondary to any state law which is more restrictive.

Tactics and or weapons intended for use against a wartime enemy force are not appropriate in a domestic situation.

## WHEN DEADLY FORCE MAY BE USED

### Generally

Laws of the various states, while they vary widely, generally revolve around the principle that only the minimum force necessary under the circumstances should be used, *i.e.*, that the force used must be “objectively reasonable.” A general statement as to when deadly force may be used is:

1. When necessary to protect oneself or others from the loss of life or serious bodily harm; and
2. In specified circumstances, the protection of property involved in national defense.

However these principles are general only, and the specifics of state law must be referenced. This law may sometimes be found in state statutes and sometimes in court decisions within the state either way your Staff Judge Advocate can assist you with developing training that follows state law.

### By the ANG

As a general principle, the official and legal status of the person employing deadly force will be crucial in determining whether the use of deadly force was proper or prohibited. In most states, the status of the person using the deadly force, and the facts and circumstances confronting that person, will determine the lawfulness or unlawfulness of the acts. In any circumstance your Staff Judge Advocate should be involved in developing rules for the use of force. The following are four likely possibilities for ANG involvement in the use of deadly force:

1. In the rare case of a declaration of martial law by a Governor or the President, the use of deadly force would be most liberally condoned. Martial law powers generally exceed common police powers;
2. If your state confers police or “peace officer” powers on members of the National Guard under certain circumstances and types of orders, then the rules governing the use of deadly force by peace officers in your state would likely apply;
3. At the most restrictive end, your ANG personnel could be held to have a status to use deadly force no higher than that of a common citizen; and
4. The status of, and use of deadly force by Air Base Security Guards (state employees) is the subject of another topic in this Deskbook entitled “AIR BASE SECURITY GUARDS.”

Your state law should be carefully examined as to the statutory or regulatory circumstances under which the Governor or the Adjutant General can employ the National Guard. Unauthorized use of the National Guard might later be found to divest the members of any higher legal status to use deadly force, and subject them and their superiors to liability.

#### **GUIDANCE FOR PROPER USE OF DEADLY FORCE**

Issues that will arise after the fact in an attempt to establish the wrongfulness of deadly force will include the following (and consequently this list can be used in advance as a checklist of obvious things to do correctly):

1. Were the ANG members authorized to use the weapons employed in accordance with applicable state and federal training requirements?
2. Were the ANG members properly briefed on their status, their authority, and on the “rules on use of force” with respect to the use of deadly force prior to undertaking their mission?
3. Did the ANG members follow these rules in carrying out their orders?
4. Were command, control, and supervision of the ANG members by those in authority adequate, both in planning and in execution?
5. Were the weapons and equipment issued to ANG members for the mission appropriate in light of the perceived threat?
6. Were the ANG members adequately trained in both the use and the destructive capability of the weapons they were issued?
7. Was there an adequate timing sequence developed and briefed as to the employment of firearms (*i.e.*, issuance of ammunition, loading of ammunition, assuming a ready position with the weapon, chambering of rounds, and firing)?
8. Did the briefing or any subsequent orders include confusing instructions (*i.e.*, “shoot to wound”, “fire over their heads”)?

ANG members who are likely to be employed for riot control and similar duty should be thoroughly trained in proper responses and general principles of engagement. If they are to be deployed in a state active duty status your Staff Judge

Advocate should ensure that any RUF are coordinated with the State Attorney General. This should be done as advance training without regard to a particular future event. Then, already trained, they should be carefully briefed and “rehearsed” on the particular rules on use of force and the likely scenario which now faces them. Untrained or questionable members should not be deployed. Your Judge Advocate should be involved in planning and coordinating these efforts.

## **CONCLUSION**

The Related Topics below include areas in which deadly force issues may arise. You should supplement this topic with applicable state law and regulations.

***KWIK-NOTE: The improper use of deadly force can expose ANG Commanders and the State and federal government to major liabilities and possible criminal sanctions***

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## Theft and Vandalism Claims

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** ANGR 112-1, *Claims Against or in Favor of the United States Arising from National Guard Activities* (10 Jul 89); AFI 51-501, *Tort Claims* (15 December 2005); AFI 51-502, *Personnel and Government Recovery Claims* (1 Mar 1997; IC-2, 10 November 2008); the Federal Tort Claims Act, 28 U.S.C. § 2671-2680; the National Guard Claims Act, 32 U.S.C. § 715.

### WHAT ARE THEY?

Theft and vandalism claims refer to claims for damage or loss of personally owned property of unit members. ANGR 112-1 provides guidelines and proceedings for implementing the Federal Tort Claims Act (28 U.S.C. 2671-2680), the National Guard Claims Act (32 U.S.C. 715) as well as other claims statutes. This regulation does not apply to claims resulting from non-federally-funded duty.

### ADVICE TO UNIT MEMBERS

#### Preventive Action

You should advise your members to secure any of their personal property at the unit to ensure their potential claims will be paid should theft or damage occur. Doors to office areas should be locked when not occupied. Members performing duty in open areas should secure their property, such as by keeping wallets or checkbooks on their person, or in their automobile which should be locked at all times when it is not occupied.

#### Reporting Theft or Damage

When theft or damage occurs, members should report the theft or damage to the Security Forces or other law enforcement personnel. The member should then contact the nearest active duty claims office about filing a claim, but only after the member first seeks advice from a Judge Advocate of the member's unit.

#### Processing Claims

Any claims for damage to or theft of personal property by members of your unit on duty at the location of duty may be handled and processed by the nearest Claims Officer at an active duty base. The Claims Officer is located in the legal office and is an active duty Judge Advocate. Your unit members need to be aware, however, that such claims are not automatically paid. The loss must not be due to the negligence or wrongful act of the claimant, and must be recognized as payable under the applicable regulations.

### COMMANDER HAS NO AUTHORITY OVER THESE CLAIMS

ANG Commanders have no approval or denial authority over these theft and vandalism claims.

***KWIK-NOTE: Commanders, through Newcomer's Briefings, the Legal Assistance Program and the Preventive Law Program, should strongly encourage their members to safeguard their personal property.***

#### RELATED TOPICS:

Claims  
Legal Assistance Program  
Newcomer's Briefing

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Preventive Law Program

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## Complaint of Wrongs

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Updated by Lieutenant Colonel Robert L. Marconi, December, 2008

**AUTHORITY:** Applicable state law; Uniform Code of Military Justice, Article 138 (for reference only); AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice* (30 Jun 94) (for reference only).

### WHAT IS IT?

The federal Uniform Code of Military Justice and many state Codes of Military Justice contain provisions for complaints of wrongs by members of the military.

Article 138, UCMJ states that members of the military who believe they have been wronged by their commanding officer, and who upon due application to such Commander are refused redress, may complain to superior commanding officers who will forward the complaint to the officer exercising general court-martial jurisdiction. If your state has such a provision, the officer exercising general court-martial jurisdiction would either be the Governor, the Adjutant General, the Commander of the state ANG or a Wing Commander. This officer must examine the complaint and take proper measures for redressing the wrong. (For an example of a state Code of Military Justice provision, see Conn. Gen. Stat. § 27-264, part of the Connecticut Code of Military Justice.)

Some states may have implemented this general provision of their Codes of Military Justice by regulation, so in addition to the applicable Code of Military Justice, Commanders should check with their SJA to see if there is a state regulation.

The “complaint of wrongs” procedure sets forth a command system for dealing with certain complaints.

It also can be used as an appeal of an adverse action taken against a member where the action taken provides no appellate procedure. An example would be where a member receives an administrative letter of reprimand (LOR) and disagrees with it. Since there is no appellate procedure for the LOR, the complaint of wrongs procedure may be used. However, in adverse actions which do not provide an appellate review, there is no requirement for Commanders, upon taking such adverse action, to advise members that they may seek redress under the complaint of wrongs procedure.

It is also distinct from the Inspector General complaint system and other methods, such as Congressional or legislative inquiries, that persons have to bring complaints to the attention of command. Complaints of wrongs filed under the state Code of Military Justice necessarily receive high-level scrutiny because of the requirement for review by the general court-martial convening authority.

### FEATURES

If applicable to your state, there are several unique features within the “complaint of wrongs” system:

1. The complainant must usually be a member of the Air National Guard. This system may not be used by civilians to complain about Guard activities;
2. The complaint must be against a Commander. Although imaginative complainants may usually be able to frame almost any complaint as one against a Commander, some subjects are clearly outside the scope of this system;

3. The complainant must first go to the Commander who allegedly committed the wrong and ask for redress. This means that these complaints sometimes can be addressed at the lowest levels;
4. The system does not always require a formal investigation. The general court-martial convening authority may direct a formal investigation, an informal inquiry, or take such other action as is deemed appropriate. The state Code or regulation providing for the complaint of wrongs procedure will probably only require (if it is similar to UCMJ, Article 138) that the senior Commander “examine” the complaint and try to redress it. The general court-martial convening authority therefore has great flexibility in determining how to look into one of these complaints. Options run the gamut from convening a board of officers for an investigation to a desk review.

## CONCLUSION

When a subordinate files a complaint of wrongs, a Commander’s first action should be to contact the Staff Judge Advocate for advice as to how to proceed. This topic should also be supplemented by your state law or regulation.

***KWIK-NOTE: Under the Complaint of Wrongs system, the member must first seek redress for the subject of the complaint from the Commander complained of.***

## RELATED TOPICS:

## SECTION

Congressional and Legislative Inquiries  
Freedom to Complain – Military Members

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# Chapter 9, Discrimination Matters

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## Affirmative Actions

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Updated by Col Julio R. Barron, June 2009

**AUTHORITY:**

DoD Instruction (DoDI) 1350.3, *Affirmative Action Planning and Assessment Process*, (29 February 1988); AFI 36-2706, *Military Equal Opportunity Program* (29 July 2004)

**PURPOSE**

The purpose of affirmative actions is to provide a systematic approach to achieve the standard of equal opportunity, treatment, representation, and selection without a reduction in readiness or qualitative standards.

**POLICY**

It is the policy of the Air National Guard to conduct all of its affairs in a manner free from discrimination and to provide equal opportunity and treatment for all members without regard to their color, race, religion, national origin, sex, or age.

**GUIDANCE**

DoDI 1350.3 requires each service to establish an Affirmative Actions Program (AAP). AFI 36-2706 provides the guidance necessary for initiating appropriate actions relating to an overt, adverse act, occurring on or off base, directed toward 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.

Should you have any questions, or should any problems arise in this area, contact your Staff Judge Advocate or Military Equal Opportunity officer.

***KWIK-NOTE: THINK AFFIRMATIVE ACTION. Let it guide your decisions without reducing your readiness or qualitative standards.***

**RELATED TOPICS:**

**SECTION**

Equal Opportunity and Treatment Program

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Discrimination Complaints – Military

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Discrimination Complaints – Technician

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Nondiscrimination in Federally Assisted Programs

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## Discrimination Complaints - Military

Updated by Col Julio R. Barron, June 2009

**AUTHORITY:** NGR 600-22/ANGI 36-3, *National Guard Military Discrimination Complaint System* (30 Mar 01); AFI 36-2706, *Military Equal Opportunity Program* (29 July 2004); AFI 90-301, *Inspector General Complaints* (8 Feb 05).

### POLICY

The Military Equal Opportunity (MEO) program is designed to ensure equal opportunity in support of mission readiness for all Air National Guard personnel. Air National Guard technicians in civilian technician status are covered by a different program. See the topic in this Deskbook entitled DISCRIMINATION COMPLAINTS - TECHNICIAN.

It is National Guard policy to conduct its affairs free from wrongful discrimination, and to provide equal opportunity and treatment regardless of color, national origin, race, ethnic group, religion or sex. This policy also prohibits sexual harassment and it prohibits retaliation for participating in the EOT complaint process. Commanders are required to take appropriate action to eliminate discrimination and its effects. Commanders should also ensure that all personnel are advised of EOT policies and complaint procedures.

### COMPLAINT PROCEDURE

Each unit Commander must ensure that personnel can present discrimination complaints without fear of retaliation. The Commander is assisted in this responsibility by the MEO staff.

Discrimination complaints that are filed by National Guard members are first handled by an administrative process through the chain of command. The emphasis in the process is to attempt to resolve complaints at the lowest level, and to reinforce command responsibility in managing complaints, in rendering decisions, and in achieving timely and reasonable resolution of these complaints. All discrimination complaints **MUST BE IN WRITING** for them to be acted upon, and must identify the kind, date and act of discrimination, the alleged discriminating official(s) or person(s), and the requested corrective action. Very often, as a practical matter, a complainant will initially make a complaint orally, rather than in writing. There is no time limit for informal complaints but formal complaints must be filed within 60 days of the alleged action, unless that time limit is waived for good cause. Commanders should direct complainants to the Military Equal Opportunity office for assistance in drafting proper written complaints.

Once a written complaint is made, the **OFFICIAL COMPLAINT** file is established. The written complaint should be referred for processing to the lowest appropriate command level, using the AF IMT 1587-1.

If the Commander is the named discriminating official, the complaint should be filed at the next higher level of the chain of command. Although an individual may initially submit a complaint at any level, to include the Adjutant General or the National Guard Bureau, such complaints will normally be referred back to the lowest command level for initial inquiry and attempts at resolution. If a complaint is accepted, with advice from the Military Equal Opportunity officer and the Staff Judge Advocate, Commanders can accept the complaint for processing or dismiss the complaint for procedural reasons or because it does not fall within the purview of the Military Discrimination Complaint System. If a complaint or part of a complaint is dismissed the commander will nevertheless refer the complainant to the proper source for assistance or take other corrective action. The Commander will initiate a fact-finding inquiry and will attempt to resolve the complaint. This fact-finding inquiry usually should initially be an inquiry rather than a full-blown investigation. The Commander should not personally conduct the inquiry, but rather should appoint an Investigating Officer (IO) who should be senior in grade or rank to, and not from the same squadron as the alleged discriminating official(s) or person(s). The selection of the IO can be based upon the

particular circumstances of each complaint, including the identities of the complainant and the alleged discriminating officials(s) or person(s), the type of discrimination alleged, and the Commander's own good judgment. The Commander should direct the inquiry by letter, which must include the following contents:

1. Cite NGR 600-22/ANGI 36-3 as authority for the inquiry (*see* para 3-5);
2. Appoint an IO;
3. Indicate the scope and particular nature of the allegations and matters to be inquired into;
4. Direct the IO to make findings of fact, and whether to make conclusions and recommendations;
5. Indicate any special instructions pertinent to the particular inquiry;
6. State that the letter is authority for the IO to interview any witness and have access to all information and documents the IO deems pertinent to the inquiry; and
7. Direct a time by which the inquiry should be concluded and when the written report of the inquiry must be submitted to the Commander.

Before drafting this letter, the Commander should consult with the Staff Judge Advocate. Additionally, after the IO is appointed but before the IO begins the inquiry, the IO should consult with the Staff Judge Advocate for advice on conducting the inquiry. Before and during the inquiry and investigation, Commanders, IOs and Staff Judge Advocates are strongly encouraged to read and use the guidance and materials contained in the topic in this Deskbook entitled INVESTIGATIONS AND INQUIRIES; and also the topic entitled SEXUAL HARASSMENT, if that is the type of discrimination alleged.

Resolution consists of corrective measures or other actions, which in the commander's judgment satisfy the Complainant and/or correct the deficiency such that the Complainant withdraws the complaint. If the matter is resolved the actions taken should be documented in the file and claimant should withdraw the complaint in writing.

If the complaint remains unresolved at unit level, the complaint will proceed through the chain of command. Each successive Commander will document the specific action taken to review the facts and the attempts to resolve the issues.

If the case proceeds through the chain of command unresolved to the Adjutant General, the Adjutant General will review the chain of command inquiry and will direct a formal investigation if an investigation has not been completed by a lower-level commander, or as necessary to ensure legal sufficiency. The Report of Investigation must be in the format specified by the National Guard Bureau and must contain a thorough documentation of relevant testimony, exhibits, facts, and analyses of the issues. The investigation will result in a recommended finding of whether or not discrimination occurred and recommended corrective action. In the conduct of the investigation, Adjutants General may use their own resources or may request the services of a National Guard Bureau investigator.

The Adjutant General will appraise the case, and using the Report of Investigation, will meet with the complainant to attempt resolution of the complaint.

An Administrative Review of each case will be conducted by the National Guard Bureau to ensure compliance with applicable law or regulation. The review will be conducted by NGB-EO and coordinated with NGB-JA and the Air Directorate, NGB. The case file will include a copy of the original complaint, chain of command inquiry report, Report of Investigation, report of resolution achieved, remedial action taken and any other action taken in disposition of the complaint. (*See* ANGI 36-3, Ch. 4). Such a review is a procedural requirement for all cases, whether or not requested by the complainant.

If an Administrative Review reveals deficiencies in compliance with law or regulation, the case will be returned to the State for appropriate corrective action. NGB issues the final decision letter.

## COMPLAINTS ALLEGING DISCRIMINATION BY A SENIOR OFFICER

All allegations of discrimination made against a general officer or general officer select must be referred to the IG or NGB-EO for forwarding and processing through IG channels to SAF/IGS, in accordance with AFI 90-301. Allegations against colonels or colonel-selects will be processed in accordance with ANGI 36-3 through regular channels, but must be reported through IG channels to SAF/IGS.

## PRACTICAL TIPS

The entire administrative process of a discrimination complaint has been explained to provide unit Commanders better perspective of their role in the process, and to reinforce the principle that all reasonable attempts should be made to resolve these complaints at the lowest level. Commanders are well-advised not to merely document the complaint record and forward it to the next higher Commander; but rather to roll up their sleeves, find out what led to the complaint and correct it if possible; or determine that the complaint is without merit with a sound basis for that determination. In other words, RESOLVE IT AT YOUR LEVEL IF AT ALL POSSIBLE. In either case, the Commander must advise the complainant of the result of the inquiry or investigation and should ask complainants if they are satisfied with that Commander's proposed resolution of the complaint. Whether the answer is yes or no the complainant should so indicate in writing. By asking if the complainant will be satisfied with your proposed resolution of the complaint you are not seeking the complainant's permission to take the action. But if the complainant is satisfied, the case will be over and not go forward once you take that action. Ask unsatisfied complainants what they want done or what they would do if they were you. The answer might surprise you or give you some ideas. The point is if you can resolve the complaint satisfactorily to the complainant and consistent with your view of appropriate action to the alleged offender, do so, even if the ultimate resolution was not your original proposed solution. The case will then either be closed, or the record, properly documented showing all reasonable attempts at resolution at that level, will be sent forward. Successive Commanders should return the record to the forwarding Commander if they are not satisfied that all reasonable attempts at resolution have been made or that the record is not properly documented.

Because of the requirements for a properly documented record, the potential for further administrative and judicial processing of the complaint, Commanders are well-advised to bring their Staff Judge Advocates into the process as soon as possible after a complaint is received. They should also ensure that their Staff Judge Advocate reviews each record of a discrimination complaint for legal sufficiency before it is forwarded to the next higher command level.

Consult ANGI 36-3, which provides guidance for the preparation, organization, and submission of military discrimination complaint case files.

***KWIK-NOTE: Promptly and thoroughly investigate military discrimination complaints, and attempt to resolve them at the lowest level.***

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## Discrimination Complaints - Technician

Updated by Col Julio R. Barron, June 2009

**AUTHORITY:** Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2000e-16; 29 U.S.C. § 633a and § 791; NGR (AR) 690-600/NGR (AF) 40-1614, *National Guard Civilian Discrimination Complaint System* (15 Mar 93), Vols. I and II.

### INTRODUCTION

It is National Guard policy to provide equal employment opportunity for National Guard technicians and applicants for technician employment. This means that all employees and applicants for employment must be treated fairly, equitably and in a non-discriminatory manner. All managers and supervisors must act promptly to prevent or correct situations that may cause legitimate complaints of discrimination.

Allegations of discrimination by federal technicians may be pursued through NGR (AF) 40-1614 or raised under negotiated grievance procedures of the applicable collective bargaining agreement. In some instances, discrimination allegations may also be raised under negotiated grievance procedures or under appellate provisions of the Merit Systems Protection Board rather than under NGR (AF) 40-1614. Volume II of that regulation states under what circumstances these other procedures are available and how an individual chooses the procedure.

### LAWS PROHIBITING DISCRIMINATION

Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(a), *et seq.*), as amended and made applicable to federal civilian employees through the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, forbids employment discrimination on the basis of race, color, religion, national origin and sex.

The Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, prohibits discrimination by the federal government in hiring, promotion and other employment of handicapped individuals. The Act requires federal agencies to make reasonable accommodations in employment practices unless it would impose an undue hardship on the agency's programs; however, this law does not apply to military members.

The Age Discrimination in Employment Act Amendments of 1978, 29 U.S.C. § 633a, holds that all personnel actions affecting applicants or employees who are at least 40 years of age will be made free from discrimination based on age; however, this law does not apply to military members.

Enforcement authority for the federal government's program rests with the Equal Employment Opportunity Commission (EEOC). The EEOC's administrative regulations for complaint processing may be found at 29 C.F.R. Part 1614, § 1614.103 *et seq.* Air National Guard procedures are contained in NGR (AF) 40-1614. Administrative regulations mandate that the complainant exhaust administrative complaint procedures with the Agency (Air National Guard) before filing suit in a United States District Court.

Complaints may either be individual (the most common form) or class, *i.e.*, one that alleges that an Air National Guard personnel policy or practice discriminates against a class of employees.

### AVAILABLE DISCRIMINATION REMEDIES

1. Back pay.
  - a. Limited to a period of 2 years preceding the filing of the administrative complaint.

- b. Complainants have a duty to mitigate their damages.
2. Front Pay.
    - a. The practice of ordering the continuation of back pay awards from judgment until the complainant receives the promotion or job that has been illegally denied.
    - b. It is an alternative to bumping (switching one person's job with another).
  3. Retroactive personnel actions.
  4. Expungement or correction of records.
  5. Injunctive Relief.
    - a. An order prohibiting use of an employment policy or practice which violates Title VII.
    - b. An order directing reinstatement or promotion with seniority.
    - c. Judicially imposed affirmative action quotas and goals for hiring, promotions, etc.
  6. Attorney Fees.
    - a. Available in the administrative process after filing a formal complaint (except for age cases), and in certain instances during the pre-complaint process-see C.F.R. Part 1614.501(e)(iv)
    - b. Available for services throughout the judicial process as long as the hours are reasonably expended and multiplied by a reasonable hourly rate.
  7. Costs: court reporter fees, printing fees, photocopying, expert witness fees. See 28 U.S.C. 1920.

*Note: Pursuant to NGR 40-1614, paragraph 7-5d, any informal settlement of a technician discrimination complaint which includes an award of back pay or attorneys fees must be sent to NGB for approval before formal offer of the award and execution of the settlement, since once the settlement proposal has been offered and executed, its terms are binding on the parties.*

8. Remedies recently made available:
  - a. Compensatory damages (pain and suffering); and
  - b. Punitive damages; or
9. Remedies not available:
  - a. Directives ordering disciplinary action against or apologies from the offender.

The most common reasons for individual complaints in the Air National Guard are:

1. Disciplinary actions;
2. Non-selection for employment or promotion;
3. Employee appraisal;
4. Sexual harassment;

5. Non-selection for training or an award; and
6. Reprisal for filing a previous EEO complaint.

### **INDIVIDUAL COMPLAINT PROCESS**

Technicians or applicants for technician employment who believe they have been discriminated against because of race, color, religion, gender (including sexual harassment), national origin, age or physical or mental handicap, or reprisal, in an employment matter subject to the control of the National Guard, may file an individual discrimination complaint. An organization or a representative designated in writing by the employee can also file a complaint.

To make a discrimination complaint, the complainant must first make an informal complaint to an EEO Counselor or a State Equal Employment Manager (SEEM). The complainant must make the complaint within 45 days of the date that the complainant knew or reasonably should have known of the alleged offense.

Whenever possible, complaints should be resolved before reaching the formal stage. However, informal resolution of a complaint can be pursued at any stage of the complaint processing. A settlement and/or withdrawal of the formal complaint can occur at any time. A Commander should consult with the SJA prior to any settlement however.

The EEO Counselor offers Alternative Dispute Resolution (ADR). If ADR is chosen the process of EEO counseling is halted and ADR is attempted. If ADR is not chosen or fails the EEO counselor conducts an inquiry of the informal complaint, defines the issues, interviews witnesses, attempts resolutions between the parties and prepares a report. Counseling must be completed in 30 days, unless the complainant agrees to an extension. An EEO Counselor advises complainants and management officials and is NOT a “representative” of the complainant. The Counselor interviews the complainant after the inquiry of the informal complaint is complete. If the complainant is not satisfied with the representative’s proposed resolution, the complainant may file a formal complaint. Any formal complaint must be in writing and must be filed within 15 days after the formal interview. The formal complaint should be filed with the SEEM but can be also filed with the Adjutant General, and the Federal Women’s Program Manager. The Adjutant General, or designee, then has five calendar days to accept or dismiss the complaint on procedural grounds. NGB-EO reviews acceptances/dismissals. It reserves the right to overturn the Adjutant General’s decision to dismiss a formal complaint. Accepted complaints must be investigated within 180 days after the complaint is filed; and a copy of the Report of Investigation must be provided to the complainant.

### **EEO Counselor Must be Contacted Before Filing a Formal Complaint under this Regulation**

After the Adjutant General accepts the formal complaint, the Adjutant General requests an investigator from NGB to review and investigate the complaint. After the investigation is complete, the investigator prepares a report that analyzes the evidence in light of applicable law. The report is sent to NGB.

NGB then sends the report back to the Adjutant General and to the complainant. The Adjutant General establishes an appointment to meet and discuss the report. The purpose of the meeting is to attempt to settle the matter. Within 15 days of the date the Adjutant General gets the report, the complaint must be resolved or the Adjutant General, or designee, must issue a proposed disposition of the complaint to NGB-EO.

After the proposed disposition is issued, the complainant can ask for an immediate final decision by NGB or a hearing before an Equal Employment Opportunity Commission (EEOC) administrative law judge (ALJ). After the hearing, the judge sends the decision to NGB-EO. NGB-EO adopts the decision or appeals to EEOC. The complainant can then appeal the judge’s decision to the EEOC or file a civil action in federal court.

There are many time limits that must be met by the complainant and the National Guard in processing an EEO complaint. Close attention is required to ensure that none of them are missed.

Supervisors, managers, Commanders, etc., may be required to provide statements and/or testimony to the following during this process:

1. Counselor during the informal proceedings;
2. NGB Investigator after a formal complaint is filed;
3. EEOC ALJ at a formal hearing; and/or
4. U.S. District Court.

Once a formal complaint has been filed, NEVER attempt to negotiate a settlement or otherwise dispose of the matter without first checking with the HRO, SJA and EEO Counselor/SEEM.

### **CLASS ACTION COMPLAINTS**

A class action provides a means by which one or more persons may sue or be sued as representatives of the class without needing to join every member of the class. These complaints are used when a group of persons have the same concerns.

Whereas most individual complaints involve disparate treatment, i.e., the employer simply treats some people less favorably than others because of one of the protected bases (race, color, religion, sex, age, handicap, or national origin), most class action EEO complaints involve allegations of disparate impact.

A disparate impact case is one in which discrimination is alleged to have resulted by operation of the system. Complainants allege that a facially neutral test or employment criterion disproportionately disqualifies a protected class from employment promotion, or some other employment benefit, and is not justified by a business necessity.

The state must designate one counselor to handle class complaints in this area.

Because these cases are often a direct attack on the validity of core Air National Guard civilian personnel programs, i.e., hiring, promotions, awards, discipline, appraisals, training, etc., they potentially may impact the Air National Guard as a whole.

When an informal class action complaint is filed:

1. Immediately notify NGB-HR through your Adjutant General telephonically and fax a copy of the complaint;
2. Freeze all civilian personnel records of any type - DO NOT DISPOSE OF ANY RECORD;
3. Insist that informal complaint processing be handled ONLY by an EEO Counselor. If you don't have one locally, seek TDY assistance from NGB;
4. Informal counseling should focus only on individual allegations and personal concerns of the class complainant(s);
5. Ensure that NO statistical studies or analyses are accomplished at this stage without prior approval of NGB;
6. Prior to the final interview, the EEO Counselor must coordinate a draft final report with NGB prior to release to the class agent(s); and
7. UNDER NO CIRCUMSTANCES should the Installation IG or Installation Commander conduct an independent investigation into the complaint.

### **Procedures**

1. The initial contact with the EEO Counselor must be made by the class representative (within 45 days of the alleged discriminatory act).

2. Informal complaint processing and final interview occur within 30 days of the initial contact.
3. The formal complaint is filed within 15 days of Notice of the Final Interview.
4. Complaint, counselor's report and NGB-JA brief on acceptance or rejection must be forwarded to the EEOC within 10 days of the complaint being filed.
5. The EEOC Administrative Law Judge (ALJ) issues a recommended decision on acceptance or cancels the complaint to NGB-EO.
6. NGB has 30 days to reject, accept or modify the ALJ's recommended decision. Failure to act makes the ALJ's recommendation a final decision.
7. NGB issues a decision whether to accept or reject the complaint. The class may appeal to the EEOC Office of Federal Operations (OFO).
8. If the complaint is accepted and the class is certified, then the process proceeds to:
  - a. Notification to the class;
  - b. Discovery;
  - c. Trial on the merits; and
  - d. Recommended decisions by the ALJ.
9. NGB has 30 days from the day of receipt to issue a final decision accepting, rejecting or modifying the findings and recommendations of the ALJ.
10. The class may appeal the NGB decision to EEOC/OFO or file suit in U.S. District Court. If a suit is filed, there is a trial which proceeds without reference to the administrative findings.

## CONCLUSION

Because of the complicated and multi-level processes for technician discrimination complaints, Commanders should involve their Staff Judge Advocates and full-time State Judge Advocates as early as possible upon receipt of a complaint.

***KWIK-NOTE: Always try to resolve technician discrimination complaints at the lowest possible level.***

## RELATED TOPICS:

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Advising Suspects of Their Rights	8-9
Commander's One-on-One Meeting With Member – Precautions	16-5
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# Equal Opportunity and Treatment Program

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**Updated by Col Julio R. Barron, June 2009**

**AUTHORITY:** NGR 600-22/ANGI 36-3, *National Guard Military Discrimination Complaint System* (30 Mar 01); AFI 36-2706, *Military Equal Opportunity and Treatment Program* (1 Dec 96)(for reference only); ANGI 36-7, *ANG Military Equal Opportunity Program* (25 April 2003); NGR 600-23/ANGR 30-12, *Nondiscrimination in Federally Assisted Programs* (30 Dec 74); NGR (AR) 690-600/NGR (AF) 40-1614, *National Guard Civilian Discrimination Complaint System* (15 Mar 93), Vols. I and II.

## STATUTORY BASIS

The Civil Rights Act of 1964 (42 U.S.C. § 2000(a) *et seq.*) is the most important single source of anti-discrimination law in this country. In 1972, Congress passed the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e-16). Although this statute only applies to federal civilian employees and not to military members, nevertheless it is the policy of the Air National Guard to conduct all of its affairs in a manner free from arbitrary discrimination and to provide equal opportunity and treatment for all members irrespective of their color, race, religion, national origin, sex, or physical handicap.

“Arbitrary discrimination” is defined as any action that unlawfully or unjustly results in unequal treatment based on the criteria enumerated above and for which distinctions are not supported by legal or rational considerations. It includes:

1. Insults, printed material, visual material, signs, symbols, posters, or insignia which infer negative statements pertaining to a protected status (*e.g.* race, religion);
2. Personal discrimination to bar or deprive a person of a right or benefit;
3. Sexual harassment; or
4. Institutional practices which deprive a person or group of a right or benefit.

## ANG RESPONSIBILITIES

ANGI 36-7 and ANGI 36-3 implement the Civil Rights Act of 1964 in the Air National Guard through the Military Equal Opportunity and Treatment (MEO) Program. NGR 600-23/ANGR 30-12 ensures that federally assisted programs are non-discriminatory. NGR (AR) 690-600/NGR (AF) 40-1614 implements Title VII of the Civil Rights Act of 1964 as well as the Age Discrimination in Employment Act and other federal regulations and directives that prohibit unlawful discrimination.

The purpose of the MEO program is to insure that individuals receive equal consideration and treatment based on merit, achievement and ability.

Members should be advised they have free access to the office of the Staff Judge Advocate, the Civilian Personnel Office (Equal Opportunity and Treatment Officer), and other personnel of the Military Equal Opportunity office when they feel they have been subjected to discrimination.

## COMMANDER'S RESPONSIBILITIES

### Freedom to Complain

Unit Commanders must ensure that all members are able to present complaints without fear of retaliation, that they are aware of the channels and procedures for filing such complaints, and that they act at once to determine if an allegation of discrimination is valid. A sample briefing in letter format regarding complaint procedures is provided as Attachment 1 to this topic. Additionally, Commanders are required to prominently display complaint procedures in writing. NGB Poster (Form No. 04-170), *Know the Facts About Filing a Complaint of Discrimination*, is available through NG publications channels.

Commanders must also take appropriate disciplinary or administrative action against the offender to eliminate or neutralize discrimination and its effects.

### Process and Complaint Resolution

You, the Commander, have the primary responsibility for resolving complaints with the assistance of the State Equal Employment Manager (SEEM), Human Resource Officer (HRO), Military Equal Opportunity (MEO) Office, Chaplain, Staff Judge Advocate, Inspector General, or others, as appropriate. Liaison should be established with the Equal Opportunity and Treatment Officer in an attempt to resolve problems at the lowest possible level. If an individual files a formal complaint with the Military Equal Opportunity office, Commanders must be informed immediately. The MEO office conducts an informal complaint "clarification" to determine the basic facts. After coordination with the Staff Judge Advocate, the MEO office will report the results to you along with any recommendations for corrective action.

You will find that the establishment of an "open door policy" will help resolve isolated problems before they become widespread. A sample briefing on complaint procedures in letter format is provided as Attachment 2 to this topic.

You should also ensure that the information contained in NGR (AR) 690-600/NGR (AF) 40-1614, Vol. II, paragraph 2-6 is regularly publicized and permanently posted on bulletin boards for easy access to all affected personnel.

The use and availability of the various methods and agencies to attempt to resolve complaints at the lowest level in no way precludes a member from filing a formal complaint with the Commander of the unit in which the alleged act of discrimination occurred, and at any successive organizational level.

If you have any questions or problems in this area, contact your Staff Judge Advocate.

***KWIK-NOTE: EOT is everyone's business. You set the tone, and your unit will follow it.***

### RELATED TOPICS:

### SECTION

Affirmative Actions	9-2
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Freedom to Complain – Military Members	16-8
Homosexuality	1-18
Investigations and Inquiries	16-11
Nondiscrimination in Federally Assisted Programs	9-6
Sexual Harassment	9-8
Whistleblower Protection Act	5-9

Attachment 1 Page 1 of 2

(Unit Letterhead)

MEMORANDUM FOR ALL PERSONNEL

(Date)

Subject: Equal Opportunity and Treatment Briefing

1. It is the policy of the (Unit Name) to conduct all of its affairs in a manner that is free from discrimination and to provide equal opportunity and treatment for all members irrespective of their color, race, religion, national origin, or sex, consistent with requirements for physical capabilities. Discrimination, in the conduct of official business, by act or inference, against anyone on or off base will not be tolerated. The principal of equal opportunity and treatment must permeate every organization, function, and activity of the (Unit Name).
2. The (Unit Name) Affirmative Actions Plan requires positive actions to ensure fair and just treatment of all personnel. It supports achievement of Department of Defense Human Goals by making equal opportunity and treatment a working reality in all aspects of Air National Guard life.
3. All members of the (Unit Name) are encouraged to seek further training and development in order to qualify for promotions and advancements, which will be based on qualifications and demonstrated abilities. Commanders and supervisors must meet their responsibilities by placing special emphasis on the recruitment of minority and female members and the development of upward mobility opportunities.
4. I encourage all personnel who believe that they have a complaint of discrimination based on color, race, religion, natural origin or sex to contact the Military Equal Opportunity officer, (Rank and Name) or myself.
5. Achievement of equal opportunity and treatment and attainment of the objectives of the Affirmative Actions Plan will require cooperation and compliance by all members. I expect all commanders and supervisors to be totally committed to eliminating all forms of discrimination and to taking positive actions toward achieving equal opportunity and treatment objectives.
6. Please also review the attached Provisions of Titles II, III & IV of the Civil Rights Act of 1964 which become applicable upon mobilization of the Air National Guard.

COMMANDER'S SIGNATURE BLOCK

Attachment 1 Page 2 of 2

## 1964 CIVIL RIGHTS ACT - TITLE II, III & IV PROVISIONS

- A. Title II: Public Accommodations. These are privately owned establishments that cater to the general public. Discrimination or segregation based on race, color, religion or national origin is banned in:
1. Inns, hotels, motels and other places providing lodgings to transients (except owner-occupied premises with fewer than six rooms for rent);
  2. Restaurants, cafeterias, lunchrooms, lunch counters, soda fountains or other facilities principally engaged in selling food for consumption on the premises;
  3. Gasoline stations;
  4. Motion picture houses, theaters, concert halls, sports arenas, stadiums or other places of exhibition or entertainment;
  5. Any establishment located on the premises of any of the foregoing and holding itself out as serving the patrons thereof; and
  6. Coverage of establishments listed in 2, 3, and 4 depends upon whether:
    - a. They serve or offer to serve interstate travelers;
    - b. A substantial portion of the products they sell or exhibit has crossed any state line;
    - c. Discrimination or segregation by the establishment purports to be required by any law, statute, ordinance, regulation, rule or order of a state or any agency or political subdivision thereof. If the establishment is covered, the Civil Rights Act protects all prospective patrons, not merely those who are interstate travelers; and
    - d. The ban on discrimination in public accommodations is enforceable by an injunction proceeding brought either by the persons discriminated against or by the U.S. Attorney General.
- B. Title III: Public or Government Facilities, other than Schools. Discrimination in these has long since been ruled unconstitutional and so this title is concerned primarily with specified enforcement procedures. It authorized the U.S. Attorney General to bring suit to end the prohibited discrimination or segregation in some cases, after receiving a complaint from an individual. Individuals remain free to institute suits in their own behalf.
- C. Title IV: Public Education. The U.S. Commissioner of Education is charged with making appropriate surveys and is authorized, upon request from a school board or other local agency, to give technical and financial assistance in school desegregation programs. The U.S. Attorney General is authorized to bring suit to end the prohibited school discrimination or segregation upon complaint by an individual. Here, too, individuals remain free to institute suits in their own behalf.

Attachment 2

(Unit Letterhead)

MEMORANDUM FOR ALL PERSONNEL

(Date)

From: CC

Subject: Briefing on Complaint Procedure

1. The (Unit Name), operates on a nondiscriminatory basis in compliance with Title VI of the Civil Rights Act of 1964. All persons, or their authorized representatives, may file a written complaint with the Commander, (Unit Name), the Adjutant General of (State), or the Chief, National Guard Bureau, or with all three of these officials, if they believe that discrimination on the basis of race, color or national origin is being practiced with any Air National Guard program of the (Unit Name) that is subject to the provisions of Title VI. ANGR 30-12, Nondiscrimination in Federally Assisted Programs, assigns responsibility and prescribes procedures to administer Title VI of the Civil Rights Act of 1964 and implements DoD Directive 5500.11, Nondiscrimination in Federally Assisted Programs. ANGR 30-12 applies to all federally assisted activities of the Air National Guard as defined in sections 101(4) and 101(6) of Title 32, United States Code. ANGI 36-3 provides that complaints based on sex or religion should also be accepted and they should be processed as outlined in the regulation.
2. Discrimination complaints on military equal opportunity and treatment matters involving personnel or facilities of the (Unit Name) should be addressed to the Commander, (Unit Name) and filed with the Military Equal Opportunity officer, (Rank and Name) who is located in (Building Number, Building Name, Room Number, Floor). Complaints must be filed within 180 days from the date of the alleged discrimination.
3. Any person filing a complaint at the Wing or Group level should make an attempt to resolve the problem on an informal basis through discussion at Wing or Group level. The Wing or Group Commander will forward all complaints to the Adjutant General of (State) with comments and an explanation of what action was taken to resolve the matter. If the problem was not resolved at Wing or Group level, the complainant should attempt to resolve it on an informal basis at the state's Adjutant General level. If the problem is still not resolved at that level, the complaint will be forwarded to the National Guard Bureau for investigation and final disposition.
4. Complaints filed initially with the Chief, National Guard Bureau or the (State) Adjutant General are referred down the chain of command for possible resolution at the Wing/Group level, after which they are then processed as outlined in paragraph 3 above.

COMMANDER'S SIGNATURE BLOCK

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## Nondiscrimination in Federally Assisted Programs

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Reviewed by Col Julio R. Barron, June 2009

**AUTHORITY:** DoDD 5500.11, *Nondiscrimination in Federally Assisted Programs* (27 May 71; Change 1, 15 Aug 72; current as of November 21, 2003 ); 48 C.F.R. 22.800, *et seq.*, *Application of Labor Laws to Government Acquisitions – Equal Employment Opportunity*; NGR 600-23/ANGR 30-12, *Nondiscrimination in Federally Assisted Programs* (30 Dec 74); Title V of the Civil Rights Act of 1964.

### **POLICY**

Under federal law, no person may be excluded from participation in, denied the benefits of, or subjected to discrimination on the basis of race, color, national origin, or handicap under any program or activity receiving federal financial assistance. This assistance can take the form of grants, loans, contracts (other than a contract of insurance or guaranty) or other arrangements by which the federal government provides funds, services performed by federal personnel, or real property interests.

### **COMMANDER'S ACTION**

Discrimination complaints should be filed not later than 180 days from the date of the alleged discrimination. When a Commander learns of discrimination in federally assisted programs, either by complaint or otherwise, the Commander must send a letter detailing the wrongful activity through military channels to the Adjutant General. Successive Commanders attach their comments and explain what action was taken to resolve the matter. If the matter is not resolved to the satisfaction of the complainant at the State level, it is forwarded to NGB.

The National Guard Bureau will investigate the allegations. When the investigation indicates that discrimination is occurring, the National Guard Bureau will attempt to resolve the problem informally. Where informal resolution is not possible, several additional steps are taken, including a hearing on the allegations. Ultimately, if the problem is not resolved, the federal assistance will be terminated or suspended.

When a discrimination complaint is received regarding a government procurement contract, the Contracting Officer immediately refers it to the Office of Federal Contract Compliance Programs (OFCCP) regional office. The Contracting Officer must notify the complainant of the referral. The OFCCP may process the complaint or it may refer it to the Equal Employment Opportunity Commission. Attempts will be made to settle the complaint informally, but when this fails, formal administrative or judicial enforcement proceedings will be used.

Upon the Commander learning of the discrimination, the Staff Judge Advocate should immediately be contacted and become involved in this process.

***KWIK-NOTE: Promptly report instances of discrimination through channels to your Adjutant General. Discrimination in federal financial assistance programs must be investigated and attempted to be resolved at the lowest possible level.***

### **RELATED TOPICS:**

Discrimination Complaints – Military  
Discrimination Complaints – Technician

### **SECTION**

9-3  
9-4

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# Release of Reports of Investigation in Discrimination Complaints to Management Officials

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Updated by Col Julio R. Barron, June 2009

**AUTHORITY:** NGR (AR) 690-600/NGR (AF) 40-1614, *National Guard Civilian Discrimination Complaint System* (15 Mar 93) Vols. I and II; DoDD 5400.7, *DoD Freedom of Information Act (FOIA) Program* (2 Jan 08); DoDI 5400.10, *OSD Implementation of DoD Freedom of Information Act (FOIA), Program* (24 Jan 91); DoD 5400.7-R *DoD Freedom of Information Act (FOIA) Program* (4 Sep 98); DoD 5400.7-R/Air Force Supplement, *DoD Freedom of Information Act* (24 Jun 02); ANGI 36-3, *National Guard Military Discrimination Complaint System* (30 Mar 01).

## INTRODUCTION

This topic applies to both technician and military member discrimination complaints.

Reports of investigation (ROI) are considered agency records. They are governed by the Privacy Act (PA) and the Freedom of Information Act (FOIA). These laws limit the release of reports of investigation.

## RESTRICTIONS ON RELEASE

Because of the restrictions on releasing reports of investigation, few individuals are entitled to see the unsanitized version of them. Individual complainants and their representatives can see them. National Guard officials who, as a part of their assigned duties, are directly involved in processing discrimination complaints or making decisions on them can also see them. The reports cannot be released to other management officials. This includes those who are identified as alleged discriminating officials or responding management officials. This applies whether or not disciplinary action is taken against an alleged offender. The principle governing the release of reports of investigation is that the individuals must have a need for the information to perform their duties.

Reports of investigation can be requested by anyone under the FOIA. An ROI request by individuals not directly involved in the investigation as described above (*e.g.*, the alleged discriminating official) is treated as a FOIA request. FOIA requests for reports of investigation should immediately be referred to NGB-AD. NGB-AD will request a copy of the report from NGB-EO which, in turn, requests a copy of the report from the state. NGB-AD will determine what parts of the report can be released. When a request for a report is made, the report will be released after the case is no longer under investigation, but only after all protected information is removed. Information in reports of investigations that will normally not be released includes names and identities of witnesses; names of individuals listed in the file; home addresses; social security numbers, investigator's findings, discussions, and recommendations; and certain information about the complainant.

These limitations upon the release of reports of investigation must be followed STRICTLY. The wrongful disclosure of protected Privacy Act information could subject the National Guard to a lawsuit for damages and it could result in a criminal prosecution of the offending official.

For further information on this subject, contact your Staff Judge Advocate.

**KWIK-NOTE:** *Reports of Investigation may only be released to certain officials with the need to know based upon their assigned duties.*

**RELATED TOPICS:**

**SECTION**

Discrimination Complaints – Military  
Discrimination Complaints – Technician  
Privacy Act  
Freedom of Information Act

9-3  
9-4  
14-12  
14-11

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# Sexual Harassment

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**Updated by Col Julio R. Barron, July 2009**

**AUTHORITY:** NGR 600-22/ANGI 36-3, *National Guard Military Discrimination Complaint System* (30 Mar 01); DoDD 1350.2, *Department of Defense Military Equal Opportunity (MEO) Program* (18 Aug 95, current as of 21 Nov 03); AFI 36-2706, *Military Equal Opportunity and Treatment Program* (29 Jul 04; current as of 17 Feb 09); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16 and applicable state law (for dual-status technicians and civilian employees only).

## INTRODUCTION

Sexual harassment, a form of illegal sex discrimination, is a very real problem in both the private and public sector workplaces.

The Air National Guard, United States Air Force, federal Equal Employment Opportunity Commission (EEOC), courts and most, if not all, states prohibit, regulate, adjudicate and punish acts constituting sexual harassment. Employers, employees, and governmental agencies and departments can be found legally liable for acts of sexual harassment in the workplace. Commanders and state Guard units can also be subject to suit from civilian employees.<sup>1</sup> While commanders and supervisors will not be held liable for suits brought by uniformed Guard members, a well-founded complaint can seriously impair a commander's career. Whether well-founded or not, an employee (male or female, military or civilian) claiming to be the victim of sexual harassment may file a complaint. The complaint must be investigated and you will expend a lot of money and valuable time investigating and, if the complaint progresses to a court case, defending these complaints.

The bottom line: **SEXUAL HARASSMENT WILL NOT BE TOLERATED IN ANY FORM**, and is a serious legal matter.

The purposes of this topic are to help you with understanding what sexual harassment is, explain your responsibilities in this area as a commander, and provide guidance for handling a sexual harassment complaint.

## NATIONAL GUARD POLICY

The fair, equitable, and non-discriminatory treatment of all members and employees of the Guard improves morale and productivity, fosters unit cohesion and readiness, and increases the combat effectiveness of the Guard. The policy of the Guard is to provide equal opportunity for Guard military personnel or applicants for membership in the Guard. One of the ways we can work towards providing equal opportunity is to ensure our members and employees are not subjected to discrimination on the basis of gender or for reprisal for having participated in a protected equal opportunity activity.

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<sup>1</sup> See Section 18-9, *Personal Liability of Federal and State Officials*

Sexual harassment is a form of gender discrimination and will not be tolerated. Sanctions outlined in State Codes of Military Justice, and/or in military or civilian personnel regulations will be applied when it is substantiated that an individual has engaged in sexual harassment or other forms of illegal discrimination. Such instances will be documented in the individual's official personnel file and reflected on evaluations or appraisals, as appropriate.

The chain of command will be the primary channel for resolving discrimination complaints. Individuals will be encouraged to use their command channel for redress of grievances. This provides the commander an opportunity to assist the complainant, inquire into the issues and allegations, take corrective action, and to attempt to resolve the complaint, where possible.<sup>2</sup>

#### **DEFINITION OF SEXUAL HARASSMENT**

ANGI 36-3 defines sexual harassment as follows:

A form of gender discrimination that involves unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or
2. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
3. Such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

A few comments about this definition: First, this definition emphasizes that workplace conduct, to be actionable as "abusive work environment" harassment, need not result in concrete psychological harm to the victim, but rather 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. Second, the alleged conduct must be unwelcome. Consensual sexual banter between two people is not sexual harassment. You may still discipline the individuals for inappropriate activity in the workplace, but the activity is not sexual harassment. Third, even if the conduct is consensual, if a supervisor then uses or condones that behavior to affect a member or employee's work environment – either positively OR negatively, then that supervisor is engaging in sexual harassment. Fourth, a single deliberate instance of physical contact of a sexual nature that is unwelcome is sexual harassment.

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<sup>2</sup> ANGI 36-3, Section II.

## AIR NATIONAL GUARD AND STATE LIABILITY

Dual-status technicians, in their civilian capacity, and/or civilian employees of the National Guard may bring suit against the employee, commander, and the unit for sexual harassment. AGR and drill status members are not entitled to do so because of their military status.

In cases involving dual-status technicians, federal case law is clear that uniformed servicemembers in the armed forces may not bring a court action. 29 C.F.R. § 1614.103(d)(1). Title VII makes employment discrimination illegal based on race color, religion, sex, or national origin and further waives sovereign immunity for "personnel actions affecting employees or applicants for employment . . . in military departments . . . [and] in executive agencies . . ." 42 U.S.C. § 2000e-16(a) (2000). Appellate courts have concluded that uniformed members of the armed services do not constitute "employees . . . in military departments," *id.*, and so do not fall within the scope of the waiver of sovereign immunity contained in § 2000e-16. *See, e.g., Randall v. United States*, 95 F.3d 339, 343 (4<sup>th</sup> Cir. 1996) (holding that "Congress intended [in § 2000e-16] to include only civilian employees of the military departments, and not uniformed servicemembers, within the reach of Title VII"). Courts have held that Congress did not waive immunity under § 2000e-16(a) to include servicemembers in the armed services. Therefore servicemembers may not bring Title VII claims before the EEOC. *See, e.g., Johnson v. Alexander*, 572 F.2d 1219, 1223-24 (8<sup>th</sup> Cir. 1978). Consequently, dual-status technicians may only bring a claim if the the action arose in his or her civilian capacity and not in a military status. Courts have described the exclusion of uniformed personnel in the armed forces from the scope of § 2000e-16(a) as the "military exception" to Title VII. *See, e.g., Hedin v. Thompson*, 355 F.3d 746, 747-48 (4<sup>th</sup> Cir. 2004); *Doe v. Garrett*, 903 F.2d 1455, 1461 (11<sup>th</sup> Cir. 1990). The "military exception" phrase may be misleading, because it may imply that § 2000e-16(a) initially waived sovereign immunity for all military employees. As the 4<sup>th</sup> Circuit Court of Appeals in *Randall v. United States* makes clear, the original scope of the § 2000e-16(a) waiver in fact "includes only civilian employees of the Army, Navy, or Air Force." 95 F.3d at 343. This construction of § 2000e-16(a), which recognizes that Congress did not waive sovereign immunity with regard to uniformed military personnel, does not constitute an exception to the statutory waiver. *Middlebrooks v. Levitt*, 2008 U.S. App. LEXIS 9701, 103 Fair Empl. Prac Cas (BNA) 261 (May 6, 2008). Regardless, anyone can file a lawsuit. Whether a court in your jurisdiction will allow it to proceed or not, you will have to expend considerable time and the State's money responding to it.

When a civilian employee who brings a lawsuit, the National Guard and the State will generally be held strictly liable for sexual harassment engaged in by individuals with supervisory authority over the employee, if the harassment results in a tangible job action against the employee. Strict liability means there is liability whether or not a higher level supervisor knew about it. Where no tangible job action has been taken, the National Guard and the State may avoid liability in cases of supervisory harassment if the employee is able to prove that: (1) the National Guard exercised reasonable care to prevent and promptly correct sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the National Guard or to avoid harm otherwise. In hostile environment cases involving only co-workers, the National Guard and the State may be held liable if a supervisor or

management employee either knew, or should have known of the conduct, and failed to take IMMEDIATE and appropriate corrective action.

### **COMMANDER RESPONSIBILITIES**

Commanders must protect themselves from liability but also to comply with current Air Force and National Guard instructions.<sup>3</sup>

1. You must ensure that the policies described above are adhered to in your organization.
2. You must act promptly to prevent or correct situations that may give rise to complaints of discrimination.
3. You must clearly articulate your unit's prohibition of sexual harassment AND that you will strictly enforce the sexual harassment policy.
4. You must ensure that military members and civilian personnel are fully aware of the procedures for obtaining redress of complaints, including those against members of the chain of command. These procedures will be in writing – such as in policy letters promulgated yearly – and prominently displayed where all unit members will have access to them. In the past this often has meant the ubiquitous bulletin board that everyone passes but few bother to read. You should still post the policy letter there. However, you should also make it available on your intranet site and through regular, periodic announcements during commander's calls.
5. You must conduct an inquiry whenever an allegation of discrimination is brought to your attention.
6. You will inform individuals who are named by a complainant as responsible for discrimination of the basis and issues of the complaint.
7. You will ensure that the command climate does not encourage or condone reprisals against individuals who exercise their rights to file a complaint. To assess your unit's climate on this subject in particular and sexual harassment in general, the MEO office can assist you. In fact, the MEO office must conduct Unit Climate Assessments (UCAs) on units with more than 50 military personnel assigned within six months of a commander assuming command and every two years thereafter. The MEO office will also conduct UCAs upon the request of the commander.<sup>4</sup>

### **THE PROCESS**

A typical military sexual harassment complaint might unfold as follows:

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<sup>3</sup> ANGI 36-3, para. 1-4.f.

<sup>4</sup> AFI 36-2706, para. 3.25.4.1

A military member says something off-color or, perhaps, touches someone in a sexual manner and that remark or contact is unwelcome. The aggrieved individual<sup>5</sup> might complain to a co-worker, supervisor, or immediate commander.

The complaint works its way up to you. What do you do?

First, CONTACT YOUR JAG! Your JAG will assist you in evaluating the complaint and explaining some of the necessary first steps. In general, those first steps will be along the following lines:

If you are the first-level commander of the aggrieved, you should sit down with the complainant along with the person's first sergeant or supervisor. You should explain to the person that she has a right to file a complaint. You should also explain that she has the right to discuss her complaint with and seek the assistance of the MEO office. If she does want to file a complaint, the MEO office will assist her. You will also tell her not to contact the alleged offender. And, you will tell her, briefly, the time frames outlined below within which you expect to process her complaint.

Afterwards, you will need to bring the alleged offender into your office as well. You should have a third person in your office this time as well.<sup>6</sup> You will tell him that a complaint has been lodged, the basis and the issues of the complaint. If he is the complainant's supervisor, you will tell him that, until otherwise directed, he will be given other responsibilities commensurate with his rank where he is not supervising the aggrieved. Whether a supervisor or not, you will direct that person, again until otherwise directed, not to contact the aggrieved, whether personally, through friends, e-mail, phone, or in any other way. Do not allow them to speak or defend themselves at that point. Tell them they will have an opportunity to do so shortly. If they do say something, even despite your admonition not to, record the statement in a memo for record (along with all of the actions you take).<sup>7</sup>

One of the areas you should be knowledgeable about is the process involved once a complaint has been brought to your attention.

In a nutshell, here is the process:<sup>8</sup>

### **Informal Complaints**

The complainant can file an informal complaint of discrimination. Although it may initially be verbal, it will (usually by MEO) be put in writing on NGB Form 333.

The complaint should remain at the lowest level possible for attempted resolution. In the case above, both parties are subordinate to you so it will be on your shoulders to attempt the initial resolution. You will have 30 calendar days (or through the following drill weekend) to resolve

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<sup>5</sup> If the aggrieved individual is a technician and believe that they have been discriminated against while they were in that status, he or she must process their complaint under NGR (AR) 690-600 [NGR (AF) 40-1614], Vol. 1, The National Guard Civilian Discrimination Complaint System; *see also* Section 9-4, *Discrimination Complaints – Technician*. For a civilian employee complaint, contact your civilian EEO office for assistance.

<sup>6</sup> *See* Section 16-5, *Commander's One-on-One Meeting With Member – Precautions*

<sup>7</sup> *See* Section 8-9, *Advising Suspects of Their Rights*

<sup>8</sup> *See* Section 9-3, *Discrimination Complaints – Military*

the complaint. This does not give you much time, especially if the complaint comes in your door on the Sunday afternoon of drill. If the complaint is not resolved at this stage, the only means of appeal is for the complainant to file a formal complaint. MEO personnel will assist you in attempting to resolve the complaint. They may conduct basic fact finding on your behalf, but you can do that yourself if you wish. If, in the course of obtaining information about a complaint, you or whomever is doing the interview suspects that the person being interviewed has violated the State Code of Military Justice (another reason to contact your JAG for advise), or other state or federal criminal codes, the interviewer must read the person his rights under the State Code (the JAG will provide you with a copy of what to read).

The complainant will be advised that communications to MEO personnel will be released to commanders and others for official use.<sup>9</sup> The only exception is that MEO personnel have limited confidentiality when using facilitation in the resolution of informal complaints. (The only person a complainant can go to and maintain a privileged communication is the chaplain).

Even if the complaint is withdrawn at this stage, you should attempt to eliminate any underlying causes for the complaint.

### **Formal Complaints**

If you cannot resolve the complaint within 30 days or by the end of the following drill weekend, the complainant can either withdraw the complaint or file a formal complaint.

If you are now at the formal complaint stage, then you will need to request an NGB case number through your State Equal Employment Manager (SEEM) within 72 hours of receiving the complaint and initiate a Commander's Reprisal Prevention Plan (Figure 2-2 in ANGI 36-3). You will now have 60 calendar days from the date of the filing to:

1. Complete a procedural review of the complaint to determine whether you will accept, dismiss or refer (in whole or in part) the complaint.
2. Complete an investigation of all accepted issues in a complaint. You will appoint an impartial investigator who is not otherwise involved in the processing of the complaint and who is outside the chain of command of either the complainant or the named responsible person(s). Your choice of investigator is an important one. He or she needs to be higher in rank than the named person(s). He needs to be able to write well. And, he needs to have the time, free from other duties and responsibilities, to carry out the job. Your SJA can assist you here; in many cases, the deputy SJA might be a good choice (assuming he or she has not given advice to anyone and will be kept from doing so). Whomever it is, he or she needs to meet with the SJA so that she knows what regulations to refer to and to review her responsibilities.
3. Complete an SJA review of the investigation for legal sufficiency.
4. Attempt resolution and take corrective action where appropriate.

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<sup>9</sup> See Section 9-7, *Release of Reports of Investigation in Discrimination Complaints to Managements Officials*

Again, this is a lot to accomplish in 60 days. You may need to bring the people involved in this process in on orders for a day or two to facilitate the completion of all of your requirements.

If the complaint is resolved, you will forward the case file to the SEER.

If it is unresolved at the end of 60 days, the case file will be automatically forwarded on appeal to the next level of command.

All successive level commanders will have 30 days to review the case and attempt resolution of the complaint.

If the complaint was dismissed, in whole or in part, the SEEM will review it as well. If the SEEM concurs, he or she will forward to NGB-EO a copy of the NGB Form 333 for a final review. If either the SEEM or NGB does not concur, you will get it back for a do-over.

If the complaint remains unresolved at the Adjutant General level after 90 days, the entire case file will be forwarded to NGB-EO with a request from TAG for a final decision.

If participants in the complaint process are full time or AGR, a reduction in the time limits described above is appropriate (but not required).

One other time limit to consider: A complaint must be filed within 180 calendar days from the date of the alleged discrimination or the date that the individual became aware or reasonably should have become aware of the alleged discriminatory event or action.

### **SPECIAL CASES**

All allegations of discrimination made against a general officer or general officer-select, personally (as opposed to those naming such a person by virtue of his or her position), will be referred to the State Inspector General or NGB-EO for forwarding and processing through IG channels to SAF/IGS and DA-IG, as appropriate, in accordance with AFI 90-301.

Allegations against a colonel or colonel-select will be processed as outlined above (in accordance with ANGI 36-3). However, such allegations will be reported through IG channels to SAF/IGS. A copy of the case file must also be forwarded by NGB-EO to NGB-IG, upon final decision, resolution, or withdrawal of the complaint.

### **INQUIRIES AND INVESTIGATIONS**

You now know quite a bit about the informal vs. formal complaint process. However, you still need to know how you are going to go about collecting the facts. You can conduct an “inquiry” or an “investigation”.

An inquiry is a fact-finding process used to determine the validity and merit of discrimination allegations. Basic fact finding will be used to facilitate resolution at the lowest level. It may involve a review of records and regulations and interviewing witnesses. This process is appropriate when the commander receiving the complaint does not have appointing authority to appoint an investigator. You may also want to conduct an inquiry (vs. an investigation) when you only have the complainant and the alleged offender to interview, the facts are simple, and, perhaps most importantly, you believe the complaint is likely to be resolved at the informal complaint level. If it is not likely to be resolved at this level, appoint an investigating officer and

do an investigation. Before you get started, consult your JAG. She can advise you of any complicating factors as well as provide you with guidance on interview techniques, whether it might be necessary to advise the member of his/her constitutional rights, and the best method of documenting your findings under the circumstances.

An investigation is an administrative fact-finding procedure to investigate the allegations in order to determine what actually occurred, to assess the validity of the allegations, to advise the command of any leadership or management concerns which might contribute to perceptions of unlawful discrimination and poor unit command climate, and to recommend appropriate corrective action. If a formal complaint is filed with the MEO office, you will not have a choice: you will conduct an investigation. Consult your JAG for further assistance.

## CONCLUSION

If you are a commander for any length of time, you will at some point be faced with a sexual harassment complaint. You can take affirmative steps, though, to reduce the number of and the consequences of those complaints upon your unit. First, be proactive in publicizing the policy and your zero tolerance for any violations of it. Two, when you do have a complaint, jump on the problem. Even if it walks into your office late on a Sunday drill, make sure you take the initial first steps in resolving the problem. Contact your JAG. If the alleged offender is the complainant's supervisor, remove the alleged offender from that position. Set up times to meet with the involved parties or appoint an investigator. Refer the complainant to the MEO office. When the complaint has been resolved, consider tasking the MEO office to perform a UCA and re-emphasize the policy through a commander's call.

***NOTE: Ensure that all unit members understand the law and command policy that prohibits sexual harassment and the disciplinary and adverse administrative actions that can or will result from and inappropriate behavior and reprisal.***

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# Chapter 10, Drug and Alcohol Abuse

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## Cross Functional Oversight Committee, Demand Reduction Program Manager, and Drug Test Program Administrative Managers

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**Updated by Capt. Kelly Adams, October 2010**

**AUTHORITY:** AFI 44-120, *Drug Abuse Testing Program* (1 July 00); NGB Policy Memorandum, All States Log Number NGB-J3-CD, *Implementing Instructions for National Guard Abuse Program Realignment* (12 May 05); ANGI 10-801, *National Guard Counterdrug Support* (31 Mar 00).

ANGR 30-2, *Social Actions NGB Program* (1 Sep 82) was superseded by ANGR 36-7 (25 Apr 03). With this, the National Guard Substance Abuse Program was realigned such that MEO/EEO was no longer the primary point of contact for the program. In addition, the Drug and Alcohol Abuse Control Committee (DAACC) was eliminated and its functions absorbed by the Cross Functional Oversight Committee. All previous ANG Surgeon General and Military Equal Opportunity drug testing-related responsibilities were assigned to the National Guard Substance Abuse Office (NGB-CDTT).

The Cross Functional Oversight Committee created by AFI 44-120 is required to assess the status and effectiveness of the drug testing program on the installation. The Installation Commander is responsible for creating the committee. The committee will advise the Wing Commander and provide recommendations to improve the efficiency of the drug testing program

For the ANG, the Cross Functional Oversight Committee must meet at least once per year, but should meet more frequently if deemed appropriate. Further, Regional Support Groups (RSG) will ensure that geographically separated units comply with drug testing procedures. The host wing commander, in conjunction with the Installation Commander will ensure GSUs comply with required drug testing procedures.

### COMMITTEE MEMBERS

1. Office of Special Investigation (OSI)
2. Staff Judge Advocate
3. Security Forces
4. First Sergeant's Council Representative
5. A Squadron Commander
6. Alcohol And Drug Abuse Prevention And Treatment Program (ADAPT) Program Manager
7. Demand Reduction Program Manager
8. Others deemed appropriate by the Installation Commander

### DUTIES

The members of the Cross-Functional Oversight Committee will monitor and evaluate:

1. The drug testing program's effectiveness to meet the drug testing program goals. Particular attention should be given to the quality of compliance with guidelines for specimen collection, packaging and shipment.
2. Commanders' and supervisors' understanding and support for the goals of the drug testing program, its readiness and health implications, as well as its effectiveness in ensuring a drug-free workplace.
3. Compliance with the required minimum testing and the type of test appropriate to the local threat.
4. Testing of personnel assigned to the installation regardless of grade, status, or position, including tenant units. Installation commanders may at their discretion test any and all TDY personnel assigned to their units in accordance with the procedures outlined in this instruction. Frequency of testing for TDY personnel will be determined by the level of perceived threat and shall be established by the installation commander following consultation with the SJA.
5. Commanders' and supervisors' understanding of the random selection process and range of appropriate responses to military members who fail to go for testing or refuse to provide a specimen.
6. Effectiveness of drug testing as a counter-measure to drug abuse when used in conjunction with investigations and law enforcement.
7. Commanders' referral for all incidents of known or suspected substance abuse or indication of deterioration of duty performance, behavioral changes such as aggressiveness, destruction of government/personal property, failure to obey orders, or other anomalies deemed unusual or suspicious in nature.
8. Compliance with established procedures to test individuals who are assigned to a base but physically reside on a Geographically Separated Unit.
9. Adequacy/appropriateness of facilities available for full-time use by the Demand Reduction Program Manager (DRPM) and the Drug Testing Program Administrative Manager (DTPAM) to include: a secured work area sufficient for the performance of administrative functions, the safeguarding of files and supplies to carry out and maintain the integrity of the drug testing program, and appropriate urine collection facilities.
10. Adequacy/appropriateness of personnel resources to meet program administration requirements (i.e., observers, collection personnel, etc.).

#### **DEMAND REDUCTION PROGRAM MANAGER (DRPM)**

Wing Commanders will appoint, on orders, a DRPM and as many DTPAMs as are necessary to properly conduct the Wing's drug testing in accordance with AFI 44-120.

The DRPM will:

1. Serve as the Wing's principal staff officer for substance abuse issues.
2. Be trained and certified by the State Substance Abuse Program Officers (SSAPO) and Substance Abuse Program Coordinators (SAPC).
3. Develop a prevention program for the commander.
4. Provide prevention education to unit members.
5. Provide periodic NGSAP evaluations to the commander.
6. Provide required reports to higher headquarters.
7. Prepare and implement a Wing level OI IAW the State's OI.
8. Administer the substance abuse program.

## **DRUG TEST PROGRAM ADMINISTRATIVE MANAGERS (DTPAM)**

DTPAMs will:

1. Be appointed in writing by local unit commanders.
2. Administer the substance abuse program.
3. Maintain the unit's NGSAP records and reports, to include individual test records.
4. Advise and assist unit commanders in carrying out the responsibilities of the NGSAP, to include conducting unit drug testing.
5. Be E-5 or above

***KWIK-NOTE: The Installation Commander should play an integral part of the Cross Functional Oversight Committee. The Committee shall be chaired by the Wing/CC or his/her designee. Further, the Commander should carefully select those members he selects to fill the critical roles of DRPM and DTPAM.***

<b>RELATED TOPICS</b>	<b>SECTION</b>
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## Alcohol Abuse

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**Updated by Capt Kelly Adams, October 2010**

**AUTHORITY:** AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 Sep 01); NGB Policy Memorandum, All States Log Number NGB-J3-CD, *Implementing Instructions for National Guard Abuse Program Realignment* (12 May 05).

### **POLICY**

The Air National Guard (ANG) and the Air Force recognize alcoholism as a progressive, non-compensable disease that affects the entire family and is both preventable and treatable. ANG policy is to prevent alcohol abuse and alcoholism, to try to restore to effective functioning persons with problems attributable to the abuse of alcohol, and to ensure humane management and disposition of those who cannot be restored or who do not remain restored. Nonetheless, ANG and Air Force policies on standards of behavior, performance and discipline are well established and will be firmly maintained. These standards apply, however, to each person's actual demonstrated conduct, rather than to the use of alcohol as such.

Standards that apply to the general military population apply equally to those who use alcohol to the detriment of their social functioning or military conduct and duty performance.

### **COMMANDER'S RESPONSIBILITIES**

Although ANGR 30-2, *Social Actions NGB Program* is no longer in effect (*see* Section 10-2 for explanation), some of the responsibilities delineated for Commanders still remain an important ideal to which Commanders should heed. These are listed below.

1. Become acquainted with the ANG alcohol program and lend support to it.
2. Become familiar with corrective procedures to rehabilitate personnel and disciplinary policies as they relate to the alcohol program.
3. Continue to observe a subordinate's performance.
4. Document specific instances where a member's work performance fails to meet job standards.
5. Consult with the medical, JAG, DRPM, chaplain, and MEO staff for advice on the cause of a member's problem, if alcoholism is suspected.
6. Interview a unit member if poor job performance is observed.
7. Offer a member a firm choice between accepting the help that is available to them or accepting the consequences for continued unsatisfactory performance.
8. Seek advise from and coordinate with the civilian personnel office relating to civilian personnel on problem areas such as performance, discipline, and suspected alcohol abuse.
9. Refer for evaluation a member involved in alcohol abuse.
10. Support the de-glamorization of alcohol.
11. Deny access to classified information and unescorted entry, and establish a Special Security File (SSF) on members whose eligibility and reliability are made questionable by use or abuse of alcohol.

Commanders must ensure that each identified problem drinker and suspected alcoholic is medically evaluated and offered treatment and rehabilitation, if appropriate.

## **DETECTION**

The possible indicators of alcohol abuse include:

1. Deteriorating duty performance.
2. Frequent errors in judgment.
3. Excessive tardiness or absenteeism.
4. Recurring reports of alcohol-related incidents.
5. Unacceptable social behavior or misconduct.
6. Domestic disturbances or family violence.

## **ACTION**

AFI 44-121 establishes guidance for the Air Force Alcohol & Drug Prevention & Treatment (ADAPT) Program. It applies to the Air National Guard when a member is activated for 30 days or more. A member identified as an alcohol abuser and in need of treatment will be entered into the ADAPT program. Members referred for substance abuse assessments who do not meet diagnostic criteria for alcohol abuse or alcohol dependence will be provided a minimum of six hours of awareness education. Members meeting the required diagnostic criteria for alcohol abuse or alcohol dependence will be entered into substance abuse treatment with the level and intensity of care determined necessary. According to Chapter 3, paragraph 3.16.2, members determined to have failed to meet and maintain Air Force standards (behavior) shall be considered for administrative separation. Air National Guard members not on active duty for 30 days who continue to abuse alcohol after or during treatment are subject to ANGR 30-2 and could be discharged depending on the behavior in each case. See ANGR 30-2, paragraph 3-30b and AFI 36-3209.

AGRs and EAD Guard members should be referred to a program at the nearest active duty military installation. Since it is a government program, it is at no cost to these full-time members. Traditional Guard members and Guard members who are technicians or state employees should be referred to reputable programs in the surrounding civilian community, but must pay their cost personally, or through private health insurance.

Commanders should consider the following when a member is identified as an alcohol abuser:

1. Revocation of security clearance and related access to classified information. See DoD Regulation 5200.2-R/AFI 31-501.
2. Appropriateness of present duty assignment, bearing in mind participation in alcohol rehabilitation does not permit assigning demeaning or punitive duties.
3. Corrective action for misconduct resulting from alcohol abuse (but not for the alcohol abuse itself). See also AFI 48-123 and AFI 31-501.
4. Denial of reenlistment when, because of the pattern of substandard performance of conduct, the member is incapable of rehabilitation.
5. A Line of Duty investigation when the member is unable to perform duty because of an alcohol-related disease or injury.

## LEGAL ASPECTS OF ALCOHOL-RELATED ISSUES

1. Know the minimum drinking age in your state, because even if your Officer or NCO Club is on federal land, that Club must adhere to the state's minimum drinking age.
2. Dram shop liability is one created by state statute or court decision which imposes on the server (activity or facility) of alcoholic beverages the duty to refuse to serve a patron who reaches or appears to be reaching the point of intoxication.
  - a. Under some state laws, the server may be held liable for damages when alcoholic beverages continue to be served to patrons who later bring claims for harm to property, themselves or others.
  - b. To protect yourself from this liability, make sure the activity where alcoholic beverages are sold or consumed on your base is established in such a form that under your state law, the activity can be and is covered by Dram Shop Liability insurance. If it is not covered, you, the Commander, may be personally liable for damages caused by the harm inflicted by one of your intoxicated members. See the topic in this Deskbook entitled "Dining Social Club Organizations" for more guidance in this area. Your best protection is to set up controls in the activity where alcoholic beverages are served to prevent the "one too many," and on the base to prevent intoxicated drivers from leaving the base.
3. Be aware that alcoholism is a disease and may, depending on the circumstances, be considered a disability under the Rehabilitation Act of 1973 (29 U.S.C. 791 *et. seq.*) and the Americans with Disabilities Act (ADA). These laws may be relevant regarding certain federal employees. If applicable, these laws impose a duty on the employer to reasonably accommodate the employee with the disability. However, these laws do not preclude disciplinary action for unsatisfactory conduct, even if caused by alcoholism. Consult your Staff Judge Advocate if you are considering disciplining a civilian employee for alcohol-related misconduct.

***KWIK-NOTE: Aggressively deal with alcohol abuse in your unit.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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# Drug Abuse

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**Updated by Capt Kelly Adams, October 2010**

**AUTHORITY:** AFI 44-120, *Drug Abuse Testing Program* (1 Nov 99); AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 Sep 2010); NGB Policy Memorandum, All States Log Number NGB-J3-CD, *Implementing Instructions for National Guard Abuse Program Realignment* (12 May 05); applicable state law.

## INTRODUCTION

Drug abuse is not tolerated in the Air National Guard. You, as a Commander, must be ever-vigilant to evidence of drug abuse within your unit due to the serious impact it may have on safety and the accomplishment of the mission. Drug cases should receive your prompt evaluation and disposition.

ANGR 30-2, *Social Actions NGB Program* (1 Sep 82) was superseded by ANGR 36-7 (25 Apr 03). With this, the National Guard Substance Abuse Program was realigned such that the state level National Guard Substance Abuse Office, NGB J3\_CDTT serves the needs of both the Army and Air National Guard.

## POLICY

The ANG does not have the resources to implement a drug rehabilitation program, but it must identify drug abusers, control their duty assignments, and discipline and/or discharge them.

Unlike alcohol abuse, which the ANG views as a preventable and treatable disease, the ANG deals with drug abuse more strictly, in that the identified drug abuser is subject to punitive action or involuntary separation under AFI 36-3209.

## PREVENTION

The two main methods the ANG employs to prevent drug abuse are (1) education of all members on the ANG policy against drug abuse unit's training program, Preventive Law Program, and Commander's calls, briefings, and distribution of anti-drug abuse materials base-wide; and (2) deterrence and detection through a properly run base urinalysis program, or documented evidence of indications of suspected drug abuse based on an individual's work performance and other conduct.

## MINIMIZING ADVERSE IMPACT

Once drug abusers are identified, and depending on how they were identified and on what their status was at the time they were identified, the ANG has two methods to minimize the adverse impact the drug abuse will have on the ANG and the individual drug abuser. The methods are SEPARATION and REHABILITATION. Included in both of these methods are other appropriate quality force management actions and disciplinary actions while the separation or rehabilitation process is pending.

## SEPARATION

Confirmed drug abusers will be processed for separation from the ANG. This includes AGRs, technicians, (confirmed as drug abusers in their military status), and traditional Guard members. When you identify a technician as a drug abuser, in technician status, you should immediately notify your Support Personnel Management Office (SPMO) for a determination of appropriate action under applicable technician regulations and any applicable provisions of the local collective bargaining agreement.

## REHABILITATION

AFI 44-121 establishes a treatment program which is applicable to ANG when activated longer than 30 days. Assigning members to a duty status or extending them on orders for purposes of rehabilitation is not authorized. AGRs are eligible to participate in government-funded alcohol drug rehabilitation programs operated by the DoD and VA, but AGRs may not be extended on active duty to complete their rehabilitation. Even though the treatment program seeks to assist members in getting professional help, rehabilitation does not bar a Commander from taking disciplinary and/or discharge action against the drug abuser, whether the member is an AGR or a traditional member of the ANG.

The eligibility of ANG members for rehabilitation involves a three-step process: evaluation, education and decision. Before the process begins, the member must be identified as a drug abuser. This done through:

1. Self identification; or
2. Commander identification and referral; or
3. Medical Care referrals

### **RELATED ACTIONS**

Upon identification of a drug abuser, a Commander may have other responsibilities in addition to disciplinary or discharge action. These include:

1. A line of duty determination.
2. A security clearance and access to classified information determination.
3. A review of the propriety of the member's current duty assignment.
4. A determination of whether state or federal law enforcement officials should be informed.

### **UNLAWFUL COMMAND INFLUENCE**

A Commander should be careful not to exert unlawful command influence. It is important for a Commander to zealously enforce the Air Force/Air National Guard policy against illegal drug use, however, it is easy for a Commander to take things too far. For example statements such as, "all drug users will be discharged and anyone who supports them will be disciplined" is problematic. It might cause a potential board member in an administrative discharge case to decide that a member should be discharged simply because he thinks that is what the Commander wants him to do. It might also cause a character witness to refuse to testify on behalf of a member who is facing a discharge board because he thinks the Commander will take action against him if he offers to come to the board and testify that the member is a good worker. Telling a board member how to vote in a discharge case or taking action against a member who wishes to stand up for a member alleged to have used drugs, is unlawful command influence. If it is proven that the unlawful command influence affected the decision of the board member, participant, or witness, the board actions will probably be nullified.

***KWIK-NOTE: Widely disseminate materials to educate your members on illegal drug use. While it is important to be aggressive, beware of unlawful command influence. Be consistent with ANG policy.***

### **RELATED TOPICS**

### **SECTION**

Command Directed Urinalysis	10-9
Commander's One-on-One Meeting with Member – Precautions	16-5
Driving While Intoxicated and Other Offenses Involving Intoxication	8-17
Drug Abuse	10-4
Drug Abuse – Administrative Discharge Policy	10-6
Evidence – Differing Standards and Burdens of Proof	8-4

Inspections and Searches  
Urinalysis Program

8-16  
10-7

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## Steroids

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Updated by Capt. Kelly Adams, January 2010

**AUTHORITY:** AFI 44-120, *Drug Abuse Testing Program* (1 Jul 00); Anabolic Steroids Control Act of 1990, 21 U.S.C. Sec. 812(c).

### **THE USE OF STEROIDS IS PROHIBITED.**

The Steroids Control Act of 1990 became effective in February 1991. It amended the Controlled Substances Act by adding anabolic steroids to Schedule III. Since steroids are a controlled substance, use may be punishable under the Uniform Code of Military Justice or State Military Code and provides a basis for discharge from the Air National Guard.

Urine samples collected for steroid testing must be collected, shipped and processed differently than those requiring routine testing. If a commander wishes to test for steroid use, a signed written request must be submitted to the drug testing laboratory before the sample is collected. AFI 44-120, Attachment 6 provides a sample format of the request letter in addition to the one we've included in Section 10-7. The gender of the member submitting the urine sample must be indicated.

At least 60 milliliters of urine must be collected and the urine bottle must be placed in frozen storage immediately after collection. The sample must be shipped with dry ice in order to keep it frozen. The urine sample is not tested at the Air Force Drug Testing Laboratory.

A commander should coordinate with the Staff Judge Advocate if he deems it necessary to do a command directed urinalysis or a probable cause urinalysis for steroids.

**KWIK-NOTE:** *The wrongful use of anabolic steroids by Air Force/Air National Guard members is prohibited.*

### **RELATED TOPICS:**

### **SECTION**

Command Directed Urinalysis	10-9
Consent Urinalysis Tests	10-8
Drug Abuse	10-4
Drug Abuse – Administrative Discharge Policy	10-6
Drug and Alcohol Abuse Control Committee	10-2
Inspections and Searches	8-16
Urinalysis Program	10-7

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# Drug Abuse-Administrative Discharge Policy

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Updated by Capt. Kelly Adams, October 2010

**AUTHORITY:** AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 05, incorporating through Change 2, 31 July 08); Article 31, UCMJ

## POLICY

DRUG ABUSE IS INCOMPATIBLE WITH CONTINUED SERVICE IN THE AIR NATIONAL GUARD. Therefore, as a Commander you must initiate discharge action against any member under your command who has engaged in some form of drug abuse unless you determine that a waiver of discharge is appropriate and the discharge authority approves a waiver IAW AFI 36-3209, paragraph 4.3.3. The authority for discharging members is AFI 36-3209. As soon as you become aware of substantiated drug abuse by a member of your unit, you should immediately contact your SJA. After consultation with the SJA, you may want to seek an admission of drug use from the member. An admission would help in the administrative discharge action.

## ACTION

After seeking advice from the SJA, you should prepare the paperwork necessary to begin the discharge process. In addition to consulting with the SJA, you should consult the Military Personnel Flight for additional information concerning the required documents. Your SJA can review the documents before you serve them on the member. An enlisted member with six years of good service is entitled to a discharge board unless this right is waived. All ANG officers regardless of years of service are entitled to a discharge board unless it is waived. If a commander recommends an Under Other than Honorable Conditions (UOTHC) discharge, a member is entitled to a discharge board.

In addition to initiating administrative discharge action, a commander should consider disciplinary action against a member who has a positive drug test or who is identified as a drug abuser through other evidence (other than a command directed urinalysis).

## CONVERSATIONS WITH THE MEMBER

A commander should be careful concerning discussions with a member who has been identified as a drug abuser. Consult your SJA regarding this matter. If you decide to talk to the member you should do so only after reading them their Article 31 or “Miranda” rights (right to remain silent). You should always have a witness with you. If the member is enlisted, the witness should be the First Sergeant. If the member is an officer, the witness should be an officer. If the member is represented by an attorney, you should not talk to the member unless his counsel is present or has given you permission to do so.

## UNLAWFUL COMMAND INFLUENCE

The Air National Guard policy on administrative discharge for drug abusers should be given the widest possible dissemination to ensure all unit members are aware of the policy. However, you should be careful that you do not engage in unlawful command influence. For example, you should not forbid members from providing favorable testimony for a member accused of illegal drug use. Nor should you take action against the member who does provide testimony. It goes without saying that a commander must not take adverse action against a judge advocate who has been assigned to represent the member accused of illegal drug use. Finally, refrain from discussing the case with any individuals who might be board members or who have been appointed as board members for the member’s discharge board. Board members must base their decision to discharge or retain a member upon the evidence presented at the board and the instructions provided to them by the Legal Advisor to the board. A commander can, and sometimes should, testify at the discharge board. **Never** take any action against a board member if a decision is made to retain a member who has been accused of illegal drug use.

## CHARACTERIZATION OF DISCHARGE

In addition to recommending that a member be discharged for drug abuse, the commander must make a recommendation regarding the characterization of the discharge. AFI 36-3209 indicates that normally a member who uses illegal drugs should receive an Under Other Than Honorable Conditions discharge (UOTHC). Of course, if this recommendation is made, the member will automatically be entitled to a discharge board. A commander should discuss the issue of discharge characterization with the SJA.

## WHO WILL TEST POSITIVE?

All commanders should keep in mind that a member who you least expect as a drug user, might test positive. The member could be a friend, a high-ranking NCO or officer, or a member with long service. Although it may be a tough case, a commander must enforce the drug abuse policy no matter who tests positive. Do not consider special treatment or favors. Rather, allow the system to work.

***KWIK-NOTE: Be uniform in the application of your administrative discharge policy for drug abuse.***

## RELATED TOPICS:

## SECTION

Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Advising Suspects of Their Rights	8-9
Boards – Investigative	16-4
Command Directed Urinalysis	10-9
Commander’s One-on-One Meeting with Member – Precautions	16-5
Command Influence	2-2
Confessions	8-10
Confidentiality and Privileged Communications	14-6
Consent Urinalysis Tests	10-8
Courts-Martial	8-15
Drug Abuse	10-4
Drug and Alcohol Abuse Control Committee	10-2
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Inspections and Searches	8-16
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# Urinalysis Program

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**Updated by Capt. Kelly Adams, Oct 2010**

**AUTHORITY:** AFI 44-120, *Drug Abuse Testing Program* (1 Jul 00); AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 Sep 01); DoD Directive 1010.1 (9 Dec 94, incorporating change 11 Jan 99); DoD Directive 1010.16 (9 Dec 94); and NGB Policy Memorandum, All States Log Number NGB-J3\_CD, *Implementing Instructions for National Guard Abuse Program Realignment* (12 May 05).

## INTRODUCTION

ANG members are expected to maintain standards of behavior, performance, and discipline consistent with State military justice code, public law and NGB publications. The illegal or improper use of drugs by ANG members is a serious breach of discipline; it is not compatible with service in the Air National Guard. Drug testing is one method a commander can use to ensure that members of his unit are not abusing drugs. The purpose of this section is to provide a commander with information necessary to understand the Air Force Drug Testing Program and to ensure it is operated properly on his installation.

## GOALS AND OBJECTIVES OF THE DRUG ABUSE TESTING PROGRAM

The goals and objectives of the Air Force Drug Testing Program are as follows:

1. Maintain the health and wellness of a fit and ready fighting force and a drug-free Air Force community.
2. Deter members, including those members on initial entry on active duty after enlistment or appointment, from abusing illegal drugs and other illicit substances.
3. Assist commanders in assessing the security, military fitness, readiness, good order, and discipline of their commands.
4. Detect and identify those individuals who use and abuse illegal drugs and other illicit substances.
5. Provide a basis for action, adverse or otherwise, against a service member based on a positive test result.
6. Ensure that urine specimens collected as part of the drug abuse testing program are supported by legally defensible chain of custody procedures at the collection site, during transport, and at the drug testing laboratory.
7. Ensure that all Air Force military specimens are tested by a DoD certified drug-testing laboratory.
8. Ensure that Air Force personnel recognize that the wrongful use of anabolic steroids by Air Force military members may be an offense under the Uniform Code of Military Justice.<sup>a</sup>
9. Ensure that all Air Force members serving in Joint-Service commands, operations, and schools are tested according to the commanding service requirements.

## DRUG TESTING

The Air Force Drug Testing Program operates on two levels. The first level is at the base and involves the selection of the member to provide a urine sample for testing and the collection of the urine sample. The second level is at the drug-testing laboratory. Both levels will be discussed in detail.

## THE BASE DRUG TESTING PROGRAM

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<sup>a</sup> Note: this may be dependent upon the status of the Guard member (e.g. Title 10, Title 32, or state active duty) and whether the state has a state-law equivalent to the federal UCMJ.

The first level involves the selection of a member to provide a urine sample for testing. A commander can select a member using the following methods:

1. **Inspection:** This category includes both random drug testing and unit sweeps. A commander may conduct inspections to assure proper command functioning, to maintain proper standards of readiness and the fitness/readiness for duty of present members. Only commanders have the authority to conduct inspections. A commander may direct an inspection of an entire unit. An example of this is the monthly drug testing during UTAs, or a portion of it. A commander may not single out an individual when doing an inspection. Singling out a member could be an illegal search in violation of the Fourth Amendment of the U.S. Constitution. A positive test result from an inspection could result in disciplinary action and could form the basis for an involuntary discharge or state UCMJ actions. The discharge could be characterized as an under other than honorable conditions (UOTHC) discharge. Note: Random inspection testing should be the predominant type of test used.
2. **Consent:** A member may always consent to give a urine sample for testing. Typically, commanders ask the member to consent prior to resorting to probable cause or commander directed. Prior to obtaining consent, the commander must inform the member that he does not have to consent. The consent should be in writing, although it is not required. The commander should coordinate with the Staff Judge Advocate before asking a member to consent to providing a urine sample. A positive test from a consent urinalysis could result in disciplinary action or form the basis for involuntary discharge, including a discharge characterization of an under other than honorable conditions (UOTHC).
3. **Probable Cause:** If a commander has a reasonable belief that a member is abusing an illegal drug, the commander can obtain a search warrant to search a member's urine for evidence of the illegal drug. A reasonable belief that a member is illegally using drugs is much stronger than a reasonable suspicion. Probable cause should be based upon reliable information that a member is using drugs. For example, a reliable witness might identify the member as using drugs, or drugs might be found in the individual's possession. A positive drug test from a probable cause urine test could result in disciplinary action against the member or form the basis for an involuntary discharge with a discharge characterization of under other than honorable conditions (UOTHC).
4. **Command Directed:** If a commander has a reasonable suspicion that a member is abusing an illegal drug, the commander can order the member to provide a urine sample for testing. A commander could form a reasonable suspicion that a member is using drugs based upon several factors. Such factors might include poor duty performance; late for duty; erratic or bizarre behavior; a change in behavior; or failure to maintain a military appearance. A commander should discuss his suspicions with the Staff Judge Advocate before command directing the member to provide a urine sample. A commander should keep in mind that a positive drug test as a result of a command directed urinalysis could form the basis to involuntarily discharge a member, however, if the urinalysis result is the sole basis for discharge, the member would receive an honorable discharge. Further, results from a command directed urinalysis cannot be used to take UCMJ action.

## REFUSALS

Individuals should be given reasonable time to provide a urine sample. The local commander determines reasonable time. If, after a reasonable time, a person cannot provide, or refuses to provide a sample, the commander must consider taking action for failure to obey a lawful order. **Under no circumstances will an otherwise healthy person, unable or unwilling to provide a sample, be catheterized solely for the purpose of obtaining a sample.**

If a member is not present for duty when randomly selected to provide a urine sample, the member should be ordered to provide a sample during the next UTAs testing.

## RESPONSIBILITIES

Now that we are familiar with the methods that a commander may use to select a member for drug testing, it is necessary to discuss the process of collecting the urine sample. There are several key individuals in the collection process. Each one will be set forth and identified.

1. **Wing Commander:** The wing commander authorizes drug urinalysis testing for his installation. In addition, the wing commander must appoint a Cross Functional Oversight Committee (CFOC) which he or his designee must chair. The CFOC membership must include, at a minimum, of one member from: the Office of Special Investigation (OSI), Staff Judge Advocate, Security Forces, a representative from the First Sergeant's Council, a squadron commander, the Alcohol and Drug Abuse Prevention and Treatment (ADAPT) manager, and the Demand Reduction Program Manager (DRPM). The CFOC must convene, at a minimum, annually to assess the status and effectiveness of drug testing program operations.
2. **Staff Judge Advocate (SJA):** An SJA should be intimately involved in assuring the installation drug urinalysis program meets or exceeds standards. Besides being a member of the CFOC, the SJA must at a minimum, inspect the Drug Testing Program annually, and document the inspection. The SJA must also conduct documented training with the DRPM for personnel assisting in collection or any other aspect of the urinalysis program regarding proper collection and observation procedures. The SJA coordinates on all requests for urinalysis drug testing other than routine random inspection testing (i.e. unit sweep inspections, consent, probable cause, and command directed testing). Finally, the SJA advises commanders, the DRPM, and DTPAM on all legal aspects of the program.
3. **Medical Squadron Commander (MDS/CC):** The MDS/CC serves as the installation Office of Primary Responsibility (OPR) for the drug testing program. The MDS/CC has the obligation to appoint in writing: (1) licensed physicians to serve as primary and alternate Medical Review Officers (MRO), (2) a Demand Reduction Program Manager (DRPM), and (3) the Drug Testing Program Administrative Manager (DTPAM).<sup>b</sup>
4. **Squadron Commanders:** In some units, the wing commander has delegated to the squadron commanders the authority to order a member of his unit to submit to testing. Hence, squadron commanders should sign the unit's inspection order letters for the random urinalysis drug-testing program as well as occasionally authorize unit inspections. Squadron commanders also appoint a trusted agents for their unit who will do the actual notifying of each member, as well as select observers for the day of testing. Finally, squadron commanders have the responsibility to ensure that appropriate action is taken against personnel who fail to report, without valid reason, to the collection site as directed as well as against those who test positive.
5. **Demand Reduction Program Manager (DRPM):** The DRPM is responsible for the overall management of the random urinalysis drug-testing program and acts as the focal point for base-level drug testing issues. The DRPM does the following: conducts documented training for personnel assisting in collection or any other aspect of the urinalysis program regarding proper collection and observation procedures; when requested, briefs commanders and CCFs on the management of the Drug Testing Program; makes confidential notifications for specimen collection to trusted agents and maintains a current listing of all trusted agents; ensures testing is conducted randomly and in accordance with AFI 44-120; ensures timely follow-up on positive test results to both the MRO, commander and other responsible parties; oversees the DTPAM and tracks the program's statistics; and acts as a member of the CFOC. Under AFI 44-120, the MTF/CC is responsible for appointing the DRPM, as the AFI assigns primary responsibility for the drug-testing program to SG.
6. **Drug Testing Program Administrative Manager (DTPAM):** The DTPAM is the primary focal point for collection, packaging and transportation to the Drug Testing Laboratory of member urine samples. In conjunction with the DRPM, monitors the rate of untestable specimens and takes appropriate action to ensure less than one percent of specimens are untestable.
7. **Observer:** The observer escorts the member to the restroom; directs the member to wash his hands with only water and dry them prior to providing a urine sample; directly observes the urine leave the member's body and enter the specimen container; ensures that the member secures the lid tightly on the bottle and does not reopen it; watches the member provide the container to the DTPAM while keeping the specimen in line of sight

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<sup>b</sup> In ANG units with one allocated manpower position, that individual will serve as the DRPM and DTPAM.

at all times. The observer verifies this by initialing, signing and dating the urinalysis ledger and specimen bottle. Observers must report any suspicious behavior on the part of the member providing the urine sample. Persons appointed as observers must meet the requirements of AFI 44-120 paragraph 4.7.6.7.

8. Medical Review Officer (MRO): The MRO reviews the medical, dental and other related documents of any member having a positive drug result to determine whether or not there exists a legitimate medical reason for the positive result and then provides a report to the DRPM of the findings. The MRO must be a medical doctor.

## COLLECTION PROCEDURES

Once a member is selected to provide a urine sample, he should be given a written order to report to the collection site. The member should report to the collection site with his military identification card. If the member is being command directed or it is a probable cause urinalysis, the member should be escorted to the collection site by his first sergeant or another person designated by the commander. The letter should not be provided to the member until just before the testing is to begin. For example, if a unit does drug testing on Sunday morning of the UTA, the member should receive his letter that morning. Under no circumstances should members be notified one day in advance that they have been selected. Further, if your unit always does random drug testing on one particular day of the UTA, it would be advisable to switch days every once in a while so that members do not discern a pattern.

If your unit medical facility is large enough, the drug testing should take place there. The area must contain nearby male and female restrooms that can be closed and used for drug testing only. The area should be large enough to accommodate members waiting to give a sample and large enough for a table to be used by the DTPAM. The DTPAM's area should be clear with only one member and one observer at the table at a time.

During the collection process, the DTPAM will do the following:

1. Have clean specimen bottles at the collection site. Between drug testing collections, the specimen bottles and other items used during the process, such as the labels placed on the bottles, should be maintained in a secure, limited-access area. While the chances for tampering with these items is low, securing them is very important to maintain the integrity of the drug testing process.
2. When a member comes forward ready to provide a urine sample, the DTPAM must check the member's military identification card. The card will be used to record information on the drug-testing ledger and will be kept by the DTPAM during the collection process.
3. Once the DTPAM has entered the member's rank and social security number in the ledger, the DTPAM will ensure that the member looks at the ledger and verifies that the information is correct.
4. After the member checks the information in the ledger, the DTPAM assigns the member an observer. Before beginning duty, the observer should have been briefed about his duties both orally and in writing. The DTPAM must ensure the observers take their responsibilities seriously and remain attentive at all times.
5. With the observer looking on, the DTPAM should hand the member a specimen bottle. The bottle will be empty and free of dirt. It will also have a label on it which contains a laboratory accession number that is preprinted and the member's social security number which was placed there by the DTPAM. The member should be instructed to keep the bottle in the observer's view at all times. In addition to the labeled specimen bottle, female members may be issued a wide mouth specimen collection cup.
6. Female members will collect the urine in the larger cup and transfer the urine to the labeled specimen bottle.

7. Members should be advised to remove bulky outer clothing such as jackets before entering the restroom to provide the urine sample. This is important because the bulky clothing could impede the observer's ability to observe the member place urine in the specimen bottle.
8. The DTPAM will receive the full specimen bottle from the member after his return from the restroom. The bottle should be checked to make sure the lid is secured, there is sufficient quantity (at least 30 milliliters) of urine, and the sample does not appear to be adulterated. If the urine quantity is insufficient, the urine will be discarded and the DTPAM will void the bottle. The member will be required to start over again.
9. If the amount of urine is adequate, the DTPAM will apply tamper-resistant tape to the bottle with the member and observer watching. This tape does not prevent the bottle from being opened, but it does provide evidence it was opened after the tape was applied. It will cause the personnel at the drug-testing laboratory to reject the sample for testing unless the DTPAM has provided an adequate written explanation to account for the broken tape.
10. After the tape is applied, the member should initial the label on the bottle, and the observer will be required to do the same. The DTPAM should review with the member the information in the ledger to ensure accuracy. The member should compare the information in the ledger with the information on the bottle label. If the information is correct, the member should sign the ledger. The observer should also sign the ledger. The member should not leave until he is satisfied with the correctness of the information. If he is, the member's identification card should be returned and the member may depart.
11. When the drug testing is complete, the DTPAM, who has maintained positive control over the full urine specimen bottles, will package them for shipment to the drug-testing laboratory.

In addition to the DTPAM, the observer plays an important role during collection of urine sample for drug testing. The observer's duties are as follows:

1. Report to the urine sample collection site when ordered and read the briefing describing an observer's duties.
2. Direct the member to wash his/her hands with only water and dry them prior to providing a specimen. Directly observe the urine leaving the individual's body and entering the specimen bottle. Keep the bottle in line of sight at all times. Ensure the member secures the lid to the specimen bottle tightly and that the member does not reopen it.
3. Escort the member back to the DTPAM after the specimen bottle is filled with urine.
4. Observe the DTPAM place the tamper resistant tape on the bottle. Initial the bottle label and print name in the ledger as directed by the DTPAM. Observe the member review the information on the bottle, initial the bottle label, review the information in the ledger and sign the ledger.
5. The observer should not leave the side of the member until the collection process is complete and the member receives his military identification card from the DTPAM.

After the urine samples have been collected, the DTPAM will package the samples and send them to the Air Force Drug Testing Laboratory in accordance with the requirements of AFI 44-120. At that point, the base collection process is complete.

#### **AIR FORCE DRUG TESTING LABORATORY**

AFI 44-120 is the governing authority for the ANG testing program, except with regard to provisions related to the Air Force Drug Testing Laboratory. The Air Force tests urine samples for the following drugs:

1. Marijuana/Hashish
2. Cocaine

3. Methamphetamine/Amphetamine: This includes MDMA (Ecstasy).
4. LSD
5. Barbiturates
6. PCP
7. Opiates (Heroin)

It is possible to make a special request to test for other drugs. This should be coordinated with the SJA who will coordinate with the drug testing laboratory. Specimens for steroid testing must be collected, shipped and processed according to para. 14.5 and Atch. 6 of AFI 44-120.

Urine samples that arrive at the drug testing laboratory are maintained at all times in a secured limited access area. The urine bottles never leave the room during the testing process. Lab personnel begin the testing process by first checking the boxes to determine whether the boxes have been tampered with. If there are signs of tampering, the urine will not be tested. Once the outside of the boxes is checked, the lab personnel will check the inside. The DTPAM should have logged all of the sample bottles on a DD Form 2624, which is a chain of custody document. This form is reviewed for accuracy and the information is compared to the information on each bottle. If the information does not match and there is no explanation, the samples will not be tested. During this check the lab personnel look to see if the tamper resistant tape is present and intact. If it is not and there is no accompanying written explanation signed by the DTPAM, the urine sample will not be tested.

Once a sample is cleared for testing lab technicians assign each specimen bottle a unique Laboratory Accession Number (LAN), using pre-printed bar-code labels. The bar-code labels greatly reduce the possibility of human error. The LAN for each specimen is entered on the chain-of-custody document and scanned into a database. Then a technician affixes three labels imprinted with the LAN on each bottle: one on the side of the bottle, one on the bottle cap, and a third (to be used on the aliquot test tube for the screen) attached vertically to the cap rim. All sample bottles are maintained at the lab until they are ordered to be destroyed. Only portions of urine (aliquots) are taken outside this room for testing. Technicians pour aliquots from the original bottle on separate occasions, any time a new test need be performed. Nothing is ever added to or dipped into the original bottle. Aliquots are destroyed after completing each test.

All urine samples undergo a screening test. If the screening test is negative for the presence of an illegal drug, the testing stops. If the screening test is positive for an illegal drug then a second test, referred to as the re-screen, is performed. If this test is negative then testing stops. If the re-screen is positive, a third test is performed. This test is called the confirmation test. If the confirmation test is positive, the unit where the individual provided the sample is notified that a member tested positive for illegal drug use. The particular drug will be identified and the amount of the drug detected in the urine will be reported. A member's sample is never considered positive unless all three tests are positive. A different portion or aliquot of urine is tested each time a test is run.

The Air Force Drug Testing Laboratory using several different types of screening tests to identify positive screens and re-screens. The type of test employed depends upon the type of drug the lab is looking for. Detailed discussion of the methodology of these types of tests is beyond the scope of this discussion. However, if more information is desired a commander should consult his SJA. The SJA should be able to provide detailed information on the testing process. The Legal Advisor for the Air Force Drug Testing Laboratory maintains and distributes a guide entitled **A HANDOUT FOR JAGS, The United States Air Force Urinalysis Drug Testing Program**. This document is very detailed and is a good source of information about the types of tests performed at the drug testing laboratory.

Although detailed information concerning the screening tests is beyond the scope of this section, some information regarding the confirmation test is necessary. As previously indicated, if a sample has tested positive during the screen and re-screen, a portion of the sample will be subjected to a third test called the confirmation test. Confirmation testing is accomplished using gas chromatography/mass spectrometry (GC/MS). Scientists consider the GC/MS a highly specific and an extremely reliable method for drug analysis or the "gold standard" for confirming the presence of a drug. Samples undergo chemical extraction and derivatization, if required, to prepare for GC/MS testing. The GC/MS instrument is a combination of a gas chromatograph (GC) and a mass spectrometer (MS). The purpose of the GC is to separate the various compounds in a sample so that a specific compound can be analyzed independently by the MS. The sample is injected into the GC/MS, vaporized and carried by an inert gas through a long narrow, coated, tube. Chemical compounds travel through the column at different speeds, and thus exit at different times, known as compounds' retention times. As the chemical compound being analyzed emerges

from the column, high-energy electrons in the mass spectrometer bombard it. This causes the compound molecules to break into ions in a predictable, characteristic, and highly reproducible fragmentation pattern. The ion fragmentation pattern is specific and unique to each compound (drug), much like a fingerprint.

The Air Force Drug Testing Laboratory maintains an extensive quality control program to ensure the accuracy of its tests. This quality control program includes internal quality controls and external quality control. The internal control involves use of open quality control samples (*i.e.*, known) and blind quality control samples (*i.e.*, unknown to the operators), that are analyzed with the regular member samples. The lab monitors the data on the quality control samples to determine whether the technicians are performing their jobs properly and the lab instruments are operating properly. The Armed Forces Institute of Pathology (AFIP) runs the external quality control program. AFIP tests all areas of the lab's operations on a frequent basis. This includes the sending of blind samples to the lab. These samples are not sent to the lab directly from AFIP, but are forwarded to Air Force bases which insert the AFIP samples with their regular member samples and ship them to the drug testing laboratory. These samples are tested by the lab, and the results are forwarded to the bases which shipped the samples to the laboratory. Each base then reports the results to AFIP. AFIP reviews the results of these tests to determine if the lab is operating properly.

### **NOTICE OF A POSITIVE RESULT**

The medical facility will be notified first of a positive drug test. The DRPM should notify the SJA and the wing commander. The wing commander should consult the SJA prior to notification of the member. The wing commander and the SJA should discuss the available options. The wing commander should keep in mind that, unless he is willing to request a special waiver, the member should be processed for an involuntary discharge. Enlisted members with six years of good service and all non-probationary officers are entitled to an administrative discharge board. These boards can be costly and are not often waived if the member has nothing to lose by going forward with the board. To lessen the chance that a member who is entitled to a board will request a board, the member should be notified of the positive test in a formal setting. The member should be read his rights under Article 31. The goal is to persuade the member to confess his wrongful drug use. For this reason, some units use their Security Forces investigators to provide the initial notification to the member and to conduct questioning. If a confession is obtained, it is unlikely the member will request a board. Even if the member does not confess, the member may provide a story of how his test could be positive. This "story" could be used later at the board to discredit the member. Accordingly, it is important that as many details of the story as possible be "nailed down." Many times the details of the story will not fit with the level of drug detected by the urinalysis and will be easily disproved at the board. Administrative discharge boards usually do not spend much time on a member they believe to be lying.

In addition to initiating administrative discharge action, a commander may want to take disciplinary action against the member. This could be nonjudicial punishment under the state military justice code. This option is unavailable in cases involving only command directed drug tests. Do not permit the member to resign or to be discharged on grounds different than the drug abuse in question. Consult the SJA before taking disciplinary action against a member with a positive drug test.

### **HEMP SEED OIL INGESTION**

Studies have shown that products made with hemp seed oil may contain varying levels of tetrahydrocannabinol (THC), an active ingredient of marijuana, which is detectable under the Air Force Drug Testing Program. In order to ensure military readiness, the ingestion of hemp seed oil or products made with hemp seed oil is prohibited. Failure to comply with the prohibition on the ingestion of hemp seed oil or products made with hemp seed oil is a violation of Article 92, UCMJ. The use of hemp seed oil is prohibited by AFI 44-121. Thus, even if a member's positive urinalysis results from hemp seed oil ingestion rather than marijuana use, the member may still be disciplined and separated.

### **ADMINISTRATIVE DISCHARGE ACTION**

Air Force and Air National Guard policy require that a commander initiate administrative discharge action against a member who has a positive drug test unless the commander obtains a waiver from the discharge authority. For those members entitled to a discharge board, a commander should consider recommending the member for an Under

Other Than Honorable Conditions Discharge (UOTHC). This is the worst type of administrative discharge a member can receive. As a result of a UOTHC recommendation, some members will waive their right to the board in exchange for a General (Under Honorable Conditions) discharge. Such an offer by a member should be balanced against the cost and time involved in an administrative discharge board. A member identified as wrongfully abusing drugs should not ordinarily be awarded an honorable discharge in exchange for a board waiver. A commander should discuss all of the options with the SJA.

If a member who is entitled to a discharge board does not waive his right to the board, the board members must determine whether the member has committed the offense charged. If so, they must decide whether the member should be discharged. A board may retain a member found to have used illegal drugs in very limited circumstances. If the board decides to recommend that the member be discharged, it must determine the characterization of discharge to recommend. In a drug abuse case, an administrative discharge board may recommend a characterization of: (1) Honorable; (2) General Under Honorable Conditions; or (3) Under Other Than Honorable Conditions. (UOTHC).

1. Honorable. An honorable discharge is given when the military record of the member warrants the highest type of discharge. As a rule, the member is entitled to full rights and benefits. However, eligibility for reentry into the military is not guaranteed. Honorable discharges are rarely, if ever given in drug abuse cases. They should almost never initially be recommended or be given for a conditional waiver of a board. They are mandatory however, if discharge is based solely on a command directed test.

2. General (Under Honorable Conditions). A General (Under Honorable Conditions) discharge is given when the military record of the member is not sufficiently meritorious to warrant an honorable discharge but is not of such nature that a discharge Under Other Than Honorable Conditions (UOTCH) is warranted. Usually, the member is entitled to full rights and benefits. However, eligibility for reentry in the military may be affected. Should present or future statutes specifically require an honorable discharge as a condition precedent to receiving certain rights and benefits, eligibility for these rights or benefits may be affected.

3. Under Other Than Honorable Conditions (UOTHC). A discharge Under Other Than Honorable Conditions (UOTHC) is given when the military record of the member warrants the least desirable administrative discharge characterization available. Discharge under these conditions may deprive the member of certain benefits as determined by the Veteran's Administration. The member is ineligible for reentry into the military.

***KWIK-NOTE: The drug testing program is very complicated. A commander should consult the SJA whenever a question arises.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Administrative Discharge of Officers	24-4
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Attachment 1

**DRUG TESTING OBSERVER'S BRIEFING**

1. You must be of the same sex as the member being observed and you must not be scheduled to provide a sample on the same day on which you are to observe specimen collection.
2. You may not be an observer if you assigned to work in any legal office.
3. You may not be an observer if you have been selected for testing in the same session as the one in which you are observing.
4. You may not be an observer if action for misconduct is pending against you or an adverse administrative action is pending against you. Nor may you be an observer if you have ever been convicted by court-martial or civilian court, received non-judicial punishment under Article 15, UCMJ, or received a letter of reprimand or similar administrative action for misconduct involving dishonesty (such as a false official statement), fraud, or drug abuse (including possession or distribution).
5. You may not be an observer if you have an Unfavorable Information File (UIF).
6. You may not be an observer if you are within six (6) months of either separation or retirement.
7. You may not be an observer if you are on a medical profile which will prevent you from performing your assigned duties as an observer.
8. You must observe the member receive the empty specimen bottle from the drug testing monitor and you must enter the restroom with the member. You must direct the member to wash his/her hands with only water then dry them prior to providing a specimen. You must observe the member urinating directly into the labeled specimen bottle and capping it. If a female chooses to use the optional wide-mouthed sterile collection cup, you must directly observe the member providing the specimen, pouring the urine into the labeled specimen bottle and capping it. As an observer, you are required by AFI 44-120 to ensure that the specimen provided is not contaminated or altered in any way.
9. You will stay with the member until ready to exit the bathroom. Neither the member nor the specimen bottle can be out of your sight at any time. You will observe the member carry the specimen bottle out of the bathroom and hand it to the drug testing monitor. You will observe the member initial and date the specimen bottle label. You will then initial and date the bottle label. **DO NOT HANDLE THE SAMPLE AT ANY TIME UNTIL IT IS TIME TO INITIAL THE LABEL.**
10. You will print your name where designated in the ledger. Initial and sign your payroll signature next to the member's entry.
11. You will observe the drug testing monitor apply the tamper resistant tape to the bottle print and sign your name and initials on the log.
12. You will report all incidents of, or suspected abuse, adulteration, or unusual behavior, by the member being tested to the DTPAM or DRPM, and legal office immediately.
13. Provide your signature and other information below acknowledging that you have read and understand your duties as an observer and may be called upon to testify as a witness in legal proceedings.

DATE	NAME	RANK	SSN	SIGNATURE
<hr/>				

Attachment 2

**COMMANDER'S ORDER**

MEMORANDUM FOR (RANK, FIRST NAME, LAST NAME)

FROM: /CC

SUBJECT: Order to Provide a Urine Specimen-Inspection Testing

1. You have been selected and are hereby ordered to provide a urine specimen for drug testing purposes. Compliance with this order requires that you:

- a. Report to (building, room, time, and date for test).
- b. Surrender your ID card upon arrival at the testing location and remain at the testing location until you have provided your urine specimen, your ID has been returned to you, and you have been given permission to leave.
- c. Be observed urinating directly into the bottle, or other receptacle provided to you for collecting the urine specimen.
- d. Avoid contaminating the specimen. Fill the bottle, or other receptacle provided to you, with a minimum of 30 milliliters of your urine.

2. Failure to comply with this order in any way may result in disciplinary action against you under the (state) Uniform Code of Military Justice or adverse administrative action. You will acknowledge that you have read this order and understand it by signing below.

JOSEPH P. SMITH, Col, ANG  
Commander

1<sup>st</sup> Ind. (Rank, First Name, Last Name)

TO: /CC

I have read and understand this order. I further understand that failure to comply with this order in any way may result in disciplinary action and/or adverse administrative action.

Date/Time Notified \_\_\_\_\_

\_\_\_\_\_  
Printed First Name, Last Name, Rank

\_\_\_\_\_  
Signature

Attachment 3

**REQUESTING STEROID TESTING**

MEMORANDUM FOR IERA/SDTP

FROM: (REQUESTING UNIT'S COMPLETE MAILING ADDRESS)

SUBJECT: Request for Steroid Testing

1. Request approval for the testing of (specify numbers) specimens for the presence of steroids.
2. (Provide justification to include the member's SSN and gender).
3. (Indicate POC and phone number).

Signature Block of DRPM

Attachment 4

**PACKAGING/SHIPPING CHECKLIST**

1. Place the specimen bottles (maximum of 12) into the specimen box ensuring that the tamper-resistant tape is intact. If the tape is broken, prepare a memorandum for record.
2. Complete and sign the DD Form 2624 ensuring that the specimens listed on the form match the bottles that are in the box.
3. Place the DD form 2624 and any MFRs inside a zip-lock bag within the box.
4. In order to prevent damage due to leakage, place an absorbent pad (NSN 6530-304-9754) in the box prior to sealing.
5. Seal all sides, edges, and flaps of the box with adhesive tape.
6. Sign payroll signature and date across the top and bottom of the box.
7. Place the sealed box in a leak preventive mailing pouch (NSN 6530-01-304 9762). The sealed pouch must be wrapped in postal mailing paper if not placed in a second container.
8. Write or stamp the phrase "Chain of Custody" on the outside of the mailing package. (Failure to annotate is not an untestable discrepancy, however, it will prevent the possibility of being untestable due to a break in the chain of custody due to misdelivery).
9. Address the package to: IERA/SDTP

Air Force Drug Testing Laboratory  
Bldg 930, Room 119  
2601 West Gate Road, Suite 117  
Brooks AFB TX 78235-5240

Attachment 5

Page 1

## **QUESTIONS AND ANSWERS ABOUT THE AIR FORCE/AIR NATIONAL GUARD DRUG TESTING PROGRAM**

### **1. WHAT IS THE AIR NATIONAL GUARD'S POLICY ON DRUG ABUSE?**

The policy on drug abuse is to maintain standards of behavior, performance, and discipline necessary for mission accomplishment. The illegal or improper use of drugs by Air National Guard members can seriously damage physical and mental health, jeopardize an individual's safety, the safety of others, and mission requirements. Drug abuse is incompatible with the Air National Guard standards of conduct. The Air National Guard is responsible for helping to prevent drug abuse among its members, and for identifying, for disciplining, and separating those who promote the illegal or improper use of drugs. A positive result from urinalysis testing is considered evidence of drug abuse.

### **2. HOW ARE THE SPECIMENS TESTED?**

The testing of specimens is very scientific and there are many terms and procedures a layperson may not be familiar with. Briefly, testing is very accurate and a test is rated as positive at a level that will leave no doubt the individual has ingested drugs.

Urine samples sent to the Air Force Drug Testing Laboratory are tested a minimum of three times before they are declared positive. The first test administered on a portion of the urine is called a screening test. If the screening test is negative, no further testing is conducted. If that test is positive a second test is performed. The second test is called a re-screen test. If the second test is negative, no further testing is done. If it is positive, a third portion of urine is tested using a third test. The third test is called the confirmation test. It is a highly sensitive, state-of-the-art test and looks for evidence of a specific drug. If the confirmation test is negative, the entire urine sample is considered negative. If it is positive, the base where the sample came from is notified of a positive drug test.

Listed below are the drugs tested for, the screen/re-screen cut-off levels, and the confirmation cut-off levels:

<b>DRUG</b>	<b>SCREEN/RE-SCREEN CUT-OFF</b>	<b>CONFIRMATION CUT-OFF</b>
Marijuana	50 ng/ml	15 ng/mL
Opiates	2000 ng/mL	Codeine 2000 ng/mL Morphine 4000 ng/mL Heroin 10 ng/mL
Cocaine	150 ng/mL	100 ng/mL
Amphetamine	500 ng/mL	500 ng/mL
Methamphetamine	500 ng/mL	500 ng/mL
Amphetamine Analogs	500 ng/mL	500 ng/mL
Barbiturates	200 ng/mL	200 ng/mL
LSD	0.5 ng/mL	0.2 ng/mL
PCP	25 ng/mL	25 ng/mL

### **3. DO MEMBERS WHO TEST POSITIVE HAVE THE OPTION OF BEING RETESTED?**

All positive urine sample bottles with the remaining urine are maintained at the Drug Testing Laboratory and are available for re-testing at the member's expense.

#### **4. ARE THERE ANY LEGITIMATE REASONS FOR A MEMBER NOT TO TAKE A TEST?**

NO. People will resist testing for a variety of reasons; however, all members in the military pay status who report for duty and are ordered to test must test. Members who are using prescribed medication must inform the DTPAM prior to testing. However, the drug tests at the Drug Testing Laboratory are very specific. They do show positive unless the drug they are looking for is present in the urine.

#### **5. WHAT IS THE ANG'S ROLE IN DRUG REHABILITATION?**

Neither the National Guard Bureau nor the States have the resources to maintain drug rehabilitation. Members who test positive should be offered a counseling session with the Military Equal Opportunity (formerly Social Actions) Office. This counseling session will be for referral to a rehabilitation program in the local community.

#### **6. CAN A MEMBER ALTER THEIR TEST RESULT?**

The answer to this question is no, so long as the observer diligently performs his duties and maintains a positive line of sight on the urine bottle at all times.

There is nothing an individual can consume prior to a test that will mask the presence of a drug. The tests are very specific and look for evidence of the drug. The presence of some other substance will not alter the tests. If a member is taking a prescription drug, the prescription drug will not be a factor unless it contains one of the drugs the Drug Testing Laboratory is looking for.

#### **7. WHAT IS THE AUTHORITY FOR MY ADMINISTRATIVE DISCHARGE IF I TEST POSITIVE.**

The authority for separation is AFI 36-3209. Commanders must initiate involuntary discharge action against a member who wrongfully uses an illegal drug. The only exception would be if the commander requests and receives a waiver from a higher authority.

#### **8. HOW CAN I ENSURE THAT MY URINE SAMPLE IS WITHOUT A DOUBT MINE AND NOT MIXED UP WITH SOMEONE ELSE?**

If the proper testing procedures are followed a mix-up should never occur. When you provide your sample pay particular attention to the actions of the DTPAM. Check to make sure that the information on the ledger and on your sample bottle is the same. Do not let the bottle out of your sight until the tamper-resistant tape is placed on it and you initial the label on the bottle.

#### **9. WHAT TYPE OF ADMINISTRATIVE OPTIONS DOES THE COMMANDER/SUPERVISOR HAVE WHEN A TECHNICIAN TESTS POSITIVE FOR AN ILLEGAL DRUG?**

Although the Drug Testing Program is strictly a military program, the testing program has a potential impact on ANG members who are full-time civilian employees of the ANG. Like traditional members, a full-time member who tests positive for an illegal drug will be processed for discharge. Once a full-time member loses military status, they will be terminated within 30 days. The full-time employment is conditioned on continued military status.

#### **10. CAN A COMMANDER TEST AN ENTIRE SQUADRON OR SECTION?**

Commanders have the authority to order an inspection of an entire unit or part of a unit at anytime. Ordering a unit wide drug test is a type of inspection done for the health and welfare of the unit.

## **11. CAN A COMMANDER REQUIRE A SPECIFIC INDIVIDUAL TO TEST?**

If there is probable cause or a reasonable suspicion that a member is using illegal drugs, the commander can order that the member provide a urine sample for testing. If there is probable cause (reasonable belief the member is using drugs) the commander will order the test based upon the commander's authority to order a search and seizure of the member's urine. If the commander has a reasonable suspicion, the commander will command direct the member to provide a sample for testing. A commander who wishes to order a member to provide a urine sample for testing will coordinate with the SJA prior to issuing this order.

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# Consent Urinalysis

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Updated by Capt. Kelly Adams, October 2010

**AUTHORITY:** Military Rule of Evidence 314(e); AFI 44-120, *Drug Abuse Testing Program* (1 Nov 99); DoD Directive 1010.1 (9 Dec 94, incorporating change 11 Jan 99); and applicable state law.

## INTRODUCTION

The authorized methods for selecting a member to provide a urine sample for drug testing are as follows:<sup>1</sup>

1. Inspection, either by random selection or as a unit sweep for health and safety reasons.
2. A search and seizure based upon probable cause.
3. A command directed urinalysis.
4. A member consents to provide a urine sample for testing.

To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, it is not required to prove such knowledge to establish a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not voluntary consent.

In other words, in order for a consent to provide a urine sample for testing to be valid, the member must be doing so, not because he thinks he will be ordered to do so whether he agrees or not, but because he genuinely wishes to consent. Further, consent means the member has not been threatened or forced to cooperate.

## WHEN TO SEEK CONSENT

Although you may have a valid reasonable suspicion (command directed) or even probable cause to obtain a urine sample for testing, it is always prudent to seek the member's consent. Reasonable suspicion or probable cause may be challenged, but if properly obtained, it is very difficult to defeat the validity of a consent search.

## WHY OBTAIN CONSENT

By obtaining consent, the results may be used for disciplinary or administrative actions, including a possible UCMJ action and adverse characterization of administrative discharges. This provides the commander with a full range of options if the drug tests results return as positive.

## HOW TO OBTAIN CONSENT

**Always** consult your SJA before attempting to get consent from a member. Only commanders or authorized security police (OSI) personnel should seek consent. Consent must be voluntary and the circumstances and atmosphere in which it is obtained must be conducive to voluntariness. The member should not be intimidated, threatened or coerced. If challenged in a judicial or administrative proceeding, the government has the burden of proving the consent was voluntary.

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<sup>1</sup> Note: A urine specimen collected as part of a patient's routine or emergency medical treatment, including routine physical examinations, may be subjected to urinalysis drug testing. Specimens from an exam for a valid medical purpose may be used for any lawful purpose. However, drug testing is incident to the medical treatment. Medical treatment may not be used as subterfuge to collect a urine sample for the specific purpose of drug testing.

The following suggestions are provided to ensure the consent is obtained voluntarily:

1. Request the member's consent in your office. Avoid the member's embarrassment or peer pressure to say yes or no by seeking the consent in front of other unit members.
2. Seek consent from the member in the presence of at least one witness. If the member is an officer, the witness should be an officer. If the member is enlisted, the witness should be your First Sergeant or an NCO of higher rank than the member.
3. Explain to the member your reason for requesting the consent to search. **Do not** tell the member that you will obtain the urine sample whether the member consents or not. This will affect the voluntariness of the consent. Of course, if the member does refuse, you will either order a command directed test or a probable cause test.
4. You are not required to advise the member of the right to consult with counsel before deciding whether to consent. However, evidence that a member was read these rights may be used to help demonstrate that consent was truly voluntary.
5. Do not keep the member in your office for an unreasonable length of time while trying to obtain the consent. Ten minutes should be all the time that is necessary to explain why you are seeking consent. This time limit is not absolute. Circumstances may cause it to vary. The more time you spend in your office seeking to obtain consent, the greater the potential for a successful claim that the consent was involuntary.
6. If the member refuses to give consent, do not ask again.
7. If the member says yes, give the member a written consent form to read and sign. An oral consent is valid, however, it is always better to get it in writing. You and the witness should sign it in the presence of the member. Attachment 1 to this topic is a sample form which incorporates the necessary provisions to best ensure a valid voluntary consent. If the test is positive, the written consent can be used as evidence if the member later claims the consent was involuntary.
8. Keep the original consent form in a secure place and provide a copy to the member.
9. After the member has consented, the member should be escorted to the medical facility to provide the urine sample. There should be no delay in testing. Previous arrangements should have been made with the medical facility.

***KWIK-NOTE: Never seek consent from a member to take a urinalysis test without first consulting with your SJA. Review state law for any special requirements to obtain valid consent of a member to take a urinalysis test.***

**RELATED TOPICS:**

**SECTION**

Command Directed Urinalysis	10-9
Commander's One-on-One Meeting with Member – Precautions	16-5
Driving While Intoxicated and Other Offenses Involving Intoxication	8-17
Drug Abuse	10-4
Drug Abuse – Administrative Discharge Policy	10-6
Evidence – Differing Standards and Burdens of Proof	8-4
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Urinalysis Program	10-7

## CONSENT TO PROVIDE URINALYSIS SAMPLE FOR TESTING

I (name, rank, SSN, unit) have been asked by my Commander to voluntarily consent to provide a sample of my urine to be tested for the presence of illegal drugs.

I have been told by my Commander and I understand that I cannot be nor have I been required, ordered, directed, compelled, coerced, forced, or unduly influenced to voluntarily consent to provide this sample, nor can there be any adverse consequences of any kind to me for refusing to voluntarily consent to provide a sample of my urine.

I also state that I have never been offered or promised, nor will I receive any rewards, favors, compensation, benefits, or special consideration to induce me to voluntarily consent to provide a urine sample, whether or not my test results are positive for illegal drugs.

I understand that if I voluntarily consent to provide a urine sample and the results of the test of that sample are positive for illegal drugs:

1. I will be immediately processed for administrative discharge from the Air National Guard and as a Reserve of the Air Force;
2. The character of the discharge recommended may be Under Other than Honorable Conditions (UOTHC);
3. Whatever rights I may have to an administrative discharge board are independent of my consent to provide the sample;
4. My consent to provide the sample does not relieve the government of proving its case against me in the administrative discharge proceeding;
5. If I am discharged it will be because of illegal drug use;
6. After discharge I will probably not be permitted to re-enter the military service in any component or service; and
7. If I receive a UOTHC discharge, I may not be entitled to certain benefits from the Veterans Administration or otherwise that I might have been entitled to had I received a higher character of discharge.

I further understand that the effects of a positive test result if my sample is given on consent are the same as if I provided the sample as a result of random selection, a group health and safety inspection, if the Commander had probable cause to believe I had illegally used drugs, or as part of a routine medical examination or emergency medical treatment.

I have read and understand this statement, and I have had ample time to consider my decision to consent to provide a sample for testing for illegal drugs. I hereby voluntarily consent to provide a sample of my urine for testing for the presence of illegal drugs.

\_\_\_\_\_  
Member's Name (Printed)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Commander (Printed)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness (Printed)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

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# Command Directed Urinalysis

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**Updated by Capt. Kelly Adams, October 2010**

**AUTHORITY:** AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (1 Jan 01); AFI 44-120, *Drug Abuse Testing Program* (1 Nov 99); DoD Directive 1010.1 (9 Dec 94, incorporating change 11 Jan 99); applicable state law; and Black's Law Dictionary.

## INTRODUCTION

While the subject of this topic is also mentioned in the topic in this Deskbook entitled "URINALYSIS PROGRAM," its uses and potential for abuse are of sufficient importance to warrant its own separate topic.

Before command directing a urinalysis test, you should consider two questions. Can you do it? Should you do it? The authority to command direct a test is a powerful tool. It should NEVER be exercised without prior consultation with your Staff Judge Advocate.

## CAN YOU DO IT?

Commanders (and ONLY COMMANDERS – not staff officers regardless of rank, and not First Sergeants or other Supervisors) have the authority to direct members of their command to provide a urine sample for urinalysis testing when they have a REASONABLE SUSPICION of the member's drug abuse.

"Reasonable Suspicion" has been defined to be an ordinary or rational belief or opinion based upon facts or circumstances which amount to only slight evidence or no real proof. It is LESS evidence than "probable cause."

"Reasonable Suspicion" may be substantiated by the member's display of aberrant, bizarre, unusual or unlawful behavior which leads the Commander to suspect that the member is illegally using drugs. Such behavior may include unauthorized absences, violations of safety requirements, disobedience of orders or regulations, apprehension or investigation for drug offenses or intoxicated driving, involvement in crimes of violence or other incidents involving repeated or serious breaches of discipline. This list is not all-inclusive. You should consider your past direct or indirect knowledge of the member. Under appropriate circumstances the member's current behavior may provide you with reasonable suspicion of illegal drug usage if you reasonably conclude "something just isn't right" with the member's behavior.

## SHOULD YOU DO IT?

Before addressing this question, a commander should know the consequences of a command directed test.

## CHARACTER OF DISCHARGE

If a member's command directed urinalysis is positive, administrative discharge action should be initiated. The characterization of a discharge based solely on positive results from a command directed urinalysis MUST BE HONORABLE.

## DISCIPLINARY ACTION

Command directed test results cannot be used to take disciplinary action, such as a court-martial or non-judicial punishment, against the member. Nevertheless, even though the results may not be used in a disciplinary action or to characterize a discharge in a separation action, the results may be used in any proceeding to impeach or rebut evidence of drug abuse or lack of drug abuse when such information is first introduced by the member.

## **REFUSALS**

You cannot force a member to provide a urine sample. If a member refuses to provide a urine sample after receiving a valid order to do so, the member is subject to discharge in accordance with AFI 36-3209. The basis for the discharge is serious misconduct resulting from failure to obey a lawful order.

## **ALTERNATIVES TO COMMAND DIRECTED TESTS**

As stated previously, the commander has the power to command direct a test. However, the commander should consider other alternatives since positive test results from command directed test preclude disciplinary action based on the results and mandate honorable discharges if the positive result is the only basis for discharge. The best alternative is to ask the member to consent to a urinalysis. Assuming the consent is valid (*i.e.*, truly voluntary), the test results may be used for disciplinary action and to characterize a discharge. (A sample consent form is attached to the section in this chapter entitled CONSENT URINALYSIS.) Prior to asking a member to consent to a urinalysis, you should consult your Staff Judge Advocate to determine whether there are adequate grounds for a “probable cause” urinalysis. That way, if the member refuses to consent to a urinalysis, you may proceed using a search authorization (warrant) for a urinalysis. If the member has refused to consent and there is insufficient evidence to support probable cause, then a command directed test is appropriate.

## **DOCUMENT “REASONABLE SUSPICION”**

If, after considering other alternatives, the commander decides to command-direct a urinalysis, he or she should obtain statements (sworn and in writing) and any other available evidence that form the basis for the commander’s determination of reasonable suspicion of drug use. Prepare a memorandum, with the advice of the SJA, showing how this evidence provided the required reasonable suspicion. The memo may be needed later if there is a challenge about whether the test was lawfully ordered.

## **DO THE TEST AS SOON AS POSSIBLE**

If the member is not on base, you must order the member to military status in order to command direct the urine sample. Your state law should give you authority over members of your unit at all times. Do not delay because the information that provided the reasonable suspicion may grow stale and the chances of a positive test may degrade. You may need to make special arrangements with the Medical Urine Testing Program Monitor to conduct the test since it is not taking place during the regular monthly testing time.

## **SUGGESTED STEPS TO FOLLOW**

Listed below are 4 steps that a commander should follow to remove a member who is using illegal drugs. These steps if followed, should provide the best options, given the facts, for removal of a member in the shortest possible time and with an appropriate characterization of discharge.

1. If there is sufficient evidence of drug abuse (misconduct) without obtaining a urine test, then there is no need to do a test. If you decide that a test is necessary, consider steps 2-4.
2. Obtain the members consent to provide a urine sample. Do this even if you have a reasonable suspicion or probable cause.
3. If the member will not consent and you have probable cause, prepare an AF Form 1176 and order the test.
4. If no consent or probable cause but you have a reasonable suspicion, then command direct the drug test.

## ISSUES TO CONSIDER

1. If a commander does not have a reasonable suspicion or probable cause, do not request a member's consent. If the member refuses you have no alternative and it could adversely impact your authority.
2. Any time an individual is ordered to provide a sample and the member refuses, process the member for discharge for misconduct (failure to obey a lawful order).
3. When you contemplate asking a member to consent to a drug test review the material in this Deskbook entitled "CONSENT URINALYSIS." **Always** consult your SJA.
4. Anytime you consider obtaining a urine sample using any of the methods discussed herein, consult your SJA and review the Deskbook section "URINALYSIS PROGRAM."

***KWIK-NOTE:*** *Command directed urinalysis test should in most, if not all cases, be the Commander's LAST OPTION among methods of selection of members for urinalysis testing.*

## RELATED TOPICS:

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# Chapter 11, Duty Status Matters

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## Active Duty – Air National Guard Members

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Updated by Lt Col Jennifer Conwell, Sep 2007

AUTHORITY: 10 U.S.C. 12301, 12302, 12303, 12304; DoD Directive 215.13, *Reserve Component Member Participation Policy* (14 Dec 95, C1, 8 Jul 98); AFI 36-2002, *Regular Air Force and Special Category Accessions* (7 Apr 99); AFI 36-2116, *Extended Active Duty for Reserve Component Officers* (1 Nov 97); AFI 36-2008, *Voluntary Extended Active Duty (EAD) for Air Reserve Commissioned Officers* (5 Nov 02); OpJAGAF 1970/58, *Air National Guard* (31 Mar 70) and 1970/103, *voluntary Call to Active Duty – Failure to Participate Satisfactorily* (9 Jul 70).

### TYPES OF ACTIVE DUTY

Air National Guard members may be placed on active duty under Title 10 of the United States Code in a number of ways including, but not limited to

1. Voluntarily with consent of the member and the governor under 10 U.S.C. 12301(d). Members continue to count against Reserve Component end strength;
2. Voluntarily as Extended Active Duty (EAD) and members count against active duty Air Force end strength;
3. Involuntarily by Presidential Reserve Call-up (10 U.S.C. 12304), Partial Mobilization (10 U.S.C. 12302), or Full Mobilization (10 U.S.C. 12301(a)); and
4. Involuntarily by the President for members who are not assigned to or participating satisfactorily in, a unit of the ready reserve and who have not fulfilled their statutory reserve obligation and have not served on active duty for a total of 24 months. (10 U.S.C. 12303)

### VOLUNTARY – WITH CONSENT OF MEMBER AND GOVERNOR

10 U.S.C. 12301(d) authorizes the Secretary of the Air Force (or designated authority) to order an Air National Guard member to active duty with the consent of the member and the governor, or to order a member retained on active duty, with the consent of the member. Training in a Title 10 status usually consists of an OCONUS deployment. Members who perform training tours at active duty bases in the CONUS do so in state status pursuant to Title 32.

Some ANG members may be called to voluntary Title 10 CONUS duty upon the occurrence of an air sovereignty event. The 1<sup>st</sup> Air Force has a system of instantaneous recall that requires guardsmen to maintain signed volunteer statements for activation in the event of an air sovereignty event. The Governors of the states with such 1AF units also sign MOAs granting activation consent for air sovereignty events. During a declared event, effected guardsmen (mainly pilots and some ground personnel) go from Title 32 to Title 10 status under a 10 U.S.C. 12301(d) recall. At the termination of the event they revert back to Title 32 status automatically.

ANG members ordered to active duty under 10 U.S.C. 12301(d) retain their ANG affiliation and continue to count against Reserve Component end strength.

### VOLUNTARY - EAD

Officers and enlisted ANG members may also voluntarily apply for an Extended Active Duty (EAD) tour under 10 U.S.C. 10211 and 10 U.S.C. 10305. Officers applying for EAD must meet the criteria set out in AFI 36-2116, which requires, among other things, meeting PME and physical qualification standards, five years of federal commissioned service and at least three years of Guard service immediately before selection. Enlisted personnel are selected for a four-year EAD tour, which may be amended as necessary, under the application standards of AFI 36-2002 and return to the ARC upon being released from the EAD. Officers applying for voluntary EAD must meet the criteria of AFI 36-2008 and lengths of tours vary.

For enlisted personnel, if the reason for the early release from an active duty or EAD tour is misconduct which supports a ground for discharge from the Air National Guard under Air National Guard regulations, the member can be discharged from the Air National Guard, by the Air National Guard.

Under this procedure the active duty component would release the member back to the state with documentation supporting the reasons for the early release from the active duty or EAD tour. The state would then determine whether discharge from the Air National Guard is appropriate.

Officers on EAD may be administratively discharged by the active duty component under AFI 36-3206.

Federal technicians who accept an active duty or EAD tour have the right upon release from an active duty or EAD tour (subject to time limitations) to return to their federal technician job. If the early release from an active duty or EAD tour supports a ground for discharge from the Air National Guard, the federal technician must still be re-employed although the technician employment will end when the administrative discharge action is completed since membership in the National Guard is a condition of employment as a federal technician.

## **INVOLUNTARY – PRESIDENTIAL RESERVE CALL-UP, PARTIAL MOBILIZATION AND FULL MOBILIZATION**

**Presidential Reserve Call-up.** 10 U.S.C. 12304 permits the President to authorize the involuntary activation of members of the Selected Reserve (including the ANG) and the Individual Ready Reserve (IRR) for a period not to exceed 270 days. Under this authority, up to 200,000 members of the Selected Reserve and the IRR may serve on active duty at any one time. The President may activate reservists under this provision of the law without approval from Congress; however, he is required to notify Congress within 24 hours of such an action. This authority has been used to mobilize reservists during the earlier part of the Persian Gulf War (1990-1991), during the intervention in Haiti (1994-1996), during the Bosnian peacekeeping mission (1995-2004) and during the low intensity conflict with Iraq (1998-2003).

**Partial Mobilization.** In time of national emergency declared by the President, 10 U.S.C. 12302 permits the Service Secretaries to authorize the involuntary activation of members of the Ready Reserve under his jurisdiction for a period not to exceed 24 consecutive months. Up to 1 million members of the Ready Reserve may serve on active duty at any one time under this provision of law. Although reservists may be mobilized under this provision of law without approval from Congress, the Secretary of Defense is required to make annual reports to the House and Senate Armed Services Committees on the policies and procedures used to implement this authority. This authority was used to mobilize reservists during the later part of the Persian Gulf War (1991) when the PRC authority was no longer sufficient to activate the number of reservists needed. President George W. Bush invoked this authority in the aftermath of the September 11, 2001, terrorist attacks; this authority has been used to mobilize reservists for Operations Noble Eagle, Enduring Freedom and Iraqi Freedom.

**Full Mobilization.** In time of war or national emergency declared by Congress, 10 U.S.C. 12301(a) permits the Service Secretaries to authorize involuntary activation of any member of the reserve components under his jurisdiction. There is no limit on the number of reservists which may be ordered to active duty under this provision and reservists may be kept on active duty for the duration of the war or emergency plus six months.

## **INVOLUNTARY – FAILURE TO SATISFACTORILY PARTICIPATE**

"Satisfactory participation" means attendance and satisfactory performance of assigned duties at the required 48 UTA and 15 days of annual training. A Guard member cannot be classified as an "unsatisfactory participant" for purpose of 10 U.S.C. 12303 and be called to active duty for failure to perform state duty, such as a failure to comply with a state emergency recall.

A member who is ordered to active duty involuntarily under 10 U.S.C 12303 may be required to serve on active duty until the member's total (past and future) service on active duty equals 24 months. If the enlistment or other period of military service would expire before service of the required period, it may be extended until service for the required period is completed. In determining the need to exercise this authority, the law requires that due consideration be given to the member's "family responsibilities," the length and nature of previous service, and if relevant, employment necessary to maintain the national health, safety or interest.

## **UCMJ ISSUES**

While the member is in Title 10 status, the member may be disciplined under the UCMJ for conduct committed in such status.

## **BENEFITS**

While on active duty under Title 10, Air National Guard members are generally entitled to military pay and benefits similar to those enjoyed by members of the regular Air Force. Title 10 status also invokes the protections afforded by the Servicemember's Civil Relief Act.

***KWIK-NOTE: ANG members who volunteer for active duty tours under AFI 36-2116 retain their ANG affiliation, while ANG members who volunteer for EAD tours under AFI 36-2002 or AFI 36-2008 are accessed into the Active Air Force.***

## **RELATED TOPICS:**

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## State Active Duty

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Updated by Lt Col Jennifer Conwell, Sep 2007

**AUTHORITY:** United States Code, Title 32; ANGI 36-2001, *Management of Training and Operational Support Within the Air National Guard* (15 Jan 97); ANGI 36-101, *The Active Guard/Reserve (AGR) Program* (2 May 02); applicable state law.

### INTRODUCTION

Members of the Air National Guard are part of the state militia. While the unit is organized, armed, and equipped wholly or partly at federal expense and is federally recognized, it remains a state organization under the command and control of state authorities, except when federalized. Training is under the Sixteenth Clause of Section 8, Article I, of the U.S. Constitution and the appointment of officers is under the same authority. Federal benefits are strictly limited to those authorized by statute and regulation.

### DUAL MISSION

Units of the Air National Guard have a dual mission. The first is a federal or state mission to provide units organized, equipped, and trained to function efficiently in the protection of life and property and the preservation of peace, order and public safety under competent orders of federal or state authorities. The second is a federal mission to develop, maintain, and provide the Air Force with operationally ready units to augment the Active Air Force upon mobilization, and support of DoD peacetime operations.

### EFFECTS OF STATE ACTIVE DUTY vs. TITLE 32 DUTY

If the anticipated activity is purely a state function, liability for injury to members is strictly a matter of state law, and there is no protection under the Federal Tort Claims Act. In addition, the state is probably responsible for loss or damage to equipment and may have an obligation to reimburse the federal government for these losses.

While members of the National Guard routinely provide support during natural disasters, these actions are normally a matter of state concern. When the governor orders the National Guard to full-time state active duty, the issues discussed above should be considered. This decision may impose state liability for damage to federal equipment. Members may accrue no federal military pay or retirement benefits and may be unable to attend UTAs while in a full-time state active duty status.

Ordering AGR personnel to state active duty has many problems. These individuals are on full-time status with a specific charter to organize, administer, recruit, instruct or train National Guard members. The Army Judge Advocate General has concluded, based on a change in the language used in the annual National Defense Authorization Act, that there is no longer any authority for AGRs to perform state missions. NGB/JA is preparing a proposed amendment to 10 U.S.C. 12310 to address this problem. You should consult your Staff Judge Advocate regarding the status of this proposed legislation and any proposed use of AGR personnel for state missions.

Before a unit is called to full-time state active duty status, the Commander should review the available options with the Staff Judge Advocate and establish protocols to resolve the anticipated use of National Guard resources to avoid delays and minimize problems in the event the governor orders a unit to state active duty.

***KWIK-NOTE: State active duty is the state equivalent of ANG members being mobilized under Title 10 to federal active duty. You may wish to supplement this topic with state law requirements.***

**RELATED TOPICS:**

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# AGR Program

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Updated by Lt Col Jennifer Conwell, Sep 2007

**AUTHORITY:** ANGI 36-101, *The Active Guard/Reserve (AGR) Program* (3 May 02); 10 U.S.C. 101(d), 12602(b)(2); 32 U.S.C. 101(19), 502(f); 38 U.S.C. 4312; *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991)(superseded by amendment to 38 U.S.C. 4312); applicable state law and regulations.

## STATUTORY BASIS

The Active Guard and Reserve Program was established in the early 1980s with participants then ordered to active duty under Title 10, U.S. Code. In 1984 the Congress redefined AGR status as "Full-time National Guard duty" (FTNGD) in the definitions sections of both Title 10 and Title 32, which read:

“Full-time National Guard duty” means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which a member has waived pay from the United States.

Orders to duty are now pursuant to 32 U.S.C. 502 (f), which is a general authority for training or other duty in a Title 32 status. The above legislation clearly established that AGRs are under the command and control of the respective governor rather than under that of the Army or the Air Force directly. Pay, allowances, benefits and privileges are essentially identical to those of the active component forces except that for purposes of Department of Veterans Affairs (DVA) benefits, a National Guard AGR member is considered in an "active duty for training" status. This status currently excludes such DVA entitlements as a G.I. Bill mortgage, active component educational benefits, National Cemetery burial, or post-AGR medical care that is not directly related to an in-line-of-duty incident. However, AGR benefits and privileges include legal assistance from active duty legal offices of any component, and military medical treatment at all times.

## RE-EMPLOYMENT RIGHTS

Additionally, the post-tour civilian re-employment rights of AGRs are those defined in 38 U.S.C. 4312. Due to problems of statutory interpretation (which even necessitated a U.S. Supreme Court decision) and the lack of uniformity with respect to the time which may be spent away for military service, the U.S. Congress in 1994 undertook to rewrite the Veterans' Re-employment Rights Act, now referred to as the Uniformed Services Employment and Reemployment Rights Act (USERRA)(38 U.S.C. 4301 *et seq.*). The statute now provides explicit limitations and notice requirements, including, in the case of a person whose period in the services was for more than 180 days, the submission of an application for re-employment no later than 90 days after the completion of that period of service. (38 U.S.C. 4312)

## MILITARY JUSTICE JURISDICTION

AGR's are under the jurisdiction of their state Code of Military Justice while in their usual Title 32 duty status. These codes vary widely from state to state. As with any other member of the ANG, that jurisdiction can change to the Uniform Code of Military Justice by changing to Title 10 status for either OCONUS duty, initial training, or active federal service.

## STATUS AND BENEFITS

Since AGRs are not deemed on active duty like a member of the regular Air Force, the federal Serviceman's Civil Relief Act does not apply to them while in Title 32 status.

AGR members are in a duty status at all times unless on leave, similar to active duty members of the Air Force.

All AGRs must have performance evaluations, officers pursuant to AFI 36-2406, and enlisted members in accordance with ANGR 39-62.

AGR grade authorizations are based on the underlying military technician (civil service) grade approved for each position.

Both DoD Standards of Conduct (DoDD 5500.7) and prohibitions against certain political activities (AFI 51-902) apply to AGRs.

AGR members may achieve an active duty retirement by the completion of 20 years of creditable active service. Any active duty or active duty for training may be combined with AGR service in the computation of time toward an active duty retirement. Inactive duty points may not count toward qualifying years of service. Alternatively, for all members each day of AGR service counts as one active duty point toward a reserve component (age 60) retirement.

## TERMINATION

The grounds and procedures for involuntary termination for cause from AGR status are prescribed in ANGI 36-101, paragraph 6.5. Briefly, the termination process commences by a letter of notification, followed by a 5-day period to respond in writing. The state Adjutant General may appoint an investigating officer to investigate and recommend appropriate action. The state Adjutant General is the separation authority. Such action results in the member being converted to "drill" or traditional Guard status. However, they should be considered for discharge. Discharge from the National Guard and/or as a Reserve of the Air Force may thereafter be as prescribed in AFI 36-3209. Separation pay is payable to AGRs who are involuntarily released before the scheduled tour if they meet eligibility requirements outlined in the DoD Financial Management Regulation (see also AFI 36-3207, *Separating Commissioned Officers* (9 Jul 04)).

If an AGR member commits an act which leads to administrative discharge processing, it may, in some cases, be appropriate to accept the member's voluntary resignation from the AGR program, and continue with the action to discharge the member from the Guard.

***KWIK-NOTE: While AGRs have nearly the same pay allowances, benefits and privileges of active duty personnel, they are in state status (Title 32), and hence governed by the same statutes and regulations as traditional Guard members.***

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## **Enforceability of Orders by Air Force Officers to ANG Personnel Not in Federal Service**

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**Updated by Lt Col Jennifer Conwell, Sep 2007**

**AUTHORITY:** 32 U.S.C. 325; OpJAGAF 1983/99, Enforceability of Orders by AF Officers to ANG Personnel Not in Federal Service (12 Dec 83); OpJAGAF 997/139, Command of Guard and Active Duty Units (11 Dec 97); OpJAGAF 1999/61, Command of Guard and Active Duty Units (18 Aug 99); AFI 51-604, *Appointment to and Assumption of Command* (4 Apr 06).

### **STATUS OF ANG MEMBER**

The question sometimes arises as to whether an active duty Air Force officer may give an enforceable order to a member of the Air National Guard. The answer depends in large part on the status of the Air National Guard member.

National Guard personnel may perform duty in three basic statuses:

1. State Active Duty - Ordered by the Governor under the authority of state law and paid for by the state. This form of duty is used primarily for state emergencies;
2. Federally-funded state training duty - Ordered by the Governor under the authority of federal law (Title 32, United States Code) and paid for with federal funds. This is the form of duty used for weekend drills, annual training, and most schools and assignments within the United States. Most National Guard duty falls into this category; or
3. Federal duty - Ordered by the President or the Secretary of the Air Force under the authority of federal law (Title 10, United States Code) and paid for with federal funds. This form of duty is used for basic military training, overseas training missions, as well as when the Guard is called or ordered to active duty (mobilized) by the U.S. Government.

### **ACTIVE STATE DUTY AND TITLE 10 DUTY**

The situation is relatively clear with regard to state active duty and federal duty. It is unlikely that an active duty officer would have contact with a National Guard member performing state active duty, and it is clear that the orders of an active duty officer would not be enforceable unless that officer were performing some state function clearly defined in the state Military Code. On the other hand, it is clear that the orders of an Air Force officer are enforceable against a member of the National Guard performing federal (Title 10) duty when the member is subject to the federal Uniform Code of Military Justice (UCMJ). An ANG officer may not command regular active duty Air Force organizations unless on EAD.

### **TITLE 32 DUTY**

The problem area is federally-funded state training duty. Guard members in this status often have contact with active duty officers. In general, the orders of active duty officers to ANG members in this status are not enforceable by court-martial because ANG members are not subject to the UCMJ. This means that an ANG member may not be court-martialed under the UCMJ if an Air Force officer gives the ANG member an order to, for example, get a haircut, and the ANG member refuses.

### **ALTERNATIVE ACTIONS OF AIR FORCE OFFICERS**

Even though the orders of active Air Force officers to ANG members who are not in federal service are not enforceable by court-martial under the UCMJ, the member may still be subject to administrative action.

1. If the ANG member is in training on an active duty installation (attending a school, for example), the member can be released from the training and sent home by the Air Force.
2. An Air Force Installation Commander can bar the ANG member from the installation. In an extreme case, if the ANG member trains at the base, the individual may ultimately have to be discharged from the ANG for nonperformance of duties.
3. The active Air Force authorities may call the member's ANG unit Commander who may issue the same order, which could then be enforced under the state Code of Military Justice.
4. In addition, the underlying conduct (for example, disobedience of a federal officer or refusal to get a haircut) may be a violation of state law or regulations, and the member may be subject to disciplinary action under the state Code of Military Justice.

## **POLICY**

ANG policy requires maximum cooperation with active Air Force authorities. When an ANG Commander learns that a member of the command has run afoul of Air Force authority, the ANG Commander should take prompt positive action to resolve the situation. The ANG should not be viewed by the Air Force as a "safe-haven" for wrongdoers.

## **EXCEPTION: DUAL STATUS COMMANDERS**

32 U.S.C. 325 was amended in 2004 to allow for dual status commanders. The statute allows a National Guard commander to retain his state commission after ordered to active duty under Title 10. Command authority is thereafter exercised in a mutually exclusive manner – the commander only wears one hat at a time. The statute requires both Presidential authorization and the Governor's consent of the dual status for the commander. The benefit of this construct is it allows a Guard commander familiar with both State and Local area of operations to serve in both a state and federal status to provide unity of command for federal and state chains of command. This construct has been used for limited duration domestic operations such as the G8 Summit and the Democratic and Republican National Committee Meetings.

## **CONCLUSION**

The authority of active duty officers over ANG members involves complex questions of status and command. Questions in this area should always be referred to your Staff Judge Advocate.

***KWIK-NOTE: Air Force officers may not directly enforce their orders to ANG personnel in Title 32 status.***

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## Relationship with Other Military Components

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Reviewed by Lt Col Jennifer Conwell, Sep 2007

**AUTHORITY:** Applicable state laws and regulations; applicable Status of Forces Agreements (SOFAs); applicable local agreements.

### INTRODUCTION

Guard members frequently find themselves having to deal with other military components. These can include the Army Guard, various Reserve units, active duty forces or forces of foreign countries. Our installations are frequently co-located with other military components. School attendees, AGR members and remote detachments often come in contact with the active duty establishment. Deployment can place Guard members almost anywhere and with any type of forces.

### COMMUNICATE WITH HOST BASE

The key for Commanders in facing these varied situations is communication, early and often. In the early stages of planning a deployment in the United States or overseas, advance coordination with the host unit Commander is essential. One of the most frequently encountered issues will be what happens when one of the deploying Guard members runs afoul of the law, either on or off base. If the Guard member will be under Title 32 orders, there is no UCMJ jurisdiction. An effort should be made in advance to apprise the host unit Commander that the member's Guard unit is responsible for discipline of the member rather than the host unit. Understanding will be facilitated if the host unit is made aware of what type of discipline is authorized and can be imposed by the deploying unit. This understanding can be reflected in an exchange of letters between Commanders, or a Memorandum of Understanding (MOU), but should be in writing for later reference. If the deployment is overseas, the member will be on Title 10 orders and there will be UCMJ jurisdiction. However, under a state's Code of Military Justice, the state may also have jurisdiction. An MOU may also be appropriate in these situations, although even if one is entered into, your advice to your members that they are "subject to" the UCMJ is often an effective deterrent. Also, the appropriate SOFA should be consulted in these situations.

Other issues that arise when dealing with other components involve processing of line of duty (LOD) determinations and imposition of administrative quality force management actions. AFI 36-2910 should be consulted for LOD matters. In quality force management actions, it is important to remember that a member of the ANG on active duty, who has not been accessed into the end strength of the Active Air Force, remains subject to ANG regulations for purposes of discharge from Reserve of the Air Force status. Typical situations are basic military training and statutory tours where the member remains affiliated with the ANG (*i.e.* is counted against ANG end strength). The Active Air Force may release such a member from active duty and return the member to the jurisdiction of the state, which may then initiate appropriate action to discharge the member under ANG regulations.

In the situation of units of different military components being co-located, or in close proximity to each other where the members of each unit frequent each installation, Commanders of the co-located or proximate units should negotiate and sign a Memorandum of Understanding (MOU). This MOU should deal with all issues the respective Commanders deem appropriate, including handling disciplinary problems occurring on one unit's (part of the) base by the other unit's members. Again, the key is the opening and maintaining of active communications between the unit Commanders. Should the Commander have any questions regarding these matters, the Judge Advocate should be consulted.

## **FOLLOW-THROUGH ON DISCIPLINE**

One last bit of advice: If one of your members has committed an act on the other unit Commander's territory for which you would take disciplinary action if it were done on your base, follow through on your end when you get the member back under your control, and write to that other Commander to advise what action you took. The surest way to eliminate the future effectiveness of a previously signed MOU or similar agreement discussed above, and to damage the reputation of your ANG unit, is to allow the other component to think your unit or base is a "safe haven" for your members, and that nothing will be done. Be sensitive to this, and you will better ensure smooth, ongoing relationships with other military components in subsequent activities involving your unit members, both on or near your installation and at deployment sites.

***KWIK-NOTE: Letters, MOUs and other protocols should be exchanged between Commanders each time an ANG unit member leaves home station or when ANG units are co-located on an installation with or near another military component.***

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# Status of National Guard Members

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**Updated by Lt Col Jennifer Conwell, Sep 2007**

**AUTHORITY:** Title 32, United States Code; *Tennessee v. Dunlap*, 426 U.S. 312 (1976); AFI 33-328, *Administrative Orders* (16 Jan 2007); AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 Oct 2003); ANGI 36-2001, *Management of Training and Operational Support Within the Air National Guard* (15 Jan 97).

## **INTRODUCTION**

One of the most important issues in determining the power of the Commander to command the members of a National Guard Unit is a determination of the status of its members. The status of National Guard members determines jurisdiction for administrative and criminal matters as well as medical benefits in the event of injury or liability in the event of the loss of government property.

Members of the Air National Guard are part of the State militia. While the unit is organized, armed, and equipped wholly or partly at federal expense and is federally recognized, it remains a State organization under the command and control of state authorities, except when federalized. Training is under the Sixteenth Clause of Section 8, Article I, of the Constitution and the appointment of officers is under the same authority. Federal benefits are strictly limited to those authorized by statute and regulation.

## **TYPES OF STATUS**

As a result of this constitutional charter, members of the National Guard serve their state and their country in a number of different roles. Depending on their "status" while performing those roles, their rights, obligations and responsibilities will vary. The three basic "status" options for a member of the National Guard are the following:

1. State Active Duty under state law;
2. Active federal service under Title 10 U.S.C.; and
3. Inactive Duty Training or Full-Time National Guard duty (FTNGD) under Title 32 U.S.C.

## **STATE ACTIVE DUTY**

When evaluating various options for using National Guard assets, Commanders should use state active duty if the anticipated activity is purely a state function. Under state active duty, injury to members is strictly subject to any benefits provided under state law. The state may be responsible for loss or damage to equipment and may have an obligation to reimburse the federal government for these losses. Members may accrue no federal military pay or retirement benefits and may be unable to attend UTAs while in state active duty status.

## **ACTIVE FEDERAL SERVICE**

If the mission of the unit is "active federal service" under Title 10, the members have all the protections of being on active duty as well as all of the responsibilities of an active duty airman. They are subject to the Uniform Code of Military Justice (UCMJ) and may be punished under its rules. They may or may not be subject to various statutory ethics prohibitions and they have certain re-employment rights and are covered by the Uniformed Services Employment and Reemployment Rights Act and the Servicemember's Civil Relief Act. When a mission is being performed outside the

United States, for example, members of the unit must have orders stating they are performing duty under Title 10 and they are subject to the UCMJ. In fact, a member may be subject to both the UCMJ and State law. Commanders should review these questions with their Staff Judge Advocate to ensure a full understanding of this matter.

## **INACTIVE DUTY TRAINING AND FULL-TIME NATIONAL GUARD DUTY**

When the duty of members is under Title 32, the members generally have the same rights and benefits as members serving on active federal service under Title 10 for a like period of time, with the exception that Title 32 members are not covered by the Servicemember's Civil Relief Act and Title 32 AGRs are considered for purposes of VA benefits to be performing active duty for training rather than active duty. It is this middle ground "status" that requires special attention to ensure that National Guard members are aware of their rights, benefits and obligations. Members generally perform their inactive duty training (UTA), annual training (AT), schools, split unit training assembly (SUTA), rescheduled unit training assembly (RUTA), equivalent training (EQT), additional flying training period (AFTP), proficiency training (PT), and training preparation and planning assembly (TPPA) under Title 32.

## **DISCIPLINARY ACTIONS**

Many States' military laws and regulations have disciplinary sections that apply to National Guard personnel whether or not they are performing duty at the time a violation of law occurs. For example, if a Guard member commits a civilian offense at a time when not in a duty status, the Commander should determine if that offense warrants taking military action against the member. The rationale of these state laws and regulations is that simply by being a member of the National Guard in that state, the member is subject to that State's military laws at all times. You should check with your Staff Judge Advocate to see if your State's laws cover this situation.

## **AGRs**

AGR personnel are a special problem when called to state active duty. These individuals are on full-time status with a specific charter to organize, administer, recruit, instruct or train National Guard members under Title 32. Using these individuals to also perform state functions is severely limited and placing them on state active duty creates a number of legal issues which should be resolved in advance of such an assignment. (Note: The Army Judge Advocate General has concluded, based on a change in the language used in the annual National Defense Authorization Act, that there is no longer any authority for AGRs to perform state missions. NGB/JA is preparing a proposed amendment to 10 U.S.C. 12310 to address this problem. You should consult your Staff Judge Advocate regarding the status of this proposed legislation.)

Since AGRs perform their duty under Title 32, they are subject to state control. As a result, they are not subject to criminal prosecution under the UCMJ.

## **TITLE 32 STATUS**

As noted above, Commanders should also be alert to jurisdictional issues when National Guard members commit criminal offenses. If a National Guard member is serving under Title 32 and commits a criminal offense, in addition to the member being subject to prosecution by civilian authorities, militarily, the Commander may only punish the member under the state military code. The UCMJ does not apply even if the offense took place on an active duty base. This is because it is the *status of the member, not the location of the offense*, that determines whether the member may be punished under the state code or the UCMJ. If the member is detained by the active duty Security Forces, the Commander should alert the active duty base Commander and explain what action will taken against the member. Any charges under the UCMJ are invalid. The Commander may have limited options to punish the member if the offense is not a violation of State law or regulation. But it is likely that the act for which the National Guard member was detained, if found by the member's Commander to have occurred, will support some kind of disciplinary or adverse administrative action against the member. Many active duty Commanders are not aware of the statutory status of members of the National Guard, and National Guard Commanders should establish operating protocols with the servicing active duty Installation Commander to avoid confusion in the event of an incident.

## **TITLE 10 STATUS**

Note that if a Guard member is on Title 10 status - mobilized, OCONUS training deployment, Basic Military Training, etc. - that member is subject to the UCMJ (including active duty Article 15 nonjudicial punishment, since “an Article 15” is Article 15 of the UCMJ) while in such status, AND, depending on your State Military Code, the member may also be subject to punishment under that State Military Code for that same act. This is called concurrent jurisdiction.

## **UCMJ's APPLICABILITY**

While there is a temptation to attempt to court-martial members under the Uniform Code of Military Justice (UCMJ), unless the member was serving under Title 10 at the time of the offense, the member may not be involuntarily called to full-time duty in the active military service of the United States under Title 10 for a court-martial. While this may frustrate the Commander in the exercise of discipline, it is consistent with the statutory charter of Title 32. As noted earlier, National Guard members generally serve under the authority of Title 32, not Title 10. As a result, they are generally subject to the jurisdiction of the State Military Code.

## **ADCON AND OPCON**

ANG Commanders in Title 32 have no command authority nor UCMJ authority over members deployed in Title 10 status. Similarly, a deployed ANG Commander can no longer command a home station unit. In order to maintain ANG administrative control over ANG personnel, members deploying OCONUS are assigned to the Air National Guard Readiness Center (ANGRC), which establishes detachments for deployments of more than ten personnel and longer than fifteen days. Detachment commanders are appointed under G-series orders and the chain of command runs through the ANGRC. Small deployments without officers will remain assigned directly to the ANGRC. Operational control over the deployed members remains with the theater commander, consistent with the tasking order. However, the ANG, through the ANGRC, will maintain control over such things as military justice, LOD determinations, emergency medical care, and foreign jurisdiction.

## **FEDERAL MAGISTRATE JUDGES**

Where a Guard member on Title 32 status commits an act on exclusive federal land for which there is no prescribed violation of law and punishment under the State's military justice law or regulation (for example, shoplifting in the BX), the Installation Commander has the authority to refer the matter to the United States Magistrate in the district in which the offense was committed for prosecution of the member under federal civilian criminal law. Before an Installation Commander refers such a matter to federal civilian authorities for criminal prosecution, the Staff Judge Advocate will usually be consulted.

## **TECHNICIANS**

The Supreme Court of the United States held in Tennessee v. Dunlap that, since a Technician must be a Guard member as a condition of the technician employment, any valid action terminating the Guard member's/Technician's military status will also result in the loss of Technician employment.

The Related Topics below are subjects in which the status of members must be considered.

***KWIK NOTE: It is imperative that all unit personnel understand the distinctions in status and the effects of those distinctions. This topic should be briefed to all personnel annually, and may be supplemented with applicable state law.***

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# Chapter 12, Environmental Matters

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Reference: AIR FORCE COMMANDER'S GUIDE TO ENVIRONMENTAL QUALITY

# Environmental Law – Criminal Liability of Commanders for Environmental Violations

Updated by Lt. Col Timothy Mullen, September 2009

**AUTHORITY:** U.S. v. Dee ("Aberdeen") 912 F.2d 741 (4th Cir. 1990); (NGB/DE-2 All States Letter, Log Number I89-0369, dated 22 Sep 1989, as guidance); applicable state law; AF Commander's Guide To Environmental Quality; DODI 4715.71, *Environmental Management Systems* (15 April 2009); AFPD 90-8, *Environment, Safety, and Occupational Health* (1 September 2004)..

## RESPONSIBILITIES AND PENALTIES

The installation commander is responsible for compliance with environmental laws that impact his or her particular facility. The installation commander and subordinate commanders have a personal stake in ensuring compliance with environmental laws and regulations within their commands. Violations of environmental laws are increasingly being enforced through criminal sanctions. The federal government and individual State governments have the ability to enforce many environmental laws by bringing criminal charges against individual offenders, including ANG Commanders. Commanders must therefore consider environmental compliance an integral aspect of mission accomplishment.

In the lead case, known as "Aberdeen", three senior civilian Army employees were convicted of violating hazardous waste disposal and pollution discharge laws at the Aberdeen Proving Grounds. They lost their jobs and each paid well over a hundred thousand dollars in defense attorney fees. None of the defendants were accused of actually dumping chemicals. Rather, the violations occurred in departments over which they exercised control.

It is no longer safe to say "I wasn't aware of the problem." Most federal and state jurisdictions have adopted the "responsible corporate officer" basis of criminal liability. Under this legal doctrine, if a commander should reasonably have known that an environmental violation was occurring within his or her command, the commander may be criminally liable, even if he or she had no actual knowledge of the violation. Thus, NEGLIGENT INATTENTION to environmental problems may subject a commander to personal criminal liability. It is particularly important to correct any environmental non-compliance noted in environmental audits, such as the Environmental, Safety, Occupational Health, Compliance Assessment and Management Program (ESOCAMP).

Commanders can reduce their personal exposure for environmental violations through active support of base environmental activities, particularly the Base Environmental Protection Committee and the self-inspections that occur during ESOCAMP actions. Reporting up the chain of command is absolutely critical. Lack of resources or authority is not, by itself, a defense. A commander must effectively communicate an actual or potential violation of environmental laws to his or her superiors, make effective efforts to secure additional funding or, in some cases, shut down the operation or activity that is violating federal criminal laws or endangering human health. Failure to take these steps leaves a commander vulnerable to criminal and civil sanctions. Criminal violations of environmental laws are also chargeable under the UCMJ (for those in Title 10 status), and may delay promotion and reassignment actions during the several years it takes to litigate an environmental case.

***KWIK-NOTE: Train yourself to always consider the impact of the decisions you make on the environment.***

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## Environmental Duties at Base Level

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Updated by Lt. Col Timothy Mullen, September 2009

**AUTHORITY:** AFI 10-2501, *Air Force Emergency Management Program Planning and Operations* (24 Jan 07); AFI 23-502, *Recoverable And Waste Petroleum Products* (15 Aug 08); AFI 32-7001, *Environmental Budgeting* (9 May 94); AFI 32-7002, *Environmental Information Management System* (31 May 94); AFI 32-7006, *Environmental Program In Foreign Countries* (29 Apr 94); AFI 32-7020, *Environmental Restoration Program* (7 Feb 01); AFI 32-7040, *Air Quality Compliance and Resource Management* (27 Aug 07); AFI 32-7041, *Water Quality Compliance* (10 Dec 03); AFI 32-7042, *Waste Management* (21 Apr 09); AFPAM 32-7043, *Hazardous Waste Management Guide* (1 Nov 95); AFI 32-7044, *Storage Tank Compliance* (13 Nov 03); AFI 32-7045 *Environmental Compliance Assessment and Management Program* (1 Jul 98); AFI 32-7047, *Environmental Compliance Tracking and Reporting* (8 Apr 04); AFI 32-7060, *Interagency and Intergovernmental Coordination for Environmental Planning* (25 Mar 94); AFI 32-7062, *Air Force Comprehensive Planning* (1 Oct 97); 32-7063 *Air Installation Compatible Use Zone Program* (13 Sep 05); AFI 32-7064, *Integrated Natural Resources Management* (17 Sep 04); AFI 32-7065, *Cultural Resources Management Program* (1 Jun 04); AFI 32-7066, *Environmental Baseline Surveys In Real Estate Transactions* (25 Apr 94); AFI 32-7080, *Pollution Prevention Program* (12 May 94); AFI 90-801 *Environment, Safety, and Occupational Health Councils* (25 Mar 05); AFPD 32-70, *Environmental Quality* (20 Jul 94); DODI 4000.19, *Interservice and Intragovernment Support* (9 Aug 95); DODI 4001.01 *Installation Support* (10 Jan 08); DODI 4715.71, *Environmental Management Systems* (15 April 2009); 32 CFR Part 989, *Environmental Impact Analysis Process*; Executive Orders 12146 and 13423; various federal environmental statutes; applicable state law and regulations; AF Commander's Guide To Environmental Quality; OpJAGAF 1980/63, *Aircraft Wreckages Are Eligible For Listing in National Register of Historic Places* (2 Jul 80); SAF/MIQ Policy Letter, *Payment of Fines and Penalties Under the Clean Air Act* (20 Sep 96); US Environmental Protection Agency Memorandum On Implementation of EPA's Penalty/Compliance Order Against Federal Agencies Under the Clean Air Act (9 Oct 98); The Yellow Book: EPA Guide To Environmental Enforcement and Compliance At Federal Facilities (issued by EPA Office of Enforcement and Compliance, Federal Facilities Enforcement Office (February, 1999)).

### INTRODUCTION

Environmental law issues are among the most important issues facing today's Air National Guard Commanders. Every Air National Guard installation impacts the environment in numerous ways. As a result, environmental laws and regulations have a daily impact on Air National Guard activities.

### COMMANDER'S DUTIES

The installation commander has a responsibility to plan, initiate and carry out actions in a manner to avoid adverse effects on the quality of human health and the environment. The Commander has the ultimate responsibility, for purposes of criminal and civil violations, for the actions or inactions of every other participant in the base's environmental program.

### BASE ENVIRONMENTAL COORDINATOR

Installation commanders may appoint a Base Environmental Coordinator (BEC) who is responsible for the day-to-day operation of the base environmental compliance program, and who should have all the cited authorities above plus all applicable state and local statutes, regulations, rules and ordinances. Compliance with the federal statutes and regulations is not enough; state and local authorities generally must also be complied with. HQ ANG Personnel has provided authorizations and funding for this position. Any officer who can qualify under the Office of Personnel Management civilian series 819 (environmental engineer) or 1301 (physical scientist) is eligible. It is strongly recommended each Installation Commander appoint the BEC to provide expertise in the high risk, very complex and highly politically charged environmental management area.

## **ENVIRONMENT, SAFETY, AND OCCUPATIONAL HEALTH COUNCIL**

The installation Environment, Safety, and Occupational Health Council (ESOHC), established pursuant to AFI 90-801, is the local body responsible for reviewing all environmental activities conducted at the installation. The installation commander may chair the Committee, or may designate a representative at all ANG installations with more than one unit. The Air Commander chairs the EPC at single unit installations. To conduct an effective base-wide environmental program, the EPC should have major staff representation with decision-making authority from the following offices: Civil Engineering, Comptroller, Personnel, Legal, Logistics, Public Affairs, Safety, Air Surgeon, and Plans and Operations. While the regulations leave the frequency of EPC meetings to the call of the chairperson, most installations find it necessary to have EPC meetings at least on a quarterly basis. Minutes must be taken.

### **GENERATING ACTIVITY**

Must ensure all wastes are properly labeled, characterized, segregated, weighed, stored, packaged and transferred. Will maintain initial accumulation points in accordance with the base hazardous waste management plan. Must notify the environmental management office/function of any changes in hazardous waste activities. Must complete all required disposal documents. Must maintain a hazardous waste file in accordance with AFI 32-7043. Must consult with environmental manager, bioenvironmental engineering, and HAZMAT planning team before any hazardous waste activity is planned or modified.

### **SJA's DUTIES**

The unit Staff Judge Advocate must review installation plans and programs for compliance with all applicable laws, regulations and standards, as well as provide legal guidance to the ESOHC. The Judge Advocate's meeting the responsibilities of the base environmental program is a high priority inspection item.

### **BASE CIVIL ENGINEER'S DUTIES**

The Base Civil Engineer (BCE) must serve as the OPR for all actions related to environmental permits, including collection of monitoring data, and the implementation of corrective action for violations of environmental permits.

### **BASE TRANSPORTATION OFFICER'S DUTIES**

Advises on proper transportation and shipping requirements for hazardous waste and substances. Works with munitions personnel to ensure compliance with hazardous material transportation laws and regulations. If required by state regulations, provides transportation vehicles and drivers that possess current commercial drivers license required for transportation of hazardous substances.

### **BASE SUPPLY**

Establishes a single point of contact for processing and controlling hazardous substance and waste supply actions or transactions. Processes paperwork and maintains computer records for hazardous waste disposal actions. Note that base supply does not accept physical control of hazardous waste. The generating units have physical control responsibilities.

### **CONTRACTING OFFICE**

The Federal Acquisitions Regulations have NUMEROUS restrictions and provisions relating to hazardous substances. Ensure your contracting officer(s) knows the FAR and DFAR provisions as well as any state acquisition rule limitations that apply.

### **HAZMAT PLANNING AND RESPONSE TEAMS**

Must ensure adequate preparation and resources are available for responding to hazardous waste releases. See AFPAM 32-4013 for more information.

## **CLINIC COMMANDER'S DUTIES**

The Medical Unit Commander is responsible for the installation environmental monitoring program.

## **ACCOUNTING AND FINANCE OFFICER**

The Accounting and Finance Office must ensure that environmental management funds are properly used and documented.

## **MULTI-DISCIPLINARY APPROACH**

The base-level environmental program is complex, and requires active participation by a number of staff agencies. It is an area where delayed action may cost many dollars and seriously hamper a base's ability to perform its mission. Impact on mission effectiveness can be minimized if the environmental problem is quickly identified and referred to those individuals with the appropriate expertise and responsibility.

## **PENALTIES FOR VIOLATIONS**

Congress has waived federal sovereign immunity in varying degrees in many of the federal environmental statutes. When that is the case, the military - Active Duty, Reserves and ANG - is not immune from penalties for violations of environmental law. Federal, state and local environmental agencies have the power, and with ever-increasing frequency are exercising it, to prosecute and fine (under some environmental statutes) not only civilian businesses and individuals, but also other federal, state and local agencies of the same government for environmental law violations.

## **KEEP CURRENT**

Support and encourage all your staff officers with responsibilities for environmental law compliance - especially your BCE and JA - to attend all available environmental law conferences and seminars. The laws and regulations in this area are always changing and developing. Your key personnel must keep current to ensure continued compliance and your PROTECTION.

***KWIK-NOTE: Know the key players in the environmental management team, ensure they are trained and environmental audits are accomplished.***

## **RELATED TOPICS:**

## **SECTION**

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# Hazardous Waste Disposal

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Updated by Lt. Col Timothy Mullen, September 2009

**AUTHORITY:** AFI 10-2501, *Air Force Emergency Management Program Planning and Operations* (24 Jan 07); AFI 32-7042, *Waste Management* (21 Apr 09); AFPAM 32-7043, *Hazardous Waste Management Guide* (1 Nov 95); 42 U.S.C. 6901 et seq; ; applicable state law and regulations; AF Commander's Guide To Environmental Quality

## THE STATUTE

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901, *et seq.*, is the primary federal hazardous waste management law. It is a "cradle-to-grave" statute, and controls generation, transportation, treatment, storage, and disposal (TSD) of hazardous wastes. RCRA's "corrective action" provisions also govern cleanup of past hazardous waste sites, called "solid waste management units" (SWMUs – or "schmoos") at RCRA permitted facilities. Sometimes these RCRA "corrective actions" conflict to one degree or another with our cleanups being conducted under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601, *et seq.* That is because CERCLA (sometimes called the "Superfund law"), is the primary federal statute governing the cleanup of past hazardous waste sites, and CERCLA, in general, gives the Air Force the "lead", working with US EPA, in cleaning up those sites (through our Installation Restoration Program -- IRP). When CERCLA governs, particularly for our sites on the National Priorities List (NPL), states may have very little to say about how we clean them up. Under RCRA, however, due to its broad waiver of sovereign immunity, states have a great deal of control over how the cleanup of SWMOs at permitted facilities is conducted. When such a site is governed by both laws, conflicts may develop. Contact your JAG immediately if such a situation arises. Many states have enacted their own hazardous waste laws closely modeled upon the federal RCRA. State regulators have authority, in many cases, to administer RCRA provisions including storage and transport activities. Hazardous waste is broadly defined under the RCRA. Generally, it is a waste which exhibits properties making it ignitable, corrosive, reactive, toxic, and/or is listed as a hazardous waste in regulations promulgated by the U.S. Environmental Protection Agency (EPA).

Unless the installation has a permit to store wastes for more than 90 days, RCRA requires hazardous waste generators (for example, ANG bases) to ship these wastes to a bona-fide permitted disposal facility within 90 days of the date of being placed in temporary storage. RCRA also has strict rules about how long wastes can stay at the accumulation point before being transferred to temporary storage. It is important to promptly identify hazardous wastes and contract for their shipment and disposal within this 90 day time period if the facility does not have a RCRA permit allowing storage for more than 90 days. All shipments of hazardous waste must be performed under a "manifest" (EPA Form 8700-22 or equivalent state form). A manifest is a detailed shipping document intended to insure wastes are properly disposed of. The manifest is a requirement for off-site transport and disposal of hazardous wastes, and must be completed with precision. The shipping manifest is a critical element in demonstrating compliance with RCRA.

## WHO IS RESPONSIBLE AND FOR WHAT

Nearly every ANG unit qualifies as a "generating organization." For example, used solvents in a maintenance squadron, spent battery acid in a motor pool, and left-over paints from a "self-help" project, make each of these functions a "generating organization" responsible for proper disposal of hazardous waste.

The Base Environmental Coordinator (BEC), in conjunction with various other staff offices, must ensure compliance with ANG, EPA and applicable state regulations regarding disposal of hazardous waste. Check with your BEC before you add or change any hazardous waste generating, transporting, storage or disposal activities to ensure compliance with RCRA and any permit requirements. EPA statistics indicate RCRA violations account for over 50% of the discrepancies noted during environmental audits. These violations can bring \$50,000 fines per day

or imprisonment for one year. Hazardous waste is stringently regulated, potential fines are high, and incarceration is a real possibility.

***KWIK-NOTE: Ensure you have a permit for all RCRA-regulated activities requiring permits. Ensure you have an accurate inventory of all hazardous substances being purchased, generated, stored or disposed of by looking at your logistics records and by thinking about what actions use or generate these substances.***

**RELATED TOPICS:**

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# Preservation of Historic Properties

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Updated by Lt. Col Timothy Mullen, September 2009

**AUTHORITY:** 16 U.S.C. 469 *et seq.*; AFI 32-7065, *Cultural Resources Management Program* (1 Jun 04); applicable state law and regulations; AF Commander's Guide To Environmental Quality.

## INTRODUCTION

The National Historic Preservation Act (section 106 in particular) and related statutes require Air National Guard Commanders to identify certain historic sites and objects under their control on ANG installations, take actions to preserve historical and archeological data under some circumstances, and subsequently process the nomination of such sites to the National Register of Historic Places. Historic places and archeological sites include properties having historical, architectural, archeological, or cultural significance.

## REQUIREMENTS

Regulations promulgated pursuant to the National Historic Preservation Act (NHPA) and related statutes require Federal agencies to:

1. Provide leadership and assume responsibility in the preservation of the prehistoric and historic resources under their control; and
2. Direct their policies, plans, activities and programs to the maximum extent possible to assure good faith consultation with the Advisory Council on Historic Preservation (ACHP) and the SHPO prior to undertaking any action that could adversely affect sites, structures, and objects listed or eligible for inclusion in the National Register.

-- CONSULT WITH THE STATE HISTORIC PRESERVATION OFFICER (SHPO) BEFORE ANY DEMOLITION OF HISTORIC BUILDINGS.

## SURVEY

An installation must survey its property if it is probable that a survey would disclose properties which are sufficiently significant to be eligible for listing in the National Register of Historic Places. A minimum survey effort includes consultation with the SHPO and/or ACHP. The installation may also make inquiries to knowledgeable private and state institutions familiar with the archeological nature of the area. Any pertinent information obtained should be sent to the Historic Preservation Officer at the NGB. Installations should develop a historic preservation plan to address significant historic properties and inadvertent discovery situations.

## HISTORIC PRESERVATION PLAN

Installations are encouraged to develop a historic preservation plan to address any significant historic properties identified in the survey summarizing how such properties will be handled operationally.

## AIR FORCE INSTRUCTION 32-7065

AFI 32-7065 is subject to clarifying guidance which is being developed by ANGR/CEV. AFI 32-7065 provides general programmatic guidance which can be followed in the interim. Any questions about the applicability of AFI 32-7065 to unique ANG situations should be directed to NGB-JA.

**RELATED STATUTES:**

-- NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA), 25 U.S.C. 3001

For activities on federally-owned land, NAGPRA requires consultation with Indian tribes or groups before intentional excavation, or removal after inadvertent discovery, of several kinds of Native American cultural items, including human remains and associated burial objects. Notification and a 30-day delay is required. For activities on Native American land, owner consent is required before such excavation or removal. Inventories of cultural items in federally assisted museums are to be generated. Repatriation of Native American cultural items is required. Violation of some sections of NAGPRA are subject to civil and criminal sanctions.

-- NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) (42 U.S.C. 4321 through 4347)

Although NHPA section 106 (which mandates review of historic properties) is separate from NEPA, and is not satisfied by complying with NEPA, it is reasonable to coordinate studies done under 106 with NEPA documents.

-- ARCHAEOLOGICAL AND HISTORIC PRESERVATION ACT of 1974 (AHPA) (16 U.S.C. 469)

If a project will affect historic properties that have archaeological significance, this act may impose additional requirements on an agency including notification of U.S. Dept. of Interior.

-- ARCHAEOLOGICAL RESOURCES PROTECTION ACT of 1979 (ARPA) (16 U.S.C. 470aa through 470ll)

If federal or Indian lands are involved, this act may impose additional requirements, including permit requirements. This act contains civil penalty provisions.

-- AMERICAN INDIANS RELIGIOUS FREEDOM ACT (AIRFA) (42 U.S.C. 1996)

If a place of religious importance to American Indians may be affected by a project, the AIRFA promotes consultation with Indian religious practitioners which may be coordinated with NHPA section 106 consultation.

**CONCLUSION**

The question of "what is historic" is a complex one. Any matter regarding the NHPA should be referred to the installation Staff Judge Advocate.

***KWIK-NOTE: Know the names, addresses, and telephone numbers of your SHPO and the ACHP, and seek their guidance to help you fulfill your responsibilities to identify and preserve historic properties on your installation. Discovery of Native American or other human remains and related cultural items should be coordinated with the installation Staff Judge Advocate.***

**RELATED TOPICS:**

**SECTION**

Base Facilities Board	3-4
Environmental Duties at Base Level	12-3
Facilities – ANG	25-9
Jurisdiction	2-5

# Environmental Impact Analysis Process

Updated by Lt. Col Timothy Mullen, September 2009

**AUTHORITY:** 32 CFR Part 989, *Environmental Impact Analysis Process*; 42 U.S.C. 4321 through 4370f; AF Commander's Guide To Environmental Quality; President's Council on Environmental Quality (CEQ) Regulations 40 CFR Parts 1500 through 1508.28.

## ENVIRONMENTAL IMPACT ANALYSIS PROCESS

32 CFR Part 989, *Environmental Impact Analysis Process* (EIAP), establishes policies, procedures, and responsibilities for implementation of the National Environmental Policy Act (NEPA). The NEPA program requires agencies to base decisions regarding proposed federally funded actions on an understanding of the potential environmental effects of the action, reasonable alternatives and the no-action alternative, in addition to purely mission-based factors. Proponents of the proposed actions are responsible for initiating the EIAP early in the planning stages of a proposal. There are three major outcomes/elements:

- A Categorical Exclusion (CATEX) exempts a proposed action from further environmental analysis.
- An Environmental Assessment (EA) is a document that provides evidence and analysis to determine if the action will have impacts. If it will not have impacts, a Finding of No Significant Impact (FONSI) can be issued.
- An Environmental Impact Statement (EIS) must be prepared if significant impacts are possible. A Record of Decision, summarizing the decision process, is then published in the Federal Register.

## PROPOSED ACTIONS

The EA/EIS must have an adequate description of the operator's proposed action with adequate information on environmental impact. The EIAP must be done ***BEFORE** the action is made or decided upon*. The purpose of the EA/EIS document is to provide the federal decision maker information about the environmental impact of various options that will serve the federal need. The key principle in NEPA is knowledgeable decision making based on reasonable options.

## MEASURING SUCCESS

EIAP actions identified and progress of phases is effectively monitored;

EIAP actions having operational mission impact have viable alternatives;

EA/EIS has several viable options, instead of a single well-documented option, to provide the decisionmaker with viable choices with different tradeoffs;

EA's and EIS's are adequately funded; and

Public Affairs is actively involved in the EIAP.

***KWIK-NOTE:*** *For some actions at your installation, you are required to consider environmental impact, as well as mission requirements. Consult your Base Environmental Engineer and your Staff Judge Advocate if questions arise in this area.*

## RELATED TOPICS:

## SECTION

Environmental Duties at Base Level

12-3

Preservation of Historic Properties

12-5

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## Air Emissions

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Updated by Col Timothy Mullen, September 2009

**AUTHORITY:** AFI 32-7040, *Air Quality Compliance and Resource Management* (27 Aug 07); 42 U.S.C. 7401 through 7642; applicable state law and regulations; AF Commander's Guide To Environmental Quality

### AIR EMISSIONS

Air Guard installations have sources of regulated air pollutants. These sources may require operating permits, permits for new construction or permits for major modifications. Operational permits include vehicle and industrial operations, painting facilities, electrical power generation, and fuel dispensing.

Major sections of the Clean Air Act (CAA) regulate greenhouse gases, stratospheric ozone, new and used automobile emissions, chemical plants, electric utilities and hazardous air emissions. This section focuses on the sections of the CAA that are most applicable to ANG facilities.

### NATIONAL AMBIENT AIR QUALITY STANDARDS AND AIR QUALITY CONTROL REGIONS

The CAA requires the US Environmental Protection Agency (USEPA) and state departments of environmental quality (SDEQ) to create National Ambient Air Quality Standards (NAAQS). The United States has been split into air quality control regions. Each region's air is tested to determine whether that region is in attainment, nonattainment or maintenance with the applicable NAAQS. A nonattainment area is an area that does not meet the NAAQS for one or more of the six criteria pollutants (particulate matter, ozone, carbon monoxide, sulfur dioxide, oxides of nitrogen, and lead). A maintenance area is the name given to an area that was previously designated nonattainment pursuant to the CAA Amendments of 1990, and subsequently redesignated attainment (an area which meets all NAAQS). Various levels of NAAQS violations describe regions in nonattainment status. Levels include moderate, serious and severe.

### STATE IMPLEMENTATION PLANS

The state(s) responsible for the region in violation of a NAAQS must create and implement a State Implementation Plan (SIP). SIPs are state or regional plans that include an emissions inventory and a plan on how that state(s) will bring the region into compliance with the violated NAAQS. Direct and non-point or area emissions are included in the SIP emissions inventory. Each time a region is placed in a more severe category of nonattainment, a new SIP must be accomplished, potentially reducing emission budgets for permit holders.

### PERMIT PROGRAM

The primary method of controlling or managing emissions is through the air emission permit program. Each facility that expects to emit over a specified amount of a regulated pollutant into the air must obtain a permit prior to operation of new unlicensed/unpermitted or modified previously licensed/permitted equipment. Permits are issued by SDEQs or the USEPA. Many CAA violations or criminal prosecutions are generated from bad or fraudulent record keeping required by permits, tampering with permit required emissions control equipment or violations of permit emissions limits.

### EMISSIONS OFFSETS

A key feature of the NAAQS / SIP / permit program involves emissions offsets. When an area is in violation of the applicable NAAQS, the SIP will call for increasing levels of offsets or reductions in overall emissions prior to authorizing any new emissions for the permit applicant. Offset levels are based on the level of nonattainment. For example, to get a permit to emit one ton of sulfur dioxide (SO<sub>2</sub>) per year, the facility, in conjunction with the SDEQ, must find a 1.5-ton SO<sub>2</sub> reduction (a 1.5 offset or reduction) somewhere else. Reductions have been accomplished

by a permit applicant paying for the local county public vehicles to be converted to natural gas, the emissions trading program (allows transfers of other companies permit based “right to pollute” through reductions in maximum authorized emissions) or by installing emissions control equipment at other facilities.

The level of NAAQS nonattainment severity automatically ratchets to the next higher level of noncompliance (e.g. serious to severe) if the region fails to attain conformity with NAAQS in a specified amount of time. The offset reductions required for new emission permits increase as the region automatically ratchets into the next higher nonattainment category or the actual air quality gets worse.

### **FEDERAL CONFORMITY DETERMINATION REQUIREMENT**

A conformity analysis is required for any federally funded action (*e.g.*, a new squadron of aircraft being added to an Air Guard base) which will occur in a nonattainment or maintenance area and which may result in an increase of emissions above *de minimis* levels. A conformity analysis is performed to ensure a proposed federal action will conform to all requirements of the applicable SIP or Federal Implementation Plan (FIP – created by EPA when states fail to gain approval for a required SIP). The conformity analysis must consider all direct and indirect emissions, which will be associated with the Federal action. Conformity requirements can be found in Title 40 CFR Part 93, Subpart B. The conformity analysis for new construction or mission modification is commonly accomplished as a part of the National Environmental Policy Act (NEPA) environmental assessment (EA) or the environmental impact statement (EIS) process.

### **CAA SECTION 112 HAZARDOUS AIR POLLUTANT PROGRAM**

CAA Section 112, found at 42 USC section 7412, tightly regulates a number of specified hazardous air pollutants in addition to all the other air emissions requirements found in the CAA. The section 112 program, including the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations, is extremely complex. Consult your base environmental manager and your Staff Judge Advocate to answer questions about the section 112 program.

### **SOLUTIONS**

Commanders should verify with the base environmental coordinator that the following programs have been established:

- Document compliance with the Conformity Rule in "nonattainment" areas;
- Ensure that installation emission growth is specified in the state SIP Emission Budget;
- Complete the Installation Emission Baseline Inventory;
- Complete and submit operating permit application if necessary;
- Operating permit record keeping, reporting, and monitoring program;
- New construction and major modification permitting review;
- Emission control technologies requirements program; and
- Accidental release reporting under risk management plans.

### **MEASURING SUCCESS**

- All construction or modification projects have proper permits to allow on-time construction if regulated emissions are expected;
- All construction or modification activities are in compliance with state or regional SIP objectives;

- Conformity is documented and demonstrated for all proposed federal actions (required prior to commitment or expenditure of federal funds);
- Accurate self-reporting and correction of permit violations;
- No accidental releases; and
- No violations of the NESHAP regulations.

More information can be found at the USEPA web site containing information on the CAA: <http://www.epa.gov/oar/>; the text of the CAA and the Plain English Guide to the CAA can be found at: <http://www.epa.gov/air/caa/>; The Air Force Center for Environmental Excellence (AFCEE) also provides a CAA resource center at <http://www.afcee.brooks.af.mil/products/air/afcee.asp>

Installations are expected to encounter greater difficulty complying with air quality requirements as permitting rules of the Clean Air Act are implemented, more stringent NAAQ standards are extended and implemented, increases in population raise overall emissions faster than control equipment can reduce emissions and regions automatically ratchet into higher levels of nonattainment.

***KWIK-NOTE: Compliance with the CAA is a highly technical undertaking. Consult your base Staff Judge Advocate or your base environmental management section immediately when emissions or air quality issues arise.***

**RELATED TOPICS:**

**SECTION**

Environmental Duties at Base Level

12-3

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# Hazardous Substance Spill Contingency Programs and Emergency Release Reporting

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Updated by Lt Col Timothy Mullen, September 2009

**AUTHORITY:** AFI 10-2501, *Air Force Emergency Management Program Planning and Operations* (24 Jan 07); 42 U.S.C. 9601 through 9675, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management; 33 U.S.C. 1251 through 1387, Clean Water Act (CWA); 42 U.S.C. 6901 through 6991i, Resource Conservation and Recovery Act (RCRA); 42 U.S.C. 7401 through 7642 (Clean Air Act (CAA), 15 U.S.C. 2601 through 2692, Toxic Substances Control Act (TSCA), 42 U.S.C. 2014, 2021, 2021a, 2022, 2111, 2113, and 2114, Atomic Energy Act (AEA); related state and local regulations; AF Commander's Guide to Environmental Quality.

## RESPONSE TO HAZARDOUS SUBSTANCE RELEASES

This section discusses the most significant emergency planning, response and reporting programs related to hazardous substance releases. There are numerous programs that require hazardous substance and environmental reporting that are outside the scope of this section. Consult your environmental management office and your installation Staff Judge Advocate for more information.

Air Force, ANG and NGB policy requires prevention of oil and hazardous substance spills. In those instances where spills do occur, immediate and direct action should be taken in order to minimize the threat posed to public health and the environment. Spills of hazardous substances and petroleum must be cleaned up immediately. Cleanup of spills is a mission-related cost that must be addressed by the activity responsible for the incident. Proper notification requirements must be followed. Commanders should determine that proper spill cleanup plans exist and that the necessary notification requirements are understood.

## EMERGENCY NOTIFICATION / REPORTING REQUIREMENTS

CERCLA Section 103 (40 CFR Part 302.6, Part 300.405): Section 103 requires that the release of a CERCLA hazardous substance that meets or exceeds the reportable quantity (RQ) set forth in 40 CFR 302.4 must be reported to the National Response Center (NRC). These substances account for, on average, 19% of all the notifications in the US Environmental Protection Agency's (USEPA) Emergency Response Notification System (ERNS) database.

EPCRA Section 304 (40 CFR Part 355.40): EPCRA requires that the release of an RQ or more of an EPCRA extremely hazardous substance or a CERCLA hazardous substance (one pound or more if a reporting trigger is not established by regulation) that results in exposure of people outside the facility boundary be reported to State and local authorities. Notifications are provided to State Emergency Response Commission (SERC) and Local Emergency Planning Committee (LEPC) for releases greater than the RQ of hazardous and extremely hazardous substances. (NOTE: EPCRA does not apply to federal facilities by its own terms. However, pursuant to Presidential Executive Order and Air Force and DoD policy, the Air Force and ANG units must comply with EPCRA.)

The Hazardous Material Transportation Act (HMTA) Section 1808 (49 CFR Part 171.15): Section 1808 requires that the release of a US Department of Transportation (USDOT) regulated hazardous material during transportation be reported to the National Response Center (NRC) under certain circumstances such as death, injury, significant property damage, evacuation, highway closure, etc. The Hazardous Materials Table (49 CFR Part 172.101) designates specific materials as hazardous for the purpose of transportation.

CWA Section 311 (40 CFR Part 110, Part 300.300): Requires that the release of oil be reported to the NRC if the release: (1) violates applicable water quality standards; (2) causes a film, sheen or discoloration of the water or

adjoining shoreline; or (3) causes a sludge or an emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines. Oil notifications account for, on average, 57% of all notifications in ERNS.

State Regulations: State regulations regarding hazardous substance releases vary from state to state. Most states have an emergency response program. Not all states regard oil as a hazardous substance, but most states require notification of a spill if it presents a condition that may jeopardize public health, safety or the environment. State threshold requirements often are more stringent than federal requirements.

## **EMERGENCY RESPONSE PLANNING**

EPCRA focuses on generating information on the amounts of chemicals stored and released from facilities. EPCRA requires Air Guard units to report the locations and quantities of chemicals stored on-site to state and local governments.

EPCRA has three major planning aspects. The first is found in sections 301-303, Emergency Planning. These sections require federal facilities that produce, store, or use any extremely hazardous substances in a quantity equal to or greater than its threshold planning quantity (TPQ) to notify state emergency response commissions (SERC) and local emergency planning committees (LEPC) of such. It also requires the development of a local emergency response plan. Installations must also provide a copy of the local emergency response plan to the LEPC.

Sections 311-312, Community Right-to-Know Reporting, require installations to submit material safety data sheets (MSDS) and an inventory of chemicals on site to the LEPC. The MSDS and chemical inventory allows the local authorities, including the fire department, to prepare for and respond to a release or emergency at a hazardous substance storage facility.

Section 313, Toxic Chemical Release Inventory Reporting (TRI), requires installation-specific reporting of total releases and off-site transfers (a transfer of wastes for treatment or disposal at a separate facility) of specific chemicals which exceed threshold values for activities that are not otherwise exempted from reporting. Air Force policy and guidance on Section 313 are issued annually by memorandum prior to the 1 July data reporting deadline. Air Force policy for Section 313 is incorporated in AFI 32-7080.

Facilities are also required to report on pollution prevention activities and chemical recycling. The USEPA has further information on the TRI program at <http://www.epa.gov/tri/>. The Air Force Center for Environmental Excellence (AFCEE) also has an Air Force TRI Reporting Guide on their web site at: [www.afcee.af.mil](http://www.afcee.af.mil).

## **SPILL PREVENTION, CONTROL AND COUNTERMEASURES PLANS (SPCCPs)**

SPCCPs describe preventive measures taken to avoid the discharge of oil/oil-related hazardous substances and addresses countermeasures to be taken to address releases. SPCCPs are required under AFI 32-7041, *Water Quality Compliance*, 33 U.S.C. 1251 and 40 CFR Part 112 if:

- (1) The facility has the potential to spill oil or a hazardous substance in such quantity as would be hazardous to human health, welfare or the environment, or
- (2) The installation has aggregated or single above-ground or underground oil/hazardous substance storage tanks above certain amounts, or
- (3) One or more hazardous substances are stored in quantities that would be harmful to human health or welfare or the environment if a spill were to occur.

## **SPILL AND HAZMAT INSTALLATION CONTINGENCY PLANS AND EMERGENCY RESPONSE**

Every Guard facility with the potential for a reportable spill must have a hazardous materials (HAZMAT) release response plan under AFI 10-2501, *Air Force Emergency Management Program Planning and Operations*, AFMAN 32-4004, *Emergency Response Operations*, AFMAN 32-4013, *Hazardous Material Emergency Response and Planning Guide* and 29 CFR Part 1910.120. HAZMAT response plans typically require designation of an

Installation On-Scene Coordinator and Installation Response Team. HAZMAT and spill contingency plans provide for inspections to detect leaks, contingency planning for spills, logistics requirements for spill clean-ups and reporting requirements. The HAZMAT response program coverage does not include the nuclear accident or explosives accident response program. (See AFI 10-2501, *Air Force Emergency Management Program Planning and Operations*).

## REPORTING PROCEDURES

If there is a RQ release, the environmental coordinator should execute applicable reporting procedures. It may be necessary to notify the NRC, State/Local Authorities (LEPC/SERC), HQ ANG/CEQ and/or NGB/JA by phone within specified time limits. Ensure your wing and state headquarters public affairs officer is notified immediately of any releases. Ensure all personnel are instructed to refer all media questions to the wing and/or state headquarters public affairs officer.

## MEASURING SUCCESS

Have/perform the following:

Federal, state and local emergency spill notification telephone numbers available to environmental flight, HAZMAT/SPILL response teams and other offices specified in response AFIs;

Ensure public affairs officer has appropriate contingency response plans for hazardous substance releases and environmental issues as well as points of contact information for NGB/PA environmental section;

List of all reportable chemicals on base as well as the RQ for each substance;

Contingency plans addressing releases of hazardous substance/oil;

Coordination / correspondence / EPCRA reports between the unit and the SERC and LEPC discussing efforts to comply with applicable laws;

All required training for emergency response and HAZMAT handling accomplished and documented;

Current MSDS sheets available in all duty sections handling HAZMAT substances;

Required response equipment available in serviceable condition;

EPCRA reporting accomplished annually or as required when HAZMAT inventory list changes or emergency response plans change; and

Self inspection and audits, such as environmental compliance audits (ECAMP) and scheduled periodic maintenance inspections, accomplished annually or as required to discover dangerous conditions or compliance problems (critical to reduce fines or avoid criminal prosecution of command personnel).

**MORE INFORMATION:** Contact your installation environmental manager, unit Staff Judge Advocate, HQ ANG/CEQ or NGB/JAV for more information. See the Air Force Center for Environmental Excellence web site at <http://www.afcee.brooks.af.mil> for additional information, available training and regional points of contacts. Also refer to the US Environmental Protection Agency, Chemical Emergency Preparedness and Prevention Office web site at <http://www.epa.gov/swercepp/> for planning, risk management, emergency response, international programs and counter-terrorism information.

## RELATED TOPICS:

## SECTION

Environmental Duties At Base Level

12-3

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## Handling Inspections and Responding to Notices of Violations (NOVs)

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Updated by Lt Col Timothy Mullen, September 2009

**AUTHORITY:** AFI 32-7040, *Air Quality Compliance and Resource Management* (27 Aug 07); AFI 32-7041, *Water Quality Compliance* (10 Dec 03); AFI 32-7042, *Waste Management* (21 Apr 09); AFPAM 32-7043, *Solid and Hazardous Waste Management Guide* (1 Nov 95); AFI 32-7044, *Storage Tank and Compliance* (13 Nov 03); AFI 32-7045, *Environmental Compliance Assessment and Management Program* (1 Jul 98); AFI 32-7060, *Interagency and Intergovernmental Coordination for Environmental Planning* (25 Mar 94); AFI 51-301, *Civil Litigation* (1 Jul 03)

### INTRODUCTION

ANG units can reduce the number of violations cited by an environmental regulatory agency during inspections by taking a few simple actions. Preparation and self-inspection are the key to avoiding violations of environmental law, avoiding criminal prosecution of commanders and reducing fines.

A Notice of violation (NOV) is issued by a regulatory agency when a violation of environmental law, agency regulations or a permit is discovered by a regulatory agency and the regulatory agency does not wish to resolve the violation informally. Failure to report required information could also result in a NOV. A NOV triggers a formal administrative process that demands specific requirements be met prior to the NOV being resolved, and may result in fines and/or penalties being levied. The unit/organization must respond within as little as 20 days. Failure to respond to any allegation may be an admission of its truth.

Most NOVs can, and should, be negotiated and resolved between the facility and the regulatory agency. Air Force and Air National Guard policy requires commanders to immediately report NOVs in accordance with Air Force Instructions.

The United States Environmental Protection Agency (USEPA) or the state departments of environmental quality (SDEQ) will seek to negotiate a compliance agreement (CA) (also called consent orders) if the responsible command or unit fails to adequately respond to the NOV or if a required response is late. The negotiated CA will specify corrective actions, timing of corrective actions and penalties. (NOTE: "Corrective actions" in the context of this NOV discussion are not the same as RCRA "corrective actions" involving cleanup of SWMUs.) CAs are mutually agreed upon corrective action plans that can be influenced positively by prompt responses by ANG units to regulatory requests, a clearly visible sense of urgency in taking corrective action, good lines of communication and efficient management of the corrective action plan addressing the violation.

Environmental regulators may also seek an injunction to shut down operations or a court order restricting operations. Regulatory agencies will generally seek injunctions if they feel there is an imminent and substantial endangerment to human health or the environment. Regulators are likely to seek criminal prosecution of ANG members, including the commander, or impose more restrictive permit requirements when an agency concludes an endangerment to human health has occurred.

Regulatory agencies will issue an Administrative Penalty Order (APO) if they conclude the offending company or agency requires an incentive to comply with environmental laws. The APO sets a penalty and conditions for returning to compliance.

Regulatory agencies generally can impose administrative fines for noncompliance related to hazardous waste. Whether such fines and penalties may be levied against agencies or departments of the federal government depends upon whether and to what extent Congress has waived sovereign immunity in the federal statute involved. Congress has, to one extent or another, waived sovereign immunity in many of the federal environmental laws. However,

those waivers are not worded identically, and federal courts have not allowed state agencies to fine federal entities in all cases. Before pulling out your unit's checkbook to pay such an imposed fine or penalty, contact your JAG.

A unit may encounter regulatory agencies that do not understand the complexity of the rules applicable to ANG units in the fines and penalties context. The law governing application of fines to federal activities and the law governing the relationship between federal and state authorities is extremely complex. The ANG is a hybrid organization that is partly federal and partly state operated. In its federal role, fines may be imposed against ANG units under limited circumstances. In its role as a state militia, the ANG comes under the rules pertaining to the application of fines against state entities under federal law. Environmental agencies also may not understand fiscal law limitations placed on federal funds and thus tend to believe such restricted funds are available for compliance, remedial action or fine payments.

ANG units should be careful to obey all federal and state rules governing use of government funds when regulators attempt to impose fines or penalties on ANG activities. Federal funds may be used for payment of environmental violations or penalties only when allowed under federal fiscal law. In some cases, federal law specifically prohibits the use of specific funds for payment of penalties. For example, the 2000 Federal Military Appropriations Act for the DOD included a provision prohibiting the use of any FY 2000 federally appropriated funds to pay any fines related to violations of environmental law without prior approval of Congress. That may change, but do not pay fines, enter into any CA or agree to any supplemental environmental projects (SEP) without receiving approval from your environmental manager, unit JAG, state JAG, ANG/CEVQ and NGB/JAV.

Fines must be paid from unit operating budgets. Units should take action to obtain and maintain compliance with environmental laws to avoid mission impact and reduction of funds available to fulfill environmental program objectives.

Commanders should ensure self-inspections are conducted under the Environmental Compliance and Assessment Program (ECAMP) found in AFI 32-7045. Contact the environmental manager, the unit Staff Judge Advocate and ANG/CEVQ to determine the appropriate course of action when violations are found during self-inspections. Make every effort to ensure that all potential violations are *first* coordinated with the installation Staff Judge Advocate and environmental manager, public affairs officer, ANG/CEVQ and environmental counsel (NGB-JAV) prior to disclosure to regulators. A corrective action plan should also be developed to address deficiencies resulting from a self-inspection.

## **STEPS TO AVOID NOVS AND REDUCE PENALTIES**

Be prepared for inspections by regulators and treat inspections the same as you would any other inspection.

Conduct pre-inspections. Develop corrective action plans immediately when problems are found.

Take corrective action on easy to fix problems. Don't wait to be ordered to take action.

*Thoroughly* document requests for funding corrective action or environmental law compliance. Clear notice to superiors in your chain of command of the critical need for funding for environmental law compliance or threats to human health *is essential to avoid criminal prosecution* of unit personnel and to reduce gravity based penalties.

Ensure public affairs officer has contingency plans, telephone numbers to NGB/PAE environmental public affairs office and has adequate training to understand environmental issues.

Attention to detail is critical. Many problems are found in poor documentation or faulty reporting.

Know and closely inspect areas that normally produce violations:

Hazardous waste management plans;

Personnel training records (lack of knowledge on emergency response or use of required safety equipment);

Hazardous waste transportation manifests and container marking;

Condition of hazardous waste storage containers, containment structures and protective equipment;

Security;

Contingency plans and emergency procedures (lack thereof or inadequate);

Material Safety Data Sheets (MSDS) (out of date or missing);

Protective equipment required by AFOSH, OSHA or MSDS (missing or damaged); and

Air and water discharge monitoring reports required by permits (failure to report or erroneous data).

### **RESPONDING TO INSPECTIONS AND NOVS**

Select and brief an escort team to go with inspectors. Ensure PA officer and JA are aware of inspection.

Ensure inspectors have proper credentials. Ensure your environmental manager is aware of the current credentials that state and federal regulators use to gain entry to conduct environmental compliance inspections (also a force protection and counter terrorism issue).

Make a reasonable attempt to ensure inspectors have required safety equipment and briefings when inspectors go into hazardous areas; ensure your environmental manager is fully trained on the rules pertaining to safety of inspectors, what restrictions your unit can legally apply to inspectors and has a copy of SDEQ and USEPA rules and policies governing inspections.

Make required notifications to get assistance (e.g. environmental manager, JA, ANG/CEVQ, public affairs).

Do not wait to resolve problems. Take immediate action when problem is pointed out.

Cooperate with regulating agency. Good relations are a critical factor in resolving problems.

Attempt to preserve all evidence and information. Request a copy of all documents inspectors wish to remove. Request an inventory of all items inspectors seize or remove. Take your own inventory of all items seized. Take notes of all comments relating to environmental law compliance inspectors make during the inspection. Photograph all items, areas or equipment inspectors indicate are potential sources of violations.

Ensure all responses are within specified time limits.

Ensure all compliance agreements proposed by regulators are immediately coordinated with unit/state JAG, NGB/JA and ANG/CEVQ prior to any response to the regulating agency. NEVER SIGN A COMPLIANCE AGREEMENT without Staff Judge Advocate (unit, state and NGB/JAV) coordination.

Ask for clarification of any violation and, if possible, ask for the opportunity to correct the problem in the presence of inspectors.

***KWIK-NOTE: Preparation and self-inspection are the keys to avoiding violations of environmental law, avoiding criminal prosecution of commanders, and reducing fines.***

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# Recycling and Waste Diversion Program

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Updated by Lt Col Timothy Mullen, September 2009

**AUTHORITY:** 10 U.S.C. 2577; 40 U.S.C. 484 ; AFI 32-7042, *Waste Management* (21 Apr 09); 42 U.S.C. 6901 to 6992k.; Executive Order 13423; AF Commander's Guide To Environmental Quality.

## INTRODUCTION

There are enormous potential benefits derived from an installation Resource Recovery and Recycling Program (RRRP) and/or the Qualified Recycling Program (QRP). The environment is better maintained and waste output is reduced, thereby saving taxpayer dollars.

## KEY PLAYERS

The Civil Engineering squadron or the Environmental Management Office runs the RRRP and/or QRP program. The recycling or solid waste diversion program may be managed by the Pollution Prevention Chief, a Designated Qualified Recycling Program Manager (in writing), a solid waste manager or the pollution prevention (P2) chief. The organization of the RRRP or QRP program depends on the recycling or waste diversion opportunities as well as available funding.

## SOLID WASTE DIVERSION VERSUS RECYCLING

The pre-1998 RRRP or QRP program focused only on easily recyclable materials. Recyclable materials were those which are normally discarded and that may be reused after undergoing some type of physical or chemical processing. Recyclable materials do not include precious metal-bearing scrap, such as film, and those items which may be used again without special processing, such as vehicle parts or electrical components.

The new RRRP and QRP program focuses on solid waste diversion, which is much more comprehensive than the conventional recycling program. The term "solid waste" refers to non-hazardous municipal refuse type of materials. It includes anything that might be sent to a municipal dump or solid waste disposal site.

## REQUIRED RECYCLING

Executive Order (EO) 13101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition, dated September 18, 1998, together with the Resource Conservation and Recovery Act (RCRA) Section 6002 govern waste diversion and recycling. EO 13101 and RCRA require the recycling of certain materials if more than a specific amount is generated, and require each agency to set goals for solid waste prevention and recycling. EO 13101 replaces an earlier EO from 1996 that had very limited requirements.

The post-1998 DOD and AF goal under EO 13101 requires greater than 40% of solid waste be diverted from waste disposal sites by 2005. At the end of the second quarter of FY2000, the Air Force reported a diversion rate of 35% without construction and demolition (C&D) debris and 67% with C&D. The diversion rate goal also requires installation waste management programs to provide an economic benefit by 2004. Economic benefit is determined by comparing the diversion program's potential costs of simply disposing the solid waste without any solid waste diversion to the actual program costs (with diversion). The economic benefit goal looks at what an installation is diverting and what costs are saved by diversion. The Air Force will initiate an investigation of the installation RRRP or QRP program if diversion costs exceed disposal costs after FY2004 (the break-even year).

A critical difference between the new rules and the old is that the new rules widen the categories of items that qualify under the waste diversion program. Installations can now take credit for mulching, donating items to charities, reconditioning of vehicle antifreeze, use of demolished building concrete to create gravel roads, sending items to the Defense Reutilization Management Office or any other diversion from landfills by weight. The RRRP or QRP no longer addresses only paper, plastic and aluminum cans. The program focuses on waste diversion from landfills. Organizations must now look under both recycling and solid waste program regulations to find RRRP or QRP information as this program moves away from easily recyclable items with high commercial value.

## **ENFORCEMENT**

The US Environmental Protection Agency (USEPA) has implemented an initiative to carry out the provisions of RCRA Section 6002 and EO 13101. The initiative, scheduled for implementation during FY 2000, will consist of inspection activities carried out pursuant to section 403 of EO 13101. The EPA EO 13101 initiative will initially emphasize field-level awareness and compliance assistance focusing on federal facility responsibilities pursuant to RCRA section 6002.

The EPA policy guidance has indicated that violations of RCRA section 6002 by federal agencies do not give rise to administrative penalty actions or orders under RCRA's enforcement authorities. This conclusion does not, however, limit EPA or the authorized states with RCRA authority to issue notices of violation (NOVs) or enter into compliance agreements at federal facilities for violations of RCRA section 6002 discovered during EO 13101 section 403 inspections. Local citizen groups may also attempt to take action pursuant to RCRA section 7002 for violations of RCRA 6002 requirements.

## **FURTHER INFORMATION**

Air Force Center for Environmental Excellence (AFCEE) offers further guidance at:  
<http://www.afcee.af.mil/>

EPA guidance document "Conducting Inspections of Federal Facilities for Compliance with Section 6002 of the Resource Conservation and Recovery Act", see <http://www.epa.gov/compliance/resources/policies/civil/federal/rcra6002.pdf>.

For EPA Comprehensive Procurement Guideline (GPG) information with EPA background documents, recycled content product fact sheets, and recycled content product manufacturer and distributor lists, see: <http://www.epa.gov/cpg>

The EPA has an Internet site with suggestions for implementing recycling programs at:  
<http://www.epa.gov/greeningepa/practices/recycling.htm>

Office of the Federal Environmental Executive site provides the full text of Executive Order 13101, the Strategic Plan to Implement EO 13101 and other buy recycled information. See: <http://www.ofee.gov>

***KWIK-NOTE: Ensure your installation has a RRRP or QRP program. Ensure the RRRP or QRP reports are being sent as required by both programs.***

## **RELATED TOPICS:**

## **SECTION**

Civil Associations and Military Corporations	22-2
Environmental Duties at Base Level	12-3
Hazardous Waste Disposal	12-4
Morale, Welfare and Recreation (MWR) Programs, Activities and Facilities	22-4

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## What Questions Should I Ask my Faculty Staff?

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Updated by Lt Col Timothy Mullen, September 2009

### OVERALL FACILITY PROGRAM

What is our compliance status?  
Is the environmental management program sufficiently staffed and funded to ensure environmental compliance?  
What NOV/NONs did we receive during the past year?  
What NOV/NONs are still outstanding?  
Do we have any Compliance Agreements or Consent Orders?  
What is our working relationship with the regulatory agencies?  
What environmental projects have we submitted? Which of these are critical, must-fund projects and why?  
What environmental and natural and cultural resources training programs do we have?  
What environmental and natural and cultural resources projects are underway or scheduled? Have National Environmental Policy Act (NEPA) requirements been considered?  
Do we have any construction projects that do not have either an Environmental Assessment or an Environmental Impact Statement under NEPA?  
When was our last Environmental Compliance Assessment Management Program (ECAMP) inspection performed? By whom? What deficiencies were found? What is being done to correct those deficiencies?  
Are we receiving environmental support from other Air Force or DOD agencies? Do we need support?  
How do we obtain support?  
What permits do we have?  
Who are our regulators?  
Do we have HAZMAT release response contingency plans? Do we know all of the emergency release reporting numbers (local, state and Federal)? Do we have a system to quickly determine if we have a reportable quantity (RQ) spill? (*i.e.*, is this a substance that has reporting requirements and how much is the RQ for that substance – in some cases, it is as little as one ounce)  
Do we have a designated and pre-briefed team that is prepared to escort environmental inspectors in site inspections?

### HAZARDOUS WASTE MANAGEMENT PROGRAM

How much hazardous waste do we generate each month? How much hazardous waste did we generate in each of the last three years? If waste generation is increasing or static, why? Shouldn't we be reducing waste generation under pollution prevention programs?  
Do we generate low level radioactive waste?  
Where and how much hazardous material is stored on our installation?  
When is the last time a visual inspection of the containment facilities was accomplished by a qualified environmental engineer specializing in the control of hazardous substances or waste?  
What type of hazardous waste storage do we have (accumulation, 90 day, or permitted)?  
What are our hazardous waste disposal costs?  
What is the status of our hazardous waste inventory? What is the date?  
How do we dispose of our hazardous waste? Do we use the Defense Reutilization and Marketing Office (DRMO)?  
Have there been any liability problems with our hazardous waste disposal company?  
Do we have a RCRA Part B permit or is a RCRA Part B permit application pending approval?  
What storage, treatment, or disposal units are on the permit?  
Are there other storage, treatment, or disposal units that should be included on the permit (or permit application)?  
How many Solid Waste Management Units (SWMUs) are on the Part B permit?  
Do we have a corrective action requirement to fulfill under the RCRA Part B permit? Who is responsible

for this and when is it due?

Do we have a designated responsible action official for hazardous waste?

What is the status of the Facility Hazardous Waste Management Plan (FHWMP)?

Do we have a list of designated contacts from each tenant for the FHWMP? Are periodic meetings held to discuss requirements and problems?

Are there any problems with tenant organizations complying with our facility requirements?

Do we have any property leased to commercial firms? Do they generate hazardous waste? How is it disposed?

## **POLLUTION PREVENTION PROGRAM**

Are we in full compliance with the Emergency Planning and Community Right-to-Know Act (EPCRA) requirements?

Are we required to submit a Toxic Release Inventory (TRI) report? If so, what are the results? Do we get our report submitted to state and local emergency response committees by the July deadline annually?

Do we have a system in the procurement program that avoids selection of hazardous substances when non-hazardous substances available to meet mission requirements? (required by pollution prevention executive order)

Do we have a Resource Recovery and Recycling Program or Qualified Recycling Program? Who manages the program and how are program receipts distributed?

Are we working on compliance with the new solid waste diversion rate requirements that replaced the old recycling program? Where are we in complying with the greater than 40 percent diversion goal by 2005?

What is the status of our Ozone Depleting Substances (ODS) conversion plan? Will we meet the AF, NGB and ANG mandated dates for phase-out of all non-mission critical applications of Class I ODSs?

Have we completed our Pollution Prevention Plan? Is it being updated annually? What is the status of its implementation?

What progress are we making toward reducing our releases of toxic chemicals and our generation and disposal of hazardous and non-hazardous wastes?

Have potential substitutes been reviewed from a safety and health perspective as well as mission support?

What measures are we taking to reduce or eliminate pollution from our base?

Is there good coordination and communication between host and tenant commands on issues like TRI reporting, pollution prevention planning, and ODS phase-out?

What cost avoidance or savings have we achieved as a result of pollution prevention?

## **ENVIRONMENTAL RESTORATION**

Is our facility on the National Priorities List (NPL)?

Do we have any sites on the facility being addressed under the Defense Environmental Restoration Program (DERP)? How many sites are under the DERP? What is the status of these sites?

Have we completed the Preliminary Assessment/Site Inspection (PA/SI)?

Is a Remedial Investigation/Feasibility Study (RI/FS) underway?

Do we have an Interagency Agreement (IAG)?

Has a technical review committee (TRC) been established?

Is there a community relations plan (CRP)? Did the PAO prepare the CRP? Did we coordinate the CRP with NGB/PAE?

What is the regulatory relationship between the state and the EPA?

## **OTHER ENVIRONMENTAL PROGRAMS**

What is the quality of our drinking water? Are we in compliance with the Safe Drinking Water Act?

How do we obtain our drinking water?

Do we provide drinking water to anyone off the facility?

Do we have any cooperative environmental programs with other organizations (such as resource recovery or recycling)?

Who is our representative to the Local Emergency Planning Committee (LEPC) (EPCRA requirement)?

Do we have any air pollution control permits? What is their status?

Do we operate a wastewater treatment facility? If so, what is the plant's condition, operating record and status of qualified operator personnel?  
Do we have any wastewater discharge permits? How many compliance points? What is the status of the permits?  
Do we meet our permit discharge limitations?  
Do we have a pest management plan?  
Do we have any Natural Resource Damage (NRD – under CERCLA) issues or claims on this installation?  
Do we know who the Natural Resource Trustees are for any NRD claims? Have we had PA involvement NRD?  
Do we have a Natural Resources Management Plan?  
Do we have a Historic and Archaeological Resources Protection Plan?  
Do we have a current, approved Spill Prevention Control and Countermeasures (SPCC) Plan (under Clean Water Act regulations)  
When was the SPCC Plan last tested? What deficiencies were noted during the test? What is the status of corrective actions?  
How many reportable spills have we had the past year? Were all spills reported properly? Have we analyzed the number and size of spills? Is there a trend?  
What is our PCB inventory?  
How many underground storage tanks (USTs) do we have? What is their status?  
Have funds been budgeted for testing/removing tanks and possible cleanups?  
Do we have any environmental noise problems?  
Do we have proper operating permits for our landfills?  
Has all regulatory mandated training been completed and records retained?  
How many people need training?  
Do we have an environmental awareness training program?  
Have all buildings been inspected for asbestos?  
Do any buildings require asbestos abatement?  
How many buildings have been tested for radon? Do any require remediation?

### **QUESTIONS FOR YOUR PUBLIC AFFAIRS OFFICE**

How is our environmental program perceived in the community?  
What is our relationship with local officials regarding environmental issues?  
What is our relationship with the media on environmental issues?  
What types of communication are used to inform the public and military dependents living in our housing areas about our environmental program?  
Are there good news stories from the Environmental Office that can be released to the local newspaper or our major claimant?  
Do we have a public involvement and response plan? Is it being activated?  
Are NEPA documents being thoroughly coordinated?  
Is the Public Affairs Officer (PAO) actively participating? What actions are being taken to increase environmental awareness of the workforce?  
Does each new military and civil service employee receive a new employee briefing and does it cover environmental programs?  
Are any organized environmental groups interested in our facility? Who are they and what is our relationship with them?

### **QUESTIONS FOR YOUR LEGAL OFFICE**

Is there coordination between key environmental personnel (i.e., installation environmental coordinator, state/installation JAG, counsel at NGB/JAV, ANG/CEV) to ensure timely coordination of environmental issues?  
How are our environmental permits reviewed by the legal office and ANG/CEV?  
Are there hazardous waste sites on the facility not in compliance with environmental statutes?  
Has the legal office coordinated the Air Force or ANG remedy with the EPA?  
Is the legal (state/installation JAG and NGB/JAV) involved in negotiations for Compliance Agreements

and Consent Orders?

How does the legal office learn of regulatory changes (local, state and federal)? Will I receive prompt briefings on changes?

### **QUESTIONS FOR YOUR OCCUPATIONAL SAFETY AND HEALTH OFFICE**

Have all appropriate personnel received the required Occupational Safety and Health Administration (OSHA) training?

Do all employees and military members have AF Form 55, Record of Safety/AFOSH Training, in their training records?

How are the Hazard Communications (HAZCOM) and other OSHA programs coordinated with the environmental plans and programs for hazardous waste?

Does this command have an official policy which requires training prior to visiting or working at a hazardous waste or hazardous materials site?

Does the AFOSH policy instruction contain specific requirements for the personnel safety aspects of the environmental program?

What involvement does the AFOSH office and cognizant industrial hygienist have in reviewing potential or actual pollution prevention process changes?

Does the AFOSH Office have the list of locations and operations that require the use of personal protective equipment (PPE)? Do training records substantiate training for the proper use of PPE? Do these lists and records include hazardous waste and emergency response personnel? Are there adequate local procedures for stocking and issuing PPE?

What are the results of the last AFOSH Oversight Inspection? Are there deficiencies identified in the hazardous material, hazardous waste or emergency response programs?

Are there any environmental-related health complaints on file? What is the resolution status?

Do employees or military personnel in high-noise areas or areas subject to exposure to hazardous substances receive annual physicals under the medical monitoring program?

Who is reviewing the environmental contracts for safety and health requirements? Is the safety office reviewing contractor submissions for compliance with OSHA standards and contract requirements?

Who coordinates and provides our industrial hygiene support? Are all of our designated personnel in a medical surveillance program?

### **QUESTIONS FOR YOUR NATURAL RESOURCES MANAGER**

Do we have an approved Integrated Natural Resources Management Plan (INRMP) (Sikes Act)? Have INRMP milestones been met according to the timeline in the INRMP? Has the INRMP been coordinated with ANG/CEV and NGB/JAV?

Do we have any agricultural leases or forestry programs? Is there a possibility of environmental contamination on these parcels?

Has an endangered species inventories been completed and when was the last time it was done?

Are there mission conflicts with endangered species (animals, insects or plants) or marine mammals? Is there a plan or mechanism for resolving such conflicts?

Is there coordination with the U.S. Fish and Wildlife Service (USFWS) and state wildlife agency?

Do we have hunting, fishing or natural resources-based outdoor recreation programs?

Is there adequate coordination between land use decision makers and natural resources managers?

How are natural resource programs funded?

Do we have soil erosion or sediment non-point pollution problems?

Do we have an Erosion Control Plan?

Do we have a wetlands inventory? Where are our wetlands? Do we have a process to get wetlands permits from the Army Corps of Engineers (ACE) when we fill or excavate wetlands?

**REFERENCE:**

**Updated by Lt. Col. Timothy Mullens, September 2009**

**Air Force Commander's Guide To Environmental Quality**

The Air Force Commander's Guide to Environmental Quality can be found at

<http://www.afcee.af.mil/resources/installationplanning/usafcommanderguidetoenvironmentalquality/index.asp>

Some sections are out of date as of July 2001. In particular, the section on recycling and solid waste is over two years out of date. Check with your environmental manager or legal office to ensure you have the most current information.

# Chapter 13, Flying and Operations

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- 13-3 Air Traffic Control Operations: Authorization and Liability
- 13-4 Aviation Career Incentive Pay
- 13-5 FAA - Investigation of Flying Violations by Military Members
- 13-6 Flying Evaluation Board

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# Aerial Events, Flyovers, and Static Displays

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Updated by Maj John W. Erickson, Jr., November 2008

**AUTHORITY:** DoDD 5410.18, Public Affairs Community Relations Policy (20 Nov 01, Certified Current as of 30 May 07); DoD 5500.7-R, Joint Ethics Regulation (JER), Chapter 3 (Aug 93, C6, 23 Mar 06); AFI 11-209, *Aerial Event Policies and Procedures* (4 May 06); AFI 35-101, *Public Affairs Policies and Procedures* (29 Nov 05); AFI 36-3101, *Fundraising Within the Air Force* (12 Jul 02); ANG Supplement 1 to AFI 11-209, *Aerial Event Policy and Procedures* (6 Mar 08).

## INTRODUCTION

In this topic we will discuss general rules and requirements for military participation in aerial events, including flyovers and static displays. We will only highlight the nature of the rules, as the regulations are quite specific and must be consulted prior to any decision regarding whether to support an off-base aerial event.

Since your involvement in aerial events will either be as a sponsor or participant, we will set forth some of the considerations to help you determine which role is more appropriate for you in a given event. A sample Memorandum of Understanding (MOU) is provided in Attachment 1 to this topic which involves an air show with a local business group as the sponsor, and an ANG unit, a state agency, and a private commercial air show company as participants. This is a common sponsor and participant arrangement for these events.

Finally, this topic will focus on prohibited practices involving the sale of unit memorabilia by ANG units sponsoring or participating in air shows.

As we begin our discussion, keep in mind this is a very sensitive area from the safety, financial, and abusive practices standpoints. Proceed cautiously and protect yourself and your unit from any appearances of improper conduct.

## PURPOSES

Air Force and Air National Guard participation in aerial events is governed by AFI 11-209. (For purposes of this Instruction, the Air Force Reserve and Air National Guard are functionally considered to be Major Commands.) This Instruction states, as general guidance: "Air Force aerial events keep the public and military informed of U.S. preparedness, demonstrate modern weapons systems, promote good community and international relations, support Air Force recruiting and retention efforts, and render military honors."

## REQUIREMENTS

Each level of command must approve aerial events described in Attachment 1 of the Instruction. Requests for flyovers for events held on a military installation may be approved by the hosting MAJCOM, as provided in Air Force Instructions. All requests for flyovers off military installations, other than for the five patriotic holidays, must be submitted to the SAF/PA for approval. Each MAJCOM that takes part in or supports an aerial event must evaluate requests for aerial events, coordinate with DoD (ASD/PA), SAF/PAC and other agencies to determine the extent of participation authorized. Waiver requests must be approved at the MAJCOM level prior to requesting any waivers to the Instruction from HQ USAF/XOO.

AFI 11-209, Atch 1, defines numerous terms relative to aerial events. There are rules for both on base events and off base events, and Attachment 2 to AFI 11-209 provides a matrix of approval levels for specific elements of an aerial event. Generally speaking, the approval levels for passive events are at a

lower level than are those for active flying. This Instruction further provides specific guidance as to: weather minimums; minimum altitudes; airspeeds; spectator areas; LAPES demonstrations; equipment drop demonstrations; helicopter assault demonstrations; parachute demonstrations; and static display of aircraft. AFI 11-209 sets forth very specific guidance for the considerations of requests for, and the planning, approval, and execution of, military aviation flyovers. Any commander receiving requests for military flyovers should consult this guidance prior to responding to requests for, and/or planning or seeking approval for, military flyovers. AFI 11-209 cautions against premature statements of support or non-support for a planned civilian air show before receiving approval or disapproval; Air Force members must not indicate support or nonsupport to the sponsor of an off base aerial event until SAF/PA approves or disapproves that event and their MAJCOMs approve or deny the use of operational resources. The rules for designated spectator areas are extremely important from a liability standpoint, and planners should carefully observe the prescribed distances and specifications and, whenever possible, provide additional buffers in the interest of spectator safety. Coordination among all aerial event organizers and participants, with full understanding of all physical structures and potential hazards, is imperative. The Italian air demonstration team tragedy at Rhein-Main Air Base several years ago was significantly worsened when a tumbling aircraft snagged onto concertina wire and dragged it through the crowd of spectators. In retrospect, an alternate method of crowd control other than the use of concertina wire might have been chosen. The public relations aspects of air shows are discussed in AFI 35-101.

A Judge Advocate should ALWAYS be part of the Commander's planning team for aerial events. Negligence claims and lawsuits are always possible from invitees to our installations, and liability prevention is well worth the effort of extra thought and coordination. Moreover, a Judge Advocate can provide insight on handling potential demonstrations, etc., which may occur at the aerial event.

#### **SHOULD YOU BE A SPONSOR OR PARTICIPANT?**

Your unit may either be a sponsor of the aerial event or a participant, i.e., either hosting it at your base or participating as a guest at another base.

If you sponsor the aerial event, you are responsible for raising the entire budget for it. By regulation, you, as a sponsor, can only have military displays as part of the event. The two main benefits to the ANG and your unit in particular, of having an air show, are enhanced community relations and recruiting. Many units either do not have the time or want the responsibility of paying for the entire air show.

If you will have a co-sponsor of the event, you should pay special attention to Section 3-206 of DOD 5500.7-R, Joint Ethics Regulation.

By having a civilian organization (e.g., local Chamber of Commerce) sponsor the air show, it can relieve your unit of an enormous financial burden, and permit civilian displays (of which there are many interesting and exciting ones) in addition to the military displays.

By having the air show at your base, with your participation and presence, you receive the community relations and recruiting benefits with less of the financial burdens. Basic Air Force policy is to keep costs of its participation to a minimum. This can be done best by using local resources. Participation requiring additional cost to the government should be avoided, unless considered in the best interests of the Air Force. Payment for these costs is based on two event categories: Primary Interest, in which all costs are borne by the Air Force unit or units involved; and Mutual Interest, in which costs are shared by the Air Force and the sponsor. Even when your unit is a participant rather than the sponsor, there is still much coordination to be done between your unit, the civilian sponsor, and other participating organizations, be they military, civilian government, or private organizations. For example, you will have to resolve issues of billeting, per diem, and fuel, as well as the payment for these items, with visiting military organizations. It can be done either by your unit paying for it or on a future reciprocation basis.

Additionally, since your base may host (not sponsor) part or all of the air show (some of the show may take place on an adjacent civilian airport facility), issues of remuneration from the civilian sponsor to you for use of your land must be addressed. Generally, your unit cannot itself directly receive such remuneration,

but you may have established a civil association or military corporation under your state's law, which may lawfully receive such money.

Questions of security, crowd control, food concessions, parking of aircraft, payment to civilian performers, maintenance services, volunteer services, clean-up, insurance and jurisdiction all need to be coordinated.

Policy guidance on use of O&M funds for community relations is provided in DoD Directive 5410.18, Section 4.9. With regard to open house events, Section 4.12.8 of the same Directive provides, "No charges or fees shall be imposed by the military installation or its agents for admission, parking, or viewing any activity."

## **MEMORANDUM OF UNDERSTANDING**

The issues arising in these events can be addressed and provided for in either a memorandum of understanding (MOU) or a contract (agreement) among the parties concerned, which includes your unit. Attachment 1 to this topic is a Memorandum of Understanding actually used among the various parties at an air show held partly on an ANG base and partly on a civilian airport with a civilian sponsor at which the USAF Thunderbirds also participated. The MOU covers most, if not all of the necessary considerations for having such an air show. The ANG unit concerned appointed one senior officer as its Project Officer for the unit's participation, and the MOU was negotiated, drafted and extensively reviewed in close consultation with the unit Staff Judge Advocate. Some of the provisions of Attachment 1 may not apply to every air show, may not cover peculiar factual problems associated with your air show, and may have to be amended to conform to your state's laws. It is offered here; however, as an example of what is needed to maximize protection to your unit and to help ensure that you have a successful air show.

## **SELLING MEMORABILIA AT AIR SHOWS**

DoDD 5410.18 prohibits the Air Force and its Reserve components (ANG) from competing with commercial enterprises where a like service is available.

From a public affairs standpoint, the primary reasons for supporting civilian sponsored air shows is to promote aviation, display our hardware to the public, explain the mission of the units, show the public the high caliber of people in the service today, and respond to the public interest in the DoD. As stated in AFI 35-101, Para 8.41.1: "Open houses should not be (or convey the image of) a fair, carnival, circus, civilian air show, or display of commercial products, and should inspire patriotism and aid in military recruiting."

AFI 36-3101, para.19 provides: "Official Endorsement." Under DoD 5500.7-R, Section 3-210.a., Air Force employees may not officially endorse, or appear to endorse, fundraising for any non-Federal entity except for those specifically identified in JER Section 3-211. That section permits official support and endorsement of the CFC and AFAF. Under Section 3-210.a.(6), officials may also officially endorse and support fundraising activities when conducted by organizations composed primarily of DoD employees (or their dependents) when fundraising among their own members for the benefit of welfare funds for their own members (or dependents) when approved by the installation commander, after consultation with an ethics official.

**KWIK-NOTE: Follow the applicable regulations. Safety must be first. Air shows should not be viewed as money-making opportunities.**

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Access to Military Installations	3-2
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Attachment 1

## MEMORANDUM OF UNDERSTANDING

### SPONSORSHIP

The \_\_\_\_\_ Chamber of Commerce (\_\_\_\_ CC) and the \_\_\_\_\_ State Department of Transportation (\_\_\_\_DOT) agree to co- sponsor an Air Show at \_\_\_\_\_ Airport on \_\_\_\_\_. (The Air Show shall recognize completion of the \_\_\_\_\_ base installation at \_\_\_\_\_ Airport).

The \_\_\_\_\_DOT sponsorship will be limited to providing airport space for parking of Civilian Military static display aircraft; vehicle parking for the general public; obtaining FAA waivers; and appropriate airport services including Control Tower Operations.

The \_\_\_\_\_ Wing, \_\_\_\_\_ Air National Guard, agrees to support the Air Show with special invitation and assistance to various Department of Defense military units to participate with aircraft static displays and tactical air demonstrations.

\_\_\_\_ CC shall be responsible as the "managing sponsor" for overseeing the organization, marketing, promotion and actual conduct of the Air Show. To this end, \_\_\_\_\_ CC will contract with (private air show company) to provide professional coordination, marketing, and on-site management of the events and activities.

### AERIAL PERFORMERS

\_\_\_\_ CC (through private air show company) will have responsibility for:

1. Selecting and executing contracts with civilian performers;
2. Parking and handling of civilian static display aircraft;
3. Providing agenda and scheduling of aeronautical performances; and
4. Arranging for all supporting activities and services.

\_\_\_\_ DOT will have responsibility for:

1. Obtaining FAA Air Space Waiver for conduct of the two day air show;
2. Arranging for USAF Thunderbirds Team (with all associated costs to be paid by \_\_\_\_\_ CC Air Show Account as required under obligations with USAF); and
3. Coordinating Air Show support with \_\_\_\_\_ (Contract Airport Operator) and \_\_\_\_\_ (Fixed Base Operator).

(ANG Unit) will have responsibility for:

1. Providing at its base installation aircraft parking for USAF Thunderbirds and military aircraft conducting tactical demonstration flights and displays requiring special security procedures in accordance with Department of Defense directives;
2. Coordinating the invitation of tactical and static display military aircraft and advising \_\_\_\_\_ CC on per diem, transportation and other services;
3. Parking for military static display aircraft within the general display area;

4. Vehicle parking for military personnel via Route \_\_\_\_\_ entrance;
5. Overnight security for all military static display aircraft in general display area;
6. Payment of costs associated with exhibits unilaterally invited by the (ANG unit) that will be housed on the Air National Guard Base and used in support of their participation in the event;
7. Access control to facilities located within the confines of the Air National Guard Base and any leased facilities the Air National Guard has outside of said confines; and
8. Providing aviation fuel for all participating military aircraft units including USAF Thunderbirds, tactical demonstrations and static display aircraft.

#### **GENERAL SUPPORT AND SERVICES**

\_\_\_\_ CC and (private air show company) will be responsible for all necessary activities together will costs associated with the preparation and conduct of Air Show activities including, but not limited to:

1. Highway traffic control;
2. Vehicle access including parking and crowd control;
3. Collection of admission fee (advance & gate);
4. Payment for civilian aerial performers;
5. Payment of all space costs associated with the USAF Thunderbirds and other military units participating in the event as agreed to by the "managing sponsors." Payment or reimbursement of above costs shall be paid to either the U.S. Air Force, the Air National Guard, the (ANG Unit) or other Military Units as appropriate except if the "managing sponsor" chooses to furnish lodging, meals, and/or transportation said costs shall be reduced in accordance with guidance provided in federal joint travel regulations. "Managing sponsor" shall also assume responsibility for additional costs including but not limited to: travel cost of military personnel and equipment; commercial shipping costs of exhibit materials owned by agencies of the federal government when requested by the "managing sponsor;" and any rental space, utilities, custodial services or any additional services deemed necessary by the participating units and agreed on by the "managing sponsor;"
6. Concession arrangement, sanitary and trash facilities and clean-up;
7. Coordination of essential volunteer services;
8. Establishing a comprehensive budget and a separate Air Show Bank Account, preparing and issuing periodic budget performance reports and also a close-out financial statement within 90 days after the Air Show;
9. Public Liability Insurance with State of \_\_\_\_\_; \_\_\_\_\_ State Department of Transportation; \_\_\_\_\_ State Adjutant General's Department; (Contract Airport Operator); \_\_\_\_\_ Chamber of Commerce; (ANG Unit); Air National Guard; United States Air Force; Department of Defense; and the United States of America as additional named insured;
  - a. Personal Injury \$10,000,000.00 minimum coverage; and
  - b. Property Damage \$1,000,000.00 minimum coverage;

10. Reimbursement to (Contracted Airport Operator's) airport operations and maintenance staff, as necessary and/or requested, to assist in setting up vehicle and crowd control barriers, facilitating and supporting air show operations and effecting prompt clean-up on conclusion of the Air Show; and

11. Coordinate Fixed Base Operator aircraft servicing of military aircraft as required.

**DISTRIBUTION AND FINANCE**

Since the \_\_\_\_\_ Chamber of Commerce incurs responsibility for all basic costs, all revenue less production costs will be retained and used by the Chamber for advancing the Chamber's community development goals. In recognition of the \_\_\_\_\_ CC role as managing sponsor and related cost responsibility, no fee for use of the Airport will be charged. \_\_\_\_\_ DOT shall, in the event of a financial loss, be responsible for reimbursement to (Contractor Airport Operator) for its overtime costs incurred in support of the Air Show.

**COORDINATION AND PLANNING**

\_\_\_\_\_ CC, DOT and \_\_\_\_\_ ANG will work together to plan, organize and conduct an air show event that will bring credit to each participating party.

This Memorandum of Understanding shall be subject to such corporate and executive approvals as may be required prior to execution by an authorized official. If this Memorandum of Understanding meets with approval, please arrange for execution.

APPROVALS: (Unit) \_\_\_\_\_ANG \_\_\_\_\_CC \_\_\_\_\_DOT

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
DATE: \_\_\_\_\_

Enc.: Contract Agreement between \_\_\_\_\_CC and (private air show company) cc: (Appropriate participants)

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# Air Traffic Control Operations: Authorization and Liability

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Updated by Maj John W. Erickson, Jr., November 2008

**AUTHORITY:** 32 U.S.C. § 502 (d)(3); Federal Tort Claims Act (28 U.S.C. § 2671 *et seq.*); AFI 13-203, *Air Traffic Control* (30 Nov 05); AFI 51-501, *Tort Claims* (15 Dec 05); and AFI 51-502, *Personnel and Government Recovery Claims* (1 Mar 97); NGR 27-20/ANGR 112-1 (10 Jul 89), *Claims Against or In Favor of the United States Arising From National Guard Activities* (10 Jul 89); applicable state law and regulations.

## INTRODUCTION

Air National Guard members with an Air Traffic Controller AFSC may perform air traffic control functions at military bases or civilian airports on a continuing or periodic basis. Two issues must be resolved by you, as Commander, before Guard members perform these functions:

- (1) authorization for the duty; and
- (2) liability coverage in the event of an incident involving personal injury and/or property damage.

Claims may arise for death, personal injury or property damage arising out of the noncombat activities of Air National Guard members while performing duty under 32 U.S.C. sections 316, 502, 503, 504 or 505, when the members are acting within the scope of their employment. *See* AFI 51-501, Para. 5.10, 5.13. Air Force Settlement authorities settle claims arising out of the activities of the ANG, while the ANG member is acting under Title 32 or Title 10 orders, other than noncombat, in accordance with AFI 51-501, Chapters 2, 3 or 4. If the claim arises out of activities of the ANG while under STATE orders, such claim must be referred to state authorities.

There are four basic scenarios in which ANG Air Traffic Control units perform functions wherein questions of authorization and liability may arise. Variables in the scenarios include: (1) the duty is being performed at a military base or civilian airport; (2) the duty is performed on a continuing or periodic basis; and (3) the duty is performed alone or with civilian air traffic controllers. Each scenario will be discussed below, together with some of the authorization and liability coverage issues raised by such situations.

## ANG MEMBERS - MILITARY BASES - CONTINUING OR PERIODIC DUTY

ANG members performing air traffic control duties at military bases on a continuing or periodic basis do so on orders (for example, Annual Training - AT) or during inactive duty training (UTA) periods. Their duties are authorized and, if they act within the scope of their employment (*i.e.*, within the parameters of their orders, and complying with applicable regulations), they have liability coverage under the Federal Tort Claims Act (FTCA).

## ANG MEMBERS AND CIVILIANS - MILITARY BASE OR CIVILIAN AIRPORT - CONTINUING DUTY

ANG members who, together with civilians, perform air traffic control duties at military bases or civilian airports on a continuing basis do so pursuant to some form of Airport Joint Use Agreement, and the ANG member does so either pursuant to AT orders or during a UTA. AFI 13-203, para 1.8.1 states: "LOAs are established between Air Force units or agencies on a particular base and a non-Air Force agency from the base or any unit or agency from another location. Routinely, LOAs are established between a supported wing and an FAA Approach Control or FAA ARTCC. Refer to the LOA section of FAAO 7210.3 for formatting and guidance on general content of LOAs."

The Airport Joint Use Agreement or LOA should be staffed, approved or signed by civilian airport officials, local unit officials, state officials, the FAA, the gaining MAJCOM and the NGB. If the ANG members' duties are authorized, and they are acting within the scope of their employment (*i.e.*, within the parameters of the agreement between the military and civilian agency), and they are acting under appropriate orders, they will have liability coverage under the FTCA.

#### **ANG MEMBERS - CIVILIAN AIRPORTS - PERIODIC DUTY**

This scenario involves ANG members who are asked to perform air traffic control duties at civilian airports from time to time, usually for a specific reason or event (for example: a civilian air show).

ANG members are authorized to perform these duties only after certain requirements are met and approvals are obtained. Typically, the first thing that happens is someone in the ANG air traffic control unit (usually the Commander or the Chief of Air Traffic Control Operations - CATCO) receives a request from civilian airport authorities for the ANG air traffic controllers to assist at the upcoming event. This request should be on the airport authority's letterhead and should specify the dates, times, places, number of ANG members needed and reasons they are needed for a specified event. The Commander or CATCO will then request FAA approval for the ANG members to participate. Upon obtaining FAA approval, the unit will send the airport's request and FAA approval, through channels to the MAJCOM, with a copy to the NGB. Upon obtaining MAJCOM approval, the unit may then issue appropriate orders for the ANG members to perform the requested duties.

Once this process has been completed, if the ANG ATC members are authorized to perform the requested duties, and they act within the scope of their employment (*i.e.*, within the parameters of their authorization, and acting under appropriate orders), they will have liability coverage under the FTCA.

This approval process must be completed for each separate request by a civilian airport authority for ANG members to perform air traffic control duties at a civilian airport on a periodic basis.

#### **ANG MEMBERS AND CIVILIAN CONTRACTORS - MILITARY BASE OR CIVILIAN AIRPORT**

This scenario arises where the ANG or a civilian airport authority has contracted with a civilian firm to perform air traffic control duties, and where military air traffic control units seek to also perform such duties with the civilian contractor.

Two separate issues may arise. First, the civilian contractor may seek FTCA coverage for its own liability. Second, the civilian contractor may want reimbursement under the contract, should any work time be taken away from the civilian contractors as a result of the ANG members' training.

ANG members are not permitted to perform air traffic control duties at military bases or at civilian airports with civilian contractors until such time as specific agreement on all issues has been reached between the ANG, the civilian airport authority (if applicable) and the civilian contractor. If and when such operational training by ANG ATC members is permitted, ANG members must be authorized by appropriate orders to act, and act within the scope of their employment (authority), before they will be afforded liability coverage under the FTCA. In absence of such permission, it is likely ANG members would not be covered for liability under the FTCA, and could be held personally liable for negligence in the performance of their duties.

#### **LIABILITY ISSUES**

Unless there is specific authority (*i.e.*, the member is authorized by appropriate orders under Title 32 or Title 10, and the member is acting within the scope of his employment) for Air Traffic Controllers to perform their function at civilian airports, they may not have liability coverage under the FTCA. This is true even if they were in a duty status at the time. Being on orders or in a UTA status does not automatically afford FTCA protection; the duty must be authorized by appropriate authorities. Being in a duty status is not enough. If there is no FTCA coverage, the member may be personally liable for negligence. Remember, Commanders who permit or authorize UTAs or AT periods for activities that are

not authorized (example: unapproved work by military air traffic controllers at civilian airports), may also find themselves PERSONALLY LIABLE for personal injury or property damage due to the negligence of their air traffic controllers.

The phrase “acting within the scope of employment,” as used in the Federal Tort Claims Act, AFI 51-501 and AFI 51-502 not only means that the member is acting under appropriate orders and authorization, but also that the member is qualified to perform such duties. As Commander, you are responsible for ensuring that your ANG ATC members are properly qualified to perform the duties they are given, that the members are physically capable of performing the duty, and that they do not violate applicable regulations in the performance of their duties. For example: if an ANG ATC member, who has proper authorization and is acting under appropriate orders, performs duties in excess of the duty period prescribed by FAA regulations and/or AFI 13-203 (which may be more restrictive than FAA regulations), the member may not be acting within the scope of his or her employment. Further, if the member's supervisor (*i.e.*, you, as Commander) directed the member to work beyond the prescribed duty period, the supervisor may also be liable for the member's actions.

As you can see, liability issues trap the unwary and unprepared. Work closely with your Judge Advocate, your CATCO and higher headquarters to ensure that the proper authorizations and orders have been issued prior to allowing your ANG ATC members to perform duties at civilian airports. And make sure that your ATC members are properly qualified and supervised as they perform their duties.

***KWIK-NOTE: Commanders of air traffic control units must ensure that their ATC members are properly qualified, acting under appropriate orders, and properly supervised BEFORE they perform duties at civilian airports.***

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## Aviation Career Incentive Pay

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Updated by Maj John W. Erickson, Jr., November 2008

**AUTHORITY:** 37 U.S.C. § 301a, *Incentive Pay: Aviation Career*; Aviation Career Incentive Act of 1974; Aviation Career Improvement Act of 1989; DoD Reg. 7000.14-R, Department of Defense Financial Management Regulations (FMRs), Volumes 1-15, date varies per volume; Volume 7A, Chapter 22, Section 2202, "Aviation Career Incentive Pay (ACIP) for Rated or Designated Officers, Aviation Cadets and Warrant Officers" (chapter issued February 2001); AFI 11-401, *Aviation Management* (7 Mar 07).

### DEFINITION AND QUALIFICATIONS FOR ENTITLEMENT

Aviation Career Incentive Pay (ACIP) is additional pay granted to rated members for the maintenance of their flying skills and to encourage their retention in the armed forces.

The rules for entitlement to ACIP differ, according to whether the rated member's entitlement is governed by the Aviation Career Incentive Act (ACIA) of 1974, or the Aviation Career Improvement Act (ACIA) of 1989. Generally, to qualify for Continuous ACIP under the ACIA of 1974, a rated member must have performed operational flying duties (including flying training, but not proficiency flying) for at least 6 of the first 12 years of aviation service, or 11 of the first 18 years of aviation service. The 12-year and 18-year requirements are referred to as "gates."

Under the ACIA of 1989, as amended by Section 616(a) of P.L. 104-106 in 1996, a rated member must have performed operational flying duties (including flying training, but not proficiency flying) for at least 8 of the first 12 years of aviation service, or 12 of the first 18 years of aviation service.

Once rated members have fulfilled these requirements, known as "gates," they will be entitled to ACIP payments on an ongoing basis, regardless of whether their present duties involve or require flying or the maintenance of flying proficiency.

Rated members who do not meet the requirements of their 12-year or 18-year "gates" may still be entitled to ACIP but generally must meet DoDFMR flying requirements in order to qualify for payment of ACIP. This is referred to in AFI 11-401 as "Conditional ACIP" entitlement.

Continuous entitlement to ACIP ceases for rated members once they complete 25 years of service, assuming that the rated member has performed operational flying duties for at least 11 (under ACIA of 1974) or 12 (under ACIA of 1989) of the first 18 years of aviation service. Nevertheless, rated members below the grade of brigadier general (O-7) with more than 25 years of service whose positions require performance of operational flying duty may be entitled to receive Conditional ACIP if the rated member is assigned to operational flying duties. (Example: a fighter squadron commander who holds the grade of O-6, has 27 years as a pilot, and whose duties include flying with the squadron.)

In addition, continuous entitlement to ACIP ceases for rated members who have completed 22 years of service if the member has performed operational flying duties for at least 9 but less than 11 (under ACIA of 1974) or at least 10 but less than 12 (under ACIA of 1989) years of aviation service.

NOTE: General officers who have completed 25 years of service and who are assigned to operational flying duties may qualify for Hazardous Duty Incentive Pay under the DoDFMR flying requirements.

### OPERATIONAL FLYING AND PROFICIENCY FLYING DISTINGUISHED

Operational flying duties are those involving flying performed by rated members while serving in assignments which require the maintenance and development of flying proficiency (Example: pilots, navigators, observers, and other rated personnel assigned to rated positions in a flying unit who perform at least their minimum required missions every month). This is contrasted with proficiency flying duty, which involves flying by rated members while they serve in assignments not requiring the maintenance of flying skills, such as MAJCOM staff positions and other career-broadening billets.

NOTE: All flying performed by rated members of the Air Reserve components [ANG and USAFR] is deemed to be operational.

If you have a question regarding a rated member's entitlement to ACIP, consult your Flight Management Office, Base Financial Manager or your Judge Advocate.

***KWIK-NOTE: Know to whom, when and for how long ACIP is payable.***

**RELATED TOPIC:**

Flying Evaluation Boards

**SECTION**

13-6

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# FAA – Investigation of Flying Violations by Military Members

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Updated by Maj John W. Erickson, Jr., November 2008

**AUTHORITY:** AFI 13-201, *Airspace Management* (01 Dec 06); AFI 13-203, *Air Traffic Control* (30 Nov 05).

## FAA REQUESTS FOR INFORMATION

The Federal Aviation Administration (FAA) Flight Inspector's Handbook now encourages inspectors to determine the identity of armed forces (including Air National Guard) pilots who are involved in alleged flying violations. Inspectors may send written requests for pilot names to Commanders through the Regional FAA Legal Counsel.

## POLICY - DO NOT RELEASE PILOT NAMES

Air Force and Air National Guard Policy does NOT PERMIT THE RELEASE OF PILOT NAMES TO ANYONE, INCLUDING THE FAA, during an investigation of alleged violations, absent prior specific approval by HQ USAF/XOO. The Federal Aviation Act of 1958 specifically requires that complaints against members of the armed forces are to be referred to the Secretary of the department concerned for action. Military members are encouraged to cooperate with the FAA during an investigation, without releasing any aircrew names. All reports or documents provided to the FAA should be sanitized so as not to reveal aircrew names. Call signs may be substituted for names.

## EFFECT OF RELEASE OF NAMES

On past occasions, pilot names have been inadvertently released to the FAA by aircrew members or third parties, such as Base Operations or Air Traffic Control personnel. It usually happens either by telephone or by signing a written statement submitted to the FAA. Any inadvertent release of names should be referred up the chain of command.

These names, whether correct or not, once released, have been entered into a computer database of all pilots, both military and civilian, who, in the past, have been involved in an alleged flying violation. This information can then be released to ANYONE who requests it, including airline representatives.

## ADVISE YOUR PILOTS

Guard and Reserve pilots who are employed by civilian carriers, and all aircrews, should be made aware of the database and should query the National Safety Data Branch, P.O. Box 25082, Oklahoma City, Oklahoma 73125, to see if their names are included in the same. There is a nominal fee for the inquiry. If their names are included in the database, they should contact their Staff Judge Advocate for guidance. The FAA is aware of the Air Force policy in this regard.

**KWIK-NOTE:** *All information provided to the FAA should be name-sanitized.*

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# Flying Evaluation Boards

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Updated by Maj John W. Erickson, Jr., November 2008

**AUTHORITY:** AFD 11-4, *Aviation Service* (1 Sep 04); AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Badges* (25 Sep 07); Privacy Act of 1974, 5 USC § 552a.

## INTRODUCTION

The basis for the USAF aviation service program is public law and is subject to interpretation by each service Secretary. Policy application must be uniform among the services. Since AFI 11-402 supplements other Department of Defense (DOD) guidance, the more restrictive provisions of the instruction apply to active duty personnel and members of the Air Reserve Components (ARC). See AFI 11-402, para 1.1.

A Flying Evaluation Board (FEB) is applicable only to rated officers. A rated officer has no inherent right to remain on flying status. A rated officer does have an obligation to maintain certain professional standards. Accordingly, qualification for aviation service is subject to review when an officer's rated duty performance becomes suspect. See AFI 11-402, para 4.2.

The purpose of the FEB is to examine a rated officer's professional qualification for aviation service, evaluate potential for future rated duties, and make recommendations to higher authorities. The functions of an FEB are administrative. An FEB does not make recommendations regarding disciplinary actions. An FEB is not a punitive measure, nor a disciplinary action, nor is it a substitute for action under the UCMJ, a state Code of Military Justice, or any other administrative directive when such action is warranted. Incidents that involve fitness or punitive liability make a rated officer subject to the same administrative or punitive actions as a nonrated officer.

An FEB is not an adversarial or judicial proceeding. It is an administrative board made up of members, qualified for aviation service, who review another member's qualification for such service. It is a peer quality review. The board is fact-finding in nature and conducted to ensure that all relevant information is reviewed and discussed in a fair and impartial manner.

## NO COMMAND INFLUENCE

The convening authority, whether because of personal feelings or otherwise must NOT EXERT ANY PRESSURE ON ANY FEB MEMBER in an attempt to influence the findings or recommendations of the FEB. You may or may not want the respondent disqualified, and you may have convened the FEB with either "fire in your eyes" or reluctance. Flying members on ANG bases form close attachments over the years, and when an FEB is convened, don't be surprised to have the members of the flying unit of the respondent taking one side or the other on the issue. It usually happens. If the "word is out" that you as the Commander expect, or even want, a certain outcome from the FEB, those FEB members, whose OPRs you probably write or indorse, will not be able to be fair and impartial in their FEB duties.

Because of the peer review nature of the FEB and what is ultimately at stake, the FEB proceedings will likely be a very emotional experience for all concerned. Often the facts that have led you to convene an FEB appear different after they have been fully aired at an FEB. Since a convening authority cannot be an FEB member, you will not have the insight into the full assessment of those facts that FEB members will have.

Therefore, whether before, during, or after the FEB, you must not indicate or reveal your feelings about convening the FEB or about an expected or desired outcome. And regardless of the outcome, you must not let it affect your future ratings of the FEB's participants.

As convening authority, you are the Wing or Group Commander who sets the tone for your unit and to whom all your members look for leadership. In your decision whether to convene an FEB and in any subsequent FEB proceedings, you must convey a sense of fairness, impartiality, and the attitude of "letting the chips fall where they may." The hardest duty any professional has to perform is to formally judge a peer. You will make the task more difficult to the extent you convey a personal stake in its outcome. However, your avoidance of even the appearance

of command influence will best ensure the fair and impartial hearing that everyone, including the Air National Guard and the United States Air Force, has the right to expect.

### **WHAT ARE GROUNDS FOR CONVENING AN FEB?**

A flying unit Commander must initially review the facts and circumstances of the situation, and AFI 11-402, Para. 4.3, to determine whether specific grounds exist to convene an FEB. Before this review, and your determination whether to convene an FEB, consult with the Staff Judge Advocate to ensure you are in compliance with the requirements of AFI 11-402. See Attachment 21 to AFI 11-402, Checklist for Flying Evaluation Boards. You don't do FEBs everyday, so by following the Staff Judge Advocate's advice and the checklist, as you go step-by-step through the FEB process, you will best ensure all aspects of the FEB proceeding will be legally sufficient and that the findings and recommendations made by the FEB will be sustained all the way up through HQ USAF.

AFI 11-402 states, in Paragraph 4.3: "Convene an FEB under any of the following conditions:"

1. Para. 4.3.1. Extended Aviation Service Suspension or Disqualification. A rated officer or CEA disqualified from aviation service for longer than eight years (at the time of submission for requalification), or whose aviation service has been invalid for more than eight years, must appear before an FEB for approval of requalification or revalidation. EXCEPTION: For extended medical disqualification, see AFI 11-402, Para. 3.8.

2. Para. 4.3.2. Lack of Proficiency. Cause exists to convene an FEB when an aircrew member shows a lack of aircrew proficiency. This may include a lack of knowledge of flying directives or a negligent violation of flying procedures. This does not apply to aircrew members enrolled in formal flying training programs.

3. Para. 4.3.3. Failure To Meet Training Standards. Failure to meet academic or flying standards while enrolled in a USAF directed formal flying training course requires an examination of the aircrew member's potential for continued aviation service. Do not remove or disenroll a rated officer or previously qualified CEA from a formal flying training course without MAJCOM/A3 approval, and do not administratively withdraw a rated officer or previously qualified CEA from a formal flying training course when the individual is eliminated for failure to meet training standards. The method of disenrollment for these members is FEB action under this paragraph or FEB waiver. An FEB or FEB Waiver evaluates retention in (or removal from) training and qualification for continued aviation service.

NOTE: Airsickness is not cause for medical disqualification unless there is evidence of organic or psychiatric pathology. However, rated aircrew members may meet a FEB under failure to meet training standards if airsickness interferes with flying duties and prevents completion of training. Forward aeromedical summaries of airsickness cases through medical channels to HQ AFMOA/SG3PF, 110 Luke Avenue, Room 405, Bolling AFB DC 20332-7050. The aircrew member may offer as evidence the results of any standard or experimental treatment program designed to treat airsickness. Do not use non-participation in an experimental program as evidence of a lack of desire to fly.

4. 4.3.5. Aircrew Requirements. Cause exists to convene an FEB when an aircrew member fails to meet ground or flying training requirements IAW AFI 11-202, Volume 1 and MDS specific instructions, or annual physical examination requirements published in AFI 11-401 and AFI 48-123, Volume 3.

5. 4.3.6. Violation of Other Aviation Instructions and Procedures. Cause exists to convene an FEB when an aircrew member has committed an intentional violation of aviation instructions or procedures.

6. 4.3.7. Habits, Traits, Characteristics. Cause exists to convene an FEB when an aircrew member exhibits habits, traits of character, or personality characteristics that make it undesirable to continue using the aircrew member in flying duties. Do not administratively withdraw an aircrew member from a formal flying training course when the individual is being eliminated under Habits, Traits, or Characteristics. Primary reasons to convene a FEB under this paragraph include:

4.3.7.1. A suspected fear of flying.

4.3.7.2. Chronic airsickness without an organic or psychiatric pathology.

4.3.7.3. Attempts to limit aviation service, such as DOR from formal training courses, requests for voluntary disqualification based on a personal desire to terminate aircrew duty, or requests to decline a particular assignment following formal training.

4.3.7.4. An FEB is not for punitive disciplinary action. It is not a substitute for action under the UCMJ or any other administrative directives.

NOTE: Do not use any aviation service action as a substitute for administrative or disciplinary action. Incidents that involve fitness or punitive liability make an aircrew member liable to the same actions as a non-aircrew member. When an aircrew member exhibits questionable professional qualities, consider initiating action outlined in paragraph 3.7.1.6. After completing action under paragraph 3.7.1.6., convene an FEB if the member's potential for continued aviation service is still in question.

### **PRELIMINARY ACTIONS BY COMMANDER**

Once grounds exist under AFI 11-402, the convening authority (usually a Wing, Group or comparable level Commander of the aircrew member's flying unit) must then determine whether a question exists concerning the aircrew member's flying qualifications and future rated potential. Although this step may not seem necessary if grounds exist, it is.

Under AFI 11-402, para 4.3, you will note that the words "Cause" and "may" are used within the definitions of grounds for convening an FEB under paragraphs: 4.3.2; 4.3.4; 4.3.5; 4.3.6. In other words, the existence of one of the "for cause" grounds does not automatically require the convening of an FEB, unless the flying unit Commander determines, in the Commander's discretion, that the existence of that ground raises a question about the aircrew member's flying qualifications and future rated potential.

In the vast majority of cases, if grounds exist, the FEB will be convened because there will be a question raised about the aircrew member's flying qualifications and future rated potential. However, depending on the particular ground and the factual reasons why it exists, the Commander **MUST** engage in the preliminary evaluation of the facts and circumstances before exercising the Commander's discretion, if applicable. The convening authority should review Air Force policies stated in AFI 11-402, Para. 1.2.7, and Para. 3.3.1 through 3.3.4.

The pitfall to avoid here is the premature convening of a FEB based on:

1. Insufficient facts; or
2. The Commander's failure to make the determination that, given the facts and existence of grounds, a question of flying qualifications and future rated potential exists.

### **CONDUCTING FLYING EVALUATION BOARDS. (See AFI 11-402, Attachment 11 – Attachment 23.)**

For detailed information re the composition of the FEB, procedures and guidelines during the FEB, findings and recommendations following the FEB, legal sufficiency review, processing the report, etc., see AFI 11-402.

### **CONCLUSION**

FEBs may also be convened as a result of an Aircraft or Missile Accident Investigation as well as after specific instances have occurred involving a rated officer and/or aircrew member. AFI 11-402 sets forth the specific guidance you need to conduct an FEB. The tips and related topics listed herein may aid Commanders and future FEB members.

***KWIK-NOTE: The most crucial aspect of the FEB process is the initial determination whether to convene an FEB.***

### **RELATED TOPICS:**

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# Chapter 14, Information Control

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## Classified Material

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Updated by Lt Col Francine Swan, Aug 2007

**AUTHORITY:** Executive Order (EO) 12958, as amended, *Classified National Security Information*, 25 March 2003; Office of Management and Budget (OMB), Information Security Oversight Office (ISOO) Directive Number 1, *Classified National Security Information*, Executive Order 12829, DODD 5200.1-R, *Information Security Program*, 14 Jan 97, for the management of the Air Force Information Security Program, Air Force Policy Directive (AFPD) 31-4, *Information Security*. AFI 31-501, *Personnel Security Program Management* (27 Jan 05); AFI 31-401, *Information Security Program Management* (1 Nov 05); DoDD 5200.1, *DoD Information Security Program*; (13 Dec 96), 32 CFR 2003.20, *Classified Information Nondisclosure Agreement (SF 312) Briefing Pamphlet*.

### PROPER CLASSIFICATIONS

Commanders are ultimately responsible to ensure that all information under their control is PROPERLY CLASSIFIED, that only authorized individuals have ACCESS to it, and that all available steps are taken to PREVENT UNAUTHORIZED DISCLOSURE of classified information. Management of the information security program is responsibility of the Information Security Program Manager (ISPM) who is usually the Chief of Security Forces; additionally each unit and work area should have someone appointed and trained to handle information security. Classified information is information that requires protection against unauthorized disclosure in the interest of national security and is classified under one of three designations: TOP SECRET, SECRET, or CONFIDENTIAL, depending on the level of sensitivity of the information. These are the only designations authorized to identify classified information. TOP SECRET is applied only to information the unauthorized disclosure of which reasonably could be expected to cause "exceptionally grave damage" to the national security. SECRET is applied only to information the unauthorized disclosure of which reasonably could be expected to cause *serious damage to the national security*. CONFIDENTIAL is applied only to information that would cause "damage" to the national security if disclosed. Only the originator of the particular information or document can determine its classification level and once classified any document that includes classified information must also be classified at the same level.

All persons with authorized access to classified information are required to sign a nondisclosure agreement as a condition of access. This requirement is contained in the executive order on classified national security information. The SF 312 is a contractual agreement between the U.S. Government and the a cleared employee, in which the individual agrees not to disclose classified information to an unauthorized person. The agreement includes the consequences that may result from failure to meet the enumerated responsibilities. See 32 CFR 2003.20. Consult your Staff Judge Advocate with any questions.

### RESPONSIBILITIES OF CUSTODIAN

A custodian of classified information has a personal, moral, and legal responsibility at all times to protect classified information, whether oral or written, within that person's knowledge, possession or control. Further, the custodian must follow procedures to ensure that unauthorized persons do not gain access to classified information. For example, classified information must not be discussed on the telephone, read, or discussed in public. Classified documents removed from storage must be kept under constant surveillance and face down or covered when not in use. Preliminary drafts, carbons, notes, floppy and hard disks and other items containing classified information must be either destroyed immediately after they have served their purpose; or be given the same classification and secure handling as the classified information they contain.

Classified information may be processed by automated information systems, but only by those systems approved for such use. Routine reproduction of classified material should be avoided whenever possible. When reproduction is

necessary, reproduced material is subject to the same controls as the original document. TOP SECRET and SECRET information may only be reproduced upon approval of higher authority.

## ACCESS TO INFORMATION

The final responsibility for determining whether a person's official duties require possession of or access to classified information, and whether that person has been granted the appropriate security clearance, rests with the individual who has authorized knowledge, possession, or control of the information sought and not on the prospective recipient. The possessor of the information is in the best position to determine whether a prospective recipient is cleared and has a need-to-know the information.

Possession of a security clearance alone does not give a person the right of access to classified information. There must also be a need-to-know. Commanders must caution all personnel that the rank, position of, or possession of a badge by a person without a need-to-know does not give that person the right of access to classified information. Commanders should strictly limit distribution of materials containing classified information and should avoid routine dissemination of classified material. The RULE regarding distribution of classified material is: *WHEN IN DOUBT, DO NOT ROUTE*.

Immediately notify your Staff Judge Advocate should any problem arise in this area.

***KWIK-NOTE: Access to classified information is on a need-to-know basis regardless of possession of a security clearance. The nondisclosure statement can be accessed on the web at <http://www.archives.gov/isoo/training/standard-form-312.html>***

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## “FOR OFFICIAL USE ONLY”

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Lt Col Francine Swan, Sep 2007

**AUTHORITY:** 5 U.S.C. Section 552, “Freedom of Information Act;” 5 U.S.C. Section 552a, “The Privacy Act of 1974;” 5 U.S.C. Section 551, “Administrative Procedures Act;” 32 CFR Section 518; 32 CFR Section 286; 32 CFR Section 806; Appendix 3 to DoD 5200.1-R *Information Security Program*, Air Force Supplement to DoDD 5400.7 (24 Jun 02), AFI 33-332, *Air Force Privacy Act Program* (29 Jan 04); AFI 33-129, *Transmission of Information Via the Internet* (3 Feb 05); AFI 90-401, *Air Force Relations with Congress* (1 Jul 98). (DoD Directive 5400.7-R was amended on 11 Apr 2006 by Change 1 which removed Chapter 4, For Official Use Only, and refers the reader to Appendix 3 to DoD 5200.1R. The Air Force Supplement to DoD 5400.7-R had not been updated at the time of this edit so the Air Force supplement to DoD 5400.7 should continue to be referenced when working with FOUO issues)

### INTRODUCTION

“For Official Use Only (FOUO)” is a designation that is applied to unclassified information that may be exempt from mandatory release under the Freedom of Information Act (FOIA). The Freedom of Information (FOIA) and Privacy Acts (PA) provide guidance on the public releasability of information contained in government documents. FOIA contains a list of nine types of documents that are exempt from release to the public. Two of the nine categories are easily identifiable, those exempted because of their security classification (1) and those exempted from release by statute (3). The remaining exemptions simply describe the characteristics of documents that are exempt. Documents that meet these criteria should typically be marked as “FOR OFFICIAL USE ONLY” by the author or originator. FOUO is not a form of classification to protect national security interests.

### WHEN AND HOW TO MARK “FOR OFFICIAL USE ONLY”

Documents should be marked “FOR OFFICIAL USE ONLY” as soon as they are created and before or when they are placed into a records system. Marking records when they are created gives notice that the contents should be protected and facilitates review when a record is requested under the Freedom of Information Act (“FOIA”). An unclassified document containing FOUO information should be marked with the words “For Official Use Only” on the bottom outside on the front cover (if any) and on each page containing FOUO information. If the FOUO information in the document is contained in servable sections, paragraphs or pages, then those should be annotated as FOUO. Documents that are transmitted outside the Department of Defense and contain FOUO material should be marked or stamped in the following manner to explain the significance of the FOUO marking:

This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the Freedom of Information Act. Exemption(s) \_\_\_\_\_ apply/applies to its contents.

Record owners may also add: “Further distribution of this document or disclosure of it’s contents is prohibited without the approval of (include owner/generators organization, office symbol and phone number).

### WHAT TO MARK FOUO

Documents which contain the following should be marked as “FOR OFFICIAL USE ONLY”

Exemption 1: Information that is classified as secret, top secret or any other security classification  
Exemption 2: Information related solely to the internal rules and practices of the Department of Defense or any of its Components. This exemption has two profiles, “high” and “low.” The “high” profile permits

withholding a document that, if released, would allow circumvention of an Agency rule, policy, or statute, thereby impeding the agency in the conduct of its mission. The “low” profile permits withholding if there is no public interest in the document, and it would be an administrative burden to process the request.

Exemption 3: Information or documents that a statute specifically exempts from disclosure, by terms that permit no discretion on the issue of withholding, or, according to defined standards, for withholding or referring to particular types of matters to be withheld;

Exemption 4: Trade secrets, commercial, financial and other information submitted by or obtained from a person or entity outside the Federal Government, with the understanding that it will be kept on a privileged or confidential basis that, if released, is likely to cause substantial competitive harm to the submitter of the information or impair the government’s future ability to obtain necessary information, or protect the Government’s interest in compliance with program effectiveness;

Exemption 5: Inter-agency or intra-agency memoranda or letters that, are deliberative in nature; this includes documents that are part of the decision making process and contain subjective evaluations, opinions and recommendations and according to recognized legal privileges, are not routinely released to a party in litigation with the Air Force or DoD;

Exemption 6: Information in records containing personnel, financial and medical files, as well as similar personal information in other files that, if disclosed to a member of the public, would result in a clearly unwarranted invasion of personal privacy.

Exemption 7: Those investigative records compiled for enforcing civil, criminal, or military law, including carrying out executive orders or regulations issued according to the law;

Exemption 8: Those in or related to examination, operation, or condition reports prepared by, on the behalf of, or for the use of an agency responsible for regulating or supervising financial institutions; and

Exemption 9: Geological and geophysical information and data, including maps concerning wells.

## PROTECTING FOUO DOCUMENTS

Commanders must ensure proper safeguarding of FOUO documents. During normal duty hours, records determined to be FOUO must be placed in an out-of-sight location, if the work area is open to non-government people. At the close of business, FOUO records must be stored to prevent unauthorized access. Such material may be filed with other unclassified records in unlocked files or desks, etc., when normal U.S. Government or government contractor internal building security is provided during non-duty hours. When such internal security control is not used, locked buildings or rooms usually provide adequate after-hours protection. If such protection is not considered enough, FOUO material must be stored in locked containers, such as file cabinets, desks, or bookcases.

## PROCEDURES FOR RELEASE, DISSEMINATION AND TRANSMISSION OF FOUO INFORMATION

1. FOUO information may be sent within DoD components and between officials of DoD components and DoD contractors, consultants, and grantees to conduct official business for DoD. Recipients must be made aware of the status of such information, and the material must be sent in a way that prevents unauthorized public disclosure. Documents that transmit FOUO material must call attention to any FOUO attachments. Normally, you may send FOUO records over facsimile equipment, however any transmission must include an explanation of Official Use (see “When and How to Mark” above). To prevent unauthorized disclosure, consider attaching special cover sheets (i.e., AF Form 3227, Privacy Act Cover Sheet, for PA information).

2. Unless specifically prohibited, holders of FOUO information are authorized to share this information with other Federal Departments and Agencies of the executive and judicial branches to fulfill a government function. Such records must be marked "For Official Use Only", and the recipient must be told that the information is considered exempt from public disclosure, according to the FOIA, and what special handling is required (if any). If the records are subject to the Privacy Act, refer to AFI 33-332 for PA disclosure policies.

3. The release of FOUO information to members of Congress is governed by AFI 90-401, *Air Force Relations with Congress*, and release to the General Accounting Office ("GAO") is governed by AFI 65-401, *Relations with the General Accounting Office*. Records released to the Congress or GAO should be reviewed to determine if the information warrants FOUO status. If not, prior FOUO markings must be removed or effaced. If withholding criteria are met, these records must be marked FOUO and the recipient must be given an explanation for such exemption and marking.

*KWIK-NOTE: It is best to determine if or how much of a document should be marked as FOR OFFICIAL USE ONLY when the document is created. Marking the document when it is written prevents inadvertent disclosure and may obviate the need for a subsequent analysis in response to a request for the document.*

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## Access to Military Records

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**Updated by Lt Col Francine Swan March 2007**

**AUTHORITY:** 5 U.S.C. 552a (Privacy Act); 5 U.S.C. 552 (Freedom of Information Act); DOD 5400.7-R/Air Force Supplement, *DOD Freedom of Information Act Program* (24 Jun 02); AFI 33-332, *Air Force Privacy Act Program* (29 Jan 04); AFI 35-101, Public Affairs Policy and Procedures (29 Nov 2005); OSD Memoranda 17746-05, Withholding Information that Personally Identifies DOD Personnel (1 Sep 2005).

### **INTRODUCTION**

There is no central repository for all military records; medical records and personnel records are stored with different agencies at different locations based on both the type of record and the affiliation of the military member (active versus reserve component for example). Individual military members and retirees are entitled to the information contained in their own personnel and medical records. This section will discuss access to military personnel records for three categories of requestors.

This topic will discuss how to obtain military records in three situations:

1. Requests for records of members who are currently not in military service;
2. Current military (Air Force or ANG) members who want their own records; and
3. Requests by third parties for records of current military members.

### **RECORDS OF MEMBERS NOT CURRENTLY IN SERVICE - REQUEST BY MEMBER OR THIRD PARTY**

*Personnel, medical and some organizational records of Air Force members retired, discharged or who died on active duty are generally available six months after retirement, discharge or death on duty. A veteran can normally obtain any unclassified information from their own records without charge. Next of kin can obtain records if a veteran is deceased, and should provide their relationship to the member. Court-appointed conservators or guardians can also obtain records for an incompetent veteran.*

*To obtain records from 1900 to 30 September 2004, the requester should complete and sign a Standard Form 180, titled "Request Pertaining to Military Records. The form can be obtained, from a local Social Security office, Veterans Administration Office, VFW Post, or electronically from the National Archives, National Personnel Center website. Records may also be obtained by writing a letter requesting the specific information sought and including the veteran's full name, service or social security number, date of birth, branch of service, period of service and a description of the kind of records or information requested. Requests are submitted to:*

*National Personnel Records Center, Military Personnel Records, 9700 Page Boulevard, St. Louis, Missouri 63132. It is a good idea to mail the request by certified mail, return receipt requested and keep a photocopy. Records can also be requested electronically from the National Personnel Center website (<http://www.archives.gov/st-louis/military-personnel/>) by a veteran requesting their own records or by next of kin of a veteran. Electronic requestors must also mail or fax an electronic signature verification form to the Personnel center within 20 days of the electronic request or the electronic request will be deleted. The SF 180 and other instructions for requesting personnel records is located on the Records center website (<http://www.archives.gov/st-louis/>)*

Mobilization Augmentees, non-participating guard members and reservists or retired or discharged members awaiting pay at age 60, should send requests to:

HQ ARPC/DPSD1,  
6760 E. Irvington Pl #4000  
Denver CO 80280-4000 or call 800-525-0102.

Written requests should include:

Full name  
social security number  
contact information  
specific record requested

Those requesting a relative's record also need to provide their relationship to the former Airman. For more information consult the ARPC website (<http://www.archives.gov/st-louis/military-personnel/>)

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Other people and organizations can also obtain information from military records subject to the restrictions of the Privacy Act and the Freedom of Information Act. The requester should submit a Freedom of Information Act request and could be required to pay certain fees in order to obtain information. Generally, however, certain information such as medical records, home addresses, and social security numbers, are not releasable to third parties. If a third party is requesting records the request should be made through the FOIA office of the appropriate service.

For requests of military records prior to 1900, write to:

National Archives and Records Administration, Military Archives Division (NNMS), 700 Pennsylvania Avenue NW Washington, DC 20408 Phone #1.800.234.8861.

#### RECORDS OF MEMBERS CURRENTLY IN SERVICE - REQUEST BY MEMBER

Current military members of the National Guard and Reserve may obtain copies of their own records from their local servicing military personnel office or by accessing and printing the documents through the Air Force virtual Military Personnel Flight (<http://ask.afpc.randolph.af.mil/>). Military Personnel records for Active duty Air Force members can be obtained through their local military personnel flight via the automated records management system.

#### RECORDS OF MEMBERS CURRENTLY IN SERVICE - REQUEST BY THIRD PARTIES

Third parties who request records of current military members may either do so through use of a court-ordered and signed subpoena or by obtaining written consent from members to release their records to the third party or by a Freedom of Information Act (FOIA) request. The rules and procedures applicable are fully discussed in the topics in this Deskbook entitled SUBPOENAS AND CONSENT, RELEASE OF RECORDS and FREEDOM OF INFORMATION ACT, respectively.

Requests for purely state records are governed by state law.

**SEE:**

<https://arpc.afrc.af.mil/vPC-GR/>

#### Frequently Requested Records That Are NOT at the National Personnel Records Center - Military Personnel Records

- Department of Veterans Affairs (VA) records. For further information call the VA Toll Free number 1-800-827-1000.

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## Confidentiality and Privileged Communications

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Lt Col Francine Swan, Sep 2007

**AUTHORITY:** Applicable state law; Military Rules of Evidence (MRE); DOD 6025.18-R DOD *Health Information Privacy Regulation* (24 Jan 03) AFI 41-120, *Medical Resource Management Operations* (22 Mar 06).

### INTRODUCTION

The subject of confidential and privileged communications in the Air National Guard is largely governed by the law of the state in which the communication takes place.

The people and their relationships whose communications have traditionally been confidential or privileged are:

1. Lawyer-Client;
2. Communications to Clergy;
3. Husband-Wife; and
4. Physician-Patient (limited and only in the context of Courts-Martial).

### EFFECT OF PRIVILEGE

In most cases, if the communication between these people is deemed confidential or privileged that means that the Attorney, Clergy and Physician are precluded from disclosing for any purpose or reason what was said to them by the Client, Penitent and Patient respectively. The privilege is personal to the Client, Penitent and Patient, who may disclose the communication and/or waive the privilege.

### CONFIDENTIAL RELATIONSHIPS

By way of guidance and comparison to your state's laws, here are some things the MREs provide regarding the privilege and confidential communications between the above stated pairs of individuals:

#### *Physician - Patient (MRE 501)*

There is no privilege for communications between military physicians and military members except for a member under court-martial charges who has been evaluated by a sanity board (See RCM 302). The Privacy Act, 5 U.S.C. 552a contains an exception in section (b)(1), which provides for the disclosure to "those officers and employees of the agency which maintains the record who have need for the record in the performance of their duties." HIPPA allows for a specific military exception governed by DOD 6025.18-R paragraph C7.11 to "assure the proper execution of the military mission". Protected health information of an individual who is a member of the Armed Forces may be used or disclosed to determine the member's fitness for duty, including compliance with standards, to determine fitness for a particular mission and "to carry out any other activity necessary to the execution of the mission".

#### *Lawyer - Client (MRE 502)*

1. A client has a privilege to refuse or to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal service to the client:
  - a. between the client or the client's representative and the lawyer or the lawyer's representative
  - b. between the lawyer and the lawyer's representative,
  - c. by the client or the client's lawyer to a lawyer representing another in a matter of common interest,
  - d. between representatives of the client or between the client and a representative of the client, or
  - e. between lawyers representing the client.
2. There is no privilege where the communication:
  - a. Clearly contemplates the commission of a future fraud or crime;
  - b. Is relevant to a breach of duty by the attorney;
  - c. Is relevant to the attorney's being an attesting witness to a document;
  - d. Is relevant to joint clients of the attorney; or
  - e. Is relevant to an issue between parties who claim rights or benefits through the same deceased client.

***Communications to Clergy (MRE 503)***

1. 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 either as a formal act of religion or as a matter of conscience.

***Husband - Wife (MRE 504)***

1. A person has a privilege to refuse to testify against his or her spouse provided the parties are not divorced or the marriage has not been annulled.
2. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.
3. These privileges do not apply when:
  - a. One spouse is charged with committing a crime against the other spouse;
  - b. The marriage is a sham to prevent testimony; or
  - c. There are other specific matters dealing with criminal cases.

***Medical records***

1. Military medical records are the property of the Air Force (ANG) and patients have only a proprietary interest in the information in them (AFI 41-120).
2. Patients are entitled to a copy of their medical records, but information from health records may not be released to a third party under the Freedom of Information Act if such disclosure would result in a clearly unwarranted invasion of privacy.

***KWIK-NOTE: In any privileged or confidential communication situation, Commanders should consult with their Staff Judge Advocate.***

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## Subpoenas and Consensual Release of Records

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Francine Swan, March 2007

**AUTHORITY:** Privacy Act, 5 USC 552a; AFI 33-332, *Privacy Act Program* (29 June 2004); AFI 51-301, *Civil Litigation* (20 June 2002); ANGR 110-24, *Litigation* (31 Aug 1991).

### INTRODUCTION

This topic concerns military records kept or maintained by the service where release is sought either through consent of the military member whose records are involved or pursuant to a subpoena.

*NOTE: Any outside request for records should be forwarded to the FOIA office and to the servicing legal office to ensure that the request complies with the applicable guidance and applicable federal or state law and regulations.*

### CONSENT RELEASE OF RECORDS

Unless classified requests for medical, personnel or pay records either by the individual those records pertain to or at that person's request. Military regulations allow individuals to review and receive copies of their own records unless an exemption for the system they are stored in has been published in the federal register or the records were created in anticipation of a civil action or proceeding (Title 5 United States Code Section 552a(d)(5)). Under the Privacy Act, a former or current military member may also consent to having certain of the member's records, released to third persons. The general rule is if the records are releasable to the military member, then the member may consent to having them released to a third person.

The unit is usually confronted with this situation when the member or the member's private attorney sends the unit a written request for the records. Often the letter is signed by the member or has attached to it an authorization by the member allowing the unit to release the records to the member or to a specified third person. *NEVER RELEASE RECORDS OF A MEMBER TO ANYONE, INCLUDING THE MEMBER, UNLESS THE UNIT RECORDS CUSTODIAN SEES THE MEMBER SIGN A CONSENT RELEASE FORM OR AUTHORIZATION, THE UNIT RECEIVES SUCH A FORM OR AUTHORIZATION ON WHICH THE MEMBER'S SIGNATURE IS NOTARIZED OR THE UNIT CONTACTS THE MEMBER AND CONFIRMS THE REQUEST/RELEASE AUTHORIZATION.* .

Absent the proper written consent of the member whose records are sought, the only way the unit may properly release those records is pursuant to a properly issued document called a SUBPOENA.

### SUBPOENAS

Frequently, units will receive subpoenas calling for records of a current or former unit member, which records are subject to the Privacy Act and are to be brought to court or made available to an attorney for inspection and copying on a certain date. This usually happens in the context of an ongoing civilian civil or criminal action or proceeding in state or federal court. Examples where subpoenas are received include divorce cases and automobile accident cases.

Any nonconsensual request for release of records of a current or former military member of a unit, which records are subject to the Privacy Act, is governed by the Privacy Act, 5 U.S.C. 552a. Pursuant to 5 U.S.C. 552a(b)(11), the military is permitted to release such records only upon an order of a court of competent jurisdiction. A "subpoena" is a judicial command requiring a person to appear and testify on a certain date or to produce and permit inspection and copying of documents or evidence in that person's custody or control on a certain date. A lawyer for one of the parties to the lawsuit or criminal case, acting as an officer of the court, can issue a subpoena. A "*subpoena duces tecum*" is a command requiring a person to come to court "and bring documents" to testify on that certain date. A lawyer for one of the parties to the lawsuit or criminal case, acting as an officer of the court, can issue a *subpoena duces tecum*. A

judicial subpoena duces tecum is a subpoena duces tecum signed by a judge. If a Judge's signature does not appear on a subpoena, records should not be released in response to the subpoena. A lawyer's or court clerk's signature alone on the subpoena document is not sufficient to permit disclosure, even if the lawyer is a district attorney, Attorney General or U.S. Attorney. A subpoena issued by a Grand Jury is also not sufficient. *A Judge's signature is required. THE STAFF JUDGE ADVOCATE SHOULD ALWAYS BE CONSULTED BEFORE RELEASING ANY INFORMATION IN RESPONSE TO A SUBPOENA.*

When an ANG unit is given a proper subpoena, it must be complied with. In such case, you do NOT need the member's consent to release the records since one of the exceptions to the Privacy Act is an order issued by a court of competent jurisdiction. However, upon releasing the information, you must make reasonable efforts to notify the individual whose records are the object of the subpoena, by mailing or delivering a disclosure statement to the member's last known address advising the member that specified records of the member have been subpoenaed. Attach a copy of the subpoena to the disclosure statement. If the member is on base, have the member sign an acknowledgment of receipt of the disclosure statement and copy of the subpoena.

### **STEPS TO FOLLOW UPON RECEIPT OF SUBPOENA**

It is imperative you follow the steps below upon receipt of a subpoena, to avoid violations -- unintentional or otherwise -- of the Privacy Act by improperly releasing records. Also, following this guidance will best ensure your protection from liability for any later claimed Privacy Act violation by the member who is the subject of the records, or any claimed violation of the subpoena. Above all, do not release any documents without your Staff Judge Advocate's advice.

1. The first person at the unit receiving the subpoena should promptly:
  - a. Note the date, time and manner in which it was received (mail, personal delivery from a process server, etc.). If a process server personally delivered the subpoena, obtain the process server's name and address;
  - b. Notify the Commander of the receipt of the subpoena;
  - c. Photocopy the subpoena and retain any other correspondence pertaining to it, as well as the envelope (Federal Express, Express mail, regular or certified mail, etc.) in which it was received; and
  - d. Place this information, along with any and/or all associated documents, in the member's military file where the original records, which are the subject of the subpoena, are located.
2. *Call your Staff Judge Advocate for further instructions and assistance.* The Staff Judge Advocate will make sure the subpoena itself is proper and has been properly and timely served.

### **WHAT TO LOOK FOR**

Make sure the following appear on the subpoena:

1. The return date -- this is the date the records are to be produced;
2. The description of the records sought and the name of the current or former unit military member;
3. The date the subpoena was issued;
4. An order to produce and the signature of the Judge. Sometimes the Judge's name is not typed beneath the signature and the signature is illegible. In such case, the SJA should call the attorney(s) whose name is on the subpoena and ask for the Judge's name. The mere absence of the typed Judge's name does not invalidate the subpoena.

Other problems like an improper Social Security Number, incorrectly named member whose records are called for, the unit no longer having the records, etc., should be immediately discussed with the SJA.

If the subpoena is not served in adequate time to permit a proper response, the SJA should notify the attorney(s) who sought the subpoena that a new subpoena may be necessary and should notify the court.

### **PREPARING RECORDS FOR MAILING OR DELIVERY**

Assuming a proper judicial subpoena or subpoena duces tecum calling for records of a military member is received and has been timely served, in preparing to mail or deliver the records, the following should be done:

1. Produce only the original records that the unit has custody and control over and that are covered by the subpoena, and ONLY those records in the unit's possession and only those specifically listed or described in the by the subpoena. A subpoena for records in the custody of another agency should be returned with contact and identifying information of the custodial agency. For example: if pay records are requested the request should be directed to DFAS; if the request is for personnel records then only personnel records should be produced
2. Photocopy the original records. The unit must keep the original record.
3. Prepare a Certificate on the unit's ANG letterhead, on a separate page, as follows:

"I certify that I am the authorized custodian of the attached records which are true and accurate copies of the original and official records required to be maintained on (this individual) by the Air National Guard and the State of (your state), and the statutes and regulations governing the preparation and maintenance of these records.

(Signature) (Name of Custodian, Rank & Unit) (Unit Record Custodian or similar title)

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

Notary Public"

Ordinarily, a certified copy of the official records is sufficient. If the records are to be used in federal litigation they should be certified in accordance with the process in chapter 8 of AFI 33-332, which requires coordination and processing through HQ Air Force. If the authenticity of the record is in dispute, however, a court may order production of the original records. If this occurs, consult your Staff Judge Advocate.

***KWIK-NOTE: Records subject to the Privacy Act may not be released without an order signed by a court of competent jurisdiction.***

### **RELATED TOPICS:**

### **SECTION**

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“For Official Use Only”	14-3
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## Releasing Information In Litigation

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Lt Col Francine Swan, Sep 2007

**AUTHORITY:** ANGR 110-24, *Litigation* (31 Aug 1991), AFI 51-301 *Civil Litigation* (20 June 2002), DoD Directive 5405.2 *Release of Official Information in Litigation and Testimony by Department of Defense Personnel as Witnesses* (23 Jul 85; certified current 21 Nov 2003).

### **POLICY**

It is Air Force and Air National Guard policy that official information should generally be made reasonably available for use in federal and state courts and by other governmental bodies unless the information is classified, or otherwise privileged or protected from public disclosure. Generally, when the Air Force or National Guard are not potential litigants the Staff Judge Advocate is responsible for determining whether official information may be released in litigation. When there is a possibility that the Air Force, National Guard or state could be or could be parties to a lawsuit the SJA should coordinate with NGB/JA, Air Force Civil Law (AFLSA/JAC) and/or the state Attorney General prior to the release of any information or records. AFI 51-301 contains specific reporting requirements where the Air National Guard and Air Force are potential parties to litigation

### **RESTRICTIONS ON RELEASE**

Official Air Force or Air National Guard documents used in civil litigation are authenticated by certificate, rather than by the personal appearance and testimony of the custodian, where practicable. See the topic in this Deskbook entitled “SUBPOENAS AND CONSENT RELEASE OF RECORDS” and for applicable and alternative procedures. Staff Judge advocates should request that court protect information that is “for Official Use only from public release. Refer documents for authentication to the Staff Judge Advocate who will work with the records custodian to ensure the records are properly certified. Unclassified official information that is not privileged should be released to the Department of Justice, U.S. Attorney or State Attorney General on request since they represent the government's interest in judicial proceedings.

Air National Guard personnel subpoenaed to testify concerning official information MUST receive legal advice from the Staff Judge Advocate and, in some cases, representation from a U.S. Attorney or State Attorney General.

There are restrictions on Air National Guard personnel regarding expert and opinion testimony concerning official Air Force, Air National Guard, or DoD information. Air National Guard personnel, in an unofficial capacity, should not provide expert testimony on official Air Force, Air National Guard or DoD information in private litigation without prior approval from NGB/JA, AFLSA/JAC, and/or DOD General Counsel. Air National Guard personnel do not provide opinion or expert testimony concerning official Air National Guard, Air Force, or DoD information, subjects, or activities, except on behalf of the United States or for a party that DOJ or the State Attorney General represents.

Under unique circumstances and when testimony will not adversely affect the interests of the Air National Guard, the Air Force or the United States, special authorization for personnel to appear and testify as an expert witness in private litigation at no expense to the state or United States government. Requests for such special authorization must be coordinated, through the appropriate organization SJA, and NGB/JA with the responsible AFLSA civil litigation division. AFLSA/JAC is the approval authority for requests for special authorization to provide expert or opinion testimony. Requests should include:

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## Media Relations and the Public Affairs Office

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Updated by 1Lt Thaddeus V. Day, June 2001

**AUTHORITY:** 5 USC 552, AFPD 35-1, *Public Affairs Management* (17 Sep 99) and its implementing AFIs; DoD Directive 5400.7, *DoD Freedom of Information Act Program* (29 Sep 97); DOD 5400.7-R/Air Force Supplement, *DoD Freedom of Information Act Program* (22 Jul 99); applicable state law or regulation.

### INTRODUCTION

The Freedom of Information Act (“FOIA”) and DoD policy require prompt and accurate disclosure of information to the public. FOIA directs maximum release of information subject to the lawful exemptions of the Act. Air Force and Air National Guard information must be presented professionally and must:

1. Be accurate, prompt and factual;
2. Be confined to our field of expertise;
3. Avoid the hypothetical and speculative;
4. Reflect Air Force and Air National Guard policy;
5. Be presented simply and honestly;
6. Comply in spirit and letter with the Secretary of Defense’s Principles of Public Information (Attachment 1 to this topic); and
7. Consider rights of living relatives and associates of deceased Air Force and Air National Guard people. The Privacy Act and the privacy exemptions of FOIA do not protect the personal privacy of deceased persons. Records about the deceased however, may be withheld under FOIA to protect the privacy of living relatives and associates if the records contain private personal information about the family or other background of persons still living.

### COMMANDER’S RESPONSIBILITIES

The Commander is responsible for releasing information to the public. Even though material is unclassified or has been cleared through security and policy review channels, it cannot be given to the public unless the Commander (or the Commander’s authorized representative) approves it for that purpose. This approval requirement avoids releases out of context that could mislead the public. It also filters out inaccurate material or information which must be protected for legal or policy reasons.

### AREAS OF CONCERN AND THE PUBLIC AFFAIRS OFFICE

Among the various operational subjects germane to the Air National Guard Commander are unit activations, deactivations, phase-downs and movements. A significant change in unit level of operations is extremely important news for local communities. This change takes place after long deliberation at high levels of government. The first announcement comes from DoD. Public Affairs personnel should not discuss these subjects until they have specific instructions.

Another area of growing responsibility for Commanders is timely notice to the public of environmental actions. The three most likely environmental actions that would affect a Commander are an Environmental Assessment,

Environmental Impact Statement, or Installation Restoration Program action. Failure to make the public a part of the decision-making process could result in court actions in which the Commander could be held personally liable or criminally responsible. Commanders should work closely with their Public Affairs Officers (PAOs) in every environmental action. An excellent source of information is the pamphlet which NGB updates annually titled "Public Affairs Guidance on National Guard Bureau Environmental Programs."

The PAO, or a designated representative must be available 24 hours a day. Arrange to have someone on call during off-duty hours. Brief security police, operations center and telephone personnel on the procedures for contacting the PAO duty representative. An instruction book should contain emergency checklists and off-duty telephone numbers of Public Affairs staff members, and key unit installation officials. It should be reviewed regularly to insure the information is current.

Media travel is authorized aboard DoD-owned aircraft on a reimbursable basis and this travel should not compete with commercial carriers. See the topic in this Deskbook entitled "CIVILIAN TRAVEL ABOARD MILITARY AIRCRAFT" for a discussion of criteria and requirements for permissible travel of civilian media personnel aboard military aircraft.

## **AFPАЗ**

In the notorious Kelly Flinn case, Captain Flinn's version of the facts surrounding the disciplinary action arising from her relationship with the husband of an enlisted member of her unit was well-established in the media long before the Air Force responded. By the time the Air Force reacted, public opinion was set against the Air Force. Largely as a result of the Kelly Flinn case, the Air Force recognized the need for fast action in the area of media relations. In February 1998, the Secretary of the Air Force established a "communications SWAT team" now referred to as AFPАЗ.

AFPАЗ is a standing, cross-functional crisis action team that works directly with the Secretary of the Air Force and the Chief of Staff of the Air Force with a goal of articulating the Air Force position before or at the same time that a "hot" story hits the press. The team members include representatives from legal, public affairs, acquisition, plans, personnel, operations, logistics, and the enlisted forces. AFPАЗ is not a part of Public Affairs, but works closely with SAF/PA to develop the Air Force position on an issue. Although AFPАЗ will keep the chain-of-command informed of issues it is working, it is not required to work through the chain of command, due to time constraints. Thus, AFPАЗ works directly with the field and directly notifies SECAF, CSAF and other Air Force leaders of significant issues.

If an issue arises within your unit that may generate adverse media attention, contact AFPАЗ immediately at (703) 695-9425.

## **VIDEO PRODUCTIONS**

The widespread use of videos, the creativity of our PAOs, and their interaction with various segments of the civilian community has created a need to secure appropriate permission to maximize the use of military-made video productions. The implementing AFIs of AFD 35-1 contain sample forms for this purpose. Some units, in accordance with their state law, and in conjunction with their Judge Advocates, have developed General Release forms to be signed by segments of the civilian community who are portrayed in unit video productions. The essence of these forms is to permit us to use the video they are in, without later claims for compensation. Attachments 2, 3, 4 and 5 to this topic are sample General Releases for individual adults, individual minors, corporations, and civilian government entities. They should be checked for validity under your state's law, and should only be used upon advice of your Judge Advocate. Attachment 6 is a sample cover letter sent with the General Releases.

The implementing AFIs of AFD 35-1 contain several checklists for myriad situations confronting a Commander. As situations arise, Commanders should consult their PAO and this instruction.

***KWIK-NOTE: Good media relations by Commanders and Public Affairs Officers will enhance your unit's reputation in the local community, and is invaluable for recruiting and retention.***

## **RELATED TOPICS:**

## **SECTION**

Aid to Civilian Authorities	6-2
Civilian Travel Aboard Military Aircraft	27-3
Community Relations Programs	6-4
Freedom of Information Act	14-11
Privacy Act	14-12

*Attachment 1*

**PRINCIPLES OF INFORMATION**

It is the policy of the Department of Defense to make available timely and accurate information so that the public, Congress, and the news media may assess and understand the facts about national security and defense strategy.

Requests for information from organizations and private citizens will be answered in a timely manner. In carrying out this policy, the following principles of information will apply:

1. Information will be made fully and readily available, consistent with statutory requirements, unless its release is precluded by current and valid security classification. The provisions of the Freedom of Information Act will be supported in both letter and spirit.
2. A free flow of general and military information will be made available, without censorship or propaganda, to the men and women of the Armed Forces and their dependents.
3. Information will not be classified or otherwise withheld to protect the government from criticism or embarrassment.
4. Information will be withheld only when disclosure would adversely affect national security or threaten the safety or privacy of the men and women of the Armed Forces.
5. The Department's obligation to provide the public with information on its major programs may require detailed public affairs planning and coordination with the Department and with other government agencies. The sole purpose of such activity is to expedite the flow of information to the public: propaganda has no place in Department of Defense public affairs programs.

The Assistant Secretary of Defense for Public Affairs has the primary responsibility for carrying out this commitment.

Attachment 2  
Page 1 of 2

### GENERAL RELEASE -- INDIVIDUAL

The United States Government and the State of \_\_\_\_\_ (Releasees) have requested me \_\_\_\_\_ (Releasor) to grant, release, and discharge to them certain rights (hereinafter more fully set forth) arising from my participation in a particular production identified and described as \_\_\_\_\_ (be it a motion picture film, videotape, photograph, portrait, drawing, painting, audio recording, writing, telecast, television recording, filmstrip, book, musical composition, including music and lyrics, or artistic production) to be made by or produced for the Releasees.

This grant, release, and discharge of said rights is made in full cognizance of the risks inherent in the operational techniques employed in the production, including, but not limited to, the focusing of lights upon me; and in contemplation of the reliance by the Releasees upon the rights herein granted and released.

I hereby grant and release to the Releasees the following rights:

- a. To use my name, photograph, likeness, acts, poses, plays, and appearances made in connection with said production in any manner; to record, reproduce, amplify, simulate, filter or otherwise distort my voice and all instrumental, musical, and other sound effects produced by me: and to reproduce, distribute, publish, exhibit, use or transmit the same or any parts thereof, by any means, in any manner and for any purpose whatsoever, including for purposes of advertising or trade, and to use the same perpetually without attribution or compensation of any kind to me.
- b. The right to double or dub any voice, acts, poses, plays, and appearance, and all instrumental, musical and/or other sound effects produced by me to such extent as may be desired by the United States Government or the State of \_\_\_\_\_, without attribution or compensation of any kind to me.
- c. The release and discharge of the Releasees from any cause of action of whatsoever nature arising from my participation in the production.

This grant, release and discharge shall inure to the benefit of:

1. The Releasees, and their respective agencies, departments, divisions, officers, agents, servants and employees when acting in their official capacities;
2. All persons, firms, or corporations contracting with the United States Government or the State of \_\_\_\_\_ and their respective agencies, departments, divisions, officers, agents, servants and employees when acting in their official capacities;
3. The heirs, executors, administrators, successors, or assigns of the Releasor and the Releasees; and
4. Any other persons or entities lawfully reproducing, distributing, exhibiting, or otherwise using the said production or any portion thereof.

Attachment 2  
Page 2 of 2

In consideration of the sum of one and 00/100 dollar (\$1.00) and other good and valuable consideration herewith acknowledged to be received, I have signed this document in the space provided below. This release may not be changed orally.

Date: \_\_\_\_\_

\_\_\_\_\_ (Signature)

\_\_\_\_\_ (Typed name)

STATE OF \_\_\_\_\_, COUNTY OF \_\_\_\_\_ ss.: On \_\_\_\_\_, 20XX before me \_\_\_\_\_ personally came \_\_\_\_\_ to me known, and known to me to be the individual (s) described in, and who executed the foregoing RELEASE, and duly acknowledged to me that he executed the same.

\_\_\_\_\_ (Notary Public)

Attachment 3  
Page 1 of 2

### GENERAL RELEASE -- MINOR

The United States Government and the State of \_\_\_\_\_ (Releasees) have requested me, on behalf of my minor child, \_\_\_\_\_, (hereinafter referred to as my child) (Releasor), to grant, release, and discharge to them certain rights (hereinafter more fully set forth) arising from the participation of my child in a particular production identified and described as \_\_\_\_\_ (be it a motion picture film, videotape, photograph, portrait, drawing, painting, audio recording, writing, telecast, television recording, filmstrip, book, musical composition, including music and lyrics, or artistic production) to be made by or produced for the Releasees.

This grant, release, and discharge of said rights is made in full cognizance of the risks inherent in the operational techniques employed in the production, including, but not limited to, the focusing of lights upon my child; and in contemplation of the reliance by the Releasees upon the rights herein granted and released.

On behalf of my child, I hereby grant and release to the Releasees the following rights:

- a. To use my child's name, photograph, likeness, acts, poses, plays, and appearances made in connection with said production in any manner; to record, reproduce, amplify, simulate, filter or otherwise distort my child's voice and all instrumental, musical, and other sound effects produced by my child; and to reproduce, distribute, publish, exhibit, use or transmit the same or any parts thereof, by any means, in any manner and for any purpose whatsoever, including for purposes of advertising or trade, and to use the same perpetually without attribution or compensation of any kind to my child or me on behalf of my child.
- b. The right to double or dub any voice, acts, poses, plays, and appearance, and all instrumental, musical and/or other sound effects produced by my child to such extent as may be desired by the United States Government or the State of \_\_\_\_\_, without attribution or compensation of any kind to my child or me on behalf of my child.
- c. The release and discharge of the Releasees from any cause of action of any nature arising from my child's participation in the production.

This grant, release and discharge shall inure to the benefit of:

1. The Releasees, and their respective agencies, departments, divisions, officers, agents, servants and employees when acting in their official capacities;
2. All persons, firms, or corporations contracting with the United States Government or the State of \_\_\_\_\_ and their respective agencies, departments, divisions, officers, agents, servants and employees when acting in their official capacities;
3. The heirs, executors, administrators, successors, or assigns of the Releasor and the Releasees; and
4. Any other persons or entities lawfully reproducing, distributing, exhibiting, or otherwise using the said production or any portion thereof.

Attachment 3  
Page 2 of 2

In consideration of the sum of one and 00/100 dollar (\$1.00) and other good and valuable consideration herewith acknowledged to be received, on behalf of my child, I have signed this document in the space provided below. This release may not be changed orally.

Date: \_\_\_\_\_

\_\_\_\_\_ (Signature)

\_\_\_\_\_ as Parent and Guardian of (Typed name of parent and guardian)

\_\_\_\_\_ (Typed name of minor child)

STATE OF , COUNTY OF ss.: On \_\_\_\_\_, 20XX before me \_\_\_\_\_ personally came \_\_\_\_\_ to me known, and known to me to be the individual (s) described in, and who executed the foregoing RELEASE, and duly acknowledged to me that he executed the same.

\_\_\_\_\_ (Notary Public)

Attachment 4  
Page 1 of 2

### GENERAL RELEASE -- CORPORATION

The United States Government and the State of \_\_\_\_\_ (Releasees) have requested \_\_\_\_\_ a corporation organized under the laws of the State of \_\_\_\_\_, and its officers, agents, servants and employees (collectively Releasor) to grant, release, and discharge to them certain rights (hereinafter more fully set forth) arising from its participation in a particular production identified and described as \_\_\_\_\_ (be it a motion picture film, videotape, photograph, portrait, drawing, painting, audio recording, writing, telecast, television recording, filmstrip, book, musical composition, including music and lyrics, or artistic production) to be made by or produced for the Releasees.

This grant, release, and discharge of said rights is made in full cognizance of the risks inherent in the operational techniques employed in the production, including, but not limited to, the focusing of lights upon the Releasor; and in contemplation of the reliance by the Releasees upon the rights herein granted and released.

The Releasor hereby grants and releases to the Releasees the following rights:

- a. To use the Releasor's name, photograph, likeness, acts, poses, plays, and appearances made in connection with said production in any manner; to record, reproduce, amplify, simulate, filter or otherwise distort the Releasor's voice and all instrumental, musical, and other sound effects produced by the Releasor; and to reproduce, distribute, publish, exhibit, use or transmit the same or any parts thereof, by any means, in any manner and for any purpose whatsoever, including for purposes of advertising or trade, and to use the same perpetually without attribution or compensation of any kind to the Releasor.
- b. The right to double or dub any voice, acts, poses, plays, and appearance, and all instrumental, musical and/or other sound effects produced by the Releasor to such extent as may be desired by the United States Government or the State of \_\_\_\_\_, without attribution or compensation of any kind to the Releasor.
- c. The release and discharge of the Releasees from any cause of action of whatsoever nature arising from the Releasor's participation in the production.

This grant, release and discharge shall insure to the benefit of:

1. The Releasees, and their respective agencies, departments, divisions, officers, agents, servants and employees when acting in their official capacities;
2. All persons, firms, or corporations contracting with the United States Government or the State of \_\_\_\_\_ and their respective agencies, departments, divisions, officers, agents, servants and employees when acting in their official capacities;
3. The heirs, executors, administrators, successors, or assigns of the Releasor and the Releasees; and
4. Any other persons or entities lawfully reproducing, distributing, exhibiting, or otherwise using the said production or any portion thereof.

The absence of the corporate seal of the Releasor from this release does not affect its validity.

Attachment 4  
Page 2 of 2

In consideration of the sum of one and 00/100 dollar (\$1.00) and other good and valuable consideration herewith acknowledged to be received, I have signed this document in the space provided below, as one of the Releasers duly authorized officers. This release may not be changed orally.

Date: \_\_\_\_\_

\_\_\_\_\_  
(Name of corporation)

By : \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Printed name and capacity of authorized officer or agent, e.g. President)

STATE OF , COUNTY OF ss.: On \_\_\_\_\_,20XX before me \_\_\_\_\_personally came \_\_\_\_\_to me known, who, by me duly sworn, did depose and say that deponent resides at \_\_\_\_\_ that deponent is the \_\_\_\_\_of \_\_\_\_\_the corporation described in, and which executed the foregoing RELEASE, that deponent knows the seal of the corporation, that if the seal is affixed to the RELEASE, it is the corporate seal, that it was affixed by order of the board of directors of the corporation; and that deponent signed deponent's name by like order.

\_\_\_\_\_  
(Notary Public)

Attachment 5  
Page 1 of 2

### GENERAL RELEASE -- GOVERNMENTAL ENTITY

The United States Government and the State of \_\_\_\_\_ (Releasees) have requested \_\_\_\_\_ a governmental entity organized under the laws of the State of \_\_\_\_\_, and its officers, agents, servants and employees (collectively Releasor) to grant, release, and discharge to them certain rights (hereinafter more fully set forth) arising from its participation in a particular production identified and described as \_\_\_\_\_ (be it a motion picture film, videotape, photograph, portrait, drawing, painting, audio recording, writing, telecast, television recording, filmstrip, book, musical composition, including music and lyrics, or artistic production) to be made by or produced for Releasees.

This grant, release, and discharge of said rights is made in full cognizance of the risks inherent in the operational techniques employed in the production, including, but not limited to, the focusing of lights upon the Releasor; and in contemplation of the reliance by the Releasees upon the rights herein granted and released.

The Releasor hereby grants and releases to the Releasees the following rights:

- a. To use the Releasor's name, photograph, likeness, acts, poses, plays, and appearances made in connection with said production in any manner; to record, reproduce, amplify, simulate, filter or otherwise distort the Releasor's voice and all instrumental, musical, and other sound effects produced by the Releasor; and to reproduce, distribute, publish, exhibit, use or transmit the same or any parts thereof, by any means, in any manner and for any purpose whatsoever, including for purposes of advertising or trade, and to use the same perpetually without attribution or compensation of any kind to the Releasor.
- b. The right to double or dub any voice, acts, poses, plays, and appearance, and all instrumental, musical and/or other sound effects produced by the Releasor to such extent as may be desired by the United States Government or the State of \_\_\_\_\_, without attribution or compensation of any kind to the Releasor.
- c. The release and discharge of the Releasees from any cause of action of whatsoever nature arising from the Releasor's participation in the production.

This grant, release and discharge shall inure to the benefit of:

1. The Releasees, and their respective agencies, departments, divisions, officers, agents, servants and employees when acting in their official capacities;
2. All persons, firms, or corporations contracting with the United States Government or the State of \_\_\_\_\_ and their respective agencies, departments, divisions, officers, agents, servants and employees when acting in their official capacities;
3. The heirs, executors, administrators, successors, or assigns of the Releasor and the Releasees; and
4. Any other persons or entities lawfully reproducing, distributing, exhibiting, or otherwise using the said production or any portion thereof.

Attachment 5  
Page 2 of 2

The absence of the government seal of the Releasor from this Release does not affect its validity.

In consideration of the sum of one and 00/100 dollar (\$1.00) and other good and valuable consideration herewith acknowledged to be received, I have signed this document in the space provided below, as one of the Releasors duly authorized officers. This release may not be changed orally.

Date: \_\_\_\_\_

\_\_\_\_\_  
(Name of governmental entity)

By : \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Printed name and capacity of authorized official)

STATE OF , COUNTY OF ss.: On \_\_\_\_\_20XX before me \_\_\_\_\_personally came \_\_\_\_\_to me known, who, by me duly sworn, did depose and say that deponent resides at \_\_\_\_\_that deponent is the \_\_\_\_\_of \_\_\_\_\_the governmental entity described in, and which executed the foregoing RELEASE with the authority of said governmental entity.

\_\_\_\_\_ (Notary Public)

*Attachment 6*

UNIT LETTERHEAD

Date

ADDRESSEE NAME  
ADDRESS  
CITY, STATE ZIP

Dear \_\_\_\_\_:

Thank you for the participation of (Rank and Name) on (date) in our production (title and description).

As a part of the security and legal review of the documentary by the Office of the Assistant Secretary of Defense for Public Affairs at the Pentagon in Washington, D.C., we have been directed to obtain a formal release for (his/her) participation in the project (and one from your corporation, or other entity). We need the (type of Release) signed by (Rank and Name) and signed by an authorized representative of your (corporation or department). (Both) (The) release(s) must be signed in the presence of a notary public. (A) (Two) stamped, self-addressed envelope(s) (is) (are) enclosed for your convenience in returning the releases.

The documentary cannot be cleared for public release without (this) (these) formal release(s).

If you have any questions about this matter, please call me at (XXX)XXX-XXXX. I appreciate the important part (your department) has played in this documentary.

Sincerely,

Signature Block, Rank, State ANG  
Public Affairs Officer

Attach: Type(s) of Release(s)  
(Two) (A) stamped,  
self-addressed envelope(s)

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# Communications Monitoring

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Lt Col Francine Swan, Aug 2007

**AUTHORITY:** AFI 33-219, *Telecommunications Monitoring and Assessment Program (TAMP)* (1 May 06); DoDD 4640.6, *Communications Security Telephone Monitoring and Security* (26 Jun 81); AFI 33-111, *Voice Systems Management* (24 Mar 05 through change 1, 11 Jul 2006)

## CONSENT TO MONITORING

DoD owned or leased communications systems (telephone, email, facsimile machines, pagers and VOIP systems) provided for transmitting official government communications are subject to monitoring for communications security (COMSEC) because of potential vulnerability for compromise of sensitive or classified information. Information collected is analyzed to determine if any sensitive or classified information transmitted on unsecured and unprotected systems could adversely affect United States (U.S.) (and allied/coalition) operations. Use of DoD telephones constitutes consent by the user to COMSEC monitoring. See DoD Directive 4640.6, para 6. Commanders will determine the need for COMSEC surveillance of their organizations over and above what is required by regulation.

Commanders are responsible for educating personnel about the hostile intelligence threat to unprotected telephone systems and for making sure that personnel do not discuss sensitive or classified information on unsecured telephones. Further, users of DoD telephones, including contractors, will be notified that use of such telephones constitutes consent to monitoring. The Monitoring Notification Decals (DD Form 2056), which are attached to telephones, cell phone and other communication devices and the notification page required for access to government computer and inter/intranet systems, are used to provide notification and obtain consent to monitoring. Commanders should also use initial orientation, as well as periodic letters, briefings and notices to remind military members of the need to observe communication security practices.

## USE OF MONITORED INFORMATION

COMSEC surveillance information will not be used for any law enforcement purpose without the consent of the Air Force General Counsel. Without this consent, receiving units may only use identifying data for corrective (administrative) or preventive actions or for DoD military or civilian personnel administrative reprimands for unauthorized disclosure of sensitive or classified information. COMSEC monitoring shall be afforded protection at least equal to that provided material officially classified CONFIDENTIAL. See DoD Directive 4640.6, para 6.4.7. The ESC (Electronics Security Command) will notify the local AFOSI of any monitored information that pertains to sabotage, threats, or plans to commit an offense that could result in loss of life or significant property damage.

Should any problem arise in this area, a Commander should notify the Staff Judge Advocate as soon as possible.

***KWIK-NOTE: All DoD telephones are legitimately monitored.***

## RELATED TOPICS:

	SECTION
Classified Material	14-2
“For Official Use Only”	14-3
Fraud, Waste and Abuse	16-7
Ethics	7-3
Surveillance	16-12
Unauthorized Tape Recordings	14-10

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## Unauthorized Recordings

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**Lt Col Francine Swan, April 2007**

**AUTHORITY:** 18 U.S.C. 2511; AFI 31-206, *Security Police Investigations Program* (1 Aug 2001); AFI 33-111, *Voice Management Systems* (24 Mar 05); AFI 51-503, *Aerospace Accident Investigations* (16 Jul 03); AFI 51-507, *Ground Accident Investigations* (28 Oct 04) AFI 51-1102, *Cooperation with the Office of Special Counsel* (3 Oct 94); AFI 84-101, *Historical Products Services & Requirements* (1 Aug 05); applicable state law.

### INTRODUCTION

Audio or video recordings of conversations between or among individuals, without consent by all parties to the recordings, may constitute a violation of federal or state laws, and may create significant problems for command and the individual responsible for such activities. Whenever audio or video recordings of an event or discussion are appropriate, the permission of all parties must be obtained in advance.

Many state privacy laws or state constitutional provisions prohibit the making of a recording without the consent of the persons being recorded. Persons or organizations engaging in such activities may be personally liable for civil damages. Making a covert recording without first obtaining a judicial order during the course of a criminal investigation violates federal law, and also in many cases state law, and could result in disciplinary actions for the person doing the recording and a possible award of civil damages to the person being recorded. Though unauthorized, a surreptitious recording of a meeting may in some circumstances qualify as an official record under the Freedom of Information Act and Privacy Act, and disclosure could be required.

### NEED FOR COMMAND POLICY

If your state law allows for the unauthorized recording of conversations and meetings it is recommended that the commander establish and publish a policy against such recording on the installation and during the course of one's military or technician duties. The establishment of a strong command policy prohibiting unauthorized recordings of meetings or conversations will ensure unit compliance with all applicable laws, and preserve the free flow of information and mutual trust within the unit. Attachment 1 to this topic contains a sample policy letter. IF your state law does not provide for these types of recording ask your base legal office to periodically prepare an article for the monthly newsletter explaining the state law and consequences of its violation. Discussions at meetings may contain information that is classified, sensitive, or privileged under one or more federal or state laws. Unauthorized recordings, if not prohibited, may result in the compromise of this classified, sensitive, or privileged information, and may result in the release of information, which may cast an unfavorable or inappropriate light on the unit and its individual members. Once a recording is made, be prepared for its unintended use. Allowing unauthorized recordings can create an environment of intimidation that is directly contrary to the continued maintenance of good order, discipline, and unit cohesiveness. Any questions in this highly perilous area should be immediately directed to the Staff Judge Advocate.

You may be required to preserve recordings under the Freedom of Information Act; balance the need to keep and safeguard the recordings and the potential for disclosure when deciding to make an authorized recording of proceedings or conversations.

***KWIK-NOTE: Make all your personnel aware that unauthorized tape recordings on base are PROHIBITED.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Classified Material	14-2
Confidentiality and Privileged Communications	14-5
Criminal Investigations, Prosecutions and Reporting – DoD and DOJ	8-12
Employee Interrogation	5-3
“For Official Use Only”	14-3
Freedom of Information Act	14-11
Investigations and Inquiries	16-11
Personal Liability of Federal and State Officials	18-9
Preventive Law Program	17-15
Privacy Act	14-12
Releasing Information in Litigation	14-7
Sources of Commanders’ Authority	2-7

Attachment 1

MEMORANDUM FOR All Personnel

Date

FROM: (Wing or Group/CC)

Subject: Unauthorized Recordings

1. Unauthorized recordings are those in which one or more of the individuals being recorded are unaware that a recording is being made. The unauthorized tape recordings of conversations or meetings, wherein one of the speakers or attendees is unaware of the recording, will not take place. In addition
2. [under the law of this state recording of conversations with/out the consent of both parties is/is not a violation of state law. The unauthorized recording of conversations or meetings is extremely dangerous and the release of information contained therein could be in violation of various federal laws, including the Privacy Act and National Security Laws.
3. Discussions at meetings may contain information or facts that are for official use only, or they may consist of investigatory material compiled for law enforcement purposes as well as material used in making decisions concerning employment, military service, federal contracts or other internal agency memoranda.
4. The use of recording devices without the knowledge and consent of others may also create impediments to the free flow of information and the quick resolution of problems that the Air National Guard relies upon in accomplishing its mission. With these concerns in mind, it is my policy that all personnel be able to work in an atmosphere free of concern that speech and discussion are being covertly recorded.

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COMMANDER SIGNATURE BLOCK

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# Freedom of Information Act

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**Lt Col Francine Swan, Sept 2007**

**AUTHORITY:** 5 U.S.C. 552, *The Freedom of Information Act (FOIA)*; Executive Order 13392 *Improving Agency Disclosure of Information* (14 December 2005) DoD 5400.7-R, *DoD Freedom of Information Act Handbook* (Sep 98); *DODD 5400.7 DoD Freedom of Information Act Program* (28 Sep 05), DoD Regulation 5400.7/Air Force Supplement, *DoD Freedom of Information Act Program* (24 June 2002) AFI 33-332, *Air Force Privacy Act Program* (29 Jan 04); applicable state laws and regulations.

## INTRODUCTION

The Freedom of Information Act (FOIA), is a federal law that permits public access to federal executive agency information. The intent of the Act is to “ensure an informed citizenry.” The general policy is that the Air Force will allow public disclosure of Air Force records in its possession, except when those records are protected from disclosure by one of the FOIA exemptions.

The statute is applicable to all federal agencies and records, and the referenced DoD Directive, applicable to all departments within DoD, should be consulted for specific guidance. Many states also have state “Right to Know” laws that may apply to requests for state documents, you should become familiar with any right to know in your state and the corresponding requirements and processes required for disclosure.

The Act contains stringent timelines for compliance so it is imperative everyone involved makes sure that any request for documents or specific information gets into the hands of the appropriate person immediately. FOIA requests should always be hand-carried from one office to the next and should not be put into the base distribution system.

## FOIA PROCEDURE

The State Adjutant General is the RELEASE authority for a FOIA request while the Chief, National Guard Bureau (NGB-ADI-P) is the DENIAL authority for all FOIA Air National Guard federal records requests, including ANG military and technician personnel records, with the exception of Inspector General records discussed later. Air Force General Counsel (SAF/GCA) is the appeal authority. The FOIA/Privacy Act Office/Monitor for the state Air National Guard is the central point through which all requests for information under the FOIA or Privacy Act should be processed. The OPR for FOIA requests is SC who should be working closely with JA to ensure a legal review is done on all FOIA requests.

A FOIA request can be made by “any person.” Broadly defined to include, e.g., foreign citizens and governments, corporations, and state governments ( U.S.C. Sec. 551(2)). Special rules exist for requests from foreign governments and citizens (or their representatives). Federal agencies and fugitives from justice are excluded. Requesters must comply with agency regulations.

The request must be in writing, should be addressed to FOIA office (a request sent to another office should still be processed) and reasonably describe the desired record. If the record is not reasonably described then the requester should be asked to provide more specific information. (This is not a denial.)

Agency records are defined as: “Products of data compilation . . . regardless of physical form or characteristics, made or received by (the Air Force) in connection with the transaction of public business and in the agency’s possession and control at the time it receives the request. [NOTE: recent amendments

define “record” to include “any information that would be an agency record subject to the requirements of [FOIA] when maintained by an agency in any format, including an electronic format.”] The agency has no obligation to create, compile, or obtain (from another Executive agency) a record to satisfy a FOIA request.

### **PROCESSING TIME LIMITS (Statutory)**

Tell requester in writing of decision on release within 20 days of official receipt. Thereafter, release any records “promptly.” (5 U.S.C. 552 (a)(6)(c).) (See DoD 5400.7-R for explanation of Multitrack Processing to be used when a significant number of pending requests that prevents a response determination being made within 20 working days.)

If the response is that you have “no record,” it is considered an adverse decision on the request, and you must give appeal rights to the requester. FOIA managers may sign “no records” responses. Denial letters and “no records” responses must also include an appeal paragraph that:

1. Tells the requester to address appeals to the Secretary of the Air Force, through the FOIA office of the activity that issued the denial or “no records” response;
2. Tells the requester to appeal within 60 calendar days from the date of the letter and to include reasons for reconsideration; and,
3. Asks the requester to attach a copy of the response.

Denial authority (includes partial denial) must tell requester of records denied, FOIA exemptions justifying denial, and appeal procedures.

Requester has 60 calendar days from date of initial denial to appeal.

Agency has 20 working days to decide appeal.

### **FOIA EXEMPTIONS**

There are nine FOIA exemptions which provide a basis for withholding information. Only seven of those are typically used.

#### *Exemption 1: Classified information.*

This refers to information which has been classified according to regulation and designated confidential, secret, and top secret information: “For Official Use Only” is not a security classification (see Section 14-3 of this Deskbook). When dealing with a request for classified information make sure that the information is currently classified and that the need for classification still exists by contacting the classifying office, agency or activity to confirm that the currency of the existing classification and the need for continued classification at that level. When dealing with a request for classified information the responder may refuse to confirm or deny the existence of the requested information where its existence or nonexistence is itself classifiable. This is called a “Glomar” denial but must be used consistently in order to effectively protect classified information. Information may also be withheld under this exemption when the requested information, when assembled together, is classifiable.

There may be information within classified documents that is not classified when segregated and should be considered for release. Any requests for classified or classifiable information should be coordinated through the appropriate security specialist.

#### *Exemption 2: Internal administrative matters*

These exemptions are divided into two parts – Low(b)(2) and High (b)(2). DoD components shall not invoke the Low(b)(2) Exception (DOD 5400.7-R, para C3.2.1.2).

“Low(b)(2)”: Internal administrative matters of a relatively trivial nature for which there is no significant public interest and the process of releasing such records would constitute an unwarranted administrative burden. The “Low(b)(2)” exemption has been totally eliminated for DoD components

Mailing lists: Current policy is to release, on request, lists containing names and *duty addresses* of all DoD personnel, military and civilian, assigned to units in the U.S. Requests for names/duty addresses for overseas units/sensitive installations/routinely deployable units should be denied under Exemption 3, 10 U.S.C. 130b. For additional guidance and information on the release of personal information see

“High(b)(2)”: Internal matters which, if disclosed, would risk circumvention of a statute or regulation. For example: security classification guide; test questions and answers used for hiring or promotion; guidelines for DOD investigators or auditors; computer software which would allow circumvention of a statute, DoD rule, regulations, orders, manuals, directives, or instructions. Most law enforcement manuals may now be withheld under expanded exemption 7e.

*Exemption 3: Exempted by another statute*

The Statute must:

- Permit no discretion on the withholding, or
- Establish criteria for withholding, or
- Refer to particular types of matters to be withheld.

For example: 10 U.S.C. 1102 (medical quality assurance records), 18 U.S.C. 798 (communication intelligence), 10 U.S.C. 618(f) (promotion selection board proceedings), 41 U.S.C. 423 (contractor proprietary information). A list of the Exemption 3 statutes compiled in 2000 can be found at <http://www.dod.mil/pubs/foi/b3.pdf>

*Exemption 4: Trade secrets or commercial or financial information submitted on privileged or confidential basis.*

This exemption is typically applied to information obtained for procurement or contracting process. To qualify for exemption, information must be commercial or financial, for example; bids, contracts, statistical data, audits, wage surveys, scientific data, computer software, etc. In general, agencies must obtain views of submitters when their data is requested under the FOIA. If information is provided voluntarily by the submitter, and of the type not customarily disclosed to the public, then information is categorically protected from disclosure. Government assurance of confidentiality is only one factor to be considered and is not determinative. If the information is required to be submitted by the government, then information may be withheld if release is likely to:

Impair the Government’s ability to obtain necessary information in the future; or

Cause substantial harm to the competitive position of the submitter.

*Exemption 5: Inter- or intra-agency documents normally privileged in the civil discovery context.*

The two privileges most commonly invoked are:

1. Deliberative process privilege which encourages frank policy discussions. This exemption, prevents premature disclosure of evolving policies, and prevents public confusion. Information or documents must be pre-decisional, and do not lose their pre-decisional character just because a decision has been made or a policy decided on.
2. Attorney work-product privilege protects adversary trial process by insulating attorney’s preparation from scrutiny. Also applies to documents prepared at direction of attorney, such

as an economist's report, or a witness statement. Both of these privileges are broadly construed under a "functional test" to include documents generated outside an executive agency if needed for the agency's functions. Do not withhold information that would routinely be available through the discovery process unless the information would be made available only by special order of the court. DoD 5400.7-R, para C3.2.1.5.2.

*Exemption 6: Information in personnel, medical, and similar files, which, if disclosed to the requester, would result in a clearly unwarranted invasion of personal privacy. (Exemption 7c, law enforcement, also protects personal privacy.)*

First, determine if there is a protected privacy interest by referring to the Privacy Act and other agency regulations and guidance. If there is no protected privacy interest, release the record (unless other exemptions apply). If there is a protected privacy interest then determine if there is a public interest in disclosure. If there is a protected privacy interest and a public interest in disclosure, balance the privacy interest against the public interest in disclosure. Balancing of interests is fact specific. Note the enhanced privacy interest in certain information by military personnel assigned to units in foreign countries, routinely deployable, or with sensitive missions, e.g., telephone directories of overseas bases. DoD 5400.7-R, para C3.2.1.6.

Examples of exempt information includes SSANs; home addresses; names and duty addresses of personnel in overseas or in classified, sensitive, or routinely deployable units; evaluations for employment or security clearances; adverse administrative personnel actions.

*Exemption 7: Law enforcement information*

Records or information compiled for law enforcement purposes (including civil and criminal statutes and implementing regulations and Executive Orders), but only to the extent production:

*Exemption 7a:* Could reasonably be expected to interfere with enforcement proceedings

*Exemption 7b:* Would deprive a person of a fair trial

*Exemption 7c:* Could reasonably be expected to constitute an unwarranted invasion of personal privacy. (Burden lower than under Exemption 6, which requires a "clearly" unwarranted invasion of personal privacy to justify withholding.)

*Exemption 7d:* Could reasonably be expected to disclose the identity of a confidential source or information supplied by a confidential source during a criminal investigation or a national security intelligence investigation.

*Exemption 7e:* Would disclose techniques and procedures for law enforcement investigations or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

*Exemption 7f:* Could reasonably be expected to endanger the life or physical safety of any individual.

*Additional exclusions for Law Enforcement Records (5 U.S.C. 552(c)):* This provision was added to FOIA in the 1986 Amendments to prevent subjects of an investigation from discovering through FOIA that they were being investigated.

The (c)(1) exclusion allows agency to report "no record exists" to requester where the disclosure of an ongoing investigation may result from a denial under Exemption 7.

The (c)(2) exclusion allows similar report where denial of request under other FOIA exemption might reveal the identification of an informant.

The (c)(3) exclusion allows “no record” response for request made to the FBI concerning counter-intelligence or counter-terrorism activities. Do not cite this provision in the response to the requester (defeats purpose of exclusion).

## HANDLING FOIA REQUESTS

**Release of Information for Litigation:** Refer to your Judge Advocate matters which involve the release of information for litigation, whether for or against the government, before releasing such information. Process the requests through the local and state FOIA/Privacy Act Monitors.

**Inspector General (IG) Records:** The guidance in All States Letter, Log Number P95-0073, 18 May 1995, is that only NGB-ADI-P will release/deny Air Force Inspector General records pertaining to ANG personnel when these records:

- a. Pertain to IG actions initiated and finalized at NGB level and in the 54 States and Territories; and,
- b. Have not required Secretary of the Air Force or SAF/IG level review. SAF/IG will retain denial/release authority for all IG records initiated and finalized at SAF level; all IG senior inquiries or investigations regardless of level of initiation/finalization; and any requests for access to IG records for use in courts-martial and non-judicial administrative proceedings. NGB-ADI-P will retain denial/release authority for non-IG records, i.e., commander-directed senior official cases or others governed by other regulations.

**Federal vs. State Records:** All States Letter, Log Number I91-0242, 17 July 1991 defines a “federal” record and a “state” record for FOIA and Privacy Act requests. While all federal records are subject to the FOIA and Privacy Act, state records created with state funds are not subject to the federal FOIA or Privacy Act (but may be subject to similar laws in your state, so check), unless the state records are:

1. At the time of the request, in possession of a federal agency as a result of the conduct of that agency’s official duties;
2. Created to meet federally dictated programs; or
3. Submitted to obtain federal funds.

**Air Force Publications:** Requests for standard unclassified Air Force publications should be logged in only. Send a letter to the requester that the publication is on sale from the National Technical Information Service (NTIS), 5258 Port Royal Road, Springfield, Virginia 22161, and suggest that the requester request the publication directly from NTIS.

Publications categorized superseded, obsolete, rescinded, classified, “FOUO” or that have a limited “L” or “X” distribution are not available from NTIS. Refer FOIA requests for such publications through normal FOIA channels to the OPR for a release recommendation.

Current Policy Guidance is available <http://www.dod.mil/pubs/foi/guidance.html> , and <http://www.foia.af.mil/> and

## CONCLUSION

General guidance for processing of FOIA and Privacy Act requests and for handling requests for particular kinds of records is contained in the Air Force Instruction 33-332. Your local FOIA/Privacy Act Monitor receives the latest guidance from your state Monitor and NGB-ADI-P.

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<http://www.dtic.mil/whs/directives/corres/pdf/540007p.pdf>

<http://www.e-publishing.af.mil/shared/media/epubs/AFI33-332.pdf>

<http://www.foia.af.mil/>

[http://www.foia.af.mil/dod5400.7\\_r\\_ahsup1.pdf](http://www.foia.af.mil/dod5400.7_r_ahsup1.pdf)

<http://www.ngb.army.mil/sitelinks/foia.aspx>

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# Privacy Act

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**Updated by Lt Col Francine Swan, January 2008**

**AUTHORITY:** 5 U.S.C. 552a, *The Privacy Act (PA)*; DoDD 5400.11, *DoD Privacy Program* (8 May 07); DoD 5400.11-R, *DoD Privacy Program* (14 May 07); AFI 33-332, *Air Force Privacy Act Program* (29 Jan 04); AFMAN 33-326, *Preparing Official Communications* (1 Nov 99); 12 U.S.C. 3403, *et seq.*; applicable state law.

## INTRODUCTION

The Privacy Act (PA) is intended to safeguard the privacy of an individual by controlling the compilation and use of personal information maintained by federal agencies. Because of the Privacy Act, the concept of records management within the Air Force and its Reserve components has undergone fundamental change since 1975. Federal law now governs the collection, maintenance and release of records. The Air Force and the Air National Guard Privacy Act Programs are governed by AFI 33-332, which implements 5 U.S.C. 552a. Check your state law for additional requirements. Because of the complexity and consistent changes in this area of the law, this topic is intended to be an overview of the subject. The latest interpretations of the law by the courts, and policies of DoD, USAF and NGB are put out in Messages and All States Letters. Always check the latest information.

This topic has been written in briefing format to which minor adjustments may need to be made. Include this subject as part of your Preventive Law Programs.

## DISTINGUISHED FROM FOIA

There is an interrelationship between the Privacy Act and the Freedom of Information Act (FOIA). While both govern the release of agency records, they operate in opposite ways.

1. The general rule of the Privacy Act is to withhold information unless disclosure is required or permitted; while the general rule of the FOIA is to release information unless the information is exempt from disclosure; and
2. Requests for information are processed under the Privacy Act when individuals seek their own records; while requests for information are processed under the FOIA when an individual's records are sought by a third person or entity.

## POLICY

Air Force and Air National Guard policy are implemented through AFI 33-332 with a focus on protection of individual privacy rights; maintenance of only so much personal information necessary for support of Air Force and Air National Guard operations ("nice to have" information should not be kept); safeguarding personal information on file to prevent unauthorized use, disclosure, or alteration; advising individuals what records the Air Force and Air National Guard maintain on them.

Basic Guidelines. The Privacy Act of 1974 and this instruction apply only to information in Air Force systems of records on living U.S. citizens and permanent resident aliens. An official system of records must be authorized by law or Executive Order; controlled by an Air Force or lower level directive; and needed to carry out an Air Force mission or function. The Deputy Chief of Staff, Communications and Information (HQ USAF/SC), is the senior official with overall responsibility for the Privacy Act Program. The Office of the General Counsel to the Secretary of the Air Force (SAF/GCA) makes final decisions on

appeals. The Director, Architecture and Interoperability (HQ USAF/SCT), manages the program through the Air Force Privacy Act Office in the Information Dissemination and Management Division (HQ USAF/SCTIR). NGB is the denial authority for National Guard requests.

## **ACCESS TO AND REQUESTS FOR RECORDS**

A Commander or a supervisor may maintain personal notes, both favorable and unfavorable, which may assist the Commander or supervisor in preparation of an OPR or other administrative actions. They do not have to be disclosed because they are not Air Force or Air National Guard records. But they become records if information in them is used for some official purpose.

The Commander will occasionally be contacted by a banking or lending institution asking for credit information on a member of the unit. Unless the individual has given written consent to disclose personal information, you are precluded from doing so. However, under the Freedom of Information Act, unclassified information including name, rank, gross pay, duty assignment and duty telephone number may be disclosed, if you or the unit FOIA/PA monitor have received a valid, written FOIA request. Disclosure of a home address or home phone is not authorized without prior consent of the individual concerned.

Another privacy act, the Right to Financial Privacy Act, 12 U.S.C. 3403, *et seq.*, prohibits a financial institution from releasing a customer's financial information to any officer or employee of the federal government, unless certain procedures are followed. ANG technicians and AGRs are considered federal officers or employees for purposes of this statute. The term "financial institutions" is so broadly defined in this statute that the term includes consumer finance companies and any credit card issuer, including gasoline and department store credit cards. Do not request any financial information on any individual, no matter how urgent or necessary the information is for any administrative or disciplinary action, until you consult with a Staff Judge Advocate. If you are in receipt of any financial records on any individual, do not copy or retransmit them to any other individual or agency until you consult with a Staff Judge Advocate.

## **PROCESSING THE REQUEST**

Requests from an individual for his or her own records in a system of records should be considered under both the Freedom of Information Act (FOIA) and the PA regardless of the Act cited. The requester need not cite any Act. Process the request under whichever Act gives the most information.

The requester should be told if a record exists and how to review the record. If possible, respond to requests within 10 work days of receiving them. If you cannot answer the request in 10 workdays, send a letter explaining why and give an approximate completion date no more than 20 workdays after the first office received the request. Show or give a copy of the record to the requester within 30 workdays of receiving the request unless the system is exempt. Give information in a form the requester can understand.

The first 100 pages are provided free, and only reproduction costs are charged for the remainder. Copies cost \$.15 per page; microfiche costs \$.25 per fiche (*see* AFI 33-332, para 4.3). Charge the fee for the first 100 pages if records show that the Air Force already responded to a request for the same records at no charge. Do not charge fees when the requester can get the record without charge under another publication (for example, medical records), or for the search, or when reproducing a document is for the convenience of the Air Force (reproducing a record so the requester can review it).

Denials are processed within 5 workdays after a request for access is received. When a record is not releasable, a copy of the request, the record, and the reason for denying access (including the applicable exemption) should be sent to the denial authority through the Staff Judge Advocate (SJA) and the PA officer. The SJA gives a written legal opinion on the denial. The MAJCOM or FOIA/ PA officer reviews the file, gets written advice from the SJA and the functional office of primary responsibility (OPR), and makes a recommendation to the denial authority. The denial authority sends the requester a letter with the decision. If the denial authority grants access, release the record. If the denial authority refuses access, tell the requester why and explain pertinent appeal rights.

Individuals may request a denial review by writing to the Secretary of the Air Force, through the denial authority, within 60 calendar days after receiving a denial letter. The denial authority promptly sends a complete appeal package to **AFLSA/JACL**. The package must include: (1) the original appeal letter; (2) the initial request; (3) the initial denial; (4) a copy of the record; (5) any internal records or coordination actions relating to the denial; (6) the denial authority's comments on the appellant's arguments; and (7) the legal reviews.

## **PRIVACY ACT STATEMENT**

Before Guard members are required to provide personal information to any federal agency, they must be advised in writing of the law authorizing the collection of such information, the general purpose of its collection, the specific use to which it will be put (including possible disclosures), and whether providing the information is mandatory or discretionary. This advisement is known as the Privacy Act Statement.

## **USE OF THE PRIVACY ACT STATEMENT ON OFFICIAL LETTERS**

The following guidelines should clarify when the Privacy Act Statement should and should not be used on official letters.

1. In accordance with AFMAN 33-326, you do not have to use the Privacy Act Statement on official military letters when a social security number is used, unless it is a "system of records." In AFI 33-332, a "system of records" is any group of records from which personal information is retrieved by name or personal identifier.
2. You do have to use the Privacy Act Statement on letters going to the private sector if a social security number is used, but the individual should first give permission. It would eliminate any need to obtain permission, however, if you omit the social security number from any letters going to anyone in the private sector.

## **VIOLATIONS**

A member of the Air National Guard or Air Force or a civilian employee of either is subject to civil and criminal penalties for failure to comply with the requirements of the Privacy Act of 1975. Such person may be fined up to \$5,000.00 and be found guilty of a misdemeanor for willfully:

1. Maintaining a system of records without first meeting the public notice requirements for establishing such a system of records;
2. Disclosing individually identifiable information to one not entitled to have it;
3. Asking for and receiving another's record under false pretenses;
4. Improperly withholding documents from an individual who requests their own records;  
or,
5. Improperly denying correction of inaccurate or untimely records.

Additionally, the agency may be vicariously liable for damages if a USAF or ANG member or civilian employee of either discloses individually identifiable information to one not entitled to have it or otherwise willfully violates any provision of the Privacy or Right to Financial Privacy Act.

## CONCLUSION

AFI 33-332 outlines the training available on the Privacy Act. Commanders and local Privacy Act monitors should be sure everyone knows how the Act works and what an individual's rights and responsibilities are under it. Being a Privacy Act monitor is no easy job. Commanders and System Managers can help by inviting the Privacy Act monitor to Commander's Calls and by knowing the reporting requirements and complying with them.

Attachment 1 to this topic contains a checklist of to whom you can give the information, and for what purposes.

Questions on release of records, exempt records, or appeals from denial of access to exempt records should be addressed to the unit Privacy Act monitor or Staff Judge Advocate.

***KWIK-NOTE: The Privacy Act is a complicated area of law. The federal courts decide precedent-setting cases affecting the liability of individuals for violating the Act. If you receive a Privacy Act or Freedom of Information Act request, or something you THINK might be such a request, IMMEDIATELY coordinate with your Privacy Act monitor and/or the Staff Judge Advocate. DO NOT request financial information from any credit card company or financial institution without first consulting a Staff Judge Advocate.***

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*Attachment 1*

**PRIVACY ACT CHECKLIST - TO WHOM AND FOR WHAT PURPOSE INFORMATION MAY BE RELEASED**

The GENERAL RULE relative to disclosure is that personal information may NOT be released to anyone WITHOUT the prior written consent of the individual to whom the information pertains. There are a number of EXCEPTIONS to this general rule. The information may be released:

1. To employees of DoD who need the information in performance of their duties;
2. When it is required to be disclosed to the public under the Freedom of Information Act;
3. To the Bureau of Census for purposes of planning or carrying out a census or survey;
4. To a recipient who provided the DoD or the Air Force with advance written assurance the record will be used solely as a statistical research or reporting record, and the record will not be used to make any decisions about the rights, benefits, or entitlements of an individual. It must be sent in a form in which the identity of the individual cannot be ascertained through usual research methods;
5. To an agency outside the DoD for a civil or criminal law enforcement activity authorized by law;
6. To another person under compelling circumstances affecting the health and safety of an individual, provided notification of any such disclosure is sent to the last known address of the individual to whom the records pertain;
7. To the U.S. Senate or House of Representatives, or a congressional committee, or subcommittee, for matters within their jurisdiction;
8. To a congressional office acting for a constituent who is the subject of the record;
9. To the Comptroller General or any authorized representatives, on business of the General Accounting Office;
10. Pursuant to the order of a Court of competent jurisdiction;
11. To the National Archives of the United States as a record with enough value to warrant keeping it;
12. To a contractor operating a system of records under contract to perform an Air Force or Air National Guard function, such as personnel, payroll, or health systems management;
13. When the public's right to know outweighs the individual's right to privacy. An example of this may be release of a home address to enforce a child support order. Never apply this exception without first consulting the Privacy Act monitor and the Staff Judge Advocate; and/or
14. When medical records of a minor are requested, to the parents or legal guardians, but only when certain conditions are met. First, have your unit's physician determine whether access could harm the person's mental or physical health. If so, you probably will withhold the information. Consult the Privacy Act monitor and the Staff Judge Advocate in these situations.

The federal Privacy Act allows individuals to examine just about any file maintained by the federal government which specifically relates to them. Like any other provision of the federal Privacy Act, this right of access does not apply to files maintained by state or local governments (for which applicable state law must be consulted), nor does it apply to files maintained by private industry.

*Attachment 2*

**PRIVACY ACT CHECKLIST - TO WHOM AND FOR WHAT PURPOSE INFORMATION MAY BE RELEASED**

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1. To employees of DoD who need the information in performance of their duties;
2. When it is required to be disclosed to the public under the Freedom of Information Act;
3. To the Bureau of Census for purposes of planning or carrying out a census or survey;
4. To a recipient who provided the DoD or the Air Force with advance written assurance the record will be used solely as a statistical research or reporting record, and the record will not be used to make any decisions about the rights, benefits, or entitlements of an individual. It must be sent in a form in which the identity of the individual cannot be ascertained through usual research methods;
5. To an agency outside the DoD for a civil or criminal law enforcement activity authorized by law;
6. To another person under compelling circumstances affecting the health and safety of an individual, provided notification of any such disclosure is sent to the last known address of the individual to whom the records pertain;
7. To the U.S. Senate or House of Representatives, or a congressional committee, or subcommittee, for matters within their jurisdiction;
8. To a congressional office acting for a constituent who is the subject of the record;
9. To the Comptroller General or any authorized representatives, on business of the General Accounting Office;
10. Pursuant to the order of a Court of competent jurisdiction;
11. To the National Archives of the United States as a record with enough value to warrant keeping it;
12. To a contractor operating a system of records under contract to perform an Air Force or Air National Guard function, such as personnel, payroll, or health systems management;
13. When the public's right to know outweighs the individual's right to privacy. An example of this may be release of a home address to enforce a child support order. Never apply this exception without first consulting the Privacy Act monitor and the Staff Judge Advocate; and/or
14. When medical records of a minor are requested, to the parents or legal guardians, but only when certain conditions are met. First, have your unit's physician determine whether access could harm the person's mental or physical health. If so, you probably will withhold the information. Consult the Privacy Act monitor and the Staff Judge Advocate in these situations.

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## Freedom of Expression

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**Lt Col Barry Maddix, July 2002**

**AUTHORITY:** DoD Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*; DoD Directive 5500.7-R, *Joint Ethics Regulation*; AFI 51-902, *Political Activities By Members of the U.S. Air Force* (1 Jan 96)(applies only to ANG when federalized); AFI 51-903, *Dissident and Protest Activities* (1 Jan 98)(applies only to active duty); Greer v. Spock, 424 U.S. 828 (1976)(distribution of campaign literature on military installation); United States v. Albertini, 472 U.S. 675 (1985)(Barring defendant from Hickam AFB did not violate the First Amendment; Brown v. Glines, 444 U.S. 348 (1980)(AF regulations requiring commander approval of petition held valid); Carr, John A. Capt (USAF), *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. Rev. 303 (1998)

### INTRODUCTION

Commanders must know the policies, prohibitions and guidelines for handling the various forms of expression by their members. A Commander must carefully balance the member's right to freedom of expression against the mission of the Air National Guard. A Commander must deal promptly with violators; however, overreaction can cause more harm than good. Sound judgment on the part of the Commander is the key to success. The balance is between competing policies:

1. Commanders are responsible for the performance of the military mission and the maintenance of good order and discipline; and
2. Every member enjoys the right of freedom of expression, but a Commander cannot be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of the unit.

This subject has previously been called "Dissent and Protest Activities" in various handouts. The subject matter is much broader, however. This topic will predominately discuss restrictions on the freedom of expression of military members. Despite the seeming similarity of this topic to the topic entitled "FREEDOM TO COMPLAIN - MILITARY MEMBERS" in this Deskbook, because of the differences in focus between these two topics (restrictions vs. relatively no restrictions), they have been made separate topics. See the topic in this Deskbook entitled "OPEN HOUSES AND FREE SPEECH, which discusses restrictions on freedom of expression of non-military visitors to the base. Some of the material in this topic, as it pertains to the base Commander's authority to control or limit, to varying degrees, the free speech of ALL PERSONS - CIVILIAN AND MILITARY - on the base, also applies to that topic.

### RESTRICTIONS ON FREE SPEECH

While the general rule is that governments may not abridge the freedom of speech contained in the First Amendment to the United States Constitution, the U.S. Supreme Court has placed restrictions on the exercise of free speech in cases where:

1. Speech created a "clear and present danger" of causing a substantial evil which the government has a right to prevent; and
2. When balanced against the public interest, limitations on free speech were reasonable in support of a compelling government interest.

Additionally, the military may impose restriction on the speech of military personnel whenever the speech poses a significant threat to discipline, morale, esprit de corps, or civilian supremacy. (See Carr at 306) Restrictions on military personnel are often focus on two factors: the LOCATION where the expression occurs, or the STATUS of the expressor.

1. Location Restrictions

The Supreme Court has set a LOWER THRESHOLD for the military Commander's decision to limit forms of expression based upon the concept that military installations are NOT public forums. Commanders need only show that their reason for limiting expression has a "rational basis in fact." The general rule, according to many state statutes and regulations, is that on a military base, the base Commander reigns supreme over military personnel and civilians who are there. Thus, although civilians enjoy more freedom when not on a military installation, once they enter the installation, they are subject to the base Commander's rules of governing conduct on that base.

*Closed vs. Open Bases:* Traditionally, "closed" military installations have NOT been characterized as public forums for the exercise of First Amendment rights. Thus, a military regulation prohibiting partisan political activity on base may validly prevent even presidential candidates from making political speeches on base. However, "open" bases may be considered public forums and later attempts to restrict freedom of expression may be held to a higher standard than "rational basis in fact" test.

*Open Houses:* An open house is an open invitation to the general public to enter the installation. Usually community groups such as Scouts, the Chamber of Commerce, Fire and Police Departments, Kiwanis, Rotary and sometimes Defense Contractors are invited and permitted to set up booths and displays. Non-ideological community groups can generally be permitted to engage in free expression even if expression is denied others as long as the activity is properly regulated by the Commander.

Properly planned open houses can include community groups which exercise expression without "opening the door" for partisan political activities. This is because the open house is a traditional military activity which does not transform the installation into an "open forum." The key to NOT turning your installation into an open forum is WHOM you allow on base and WHAT you permit them to say.

Base Commanders can restrict the kind of expression, and restrict it to certain groups even though permitting them to enter the base, and can restrict the total expression of certain persons by denying them access to the base. Be conservative about whom you invite and what you allow them to say and do. If this has become a problem for you, you may wish to have "invitation-only" open houses, air shows, etc. The invitations may be sent to a group.

2. Status Restrictions

Historically, the courts and our laws have permitted tighter control over military members based on the constitutional concern for maintaining civilian control over the military and for the need for discipline and obedience. As a result, Air National Guard members, particularly when in Title 10 status, may be limited in their freedom of expression.

Expression can be regulated or restricted in the following areas:

1. Making "criminal" certain speech;
2. Political or ideological;

3. Written publications;
4. Distribution or posting of writings on base;
5. Pornography;
6. Petitions;
7. Demonstrations;
8. Participation in public events;
9. Disclosure of classified material;
10. Release of information constituting an unwarranted invasion of personal privacy;
11. Discriminatory acts or statements; and
12. Permissible off-base gathering places.

#### **BASE COMMANDER AUTHORITY**

Whether persons are in the military, are civilians or are dependents, simply by being on the base, even as part of their regular duties or residence, the authority of many state's laws granting base Commanders full charge and control over the base, likely includes prohibiting the distribution or posting of materials, demonstrations, or other activities on the base if the base Commander determines:

1. There is a clear danger to the loyalty, discipline, or morale of members; or
2. Interference with the accomplishment of the military mission may result.

Additionally, Commanders can control even the "on duty" speech of civilians. Commanders should consult with the Staff Judge Advocate to determine the extent of their authority over their bases according to their state's laws.

#### **CRIMES**

Certain speech, under state military justice codes, may constitute a crime. The following references are to the UCMJ, applicable to Title 10 personnel, but may have equivalents under your state's laws:

1. Disloyal statements (Art. 134);
2. Contempt toward certain elected officials (Art. 88);
3. Disrespect to a superior commissioned officer (Art. 89); and
4. Insubordinate language to an NCO (Art. 91).

#### **POLITICAL OR IDEOLOGICAL EXPRESSION**

The validity of the restraint on political or ideological expression is based on the premise that the primary function of a military organization is to execute orders, not to debate the wisdom of decisions that the Constitution entrusts to the legislative and judicial branches of the government and to the Commander-in-Chief.

Many state statutes and regulations prohibit Commanders from authorizing demonstrations for partisan political purposes on base. AFI 51-902 addresses the subject of partisan political activities by Air Force members by listing permitted and prohibited activities. While the instruction is stated to be applicable to the Air National Guard, many of its prohibitions only apply to ANG members in federal status. For a more complete discussion of this subject, see the topic in this Deskbook entitled "POLITICAL ACTIVITIES." The point here is that by virtue of ANG membership, certain aspects of a member's political and ideological expression may be restricted.

Also certain public speaking engagements by ANG members may require approvals and may have to meet certain conditions in the Joint Ethics Regulation, DoD Directive 5500.7-R and in applicable state statutes and regulations.

### **WRITTEN PUBLICATIONS**

Written publications, including but not limited to those for newspapers or magazines, for non-military use must be accomplished during off-duty time, without the use of government property or supplies (see JER DoD Directive 5500.7-R and applicable state statutes), written so as not to undermine good order and discipline, and depending on the subject matter, screened for classified material and approved for publication. Writings during off-duty time, which contain language violating federal or state law, such as advocating the overthrow of the government, may subject the author to disciplinary action.

### **DISTRIBUTION OR POSTING OF WRITINGS ON BASE**

Depending on state law or regulation, before certain writings may be distributed or posted on base, the base Commander may have to approve. Usually government agency or base-regulated activity publications do not require that approval before they may be distributed or posted. However, AFI 51-903, Dissident and Protest Activities, prohibits Air Force members from distributing or posting any printed or written material, other than publications of an official government agency or base-regulated activity, within any Air Force installation without permission of the installation commander or that commander's designee. Members who violate this prohibition are subject to disciplinary action.

It does not appear that AFI 51-903 applies to ANG members, however, since AFI 51-903 does apply to Air Force installations, it is advisable to follow the requirements of this instruction. In any event, ANG Base Commanders should require ANG members, who are seeking to post or distribute material on base, to submit a copy of the material and the proposed method and place of distribution or posting. The commander may prohibit the distribution or posting of any material if it poses a clear danger to the loyalty, discipline, or morale of members, or if it will interfere with the accomplishment of the mission. The commander should always consult with his or her judge advocate before prohibiting the distribution or posting of written material on base, particularly if the contents represent political speech, e.g., words that are critical of government policies or officials.

### **PORNOGRAPHY**

Pornography is not constitutionally protected expression, but under many state civilian penal statutes or military justice codes, mere possession of pornography may not be a crime. However, where pornography is displayed on base under circumstances likely to incite violence or disorder, it violates AFR 30-1. Under your state military justice code there may be criminal sanctions when the display of pornographic materials is prejudicial to good order and discipline. State law should be consulted.

### **PETITIONS**

While Air National Guard members have the right to petition members of the legislature, base Commanders may, under their authority granted by state law to be in charge and control of their base, control the circulation of petitions on base.

## DEMONSTRATIONS

ANG members are subject to the Joint Ethics Regulation, DoD Directive 5500.7R, and when in federal status by AFI 51-903, which prohibit members from demonstrating:

1. On duty;
2. In a foreign country;
3. In uniform, in violation of AFI 36-2903;
4. If the demonstration constitutes a breach of law or order; or
5. When violence is likely.

Many state laws or regulations prohibit or restrict demonstrations on or off-base by ANG members in Title 32 status. Restrictions on expression of members may be based on whether or not they are on orders, and the type of those orders. Commanders should consult with their JAGs who should check the state's laws and regulations in this area.

## COMMANDER'S RESPONSIBILITIES

In matters involving the freedom of expression of ANG members, Commanders should:

1. Keep an open-door policy;
2. Be firm, but fair, when dealing with individuals causing potential problems;
3. Keep the base Commander informed;
4. Take prompt corrective action when warranted; and
5. Never attempt to prevent a member from exercising the right to:
  - a. Correspond with elected representatives;
  - b. Seek redress under applicable statutes; or
  - c. Seek assistance from the Inspector General.

## CONCLUSION

Because of the First Amendment implications, the necessity for interpretation of federal and state statutes and regulations, and the potential impact certain restrictions of expression have on the neighboring civilian community, Commanders should closely consult with their Judge Advocates before implementing any restrictions on expression.

***KWIK -NOTE: Your status as a member of the Air National Guard and your presence on a military installation, whether as a military member or civilian, restricts your freedom of expression in certain ways. Be aware of them.***

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# Copyright

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Updated by Lt.Col. Barry K. Maddix, June 2001

**AUTHORITY** : 17 U.S.C. 101 et seq.; U.S. Constitution, Article I, Section 8, Clause 8; AFI 51-303, *Intellectual Property – Patents, Patent Related Matters, Trademarks and Copyrights* (1 Sep 98)(for reference only); OpJAGAF 1993/76, “Fair Use” Determination (30 Jul 93); OpJAGAF 1992/36, *No Copyright Infringement in Dining-In VCR Comedy Tape* (14 Apr 92).

## INTRODUCTION

Our founding fathers believed that free expression is enriched by protecting the creations of authors from exploitation by others and that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors. As a result, the United States Constitution provides that Congress shall have power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

## WHAT IS A COPYRIGHT?

Copyright is a form of protection provided by the laws of the United States to the authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the 1976 Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

- **To reproduce** the work in copies or phonorecords;
- To prepare **derivative works** based upon the work;
- **To distribute copies or phonorecords** of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- **To perform the work publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- **To display the copyrighted work publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- In the case of **sound recordings, to perform the work publicly** by means of a **digital audio transmission**.

It is illegal for anyone to violate any of the rights provided by the copyright law to the copyright owner. These rights, however, are not unlimited in scope. Sections 107 through 121 of the 1976 Copyright Act establish limitations on these rights. In some cases, these limitations are specified exemptions from copyright liability. One major limitation is the doctrine of “fair use,” which is given a statutory basis in section 107 of the 1976 Copyright Act and has been relied on by the Air Force in using certain copyrighted material. See, *e.g.*, OpJAGAF 1993/76, 30 Jul 1993 (use of a portion of two pieces of commercial music for an Air Force recruiting informational video is “fair use”) and OpJAGAF 1992/36, 14 April 1992 (use of a modified comedy tape comprising twenty or so short film clips taken from various movies and a few songs used at a dining-in deemed to be “fair use”). In other instances, the limitation takes the form of a “compulsory license” under which certain limited uses of copyrighted works are permitted upon payment of specified royalties and compliance with statutory conditions.

## WHAT CAN BE COPYRIGHTED?

The following broad categories list the areas which constitute “works of authorship” under the Copyright Act of 1976 as amended and, thus, may be copyrighted:

1. Literary works;
2. Musical works, including any accompanying words;
3. Dramatic works, including any accompanying music;
4. Pantomimes and choreographic works;
5. Pictorial, graphic and sculptural works;
6. Motion picture and other audiovisual works;
7. Sound recordings; and
8. Architectural works.

## HOW DO YOU KNOW IF SOMETHING IS COPYRIGHTED?

The way in which copyright protection is secured is frequently misunderstood. A work that is created (fixed in tangible form for the first time) on or after January 1, 1978, is automatically protected from the moment of its creation and is ordinarily given a term enduring for the author’s life plus an additional 70 years after the author’s death. There is no requirement to use a copyright notice under U.S. law in order to protect rights in a work although many works do carry a copyright notice. Example: © 2000 John Doe. ANG members should always presume that a work that falls within the categories described above is protected by copyright. In order to use these works, authorization must be obtained from the author.

## COPYRIGHT AND THE ANG

Copyright law affects Air National Guard units in many ways. ANG members should not copy copyrighted material unless there is an exception under the copyright laws for doing so, *i.e.*, materials are copied for teaching purposes. Computer software purchased by Air National Guard units must not be reproduced or used except as permitted by the vendor’s contract. In addition, any privately owned software may not be used on ANG computers without written approval from the Commander and only if permitted by the software license.

In general, Air National Guard policy favors use of materials that would not involve infringement of a copyright. If copyrighted materials are to be used, ANG members should seek permission from the copyright owner or contact their local Staff Judge Advocate to see if the use of the material falls within an exception to the copyright laws, *i.e.*, fair use. ANG members should be mindful that violations of copyright laws could subject the violator, and possibly the commander, to criminal prosecution, liability for monetary damages, and military disciplinary action.

Any questions concerning the reproduction, copying, or other use of any copyrighted material should be directed to the Staff Judge Advocate.

***KWIK-NOTE: Copyrighted items may not be reproduced without permission.***

### RELATED TOPICS:

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Computer Acquisition and Security	25-6
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# Unauthorized Copying and Unauthorized Use of Software

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Updated by Lt Col Barry K. Maddix, June 2001

**AUTHORITY:** United States Code, Titles 17 (Copyright), 18 (Criminal) and 44 (Public Printing and Documents); DoDD5330.3/AFSUP1, *Defense Automated Printing Service (DAPS)*(18 Feb 98); AFI 51-303, *Intellectual Property – Patents, Patent Related Matters, Trademarks and Copyrights* (1 Sep 98)(for reference only).

## INTRODUCTION

Under the Copyright Act of 1976, any original work that authors have created by their own skill, labor, and judgment is copyrightable. ANG members should presume all publications, software and other works created by others are protected by copyright and require express permission to use. A copyright notice is not required for protection.

## OBTAINING PERMISSION TO USE COPYRIGHTED MATERIAL

It is important to obtain permission before using copyrighted materials, particularly if those materials will be distributed over a wide audience or disseminated over the Internet. An Air National Guard unit could be found liable for copyright infringement, whether directly or through a theory of vicarious liability, for allowing others to disseminate such information through its computer systems. Personal liability of the member is also a possibility.

There is not a specific form for a request or license agreement set out in any ANGI or AFI 51-303. If material is obtained through the Internet, there may be information supplied in the “disclaimer” section or the “legal” section as to what use is permitted of the material posted and/or how one might obtain permission to use the material for a particular use. In writing to a copyright owner to seek permission to use certain copyrighted works, the military requester should be very specific as to the number of paragraphs, pages, or excerpts he/she intends to use; the type of use, *i.e.* on what World Wide Web or Internet sources the materials will be posted; how long the postings will remain; whether access will be granted to military users as well as the public; and whether the source of the work will be credited. The requester should be careful not to imply a more limited audience for the material than will be the case. See OpJAGAF 1996/15, *Permission to Use Copyrighted Materials on Air Force Home Pages* (7 Feb 96).

## ILLEGAL PHOTOCOPIES

The subject of illegal photocopies encompasses issues of who can photocopy what, when, where, in what quantities and at whose expense. Photocopies should not be made of copyrighted material unless the user has permission to do so or the use fits within an exception to the Copyright Act of 1976. Additionally, Air Force personnel should not photocopy government bonds, notes, money, checks, certificates of citizenship, immigration papers, draft cards or military badges. State laws may also prohibit copying automobile titles, registration certificates and driver’s licenses. AF Form 1112, *Copying Machine Limitations and Unlawful Reproduction*, is used by some ANG units and identifies a list of items that should not be copied on government copiers. It is the responsibility of the commander to ensure that unit photocopy machines are used only by authorized personnel for authorized purposes.

## UNAUTHORIZED USE OF SOFTWARE

A computer program purchased from a vendor is a work of authorship that is subject to the copyright laws of the United States. Only the owner of copyrighted software has the exclusive right to reproduce, adapt, distribute, perform or display this software and, conversely, to exclude others from exercising these rights. When the Air National Guard purchases such software pursuant to the terms and conditions of a purchase contract and license

agreement, the owner of the software grants the purchaser, under the contract terms, a LIMITED right to exercise the rights enumerated above.

Air Force and Air National Guard personnel should not reproduce vendor- supplied software except as permitted by the terms and conditions of the contract with the software vendor. Most importantly, copying commercially purchased software not purchased by the Air National Guard or U.S. Air Force or using such software on a computer is illegal and could result in appropriate disciplinary action. Finally, any use of privately owned software or hardware on military bases must be approved by the unit commander or delegated authority.

Unauthorized copying of copyrighted computer software can subject the violator, and possibly the commander, to criminal prosecution, liability for monetary damages, and military disciplinary action. All Commanders, supervisors, officers, and superintendents at all levels should inform, and periodically remind all their subordinates of the consequences of copying or using copies of copyrighted materials and software.

### **USE OF GRAPHICS OR OTHER MATERIAL ON HOME PAGES AND PUBLICATIONS**

Home Pages are computer sites on the World Wide Web of the Internet. They are accessible in varying degrees by Air National Guard and Air Force members, employees, contractors, and/or the public. Such sites routinely provide access to information databases as well as quick connections to other sites. Use of icons or graphics which have been incorporated from commercial software products on a unit's home page or other publication may violate copyright laws if there has not been authorization from the owner of the software from which such computer icons and graphics are taken.

Air National Guard offices may not "republish" such a copyright protected product. Copyright law recognizes that in the area of computer software programs, it is the programmer's method of achieving a result and the expression of ideas that is protected. The design of an icon, its appearance, coloration, and form is copyrightable. Within the software program, the sequence of steps reflecting the "art" of writing the sequences of codes that will produce the icon is also protected. To make such computer-generated designs, the publisher of the software had to create a software program that figuratively painted the design using pixels on the computer screen. The subject icons or graphics are thus images which were first conceptualized, reflecting a creative process, and then produced through the process of a computer software program. These creative processes result in a form of expression that is subject to copyright protection.

Therefore, where the license under which the software program containing the icons does not contain the authority to use the icons in the manner desired (*i.e.*, importing them into another program to be used on the World Wide Web), express permission from the copyright owner must be obtained. If permission is not obtained, then the icons may not be used in this manner. See OpJAGAF 1996/38 (19 Mar 96) for more information.

***KWIK-NOTE: When in doubt, ASK before you make a copy of any other person's work.***

#### **RELATED TOPICS:**

Computer Acquisition and Security  
Copyright  
Preventive Law Program

#### **SECTION**

25-6  
14-14  
17-15

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## Improper Use of Government Computer Systems and Monitoring Internet and E-Mail Use

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Lt Col Cynthia Ryan, April 2001

**AUTHORITY:** 18 U.S.C. 2510-21, 2701-20, 3117, 3121-26; AFI 33-119, *Electronic Mail Management and Use* (1 Mar 99); AFI 33-129, *Transmission of Information via the Internet* (4 Apr 01); AFI 33-202, *Computer Security* (15 Feb 01); AFI 33-207, *Computer Security Assistance Program* (1 Sep 97); AFI 33-219, *Telecommunications Monitoring and Assessment Program* (15 May 00); AFI 71-101, Vol. I, *Criminal Investigations* (1 Dec 99). See also Lt Col LeEllen Coacher, *Permitting Systems Protection Monitoring: When the Government Can Look and What It Can See*, 46 A.F. Law Review 155 (1999); AFOSI Computer Crime Investigator's Handbook, April 2000.

### INTRODUCTION

The use of government computers is limited to official and authorized use not only by section 2-301 of the JER, but also applicable service regulations. However, some personal use may be authorized with the permission of certain superiors. AFI 33-119 and AFI 33-129 adopt the same types of prohibitions set forth in the JER, although the instructions also contain specific prohibitions that are set forth below.

With the Internet, and even e-mail, a necessary part of military operations, concerns occasionally arise about misuse and the extent to which a commander may go to discover misuse. The primary statutory law in this area is the Electronic Communications Privacy Act of 1986 ("ECPA"), an amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, commonly known as the Wiretap Law. 18 USC Sec. 2501, *et seq.* Even though the government, like any company, may own and provide telephones, voice mail and computers for its employees, it does not have unfettered rights to monitor its employees' usage of these items. There are common law, statutory, and regulatory protections for an employee's expectations of privacy in the workplace.

### WHEN IS ACCESS TO THE INTERNET PROHIBITED FROM GOVERNMENT COMPUTERS?

AFI 33-129, which is applicable to the ANG, contains the following prohibitions for using the internet for other than authorized purposes. Because the instruction is punitive, violations may result in adverse administrative or punitive disciplinary action.

The specifically prohibited activities involving the use of government-provided computer hardware or software are listed in paragraphs 6.1.1 through 6.1.12 of the instruction:

6.1.1. Any use of government-provided computer hardware or software for other than official and authorized government business.

6.1.2. Activities for personal or commercial financial gain. This includes, but is not limited to: chain letters; commercial solicitation; and sales of personal property, except on authorized bulletin boards established for such use.

6.1.3. Storing, processing, displaying, sending, or otherwise transmitting offensive or obscene language or material. Offensive material includes, but is not limited to, "hate literature," such as racist literature, materials or symbols (for example, swastikas, neo-Nazi materials, and so forth), and sexually harassing materials. Obscene material includes, but is not limited to, pornography and other sexually explicit materials.

6.1.4. Storing or processing classified information on any system not approved for classified processing.

- 6.1.5. Storing or processing copyrighted material (including cartoons) unless approval is obtained from the author or publisher.
- 6.1.6. Participating in “chat lines” or open forum discussion unless for official purposes and after approval by appropriate Public Affairs channels.
- 6.1.7. Using another person's account or identity without appropriate authorization or permission.
- 6.1.8. Viewing, changing, damaging, deleting, or blocking access to another user's files or communications without appropriate authorization or permission.
- 6.1.9. Attempting to circumvent or defeat security or auditing systems without prior authorization or permission (such as for legitimate system testing or security research).
- 6.1.10. Obtaining, installing, copying, storing, or using software in violation of the appropriate vendor's license agreement.
- 6.1.11. Permitting any unauthorized individual access to a government-owned or government-operated system.
- 6.1.12. Modifying or altering the network operating system or system configuration without first obtaining permission from the administrator of that system.

#### **WHAT ARE PROHIBITED USES OF GOVERNMENT ELECTRONIC MAIL SYSTEMS?**

Paragraphs 3.1 and 3.3 of AFI 33-119 set forth mandatory prohibitions; violations of these prohibitions can result in punitive and administrative disciplinary actions. As set forth in the instruction, military members and civilian employees use government communications systems with the understanding that any type of use, authorized or unauthorized, incidental or personal, serves as consent to monitoring. The government e-mail communications system can only be used for official or authorized use. Any other use is prohibited. Some of the prohibitions concern sending e-mail to a large number of recipients. “Digital images as well as mass distribution of smaller messages may delay other traffic, overload the system, and subsequently cause system failure.” (Para 3.1.2). The use of electronic bulletin boards or e-mail public folders for non-mission related e-mail is highly suggested.

Official use includes communications, including emergency communications, which the Air Force has determined necessary in the interest of the federal government. Official use includes, when approved by the theater commander in the interest of morale and welfare, those communications by military members and other Air Force employees who are deployed for extended periods away from home on official business.

The following are prohibited uses of government e-mail as set forth in paragraph 3.3.1.1:

- 3.3.1.1.1. Distributing copyrighted materials by e-mail or e-mail attachments without consent from the copyright owner. Failure to maintain consent may violate federal copyright infringement laws and could subject the individual to civil liability or criminal prosecution.
- 3.3.1.1.2. Sending or receiving e-mail for commercial or personal financial gain using government systems.
- 3.3.1.1.3. Intentionally or unlawfully misrepresenting your identity or affiliation in e-mail communications.
- 3.3.1.1.4. Sending harassing, intimidating, abusive, or offensive material to, or about, others.
- 3.3.1.1.5. Using someone else's identity (UserID) and password without proper authority.

3.3.1.1.6. Causing congestion on the network by such things as the propagation of chain letters, broadcasting inappropriate messages to groups or individuals, or excessive use of the data storage space on the E-mail host server.

The instruction also states that an “Agency Designee,” *i.e.* the first supervisor in the chain of command who is a commissioned officer or a government civilian holding a rank of GS-11 or above, may authorize limited personal use of government-provided e-mail communication, when it:

- (1) Serves a legitimate public interest,
- (2) Conforms with theater commander-in-chief (CINC) and MAJCOM policies,
- (3) Does not adversely affect the performance of official duties,
- (4) Is of reasonable duration and frequency, and whenever possible, is made during personal time (such as after-duty hours or lunch time),
- (5) Does not overburden the communications system with large broadcasts or group mailings,
- (6) Does not create significant additional costs to DoD or the Air Force, and
- (7) Does not reflect adversely on DoD or the Air Force (such as uses involving pornography, chain letters, unofficial advertising, soliciting or selling, violations of statute or regulation, inappropriately handled classified information or other uses that are incompatible with public service).

Examples of authorized limited personal use that are set forth in the instruction include, but are not limited to:

- (1) Brief communications made while traveling on official business to notify family members of official transportation or schedule changes.
- (2) Using government systems to exchange important and time-sensitive information with a spouse or other family members; such as, scheduling doctor, automobile, or home repair appointments, brief internet searches, or sending directions to visiting relatives.
- (3) Educating or enhancing the professional skills of employees (e.g., use of communication systems, work-related application training, etc.)
- (4) Improving the morale of employees stationed away from home for extended periods.
- (5) Job searching in response to Federal government downsizing.

Although military members and civilian employees can subscribe to official Air Force-sponsored list servers, mailing lists, and discussion groups, they must have written approval of the unit commanders at base-level/division chiefs at headquarters, before subscribing to such information sources. Any person using government equipment to participate in any news group or list-server, Air Force-sponsored or not, must clearly state “The opinions expressed are those of the individual and do not represent an official position of the United States Air Force.”

Participation in news groups or list-servers with content contrary to the standards set by the Joint Ethics Regulation (e.g., obscene, offensive, etc.) is prohibited.

Commanders may direct e-mail administrators to set up permanent blocks on a specific site, news group or list-server address to prevent subscription to such services.

## **WHAT IS MONITORING?**

It is important to distinguish between the three different types of “monitoring” because the rationale behind the “monitoring” and the gathering of information about computer transmissions will determine who can do it, when they can do it, why they can do it and how you as a commander can use the information that is obtained. Each category requires a different legal analysis which begins with “what is the purpose of the monitoring?”

### **Systems Protection “Monitoring”**

Only specifically trained and authorized systems administrators can conduct this type of monitoring. Its purpose is to ensure the proper functioning of the communications system and the integrity of the data in the system by allowing the discovery and prevention of prohibited use. Because it is viewed as the first line of defense against unlawful intrusions into our government networks, it is part of our operations security. It is imperative to understand the proper boundaries and guidelines that govern this type of monitoring.

Those individuals responsible for conducting this monitoring activity are subject to punitive and administrative actions if they violate paragraphs 21.6 and 21.7 of AFI 33-219. These sections provide that personnel are subject to discipline:

-- if they “intentionally report, or file any acquisition or proprietary information, or personal privacy information (PPI) extraneous to the TMAP activity, or any privileged information such as confidential communications between attorney and client, husband and wife, or clergy and penitent,” and

-- if they do not “promptly destroy any information inadvertently collected except if it: 1) relates to an intrusion, or to activities that are likely to impair the efficiency of the system or are likely to enhance system exposure to intrusions; or 2) reveals an emergency situation or situation threatening grievous bodily harm; or significant loss of property. Inadvertently collected information that is not destroyed shall be reported according with the provisions of paragraph 24.5.”

It is important to remember that any information gathered by the systems administrators may be turned over to law enforcement for prosecution or administrative action if the information is discovered inadvertently. For example, if the system indicates that the server is becoming clogged with e-mails with large graphic files, and the administrator determines that the e-mails contain pornography, this information may be used for prosecution. However, systems administrators may NOT be used to monitor specific communications to or from certain people for the purpose of gathering “evidence.”

### **Law Enforcement “Interceptions”**

The purpose of law enforcement monitoring or “interception” is to gather evidence of illegal activity. Therefore, the law enforcement act must be authorized by either consent of a party to the communication or by court order, a valid warrant, or a probable cause search authorization. The legal analysis will necessarily require that constitutional, statutory, and regulatory guidance be strictly followed.

It is important to remember that law enforcement can use information gathered by systems administrators; however if law enforcement attempts to extend the scope of the “search” by attempting to gather further information, a warrant may be necessary.

Here it is important to analyze the “reasonable expectation of privacy.” Look at the totality of the circumstances and the operational realities of the workplace. Factors to examine: status of individual and their access to the computer; private vs. an open bay office; security procedures; office policies and consent banners. Balance the interests of the employee against the interests of the government in the place or item to be searched. Do you need a warrant? What is the scope of the search? Are there exigent circumstances? Be careful—because usually you can prevent the “destruction of evidence” merely by removing the person’s access to the system.

Consider the use of the AFOSI, your State Attorney General, or the local United States Attorney’s office if you find a need to investigate and prosecute a computer crimes case as the affidavits for the warrants need to be carefully written and the investigation itself requires highly trained investigators.

## **TMAP/COMSEC “Surveillance”**

The purpose of the TMAP (telecommunications monitoring and assessment) Program set forth in AFI 33-219 is to monitor unsecured telecommunications systems (telephone, radio, wire and computer transmissions) to ensure that these unsecured systems are not used to transmit sensitive or classified information. In other words, its purpose is to ensure operational security (OPSEC). Utilize DOD and AF instructions governing the program.

This surveillance requires notice to users of the system (banners, for example); disclosure of information gathered may be limited. SJAs should be intimately involved in reviewing the banners used, the written policies, and the other consent notification actions.

## **DO MILITARY PERSONNEL HAVE AN EXPECTATION OF PRIVACY IN GOVERNMENT COMPUTERS?**

Although the federal constitution provides all of us with protections from “unreasonable searches and seizures,” the operative word is “unreasonable.” An analysis of search and seizure cases underscores the importance of the concept that an individual must have a “reasonable expectation of privacy” in the area to be searched before the Fourth Amendment applies. There arguably is no expectation of privacy in anything subject to inspection (essentially the argument is that systems protection monitoring is an inspection).

### **The Electronic Communications Privacy Act (ECPA), 18 USC Sec. 2511 *et seq.***

There are three components to the ECPA – Title I, which concerns the interception of wire, oral, and electronic communications; Title II, which concerns access to stored communications; and Title III, which concerns the use of pen registers and trap and trace devices.

Generally the ECPA provides civil and criminal penalties for any person who intentionally intercepts, uses, or discloses “any wire, oral, or electronic communication” or accesses stored communications.

Although there are five exceptions to the ECPA commonly used by the military, there are two primary exceptions to the ECPA that afford employers broad rights to monitor their employees’ use of government equipment/resources. They are:

#### **Exception #1 – System Operator**

Employees of an electronic communication service are allowed to monitor electronic communications that traverse their system provided that the monitoring was “necessary incident to the rendition of his service or to the protection of the rights or property of that service.” 18 USC 2702 (b)(5). This exception allows system operators and certain other employees the ability to ensure the efficient operation of the system, that information is safe from loss (back-ups) and corruption, and that the system resources are not being improperly used by either authorized or unauthorized users.

#### **Exceptions #2 and #3 – Consent**

18 USC Sec. 2511 (2)(c) and (d) provide for monitoring by virtue of consent, which can come in many forms. For this reason, special wording should be employed on log-on banners, user agreements, and organizational policies.) Subsection (2)(c) allows a “person acting under color of law to intercept a wire, oral or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent.” Subsection (2)(d) provides that a “person NOT (emphasis added) acting under color of law may intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent.”

Consent can be actual or “implied” and evidence of consent is created by the use of policy statements signed by members and banners that are acknowledged before access to the computer is permitted.

Before the commander can access data on the Internet, it is important to analyze and understand the type of communications at issue because each has a different approach under the ECPA, 18 USC Sec. 2511.

### **Real Time and Stored Communications**

“Interceptions of real time communications” are defined in the OSI Handbook as the monitoring or recording of communications while being transmitted. These interceptions are subject to the federal wiretap statute, 18 USC Sec. 2511.

“Access to stored communications,” on the other hand, is the reading or copying of data that is, at that moment of being accessed, in storage and therefore is not being transmitted. Access to stored communications “in a facility through which an electronic communication service is provided” is governed by 18 USC Sec. 2701, *et seq.*

### **Differences between accessing stored and live communications**

Access to live communications: Even relying on the consent exception, permission is required from AFOSI/CC. DoDD 5505.9, para. 4.4.1 provides that AFOSI is the only Air Force entity authorized to intercept wire, electronic, and oral communications for law enforcement purposes.

Stored communications – Expectation of Privacy: In United States v. Monroe, 52 M.J. 326 (CAAF 2000), the accused was convicted by a court-martial of wrongful use of a government computer, child pornography and obscenity offenses. Base personnel at Osan AFB were allowed to use the host Air Force e-mail for limited morale and welfare purposes and were given individual accounts with unique log-ons and passwords. Users were advised by a banner that the system was for “official purposes only.” When e-mail became stuck in the system, LAN administrators opened the e-mails to diagnose the problem and found the sexually explicit materials. The court found that a military member does not have a reasonable expectation of privacy in e-mail sent over a government computer system. The court found the existence of a password of no concern finding that the password was to keep out interlopers, not the system administrator. The court compared the user’s e-mail account to an unsecured file cabinet which he could use for performing official duties and to which his supervisor had access.

### **WHAT DO YOU NEED TO KNOW AND DO AS A COMMANDER?**

Ensure that all of your personnel are properly trained on computer security before being provided access to government computers. Ensure that your information systems personnel work closely with the base legal office to ensure that all computers are properly bannered so that all personnel are aware of the extent of the monitoring that takes place on a regular basis. Ensure that all users of the systems sign policy statements that set forth their duties and obligations, and ensure that the members understand the monitoring. Ensure all of those who have access to the monitoring tools are properly trained and know what they can and cannot do. Last but not least, be aware of the tremendous security implications involved in the unauthorized use of government computers.

***KWIK-NOTE: Ensure that members are properly trained on computer security and authorized use before being provided access to government computers. Understand that your authority to monitor use is limited, and depends upon the purpose of the monitoring and the type of communication to be monitored.***

#### **RELATED TOPICS:**

	<b>SECTION</b>
Computer Acquisition and Security	25-6
Criminal Investigations, Prosecution and Reporting – DOD and DOJ	8-12
Ethics	7-3
Fraud, Waste and Abuse	16-7
Unauthorized Copying and Unauthorized Use of Software	14-15
Surveillance	16-12

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# Trademarks

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**Updated by Lt.Col. Barry K. Maddix, June 2001**

**AUTHORITY:** 17 U.S.C. 101 *et seq.*; U.S. Constitution, Article I, Section 8, Clause 8; AFI 51-303, *Intellectual Property – Patents, Patent Related Matters, Trademarks and Copyrights* (1 Sep 98)(for reference only); OpJAGAF 1981/38, *Protecting Government Ownership of Base Newspaper Names* (29 Jun 81).

## INTRODUCTION

A very important type of intellectual property is trademark rights. The United States Constitution provides that Congress shall have power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Protection of trademarks is a very important part of that power.

## WHAT IS A TRADEMARK?

A trademark is a word, phrase, symbol or design, or combination of words, phrases, symbols or designs, which identifies and distinguishes the source of the goods or services of one party from those of others. Examples of trademarks are words like “Exxon” and “Kodak,” the color pink on fiberglass insulation, and the cartoon character “Mickey Mouse.” A trademark is different from a copyright or a patent. A copyright protects an original artistic or literary work; a patent protects an invention.

A person can acquire trademark rights by actually using a mark in commerce. Registration of those rights can be achieved by registering the mark with the United States Patent and Trademark Office (USPTO) in Washington, D.C. Although federal registration is not required to establish rights in a mark, nor is it required to begin use of a mark, federal registration can secure a number of benefits for the holder beyond the rights acquired by merely using a mark. For example, the owner of a federal registration is presumed to be the owner of the mark for the goods and services specified in the registration, and to be entitled to use the mark nationwide.

## WHAT RIGHTS DOES ONE HAVE IN A TRADEMARK?

There are two related but distinct types of rights in a mark: the right to register and the right to use. Generally, the first party who either uses a mark in commerce or files an application in the PTO has the ultimate right to register that mark. The PTO’s authority is limited to determining the right to register. The right to use a mark can be more complicated to determine, particularly if two parties have begun use of the same or similar marks without knowledge of one another and neither has a federal registration. Only a court can render a decision about the right to use, such as issuing an injunction or awarding damages for infringement.

Unlike copyrights or patents, trademark rights can last indefinitely if the owner continues to use the mark to identify its goods or services. The term of a federal trademark registration is 10 years, with 10-year renewal terms. However, between the fifth and sixth year after the date of initial registration, the registrant must file an affidavit setting forth certain information to keep the registration alive. If no affidavit is filed, the registration is canceled.

Anyone who claims rights in a mark may use the TM (trademark) or SM (service mark) designation with the mark to alert the public to the claim. It is not necessary to have a registration, or even a pending application, to use these designations. The claim may or may not be valid. The registration symbol, ®, may only be used when the mark is registered in the PTO. It is improper to use this symbol at any point before the registration issues.

## WHY ARE TRADEMARKS IMPORTANT TO THE ANG?

It is important that all ANG members become acquainted with trademarks. Improper use of trademarks can lead to an action for trademark infringement, which could pose liability for the unit, the commander, and/or the member. Although AFI 51-303, *Intellectual Property – Patents, Patent Related Matters, Trademarks and Copyrights*, does not apply directly to the Air National Guard, the guidance provided in that instruction should still be followed. Each ANG member, acting within the scope of his or her official duties should always honor private trademark rights and acknowledge the trademark owner's mark, if it is used in an Air Force or Air National Guard catalog, correspondence, contract, or publication.

Properly used, a trademark can be legally protected indefinitely. However, if used improperly, a trademark can become diluted or fall into generic use and lose its protected status. Words such as aspirin, zipper, kerosene, and harmonica were once trademarks that became generic because their owners did not protect them properly. Companies that deal with the ANG do not want to have their valuable trademarks added to the list of genericized trademarks. The responsibility for protecting trademarks occurs every time each trademark is used by an ANG member, whether the trademarks are used in products, presentations, books, marketing materials, or advertisements.

## HOW DO I USE THE TRADEMARKS OF OTHERS PROPERLY?

Many companies give explicit directions on their webpages on how to use their trademarks properly. There are six basic guidelines on how to use trademarks. Trademarks held by MicroSoft Corporation provide some excellent examples of how these guidelines are used in practice:

1. Set trademarks apart from other words or the nouns they modify. The common way to do this is to properly capitalize the product name and designate the trademarks with the appropriate symbols- ® or TM. You can also use underlining, italics, or bold type.

### Examples:

#### Incorrect

“When you start up Windows, click on the . . .”

#### Correct

“When you start up Microsoft® Windows® operating system, click on the . . .”

2. Use Microsoft trademarks as proper adjectives. Trademarks are adjectives that describe a specific person, place, or thing. Because a trademark is an adjective, it should be used with the noun that it modifies.

### Example:

“The format command of the MS-DOS® operating system . . .”

Or

“. . . application for the Windows® operating system . . .”

3. Never combine a trademark/product name with another third party's trademark/product name.
4. Don't use trademarks in the possessive or plural form.

### Examples:

Incorrect

“CodeView®’s interface . . .”

Correct

“ . . .the Microsoft® CodeView® debugger’s interface . . .”

Incorrect

“A case of Microsoft® PowerPoint®s . . .”

Correct

“A case of Microsoft® PowerPoint® presentation graphics programs . . .”

5. Use the appropriate trademark symbol in the proper place and give proper attribution.

Symbols:

®= registered trademark or service mark

TM= trademark ownership claimed

Notice:

“\_\_\_\_\_ are either registered trademarks or trademarks of Microsoft Corporation in the United States and/or other countries.”

6. Do not shorten, abbreviate or create acronyms out of Microsoft trademarks.

Examples: Do not say VC++ for the trademark Visual C++™ or FP for the registered trademark FoxPro®.

### **SHOULD AN ANG UNIT REGISTER ANY TRADEMARKS (BASE NEWSPAPER)?**

Many Air National Guard units and bases have newspapers, newsletters or magazines (collectively referred to as newspapers in this topic) that they publish regularly or periodically. In most cases, the newspaper is known by a name, and has had that name for many years. Prior editions of the Commander’s Deskbook have advised that the ANG unit or base should register its newspaper’s name by obtaining either a federal or state trademark in order to avoid losing that recognition factor and to preclude other organizations in that geographical area from using the newspaper’s name. The prior section of the Deskbook dealing with this topic noted that there had been several cases where base newspapers’ names (which the bases had not trademarked) were taken and trademarked by the private commercial printers the bases used to publish their newspapers, when the bases decided to switch commercial printers.

In order to avoid this situation, commanders should first include a provision in their contracts with printers stating that the unit has established common law trademark rights to use the name of the base newspaper and that the printer recognizes those rights and agrees not to use the name for its own personal use. Additionally, the commander may want to consider acquiring additional protection for the newspaper’s name by obtaining a state registration of the trademark. State trademarks cost less and are processed much quicker than federal trademarks. Most base newspapers are amply protected with a state registration since the threat of losing the newspaper’s name is usually from spurious claims of trademark rights from third parties in the local geographical area. See OpJAGAF 1981/38, *Protecting Ownership of Base Newspaper Names* (29 Jun 81).

Typically, states have trademark statutes for the registration of marks used solely in intrastate commerce. Most state registrations are for a 10-year period with 10-year renewals. Your Staff Judge Advocate can assist you in filing an application for state registration. Applications can usually be obtained from your state Secretary of State’s office

and involve a nominal fee. It may be possible, through the local state military department, to attempt to seek a waiver of these fees. Once the certificate of registration is received, the unit should give notice that the name is registered by displaying the appropriate symbol to the upper right or lower right of the name, usually the TM symbol set in agate type.

### **WHERE CAN I LEARN MORE ABOUT TRADEMARKS?**

Additional information about trademarks can be obtained from the USPTO, a non-commercial federal entity which is one of 14 bureaus in the Department of Commerce. The USPTO has an excellent website at <http://www.uspto.gov> and can be reached as follows:

General Information Services Division  
U.S. Patent and Trademark Office  
Crystal Plaza 3, Room 2C02  
Washington, DC 20231

800-786-9199 or 703-308-4357

### **RELATED TOPICS:**

### **SECTION**

Copyright	14-14
Preventive Law Program	17-15
Unauthorized Copying and Unauthorized Use of Computer Software	14-15

# Chapter 15, International Operations Law

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# Asylum and Refuge Requests – Aircraft Outside the United States

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Updated by Colonel Andrew Turley, Walter D. Phillips, Esq., and Lt Col Frank M. Wood, July 2001

**AUTHORITY:** DoDD 2000.11, *Procedures for Handling Requests for Political Asylum and Temporary Refuge* (3 Mar 72, C1, 17 May 73); AFPD 51-7, *International Law* (19 Jan 01); AFI 51-704, *Handling Requests for Political Asylum and Temporary Refuge* (19 Jul 94)

## INTRODUCTION

When an Air National Guard aircraft or pilot flies on a mission outside the United States, the aircraft commander and crew need to know how to properly respond to requests for temporary refuge and political asylum by foreign nationals. As a practical matter, given the security measures which surround flight lines at most airports in the United States used by military aircraft, it is unlikely that a person seeking political asylum would be able to approach an Air National Guard aircraft on the ground in the United States to present such a request. The more likely scenario is a foreign national passenger on a United States military aircraft making such request while the aircraft is in flight or is on the ground in a foreign country. However, during recent exercises with foreign forces in the United States, there have been instances of foreign military personnel requesting political asylum from U.S. military commanders.

## POLITICAL ASYLUM

Political asylum refers to the protection or sanctuary granted by the U.S. government, within U.S. territorial jurisdiction (or on the high seas or other area not within another nation's jurisdiction), to a person who applies for such protection asserting persecution or fear of persecution because of race, religion, nationality, membership in a particular social group, or political opinion. The need for asylum cannot simply be the desire to immigrate to the United States, but must be based on the claimed need to escape from some sort of persecution. Asylum ultimately can be a permanent arrangement.

## TEMPORARY REFUGE

Temporary refuge is protection afforded for humanitarian reasons to a foreign national in a DoD aircraft, vessel, or facility, within the territorial jurisdiction of a foreign country, under conditions of urgency in order to secure the life or safety of that individual against imminent danger, such as pursuit by a mob. Temporary refuge may or may not lead to political asylum.

## REQUEST FOR POLITICAL ASYLUM IN FOREIGN COUNTRY

When a request for political asylum is made aboard a United States military aircraft in another country or in a foreign installation, the aircraft commander or U.S. military commander CANNOT grant political asylum. In these situations, the most the commander can do is grant temporary refuge to the person seeking political asylum in order to secure the life or safety of the individual against imminent danger. The servicing Air Force Office of Special Investigations (AFOSI) office should be immediately notified of all requests for political asylum. The foreign national should be referred to the nearest US embassy or consulate to apply for political asylum in person.

## **REQUEST FOR POLITICAL ASYLUM IN US TERRITORY OR INTERNATIONAL AIRSPACE**

If a request for political asylum is made aboard a United States military aircraft in flight over international waters, or in United States airspace, or on the ground in United States territory, then the person seeking asylum has the right to have the request considered by the appropriate agency of the United States government. If confronted by a claim for asylum in these situations, the commander's responsibility is to ensure that the person has an opportunity to present the request to the appropriate authorities. The commander has no authority to grant or deny claims for political asylum, whether or not they appear to meet the requirements for asylum. Notify the servicing AFOSI office and nearest Immigration and Naturalization Service (INS) office immediately (Atch 3 to AFI 51-704 lists INS locations). The Air Force Operations Support Center must also be notified. If practical, the foreign national should be referred to the closest INS office to apply for asylum. The commander's responsibility in this situation is to protect the individual pending transfer to INS. This protection is superior to the authority of local, state, or federal law enforcement agencies.

## **IMMUNITY AND POLITICAL ASYLUM DISTINGUISHED**

A U.S. military aircraft is within the sovereignty of the United States wherever it may be located. Although it may be immune from the exercise of jurisdiction by the local nation while on the ground, this does not give the United States (including its aircraft commanders) the right to grant political asylum aboard such aircraft.

## **TEMPORARY REFUGE**

DoD policy is to grant requests for temporary refuge in a foreign country to protect people from imminent danger to life or safety. This does not include protection of persons fleeing from duly constituted law enforcement authorities of the host nation. The commander has the discretion to refuse temporary refuge if such action would endanger the aircraft and crew or the military facility.

Once temporary refuge is granted, it cannot be terminated without authority from higher headquarters, as explained in AFI 51-704. Two real-life situations highlight this rule. Temporary refuge is granted, but the aircraft commander then learns that what was thought to be a fleeing from private violence is really flight from the police; or temporary refuge is properly granted to protect life or safety of the individual, but when the local police arrive to restore order, the refuge seeker refuses to go with them, for whatever reason. In either situation - the mistake or the refusal to leave after the reason for refuge has terminated - even if the local police demand access to the refuge seeker, the aircraft commander CANNOT, pursuant to AFI 51-704, turn the person over without instructions from higher authority.

When faced with either situation, once temporary refuge has been granted, the aircraft commander should:

1. Notify AFOSI, the Air Force Operations Support Center, and the local U.S. embassy or consulate at once. Copies will be sent to AF/JAI, intermediate commands, the U.S. embassy or consulate, and other interested agencies as outlined in AFI 51-704.
2. Do nothing to imply to the refuge-seeker that asylum will be granted;
3. Assure the local police of the recognition of their right to demand the person they seek, but that the commander lacks authority at the moment to either allow them on the aircraft or give the person up; and
4. Tell the local police of the efforts to obtain the necessary authority. If the refuge-seeker decides to voluntarily leave the aircraft, the aircraft commander has no authority to prevent it.

Requests for political asylum or temporary refuge are often high profile, fast moving situations that frequently draw intense diplomatic and media interest. Rapid notification and coordination with AFOSI and higher headquarters is critical. The commander is required to report all circumstances involving

requests for temporary refuge and political asylum to USAF Operations Support Center as outlined in Paragraph 3 of AFI 51-704, and to furnish as much of the information requested in Attachment 2 of AFI 51-704 as possible. If at all practicable, the commander should also seek the assistance of the closest serving Staff Judge Advocate, or his or her own SJA if there is no nearby U.S. military facility, if a request for political asylum or temporary refuge is made.

Commanders should insure that aircrews are regularly briefed on procedures for handling requests for political asylum and temporary refuge under AFI 51-704, and should periodically coordinate these briefings with their Staff Judge Advocates for changes in the law.

#### **SUMMARY OF COMMANDER'S RESPONSIBILITIES**

1. Political asylum requests - no authority to grant; the most an aircraft Commander can do is grant temporary refuge.
2. Temporary refuge request - authority to grant to protect life or safety of the individual.
3. Cannot grant temporary refuge against duly constituted law enforcement authorities outside of the U.S.
4. No need to grant temporary refuge if aircraft and crew endangered.
4. Once temporary refuge is granted for whatever reason, even if by mistake, only higher headquarters, not an aircraft or local commander, can terminate it; and during time of temporary refuge, aircraft commanders must protect refuge-seekers until receipt of further instructions from higher headquarters.
5. Once a political asylum request is made or temporary refuge is granted, the aircraft or local commander must immediately notify higher headquarters including AFOSI and USAF Operations Center.

***KWIK-NOTE: Brief this topic annually to aircrews.***

#### **RELATED TOPICS:**

#### **SECTION**

Foreign Search, Inspection and Customs  
Status of Forces Agreement (SOFA)

15-9  
15-14

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## Border Clearance – Arrival of Aircraft from OCONUS

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Updated by Walter D. Phillips, Esq., Colonel Andrew Turley and Lt Col Max Wood, July 2001

**AUTHORITY:** AFPD 24-4, *Customs and Border Clearance* (15 Apr 93); AFI 24-404, *Customs - Domestic* (26 Jul 94); AFI 11-2x-xxx [aircraft type – e.g., 11-2C-130], *Operations Procedures*, Volume 3, Chapter 6; <http://www.customs.gov/travel/travel.htm> (U.S. Customs Home Page)

### INTRODUCTION

An integral part of the worldwide mission of the Air Force is reception on Air National Guard bases of aircraft originating from foreign locations.

### INSPECTIONS AUTHORITY

The Immigration and Naturalization Service (INS) of the U.S. Department of Justice clears all citizens in and out of the United States. The INS has delegated the responsibility for border clearance inspections of aircrew, personnel and cargo to military authority.

### PROCEDURE

Commanders must provide full support to executive agencies, including federal Departments of Health and Human Services, Education, Agriculture, Treasury, Interior, and Commerce, which inspect arriving aircraft. These inspectors are authorized to board military aircraft arriving at Air Force installations, but their inspections are subject to all military restrictions necessary to preserve the security of classified material.

So far as practicable, inspectors of these agencies must be notified by the local commander in advance of the arrival or departure of aircraft to or from OCONUS.

### PASSENGERS AND CARGO

Aircraft arriving from OCONUS may unwittingly carry unwanted passengers or cargo in the form of pests and vector-borne diseases, which may affect humans, plants animals.

Depending on where the flight originated, medical quarantine procedures for the passengers, cargo, and aircraft itself may be necessary.

Garbage and trash may be generated during a flight from overseas. Aircraft personnel will insure trash generated in-flight is stored in a tightly-closed, leak-proof container.

***KWIK-NOTE:*** *Commanders should know which civilian agencies they must notify concerning their aircraft arriving from OCONUS.*

### RELATED TOPICS:

### SECTION

Civilian Travel Aboard Military Aircraft  
Classified Material  
Returning to the United States – Customs

27-3  
14-2  
15-13

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# U.S. Military Personnel in Captivity - Code of Conduct and Hostile Detention During Operations Other Than War

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**Cassie A. Strom, October 2007**

**AUTHORITY:** DoDD 1300.7, *Training and Education to Support the Code of Conduct (CoC)* (8 Dec 00); DoDI 1300.21, *Code of Conduct (CoC) Training and Education* (8 Jan 01); DoDD 2310.2, *Personnel Recovery* (22 Dec 00); AFPD 16-13, *Survival, Evasion, Resistance and Escape (SERE)* (6 Sep 06); AFI 16-1301, *Survival, Evasion, Resistance and Escape (SERE) Program* (6 Sep 06); AFPD 36-22, *Military Training* (22 Mar 04)

**GENERAL:** The Code of Conduct (CoC) is the foundation underpinning the warfighter's personnel recovery (PR)/SERE preparation and training. AF training programs must prepare USAF personnel for all forms of modern contingencies from wartime to operations other than war.

U.S. military personnel, because of their employment in a wide range of circumstances throughout the world, participate in operations other than war that can result in detention by unfriendly governments or captivity by terrorist groups. Although designed for evasion and prisoner of war (POW) situations, the spirit and intent of the CoC are applicable to Service members subjected to other hostile detention, and such Service members should conduct themselves consistently in a manner that avoids discrediting themselves and their country.

**TRAINING:** AFPD 16-13 and AFI 16-1301 set out the CoC Training and CoC Continuing Training for USAF personnel. All USAF officers and enlisted students attending accession programs or PME courses must receive level-A CoC Training which includes information on wartime, peacetime governmental and hostile detention situations. The goal of this training is to prepare personnel to return with honor, regardless of the circumstances of isolation.

## **CODE OF CONDUCT OF THE U.S. FIGHTING FORCE**

The Code consists of six Articles or Rules for the fighting person to use to survive honorably upon capture.

**Article I:** I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

**Article II:** I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

**Article III:** If I am captured, I will continue to resist by all means available. I will make every effort to escape. I will accept neither parole nor special favors from the enemy.

**Article IV:** If I become a prisoner of war, I will keep faith with all my fellow prisoners. I will give no information or take part in any actions which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

**Article V:** When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost

of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

Article VI: I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principals which made my country free. I will trust in my God and in the United States of America.

**Change in Article V.** Article V in the past only allowed the giving of name, rank, service number and date of birth. After the Vietnam experience, it was broadened to allow captives to give flexibility of response and action that would help maintain their self-respect after being pushed beyond the limits of human tolerance. In other words, Article V was broadened to encompass compassion. Training is the key element to survival under enemy captivity. One aspect of that training is learning these rules. Understanding and living them will help all fighting persons survive and maintain their honor.

**The Code of Conduct should be briefed at least annually to all personnel.** The American Forces Information Services of the Department of Defense, in June 1988, published an official booklet fully explaining the rationale of each of the Articles of the Code of Conduct. It provides all the information necessary for the briefing, and is available at <[http://www.army.mil/usapa/epubs/pdf/p360\\_512.pdf](http://www.army.mil/usapa/epubs/pdf/p360_512.pdf)>. It is entitled, “Code of the U.S. Fighting Force (DoD Gen11B).”

Additionally, DoDI 1300.21 provides an excellent guide for the training on the Code of Conduct. This topic has also been designated to be adaptable to a briefing format with a few minor non-substantive adjustments.

## **HOSTILE DETENTION (DETAINEE OR HOSTAGE) DURING OPERATIONS OTHER THAN WAR**

**General.** U.S. military personnel captured by terrorists or detained by hostile foreign governments are often held for individual exploitation, or to influence the U.S. Government, or both. The U.S. Government shall make every good-faith effort to obtain the earliest release of U.S. military personnel, whether detainees or hostages. However, the U.S. Government's policy is that it will not negotiate with terrorists.

**Goal, Military Bearing, Classified Information.** U.S. military personnel must take every reasonable step to prevent exploitation of themselves and the U.S. government, or limit exploitation as much as possible. Detained or captured U.S. military personnel may be catalysts for their own release based on their ability to become unattractive sources of exploitation. Detainees and hostages must make their own judgments as to which actions shall increase their chances of returning home with honor and dignity.

U.S. military personnel shall maintain their military bearing, regardless of the type of detention or captivity, or harshness of treatment. They should make every effort to remain calm, courteous, and project personal dignity. Discourteous, nonmilitary behavior seldom serves the long-term interest of a detainee or hostage and often results in unnecessary punishment that could jeopardize survival and severely complicate efforts to gain release of the detainee or hostage.

There are no circumstances in which a detainee or hostage should voluntarily give classified information or materials to those who are not authorized to receive them. An unauthorized disclosure of classified information, for whatever reason, does not justify further disclosures. Detainees and hostages must resist, to the utmost of their ability, each and every attempt by their captor to obtain such information.

**Chain of Command.** In group detention or hostage situations, military detainees or hostages shall organize, to the fullest extent possible, in a military manner under the senior military member present and eligible to command.

**Guidance for Detention by Governments (Detainee).** The basic protections available to POWs under Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War, may not be required in operations other war. As a result, U.S. military personnel may be subject to the domestic criminal or civil

laws of the detaining nation. Detainees should attempt to avoid aggressive or combative behavior that would violate the criminal or civil laws of the subject country. Detainees should not forget, however, that they have an inherent right of self-defense.

- ◆ Detainees should ask immediately and continually to see U.S. embassy personnel or a representative of an allied or neutral government. Governments are obligated to notify the detainee's consular officials.
- ◆ Detainees should provide name, rank, service number, date of birth and the innocent circumstances leading to their detention. Detained military personnel should be very cautious of their captors in everything they do and say. Detainees are not likely to earn release by cooperation with the detainer.
  - Avoid discussion on useless topics and provocative issues and limit further discussion to health and welfare matters, condition of fellow detainees, and going home.
  - Avoid providing propaganda for the detaining government. If a detainee writes or signs anything, such action should be measured against how it reflects on the U.S. and the military and how it could be misused by the detaining nation.
- ◆ Detainees should accept release, unless doing so requires them to compromise their honor or cause damage to the U.S. government or its allies.
- ◆ Detainees should avoid escape attempts, except under unique or life-threatening circumstances. A failed escape attempt may provide the detaining nation with further justification to prolong detention by adding additional criminal or civil charges.

**Guidance for Captivity by Terrorists (Hostage).** Capture by terrorists is generally the least predictable and structured form of captivity during operations other than war. In such captivities, hostages play a greater role in determining their own fate since the terrorists in many instances expect or receive no rewards for providing good treatment or releasing victims unharmed. If U.S. military personnel are uncertain whether captors are genuine terrorists or surrogates of another government, they should assume that they are terrorists.

Surviving in some terrorist situations may depend on a hostage's ability to portray himself or herself as a person rather than an object and by conveying personal dignity and apparent sincerity. Hostages may discuss non-substantive topics to convey their human qualities and build rapport by acting as follows:

- ◆ Listen actively. Allowing captors to discuss their cause or boast, but do not praise, pander, participate or debate with them.
- ◆ Introduce commonalities such as family, cloths, sports, hygiene, food etc.
- ◆ Use their own names.
- ◆ Introduce benign topics at critical times to reduce tensions.
- ◆ Avoid emotionally charged topics of religion, economics, and politics.
- ◆ Avoid being singled out by being argumentative or combative.
- ◆ Avoid escalating tensions with language such as "gun, kill, punish," etc.

Hostages should make reasonable efforts to avoid signing confessions, making propaganda broadcasts, conducting "news interviews", etc., which could embarrass the U.S. government or host governments. If forced to sign or make a statement, hostages should attempt to degrade the propaganda and to provide the minimum information.

Detainees should accept release, unless doing so requires them to compromise their honor or cause damage to the U.S. government or its allies.

Hostages should plan for being rescued. Leaving fingerprints whenever and wherever possible should assist in locating hostages. The hostage should not attempt to hide his or her face, if photographs are taken as photographs provide positive identification and information about the terrorists. In case of rescue, the hostage should plan to reach the "safest" area, such as under desks, behind chairs, or any large object that

provides protection. Instructions by the rescuers must be followed and rough handling can be expected until authentication is accomplished.

Hostages who consider escape to be their only hope are authorized to make such attempts. Escape from detention by terrorists is risky but may become necessary if conditions deteriorate to the point that the risks associated with escape are less than the risks of remaining captive. The decision to escape should be based on the careful consideration of the unique circumstances of the terrorist situation to include an assessment of the current detention conditions, potential for success, risk of violence during the escape attempt, and the potential reprisals if recaptured and on detainees remaining behind.

**KWIK-NOTE: Brief these topics annually to all unit members.**

**RELATED TOPICS:**

**SECTION**

Law of Armed Conflict

15-16

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# AIRSPACE AND AIRCRAFT

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By Lt Col Thomas C. Patton, November 2007

**AUTHORITY:** Air Force Operations and the Law, 1<sup>st</sup> Ed., 2002; DoD 4500.54-G, *Foreign Clearance Guide*; AFI 11-202, vol. 3, *General Flight Rules*, 1 June 1998; Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295.

## OVERVIEW

This chapter does not attempt in-depth review of the many sources of law that impact the international operations of Air National Guard aircraft. Rather, it is a brief overview of important topics and sources. The Air Force Operations and the Law, A Guide for Air & Space Forces, is an excellent publication, written by knowledgeable and expert members of the Judge Advocate General's Corps, Operations Law Division. This overview draws liberally from it, and it is highly recommended follow-on reading. It can be reviewed or downloaded from the HQ USAF/JAI web site, found at:

[http://www.afjai.hq.af.mil/publications/af\\_olg.htm](http://www.afjai.hq.af.mil/publications/af_olg.htm)

## AIRSPACE DEFINED

Two important sources of law governing international aircraft operations are the 1944 Convention on International Civil Aviation ("Chicago Convention"), and the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which together define national and international airspace.

States enjoy absolute sovereignty over their national airspace, and aircraft of foreign nations are prohibited from flying over the territory of a state without consent. The Convention also created the International Civil Aviation Organization (ICAO), which creates the international aviation standards and recommended practices (SARPS) applicable to international civil aviation. Although ICAO SARPS are inapplicable to state aircraft, AFI 11-202 requires all Air Force aircraft operate in accordance with the SARPS in international airspace, mission permitting. The Convention also requires that state aircraft have "due regard" for the safety of navigation of civil aircraft.

UNCLOS defines a nation's airspace as the area above the nation and its territorial seas, which extend up to 12 nautical miles of sea beyond its shores. Largely, airspace that is not national is international. All aircraft enjoy freedom of navigation and overflight in international airspace.

## ENTRY INTO FOREIGN AIRSPACE

**Diplomatic Clearances.** International commercial aviation utilizes standing multinational and bilateral agreements to permit international overflight and landing rights. Military and other state aircraft, however, often deal with national overflight and landing on an *ad hoc* basis. Absent a standing agreement, such as between the US and Great Britain, ANG aircraft commanders must have individual diplomatic overflight or landing clearance. For some countries, diplomatic clearance requests can take months to process. ANG units and aircraft commanders are therefore well advised to plan far in advance of a scheduled mission.

Diplomatic clearances are obtained through the State Department. To process a request for overflight or landing, the unit must supply the aircraft information, including type and tail number; aircraft itinerary and route of flight, including Flight Identification Region (FIR) entry and exit points (discussed below), dates, and times; the identification of the crewmembers, which may include a requirement to supply passports for each crewmember; and support needed at the arrival airbase.

Once diplomatic clearance is obtained, aircraft wishing to enter national airspace must identify themselves, seek or confirm permission to land or to transit, and must obey all reasonable orders to land, turn back, or fly a prescribed course and altitude. Aircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights. Where there is a standing international agreement granting overflight and landing rights to foreign aircraft, there may also be designated procedures and conditions which must be complied with before those rights can be exercised.

**Air Defense Identification Zones in International Airspace.** Many nations, including the US have established air defense identification zones (ADIZ) in the international airspace adjacent to their territorial airspace. The legal basis for ADIZ regulations is the right of a nation to establish reasonable conditions of entry into its territory. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations promulgated by the US apply to aircraft bound for US territorial airspace and require the filing of flight plans and periodic position reports. Some nations, however, purport to require all aircraft penetrating an ADIZ to comply with ADIZ procedures, whether or not they intend to enter national airspace. The US does not recognize the right of a coastal or island nation to apply its ADIZ procedures to foreign aircraft in such circumstances. Accordingly, US military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with ADIZ procedures established by other nations, unless the US has specifically agreed to do so.

**Flight Information Regions.** A flight information region (FIR) is a defined area of airspace within which flight information and alerting services are provided. FIRs are allocated to coastal states by ICAO for the safety of civil aviation and encompass both national and international airspace. Primarily, the FIR system ensures that somebody is providing air traffic control and flight service to civilian air traffic. Coastal states like having FIRs allocated to them for reasons of prestige and because they can charge flight service fees. Allocation of FIRs is a result of negotiation between interested countries.

Ordinarily, but only as a matter of policy rooted in safety concerns, US military aircraft on routine point-to-point flights through international airspace may follow ICAO flight procedures and utilize FIR services. This policy does not modify US freedom of navigation rights. Exceptions to this policy include military contingency operations, classified or politically sensitive missions, and routine aircraft carrier operations or other training activities. When US military aircraft do not follow ICAO flight procedures, they must navigate with “due regard” for civil aviation safety. Some nations, however, purport to require all military aircraft in international airspace within their FIRs to comply with FIR procedures, whether or not they utilize FIR services or intend to enter national airspace. The US does not recognize the right of a coastal nation to apply its FIR procedures to foreign military aircraft in such circumstances. Accordingly, US military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with FIR procedures established by other nations, unless the US has specifically agreed to do so.

## **INTERCEPTION OF AIRCRAFT - US PROCEDURES WHEN CHALLENGED**

**International Airspace, International Straits, or Over Archipelagic Sea Lanes.** When challenged by authorities of a coastal or archipelagic state, aircraft commanders advise such authorities that the aircraft is a US military aircraft. In accordance with international law, the aircraft is either operating in international airspace, or exercising the right of transit passage of an international strait, or exercising the right of archipelagic sea lane passage, as the case may be. After the advisory, the aircraft should continue on the planned route of flight. The aircraft commander always retains the responsibility for the safe conduct of the flight and has the option of landing the aircraft if, in the aircraft commander’s view, he or she has no other option than to follow the directions of an interceptor to prevent loss of life. If forced to land, the aircraft commander should immediately contact the US embassy.

**National Airspace of Foreign State.** If challenged in a foreign nation’s territorial airspace, the aircraft commander must comply with directions to depart or land, if landing can be safely accomplished (e.g., suitable airfield). Upon landing, the aircraft commander should immediately contact the US embassy for assistance. The policy described above is applicable to all DoD aircraft. Responding to the coastal or

archipelagic state, or complying with direction to land may be contrary to mission specific operating procedures (e.g., Peacetime Application of Reconnaissance Programs) or rules of engagement (ROE). In such instances, the operating procedures and ROE prevail. Such mission specific procedures or rules must have Joint Staff approval before combatant command implementation.

**Aircraft in Distress.** State aircraft in distress are permitted under principles of customary international law to make emergency landings in the territory of another state without the permission of that other state. The crew must be treated humanely and the aircraft permitted to depart. A state aircraft, on the ground as a result of distress, continues to enjoy sovereign immunity. This immunity precludes search, inspection or detention of the aircraft without US consent. As stated earlier in this chapter, US military aircraft commanders will not authorize search, seizure, inspection, or similar exercises of jurisdiction by foreign authorities except by direction of the appropriate service headquarters or the US embassy in the country concerned. Moreover, US consular officials shall be free to communicate with the aircrew and vice versa. The US consular post must be informed if any US persons are detained in any manner. Consular officials have the right to visit any detained US citizens.

## LANDING IN FOREIGN NATIONS

**Status of Military Aircraft.** As military aircraft are “state aircraft” within the meaning of the Chicago Convention, they, like warships, enjoy sovereign immunity from foreign search, inspection and taxation. US military aircraft commanders will not authorize boarding, search, seizure, inspection, or similar exercises of jurisdiction by foreign authorities except by direction of the appropriate service headquarters or the US embassy in the country concerned. (*See* Chapter 15-9, Foreign Search, Inspection, and Customs Duties of U.S. Aircraft). US policy prohibits the payment of navigation and overflight fees. Moreover, US military aircraft do not, as a matter of policy, pay landing or parking fees at foreign government airports. Landing and parking fees may be paid at commercial airports. Disputes have arisen with some host nations on the issue of landing and parking fees. Where fees are payable, then US military aircraft, as with all US state aircraft, will pay reasonable fees based on ICAO standards for parking and landing. Reasonable fees for services requested (e.g., fuel and routine maintenance fees) are routinely paid regardless of the type of airport.

**Status of Civil Aircraft Chartered by DoD.** The US regularly charters civil aircraft to provide air transportation and other services. Such aircraft retain their status as civil aircraft unless the US Government specifically designates them to be state aircraft, which is unusual. Unless designated as state aircraft, aircraft chartered by DoD are subject to the regime applicable to international civil aviation. Although many Status of Forces Agreements (SOFAs), base rights, and other agreements grant civil aircraft chartered by DoD the same rights of access, exit and freedom from landing fees and other similar charges enjoyed by US military aircraft, such agreements do not have the effect of declaring chartered aircraft to be military or any other form of state aircraft. Consequently, civil aircraft chartered by DoD are not immune from landing or similar fees and from foreign search and inspection.

## RELATED TOPICS:

## SECTION

Foreign Search, Inspection, and Customs Duties of U.S. Aircraft	15-9
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Judge Advocate Support for ANG Units Deploying Overseas	17-5

# Civil Affairs, Civil-Military and Stability Operations

Updated by Col Cassie A. Strom, November 2007

**AUTHORITY:** National Security Presidential Directive (NSPD) 44, *Management of Interagency Efforts Concerning Reconstruction and Stabilization* (7 Dec 05); DODD 3000.05, *Military Support for Stability, Security, Transition, and Reconstruction* (28 Nov 05); Joint Publication 3-57, *Joint Doctrine for Civil-Military Operations* (8 Feb 01); Joint Publication 3-57.1, *Joint Doctrine for Civil Affairs* (14 Apr 03); US Army FM 41-10, *Civil Affairs*. **NOTE: Joint Publication 3-57 is under revision.**

Additional sources: DODD 2000.13, *Civil Affairs* (27 Jun 94); JP 3-08, *Interagency, Intergovernmental Organization, and Nongovernmental Organization Coordination during Joint Operations*, (17 Mar 06); Joint Publication 3-07.3, *Peace Operations* (17 Oct 07); Air Force War and Mobilization Plan (WMP), Volume 1, Legal Annex P and Civil Affairs Annex R.

## INTRODUCTION

The Air National Guard Commander should be aware that many ANG Judge Advocates and Paralegals are trained in civil affairs issues and have been involved in civil-military and stability operations. Individual ANG Judge Advocates can play a critical role in the interface with the Department of State, other U.S. government agencies (OGAs), the U.S. Army and Marine civil affairs teams, and host nation civilian officials when an ANG unit is deployed OCONUS. Further, JAG personnel may be deployed independently of their unit to perform civil affairs missions which focus on legal and judicial reform, or during exercises to train foreign militaries in the rule of law, protection of civil rights and military subordination to civil authority. Specific missions have included serving on the provincial reconstruction teams in Afghanistan and on Rule of Law teams in Iraq. The ANG JAG Corps organizes and runs the United Nations Peace Operations and the Law Symposium, currently held annually in New York City.

## MISSION

National Security Presidential Directive (NSPD) 44, tasks the Department of State (DOS) to lead interagency coordination, planning, and civil response for reconstruction and stabilization through the Office of the Coordinator for Reconstruction and Stabilization. Department of Defense Directive (DODD) 3000.05 defines stability operations as military and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in states or regions and states that “integrated civilian and military efforts are key to successful stability operations.” At all levels and across the full range of military operations, civil-military operations (CMO) are the primary military instrument in support of stability as well as counterinsurgency and other operations dealing with “asymmetric” and “irregular” threats. Military-civilian teams are a critical stability operations tool. DOD leads and supports the development of military-civilian teams.

The relationship between CMO and civil affairs operations (CAO) is best considered within the broad context of unified action which involves the synchronization, coordination, or integration of the activities of governmental and nongovernmental entities with military operations to achieve unity of effort. Joint Force Commanders seek this synergy by several means, one of the more prominent being through the conduct of CMO which bring together the activities of joint and multinational forces and nonmilitary organizations to achieve common objectives. Commanders, in carrying out their CMO responsibilities are assisted by Civil Affairs (CA) personnel. CA personnel are those personnel and forces whose specialized CAO support execution of CMO by planning, organizing and coordinating its implementation through, with, or by the remainder of the joint force, indigenous populations and institutions (IPI), OGAs, intergovernmental organizations (IGOs), and nongovernmental organizations (NGOs).

CMO are the activities of a commander that establish, maintain, influence, or exploit relations between military forces, governmental and nongovernmental civilian organizations and authorities, and the civilian populace in a friendly, neutral, or hostile operational area. CA activities (1) enhance the relationship between military forces and civil authorities in areas where military forces are present; and (2) involve the application of CA functional specialty skills, in areas normally the responsibility of civil government, to enhance conduct of CMO.

The Joint Force Commander (JFC) is responsible for the organization and centralized direction of CMO in the assigned operational area. This responsibility embraces the relationship between military forces, civil authorities, and the civilian population of a country or area of operation. The scope of civil affairs operations may range from liaison and coordination with local authorities to the assumption by a commander of full legislative, executive, and judicial authority (military government). Civil affairs operations may also include support for the programs of other U.S. agencies, such as social and economic development in the area of operations, or assumption of primary responsibility for these programs when other U.S. agencies are unable to operate effectively. An appropriate capability must be maintained to assist commanders in carrying out their civil affairs responsibilities.

### **CIVIL AFFAIRS PLANNING**

Civil affairs plans must include the following elements, as appropriate:

1. General Operations:
  - a) A concept of civil affairs support based on the mission and the basic civil-military relationship desired;
  - b) Resource and population control measures, in support of national plans, including establishment of law, order, and security of government and public facilities, when authorized;
  - c) Development of emergency civilian food and relief requirements, including estimates of support which cannot be met by command resources;
  - d) Estimates of availability, extent, and capability of indigenous civil resources (facilities, communications and public utilities, manpower, material, money, real estate, and services) to support U.S. Forces, and the provision of needed services to the local community when their resources can not provide basic services to the local population;
  - e) Liaison with the Chief(s) of the U.S. Diplomatic Mission(s);
  - f) A claims policy for the military government;
  - g) Essential civil affairs staff augmentation, consistent with assigned responsibilities;
  - h) Allocation and deployment of civil affairs personnel and unit resources;
  - i) Use of supporting units, in addition to civil affairs units, to assist in conducting civil affairs operations;
  - j) Coordination of civil affairs activities with staff elements whose fields of interest involve civil-military relationships (these fields include, but are not limited to, psychological operations, military operations, domestic emergencies, and intelligence activities); and
  - k) Provision of communications facilities necessary to support civil affairs operations and essential indigenous communications including, but not limited to emergency and public safety radio nets. Appropriate coverage must be given to these requirements in the overall

communications plan, including provision for joint military and civil sharing of the radio frequency spectrum;

2. Civil Affairs Operations involving Assumption of LESS THAN FULL Legislative, Executive, and Judicial Authority:
  - a) Development of status of forces or civil affairs agreements appropriate for the intended area of operations;
  - b) Establishment of civil affairs commissions and committees to include representatives of U.S. and/or allied agencies, indigenous civil and military agencies, and other groups, as appropriate;
  - c) Assistance to friendly forces engaged in civil affairs operations; and
  - d) Assistance to U.S. and other military forces engaged in military civil actions in support of foreign internal defense and related activities; and
  - e) Assistance to local authorities and institutions, and to Non-Governmental Organizations (NGOs) to meet local needs when the civilian infrastructure can no longer meet its responsibilities.
  
3. Civil Affairs Operations involving Assumption of FULL Legislative, Executive, and Judicial Authority (Military Government):
  - a) Issuance of general directives for the establishment and conduct of military government;
  - b) Provision of detailed guidance for execution of functions;
  - c) Proclamations to be issued to the civil populace in the area of operations;
  - d) Establishment and support of a post-hostilities military government organization; and
  - e) Procedures to facilitate orderly return to domestic government authority upon termination of the emergency or hostilities;
  - f) Procedures for communication of this information to the local populace.

***KWIK-NOTE: Every Commander should be familiar with these operations and closely coordinate with his or her Judge Advocates in executing it.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Status of Forces Agreements	15-14
War and Deployment Planning – The Judge Advocate’s Role	15-17

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# Claims

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**Updated by Walter D. Phillips, Esq., Colonel Andrew Turley and Lt Col Max Wood, July 2001**

**AUTHORITY:** AFI 51-501, *Tort Claims* (1 May 96), Chapter 4, Section C; AFMAN (draft) 51-505, *Tort Claims*, Chapters 5 and 6.

## COMPONENT CLAIMS AUTHORITY

The active duty Air Force, and not the Air National Guard, has the authority and responsibility to process and pay overseas claims. In many countries, claims jurisdiction will be assigned to the Army or Navy.

## FOREIGN CLAIMS ACT

The purpose of the Foreign Claims Act (FCA) is to promote and maintain friendly relations through the prompt settlement of meritorious claims.

The Foreign Claims Act generally deals with the acts of U.S. military personnel arising outside the scope of employment and only applies outside the U.S., its territories and possessions. However in most countries to which U.S. forces now deploy (not including NATO, Partnership for Peace [PfP] countries, Australia, Japan and Korea), the FCA also applies to in-scope acts.

There is a delicate interrelationship between the Foreign Claims Act and foreign criminal jurisdiction of U.S. military members, in that the prompt processing of an FCA claim may serve to prevent the imprisonment of a U.S. military member in a local foreign jail through addressing the concerns of aggrieved foreign nationals and the host nation's local law enforcement authorities. Personal injury or death motor vehicle accidents might be appropriately addressed in this manner (property damage accidents are generally handled by insurers). Commanders, upon advice of the Judge Advocate, may pay some money from their operational funds to the aggrieved foreign national for this purpose.

Time is of the essence in these situations, as host nation authorities are less likely to invoke foreign criminal jurisdiction if the potential complaining witness has been made whole financially through the FCA.

The criterion for payment is causation, not negligence. There is a two (2) year statute of limitations. Proper claimants are any foreign country or any political subdivision or inhabitant of a foreign country.

Claims are payable for death, personal injury and property damage. Also, noncombat activities such as sonic booms, aircraft crashes and maneuver damage, are frequently paid under the FCA, except in NATO, PfP, Australia, Japan, and Korea, where they are handled as SOFA (Status of Forces Agreement) claims.

FCA claims may be paid based on the acts of a U.S. military member or civilian employee or even an indigenous U.S. employee, POW, or interned enemy alien.

Before leaving the foreign country, the Commander, through the Judge Advocate, should report all incidents giving rise to claims under the FCA to the active duty Judge Advocate office that has responsibility for handling claims arising in that country.

## **INTERNATIONAL AGREEMENT (SOFA) CLAIMS ACT**

These claims are governed by the particular SOFA in force in a host nation and they are sometimes referred to as International Agreement Claims Act (IACA) claims.

Proper claimants are third parties, such as foreign nationals of any foreign country, some agencies of the host nation government and, in Germany and the United Kingdom, U.S. dependents.

SOFA claims are payable for death, personal injury and property damage.

Examples of claims not payable as SOFA claims are “war damage” claims, host country military property claims, and contractual claims.

SOFA claims are filed with and paid by the host nation government which then bills the U.S. for a pro rata share of that payment, which share is usually 75%.

Payments by the host nation government under a SOFA are only for official duty or legal responsibility claims as opposed to Foreign Claims Act claims which may be paid for scope of military duty (if not preempted by a SOFA) or non-scope of military duty situations.

## **COMPARISON OF FCA AND IACA (SOFA) CLAIMS**

The FCA does not apply if there is a SOFA which establishes pro rata sharing of costs for official duty claims.

FCA claims generally deal with acts of U.S. military personnel arising outside the scope of employment while IACA (SOFA) claims arise from the acts of U.S. military personnel acting within the scope of employment.

Payments under SOFAs are shared by the host nation and the U.S. Payments under the FCA are made only by the U.S.

Advance payments (Paragraph 1.18, AFI 51-501) may be made under the FCA but not under SOFAs unless the host nation law authorizes them.

Claimants under the FCA may only request the FCA authority to reconsider an award. Under a SOFA, claimants have all rights, including suit, given by the laws of the host nation; but in a lawsuit the defendant is the host nation.

The claimants under the FCA can be foreign governments, their political subdivisions, and inhabitants of a foreign country, while for SOFA claims, they can only be “third parties” as defined in that SOFA.

## **OVERSEAS CLAIMS AUTHORITIES**

Authority to approve or review claims varies from command to command. Before deploying, know who the authority is for the country of your deployment advise the appropriate claims office of your upcoming deployment and obtain from that office any procedures to follow in the event of a claims situation arising during such deployment.

### **RELATED TOPICS:**

### **SECTION**

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## Foreign Criminal Jurisdiction

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Updated by Walter D. Phillips, Esq., Colonel Andrew Turley and Lt Col Max Wood, July 2001

**AUTHORITY:** AFI 51-703, *Foreign Criminal Jurisdiction* (6 May 94); AFI 51-501, *Tort Claims* (1 May 96); Status of Forces Agreements; applicable unified command publications (e.g., EUCOM Directive 45-3, *Foreign Criminal Jurisdiction Over U.S. Personnel*)

### INTRODUCTION

Foreign criminal jurisdiction (FCJ) is important to the Air National Guard Commander deploying OCONUS because few topics are of greater concern to the host nation than the enforcement of the host nation's laws. And Commanders do not wish to leave any members of their unit in a foreign jail when they re-deploy.

### U.S. POLICY

The U.S. policy is to MAXIMIZE U.S. JURISDICTION to the extent permitted by the circumstances and applicable law in each individual case.

### WHO HAS WHAT KIND OF JURISDICTION

In the absence of an agreement between countries, the host nation (the "Receiving State" in the NATO SOFA) has exclusive jurisdiction over almost all criminal offenses committed by troops permanently stationed there.

However, in our SOFAs, we have made provisions for either exclusive or concurrent jurisdiction.

The United States (generally, the "Sending State" in the NATO SOFA) has exclusive jurisdiction over offenses not prohibited by the law of the host country. Typically, these are traditional military justice offenses.

The host nation ("Receiving State") has exclusive jurisdiction over offenses prohibited by local law, but not by U.S. law. It thus is important to read the Project Pitfall letters and the "Country law studies" of the host nation before deploying.

Concurrent jurisdiction applies to crimes that violate laws of both countries, such as murder, rape, robbery and assault. The basic rule is that the host country has the primary (first) right to assert jurisdiction over all concurrent offenses except:

***Inter se*** – offenses committed by a U.S. service member against the United States or another U.S. service member.

***Official duty*** – offenses committed by a U.S. service member while in the performance of official military duties.

Where the foreign country has jurisdiction, the U.S. policy will generally be to REQUEST the foreign country to WAIVE ITS JURISDICTION and give it to us.

## AVAILABLE PROTECTIONS

There are extensive protections (to include assistance, support and services) given to U.S. service members subject to foreign criminal jurisdiction. Note: U.S. criminal jurisdiction for offenses committed abroad by U.S. civilians is very limited. Therefore, all deployed personnel (including technicians) must be in a military status for overseas deployments. An ANG Judge Advocate can provide in-depth guidance on these protections.

***KWIK-NOTE: Before deploying OCONUS, brief all deploying personnel on foreign criminal jurisdiction, and specifically on those offenses indigenous to the local law of the host nation.***

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# Foreign Search, Inspection, and Customs Duties of U.S. Aircraft

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Updated by Walter D. Phillips, Esq., Colonel Andrew Turley and Lt Col Max Wood, July 2001

**AUTHORITY:** DoD 4500.54-G, *DoD Foreign Clearance Guide (FCG)*; AFPD 24-4, *Customs and Border Clearance* (15 Apr 93), AFI 24-405, *Department of Defense Foreign Clearance Guide* (6 May 94); AFI 11-2x-xxx [aircraft type – e.g., 11-2C-130], *Operations Procedures*, Volume 3, Chapter 6

## U.S. POLICY

The United States' legal position and policy is that U.S. military aircraft are sovereign instrumentalities.

When in foreign countries with permission, military aircraft are entitled to the privileges and immunities normally accorded warships. Such military aircraft are exempt from customs duties and taxation and are immune from search, seizure, and inspection, including safety inspections, and spraying of aircraft interiors.

## AIRCRAFT COMMANDER'S RESPONSIBILITIES

U.S. Aircraft Commanders are to REFUSE to authorize searches, seizure of property, inspections, spraying of aircraft interiors, or other exercises of jurisdiction over USAF aircraft by foreign officials, except by direction of the appropriate service headquarters of the American Embassy.

Any unique arrangements with a particular nation will be included in the USAF Foreign Clearance Guide.

An Air National Guard Commander should check with an ANG Judge Advocate about specific sensitivities on these issues in some host nations that have led to the boarding or attempted boarding of some USAF aircraft.

**KWIK-NOTE:** *The principle of sovereign immunity of U.S. aircraft must be maintained to the maximum. Brief this topic to all aircraft Commanders before they travel to foreign countries.*

## RELATED TOPICS:

## SECTION

Asylum and Refuge Requests – Aircraft Outside the United States	15-2
Passports and Visas	15-12
Status of Forces Agreement (SOFA)	15-14
Judge Advocate Support for ANG Units Deploying Overseas	17-5

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## Host-Nation Support - Peacetime and Wartime (NATO)

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By Lt Col Thomas C. Patton, November 2007

**AUTHORITY:** DODD 5530.3, *International Agreements*; DODD 2010.9, *Acquisition and Cross-Servicing Agreements*; DODI 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*; AR 570-9, *Host Nation Support* (29 Mar 2006); Operational Law Handbook (2006).

### HOST-NATION SUPPORT DEFINED

Host-nation support (HNS) is the civil and military assistance provided by a NATO host nation to the forces located in or transiting through that nation's territory during times of crisis, transition to war, and wartime. The basis for that assistance lies in the commitments arising from the NATO Alliance, or bilateral or unilateral agreements between the host nation, NATO, and the hosted nation(s).

HNS plays a critical role in US operations in NATO countries. Efficient use of available HNS can greatly reduce the combat and combat support requirements of the hosted forces. ANG planners should determine what HNS is provided or available for deploying units.

### TYPES OF SUPPORT

The two types of HNS are planned and *ad hoc*.

**Planned** HNS is support that has been identified in past agreements for implementation during peacetime, crisis, and wartime. Based upon negotiations between the hosting and hosted nation, HNS is identified for planned force deployment requirements. Once agreed upon, HNS can be requested in advance of arrival in the host nation, or as needs increase in transition to crisis or wartime.

**Ad Hoc** HNS is that requested during crisis or wartime that has not been previously identified, planned, or agreed to in advance of the deployment to the host nation. Of course, host nation resources are not unlimited, and the hosted force should expect the host nation to make meeting its own force requirements first priority.

### LOGISTICS

The most common category of support is logistical, including facilities, transportation, services, supplies, construction equipment and materials, base operations support, and civilian labor. The stability and strength of the host nation's infrastructure, therefore, is a critical consideration.

Three factors will influence the decision to use HNS in a deployment: the capability, dependability, and willingness of HN to provide assistance; the risks associated with dependence on HNS; and any negative impact on the security of US forces.

### SUPPORTED UNIT'S RESPONSIBILITIES

If a unit is participating in the development or modification of an HNS agreement, during pre-deployment planning the supported unit should identify support requirements and evaluate their own ability to fulfill them. Identified shortfalls should be forwarded to the joint planning commission or group JPC/G. The JPC/G will consist of senior officials in the unified command and the host nation's defense ministry. The

JPC/G negotiates the specific requirements and develops documents listing the details of expected HNS, which are further defined and detailed in the Joint Implementation Plan (JIP).

If a unit is planning its deployment around an existing HNS agreement, the unit planners should know what is contained in the JIP. The JIP establishes detailed procedures for obtaining HNS.

Once deployed, if the ANG Commander determines that the provided HNS is not meeting mission requirements, he or she see the servicing Judge Advocate to determine whether the existing agreement and JIP allow for modification of the contracts or agreements that implement the JIP. Many NATO countries have USAF active duty Host-Nation Support JAGs, who should always be contacted regarding any such considerations.

## **INITIATIVES**

The NATO Strategic Commands have been developing standing Host-Nation Support Memoranda of Understanding (HNS MOUs). These standing MOUs are intended to be used to support wide ranging NATO-led exercises and operations.

## **RELATED TOPICS:**

## **SECTION**

Status of Forces Agreement (SOFA)  
Judge Advocate Support for ANG Units Deploying Overseas

15-14  
17-5

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# Interrelationship of U.S Civil and Military Agencies – The U.S. Country Team

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Updated by Colonel Andrew Turley, Walter D. Phillips, Esq., and Lt Col Max Wood, July 2001

**AUTHORITY:** U.S. Army FM 41-10, *Civil Affairs*

## INTRODUCTION

Air National Guard Commanders deploying OCONUS should be familiar with the U.S. Country Team Concept. The President has assigned to the Secretary of State the authority and responsibility for overall direction, coordination, and supervision of overseas activities. The Under Secretary of State for Security Assistance, Science and Technology is responsible for coordinating the plans and programs dealing with the “security assistance” activities normally carried out by the military. In this capacity, that official chairs the Arms Transfer Management Group (ATMG), which provides policy planning and review functions for security assistance matters.

## COMPOSITION OF THE TEAM

Coordination is accomplished in a given nation by the U.S. Country Team. The Team includes representatives of all in-country U.S. government departments. The Ambassador, as the President’s representative, functions within the organization of the State Department and has full responsibility for directing and coordinating the activities and operations of all elements of the U.S. diplomatic mission. The Ambassador’s authority does not, however, include the direction of U.S. military forces operating in the field when such forces are under the command of a U.S. area military command. The CINC of the U.S. area military command usually participates as a member of the Country Team, even though the CINC is not a member of the diplomatic mission.

## FOCUS

The Country Team’s focus is directed toward both the identification of potential sources of conflict and threats to U.S. interests in a particular country and to the amelioration of these problems through programs designed to assist the economy, upgrade medical care, improve transportation systems, etc. When assessing the needs of a country, host country capabilities and the threat are also evaluated. On the basis of this evaluation, political, economic, and if necessary, military actions are then recommended. The primary concern of the Country Team is to help stabilize, as rapidly as possible, a friendly and viable government capable of self-preservation and growth.

## JOINT EFFORT

Involvement of U.S. military forces in foreign infrastructure development seldom is restricted to a single service. Service components will operate in concert with each other and host country armed forces, under joint or unified Commanders, and in coordination with U.S. civilian agencies.

The Judge Advocate of an individual Air National Guard unit deploying OCONUS can be a key link between the ANG Commander and the U.S. Country Team in the host nation.

***KWIK-NOTE: All Commanders should establish contact with the U.S. Country Team in the host country before the deployment.***

**RELATED TOPICS:**

**SECTION**

Civil Affairs

15-6

Host Nation Support – Peacetime and Wartime (NATO)

15-10

War and Deployment Planning – The Judge Advocate’s Role

15-17

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# Passports and Visas

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Updated by Walter D. Phillips, Colonel Andrew Turley and Lt Col Max Wood, July 2001

**AUTHORITY:** Status of Forces Agreements (SOFAs); *Joint Federal Travel Regulations (JFTR)*; DoD Directive 4500.54-G, *DoD Foreign Clearance Guide*; <http://www.dp.hq.af.mil/dplp/dplp.htm> (Air Force Passport Matters home page).

## INTRODUCTION

A major concern for Air National Guard Commanders deploying OCONUS for exercises is passports, and visas for their personnel at transit sites and in the host nation at the deployment site.

## EXEMPTION FROM REQUIREMENTS

According to Status of Forces Agreements (SOFAs), U.S. forces are generally EXEMPT from passport and visa regulations and immigration inspection upon entering or leaving a host nation. The major SOFAs provide that a U.S. military ID card and “movement orders” are sufficient.

Personnel on mobility status to “high threat areas” or passing through “high risk airports” can obtain unofficial passports and receive reimbursement through DoD accounting and finance channels.

In some countries where the SOFA is not as well developed as in NATO, U.S. forces may not be exempt. If this is the case, it will be necessary to explore whether the host nation will issue “plane-side visas” upon arrival overseas. In the alternative, other means of obtaining visas should be arranged before deployment.

The country deployed to may not have a SOFA, and passports and visas may be required.

Always check the SOFA and law of the host country before you deploy for local customs laws and regulations applicable to your personnel.

These concerns illustrate why it is wise to involve an ANG Judge Advocate in the planning stage of any deployment.

***KWIK-NOTE: Before deploying, always check the applicable SOFA to determine passport, visa and customs requirements of the host station, and brief this topic to all deploying personnel before deployment.***

## RELATED TOPICS:

## SECTION

Foreign Search, Inspection and Customs Duties of U.S Aircraft	15-9
Status of Forces Agreement (SOFA)	15-14
War and Deployment Planning – The Judge Advocate’s Role	15-17
Judge Advocate Support for ANG Units Deploying Overseas	17-5

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## Returning to the United States – Customs

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Updated by Walter D. Phillips, Esq., Colonel Andrew Turley and Lt Col Max Wood, July 2001

**AUTHORITY:** 19 U.S.C. 1481, *et seq.*; AFD 24-4, *Customs and Border Clearance*; AFI 24-404, *Customs - Domestic* (15 Apr 93); AFI 11-2x-xxx [aircraft type – e.g., 11-2C-130], *Operations Procedures*, Volume 3, Chapter 6; <http://www.customs.gov/travel/travel.htm> (U.S. Customs Home Page)

### SEARCH OF BAGGAGE

ANG members returning to CONUS from OCONUS deployments may have baggage subject to U.S. Customs searches and ANG members will have to file declarations as to all articles bought abroad.

Baggage on military aircraft will be examined at the U.S. port of entry where the aircraft has landed in the same manner as baggage on commercial aircraft.

### EXCEPTIONS

Specific exemptions are provided for alcoholic beverages and tobacco products. There are differences in exemptions for military members who have been OCONUS on temporary duty (TDY) as opposed to permanent change of stations (PCS).

An ANG Judge Advocate should be consulted in regard to current U.S. customs rules, and these rules should be briefed to all personnel who deploy to foreign countries.

***KWIK-NOTE:*** *Military members on duty in foreign countries are not exempt from U.S. customs laws and regulations upon returning to the United States.*

### RELATED TOPICS:

### SECTION

Judge Advocate Support for ANG Units Deploying Overseas

17-5

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## Status of Forces Agreement (SOFA)

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Updated by Colonel Andrew Turley, Walter D. Phillips, Esq., and Lt Col Max Wood, July 2001

### DEFINITION AND PROVISIONS

A Status of Forces Agreement (SOFA) is an international agreement regulating the terms and conditions under which forces of one country are present in the territory of another country.

Some of the topics covered in SOFAs are operational rights, personnel actions, security and law enforcement, taxation, and customs, passports, and visas.

The most common provision of SOFAs pertain to Foreign Criminal Jurisdiction (FCJ) and claims. These are topics of particular concern to an Air National Guard Commander preparing for an OCONUS deployment.

According to SOFAs, U.S. forces are exempt from passport and visa regulations and immigration inspection upon entering and leaving the host country. Under the major SOFAs, a U.S. Armed Forces ID card and movement orders will usually suffice.

### JUDGE ADVOCATE ASSISTANCE

An ANG Judge Advocate can do much to work out the details in advance of an OCONUS deployment by contacting the host nation legal office to obtain the current practices relating to the SOFA and the host country's law and customs. Thoroughly prepared legal briefings by an ANG Judge Advocate prior to deployment can prevent an international incident that could lead to an ANG member being placed on International Hold in the host nation, pending a civil adjudication or court-martial.

***KWIK-NOTE: If the place of deployment has a SOFA, brief it to all deploying personnel before you go.***

### RELATED TOPICS:

### SECTION

Claims	15-7
Foreign Criminal Jurisdiction	15-8
Passports and Visas	15-12
Judge Advocate Support For ANG Units Deploying Overseas	17-5

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## OPCON and ADCON for Deploying Air National Guard Forces

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*Note: This article was a collaborative effort by Maj Gen Robert Gruber, Col Joe Pexa, Col Jim Thompson, Col Andy Turley and Lt Col Terry Davis.*

**January, 2001**

### INTRODUCTION

To understand the concepts of administrative control (ADCON) and operational control (OPCON) as they apply to Air National Guard members, one must first understand the legal structure of the United States Air Force and the means by which ANG members are brought onto active duty.

### The Legal Structure of the United States Air Force

The Air Force is composed of three separate organizations:

- The Active Duty Air Force
- The Air Force Reserve
- The Air National Guard of the United States (ANGUS)

The Air Force Reserve and the Air National Guard of the United States are often referred to together as the “Air Reserve Component (ARC).” The active duty and the Air Reserve Component perform duty only under Title 10 of the United States Code, a federal statute. Members of the active component and the Air Force Reserve are members of their own separate organizations. Regular Air Force members are military members at all times, and reserve component members are citizen soldiers. The Air National Guard members, however, belong to two separate organizations: the Air National Guard and the Air National Guard of the United States.

### The Air National Guard (ANG)

The Air National Guard is the air arm of the organized militia that exists in all 50 states, the District of Columbia, and the territories of Guam, Puerto Rico, and the Virgin Islands. The ANG is not a reserve component of the United States Air Force. It is a unit-structured state organization, composed of federally-recognized members and units, created and managed under state law by the governor (or equivalent civilian official) serving as its commander-in-chief. Under the authority of the state commander-in-chief, the ANG in each state is led by The Adjutant General (TAG) for that state, and in each territory and the District of Columbia by a separate commanding general. ANG units and their members are state militia personnel trained in accordance with the discipline prescribed by the United States Congress.<sup>1</sup> The ANG can be called into federal service as a militia force to execute such federal tasks as enforcing federal law, suppressing insurrection, and repelling invasions, but such service is very rare for ANG units and members. This is not service as a reserve component of the Air Force. When military members are in ANG status, it is usually for the purpose of training. ANG members either perform their duty under Title 32, U.S. Code, or under state statute when they are ordered onto state active duty as the state militia by their governor for state emergencies.

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<sup>1</sup> See Article 1, Section 8, Clause 16 of the US Constitution and Title 32, United States Code.

### The Air National Guard Of The United States (ANGUS)

The ANGUS is an organization separate from the ANG and is a reserve component of the USAF. It consists of federally recognized units and their members who are activated or mobilized. ANG members become members of the ANGUS when they enter Title 10 active duty status by various methods of activation or mobilization. ANGUS members activated or mobilized at less than full mobilization are not regular Air Force members nor do they count against active duty end strength unless they are brought onto active duty by "Full Mobilization." ANGUS members only perform their duty under Title 10, U.S. Code.

### Distinction Between and Dual Membership in the ANG and ANGUS

The ANG and the ANGUS are two completely separate legal organizations composed of identical personnel. Members can only serve in one of these two organizations at a given time. The ANG is the state militia, made up of federally recognized units in the states, the District of Columbia and the territories of Guam, Puerto Rico and the Virgin Islands. ANG members perform training duty under Title 32, and can only perform Title 32 duty in the United States. Its members have no authority over Title 10 organizations or members and likewise are not governed in most circumstances by Title 10 members or organizations, such as the regular Air Force, or statutes, such as the federal UCMJ. (In some limited circumstances in CONUS, a Title 10 officer may be dual-commissioned or detailed to serve as commander of an ANG unit, with the concurrence of the governor.<sup>2</sup> A similar unique arrangement exists for sector commanders in 1<sup>st</sup> Air Force, who are full-time ANGUS officers.) For members of the ANG to be able to perform duty OCONUS, they must first become part of the ANGUS under one of the several ways ANG members are brought onto active duty as discussed in the next section. ANGUS members only perform duty under Title 10. Except in the limited circumstances discussed above, ANGUS members have no authority over Title 32 organizations or members and likewise are not governed by members or organizations, such as the ANG or individual state military statutes. One of the unique features of the National Guard is that Title 32, U.S. Code is a federal statute under which state National Guard organizations are federally recognized and under which its members receive federal dollars for pay and accrue credit toward a federal retirement. This same federal statute, Title 32, also provides that while National Guard organizations and members perform duty under Title 32, they are governed by their individual state laws for disciplinary purposes, and not the federal UCMJ.

### The National Guard Bureau (NGB)

NGB is a joint bureau of the Army and the Air Force within the Department of Defense. Its mission is to serve as a channel of communication between the DOD departments and the states on matters concerning the ANG and ANGUS as well as the Army National Guard and Army National Guard of the United States. Since it is a staff agency, the Chief, NGB, currently an Air Force lieutenant general (this position may be held by an Army lieutenant general as well) has no command authority. He is on Title 10 orders as a member of the active component for the duration of this appointment. The Chief, NGB, is assisted in matters concerning the ANG and ANGUS by the Director, Air National Guard, who manages the Air National Guard Directorate.

### The Air National Guard Directorate

The Air National Guard Directorate is part of the joint directorate of the National Guard Bureau with the responsibility of directing the administration of policy and funding concerning operation of the Air National Guard. Since the ANG is composed of separate units in the states, the District of Columbia and the territories of Guam, Puerto Rico, and the Virgin Islands, there is no national ANG Title 32 unit or organization. The ANG Directorate is a staff agency. The ANG Director, currently a major general, has no command authority. He is on Title 10 orders as a member of the active duty Air Force for the duration of this appointment.

### The Air National Guard Readiness Center (ANGRC)

ANGRC is a Field Operating Agency (FOA) of HQ USAF that executes NGB policy for the ANG and ANGUS and exercises elements of command and control over ANGUS units and members. It is a Title 10 organization with a

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<sup>2</sup>32 USC 104

commander appointed on G-series orders. The ANGRC commander, currently a brigadier general, also serves as the Deputy Director of the ANG Directorate and is on Title 10 orders.

### Overview

ANG personnel are members of two separate organizations, ANG and ANGUS, and function in three separate statuses: citizen, Title 32 (state) and Title 10 (federal). ANG members can only be in one organization and in one status at any given time. Removing the words "Title" and "U.S. Code" from the explanation and personifying the numbers may be helpful in succinctly stating the distinctions between the two military statuses of Guard members and how they interrelate. "When a 32 becomes a 10, s/he ceases to be a 32, and when a 10 becomes a 32, s/he ceases to be a 10. 32s are commanded by 32s and 10s are commanded by 10s. Neither may command the other except in limited circumstances noted above. 32s are not governed by the UCMJ, a 10 law, and 10s are not governed by state military laws. When you think "ANG," think 32. When you think "ANGUS," think 10.

### **Mobilization and Activation**

There are several ways to bring Title 32 ANG members onto active duty under Title 10. These methods vary based on the number of people brought onto active duty, the length of the active duty tour and whether entry onto active duty is voluntary or involuntary. The method used to bring ANG members onto active duty will depend on the nature of the operation to be supported (declared war, national emergency, operational augmentation, etc.), and the size of the reserve force needed. When an ANG member enters active duty under Title 10, he or she is relieved of duty as a member of the ANG.<sup>3</sup>

#### Full Mobilization<sup>4</sup>

During time of war or national emergency declared by Congress, any unit and any member not assigned to a unit organized to serve as a unit may be ordered to active duty without their consent for the duration of the war and for six months thereafter. An unlimited number of members may be ordered to active duty under full mobilization, and they become members of the regular Air Force.

#### Partial Mobilization<sup>5</sup>

In a time of national emergency declared by the President, any unit and any member not assigned to a unit organized to serve as a unit may be ordered to active duty without their consent for up to 24 months. Not more than one million members may be on active duty at any one time under partial mobilization.

#### Presidential Reserve Call-Up (PRC)<sup>6</sup>

When the President determines that it is necessary to augment the active duty force for any operational mission, any unit, any member not assigned to a unit organized to serve as a unit<sup>7</sup> and certain members of the Individual Ready Reserve, may be ordered to active duty without their consent for up to 270 days, though the length of the tour could be for less than this time. Not more than 200,000 members may be on active duty at any one time under a PRC.

#### 15-Day Call-Up<sup>8</sup>

A designated authority of the Secretary of the Air Force may order any unit and any member not assigned to a unit organized to serve as a unit to active duty without their consent (but with the consent of the governor) for no more than 15 days per year. There is no statutory numerical limit on this provision. It is rarely used and appears to be

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<sup>3</sup> 32 USC 325(a).

<sup>4</sup> 10 USC 12301(a).

<sup>5</sup> 10 USC 12302(a).

<sup>6</sup> 10 USC 12304.

<sup>7</sup> DOD Directive 1235.10, *Activation, Mobilization, and Demobilization of the Ready Reserve*, para 4.2, defines a unit as "...any identified and managed group or detachment of one or more individuals, organized to perform a particular function whether or not such a group is part of a larger group..."

<sup>8</sup> 10 USC 12301(b).

related to involuntarily ordering a unit or person to active duty to satisfy annual training requirements. This provision would not be useful for staffing AEF deployments, since the current arrangement is for ANG members to serve about 19 days, which provides for a full 15 days at the deployed location and a travel time of up to 4 days.

### Volunteers<sup>9</sup>

Any member may be ordered to active duty or retained on active duty with his or her consent and that of the governor or commanding general in the case of territories and the District of Columbia. There is no statutory limitation on the number of members who may be serving as volunteers on active duty at any one time. The current arrangement is that all ANG AEF taskings will be filled by volunteers.

### **OPERATIONAL CONTROL (OPCON) AND ADMINISTRATIVE CONTROL (ADCON)**<sup>10</sup>

The rules concerning ADCON and OPCON apply to all Title 10 active duty personnel except during full mobilization. ANG members become members of the Air Force when brought onto active duty under full mobilization. The ADCON and OPCON rules also apply to all types of Title 10 duty short of full mobilization, no matter where it is performed or the reason for the active duty service. These rules apply to CONUS and OCONUS operational missions, training and exercises.

OPCON is the authority exercised by a commander over all aspects of military operations necessary to accomplish missions assigned to the command. It primarily focuses on warfighting tasks and includes: organizing and employing forces to engage an adversary; assigning tasks and designating military objectives; and developing and executing an overall aerospace strategy in conjunction with superior commanders. OPCON does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization or unit training.<sup>11</sup> OPCON flows from the National Command Authorities through the CINCs to subordinate warfighting organizations, such as joint task forces. A commander exercises OPCON over all assigned and temporarily attached forces.

ADCON is the authority exercised over subordinate organizations regarding administration and support. It primarily focuses on providing the commander exercising OPCON with capable and ready forces with which to fight the war. ADCON includes: organization of forces; personnel management; control of resources and logistics; training, readiness, and mobilization; and discipline. ADCON flows from the National Command Authorities through the Secretary of the Air Force, Chief of Staff of the Air Force, Major Commands, and Numbered Air Forces to a unit. A commander exercises ADCON over all assigned forces, but not over attached forces. For attached forces, ADCON remains with the commander to whom they are assigned. For example, when forces are assigned to ANGRC but temporarily attached to another unit, ADCON remains with ANGRC.

When ANG members enter Title 10 active duty, they are transferred from their ANG units and assigned to the ANGRC, either directly or to a detachment of the ANGRC created for the purpose of deploying forces in support of an active duty mission. ANGRC/CC exercises ADCON over all units and members in Title 10 status (except those brought on active duty through full mobilization) by virtue of the fact that they are assigned to ANGRC. ANGRC/CC makes forces available to a supported active duty commander by attaching them to the gaining organization within the AOR that will exercise OPCON over them.

The Air Force Doctrine Document (AFDD) 2 provides the blueprint for organizing Air Force forces for operational employment. AFDD 2 establishes a Commander of Air Force Forces (COMAFFOR) as the principal USAF commander supporting an operational mission. To support the operational mission, the COMAFFOR uses forces assigned to him or her, such as subordinate wings, and forces that are attached by other USAF organizations. The COMAFFOR can exercise ADCON only over assigned forces, not over attached forces. The NGB and the Air Force jointly developed the concept of “specified ADCON” to include the following elements: designating specific units for operational use; organizing, training, equipping, and sustaining forces for in-theater missions; providing

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<sup>9</sup> 10 USC 12301(d).

<sup>10</sup> See generally, Air Force Doctrine Document (AFDD) 2, *Organization And Employment Of Aerospace Power*, 17 Feb 00. AFDD 2 incorporates and supersedes the “Little Red Book,” the genesis of current Air Force operational doctrine.

<sup>11</sup> AFDD 2, *Organization And Employment Of Aerospace Power*, p 140.

force protection; and maintaining discipline. The COMAFFOR exercises specified ADCON over all attached forces (it is not needed for assigned forces, since the COMAFFOR already exercises ADCON over them).

### **UCMJ Authority**

UCMJ authority is a function of command under federal law and the Manual for Courts-Martial. The Uniform Code of Military Justice (UCMJ) gives the COMAFFOR or any active duty commander within the chain of command the right to discipline any person serving in Title 10 status. ADCON and specified ADCON do not confer UCMJ authority. Rather, ADCON and specified ADCON help to identify those commanders who may exercise UCMJ authority as a matter of Air Force doctrine and policy. This doctrine recognizes that more than one commander may have UCMJ authority over a member in a given situation. Command authority for discipline includes UCMJ authority as an element of ADCON, which, for members of an ANGRC detachment, is within the command authority of ANGRC.<sup>12</sup> Discipline is also an element of specified ADCON, which is within the command authority of the COMAFFOR. Since disciplinary authority is shared between the commanders holding ADCON and specified ADCON, it is frequently a matter of coordination between the two concerning which one will take disciplinary action. This concept has been codified in AFI 51-202.<sup>13</sup>

ANG units, acting under the authority and direction of ANGRC, issue orders to ANG members to bring them onto active duty. These orders specify in the “Remarks” section that the member is relieved of duty with his or her ANG unit and assigned to ANGRC or to a detachment created by ANGRC. For example: “Member is assigned to ANGRC Detachment 16.” ANGRC/CC acquires ADCON over the member by virtue of this assignment process for all types of activation and partial mobilization.<sup>14</sup>

When ANGUS detachments or members deploy in support of a military operation, the gaining MAJCOM will often create a specially-designated aerospace expeditionary unit and attach the attachment or members to it. For example: “Member is attached to 104 Expeditionary Operations Group.” When members deploy OCONUS or CONUS, they or the unit to which they are assigned must be attached for OPCON to a designated in-theater commander, most often the COMAFFOR. The orders specify in the “Remarks” section that the member or unit is attached to the particular theater commander through an active duty unit in the theater. Under AFDD 2, the gaining COMAFFOR acquires specified ADCON over the ANGUS units and members because they are attached to his or her command. Deployed ANGUS members are commanded by two individuals: the commander of the unit to which they are assigned, and the commander of the unit to which they are attached. OPCON applies to assigned and attached forces and resides with the COMAFFOR. ADCON applies only to assigned forces, and for ANGUS members resides with the ANGRC/CC. Specified ADCON applies only to attached forces, and resides with the COMAFFOR. Thus, the commander having OPCON also has specified ADCON.

### **COMMAND ISSUES RELATED TO ANGUS DEPLOYMENTS**

ANGRC usually creates detachments and assigns ANGUS members to them for deployments that involve 10 or more persons for 15 days or longer. If a deployed group is less than 10 persons, or a deployment will not be for more than 15 days or does not include an officer, then ANGUS members are attached directly to the 201<sup>st</sup> Mission Support Squadron (201MSS), a Title 10 subordinate unit to ANGRC. ADCON and OPCON apply in the same manner to those directly attached to 201MSS as they apply to ANGRC detachments.

When ANGRC creates a detachment, it appoints a commander for the detachment using an AF Form 35. The detachment commander (DETCO) will be the senior ranking officer eligible to command.<sup>15</sup> He or she exercises ADCON over the members assigned to the detachment.

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<sup>12</sup> See Air Force Doctrine Document 1, *Air Force Basic Doctrine*, pp 65-66. See also OPJAGAF 1997/93

22 July 1997 (“Examples of administration control are UCMJ[Uniform Code of Military Justice] authority,...”)

<sup>13</sup> AFI 51-202, In matters of discipline,...coordination...

<sup>14</sup> ANGRC/CC does not acquire ADCON over members who enter active duty under full mobilization, since they are gained directly by the active duty MAJCOMs and not assigned to ANGRC

<sup>15</sup> AFI 51-604, *Appointment To And Assumption Of Command*, contains detailed information about eligibility to command. One significant feature of eligibility to command is that only a rated officer is eligible to command flying units.

Since OPCON is exercised by the in-theater commander (usually the COMAFFOR), ANGUS detachments deployed in support of operations will usually also be given a theater designation to reflect their attachment to the COMAFFOR. (See example above.) The tasking order will often specify who will command the in-theater unit, such as an Expeditionary Operations Group. The appointment of a commander for the in-theater unit should be accomplished through an AF Form 35 or G-series order, usually issued by or under the authority of the MAJCOM supporting the COMAFFOR. This may be the ANGRC detachment commander in some situations.

The ANGRC DETCO has ADCON over those attached to the detachment. ANGRC/CC is the DETCO's next superior commander. If the DETCO is also the commander of the in-theater unit, then he or she also is the channel through which OPCON and specified ADCON flow from the COMAFFOR. The DETCO thus becomes the focal point for the full measure of command authority and responsibility. This requires a careful delineation of the command role in which the DETCO may be acting in a particular situation. This is especially important in matters related to taking disciplinary action and the administration of military justice, such as imposing nonjudicial punishment and referring a member to a court-martial under the UCMJ.

If The DETCO Is The In-Theater Unit Commander. An interesting situation illustrating the dual command chain over ANGUS members and its effect on the imposition of discipline is posed for the officer who serves as both DETCO and as commander of the in-theater unit. If the local commander takes the disciplinary action as the DETCO under his or her authority of ADCON against the ANGUS member who is both assigned to the ANGRC detachment and attached to the in-theater unit, then the authorities for appeal of nonjudicial punishment and jurisdiction for convening courts-martial are through ANGRC in CONUS. If the local commander takes the disciplinary action as the commander of the in-theater unit, then the authorities for appeal of nonjudicial punishment and jurisdiction for convening courts-martial are through the COMAFFOR in the theater of operations. This appears to be an unresolved issue that will come up in limited circumstances. In such situations, the best approach for the commander on the ground is to coordinate the matter immediately with both the superior in-theater commander and with ANGRC/CC, since any discipline will be imposed as either DETCO or in-theater commander, not both.

If The DETCO Is Not The In-Theater Unit Commander. This situation is similar to that of the above even if the ANGRC detachment is not designated as an in-theater unit, but its members are instead attached to another active duty unit or if the ANGRC DETCO is not designated as commander of an in-theater unit. In this case, the only difference is that the DETCO and the in-theater commander are two different people. The ANGRC detachment commander retains ADCON over those assigned to his or her unit and the in-theater unit commander acquires specified ADCON over these same individuals or units who are attached to the in-theater unit. The DETCO and the in-theater unit commander exercise concurrent UCMJ jurisdiction, and should coordinate the matter immediately with both ANGRC/CC and the superior in-theater commander, respectively.<sup>16</sup> In the above situation, if it is decided that ANGRC will take the disciplinary action, then it will be handled by the DETCO or ANGRC. If the COMAFFOR or comparable in-theater commander will take the action, then it will be handled by the active duty commander. If ANGRC does not create a detachment but instead assigns ANGUS members to 201MSS, then 201MSS/CC exercises ADCON and the COMAFFOR exercises OPCON. In such a circumstance, if it is determined that ANGRC will take the disciplinary action, then it will be handled by 201MSS/CC.

### **Home Station Command**

Another matter to consider is command of the home station ANG unit if the ANG commander of that unit deploys. Commanders command units. Commanders must be members of the units in order to command them. When an ANG commander enters active duty as a member of the ANGUS, regardless of how long, he or she is transferred from the ANG. Since the ANG commander is no longer an ANG member or a member of the ANG unit, he or she is no longer eligible to command the ANG unit. A new commander for the ANG unit must be appointed by The Adjutant General of the state or Commanding General of the District of Columbia or territory using procedures established by the respective states, the District of Columbia and territories of Guam, Puerto Rico, and the Virgin Islands. A new ANG unit commander should be appointed regardless of the length of time the former commander will be on active duty as a member of the ANGUS. These arrangements should be worked out well in advance of the deployment. The new commander will be appointed pursuant to applicable state procedures, vice the current

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<sup>16</sup> See Air Force Doctrine Document 1, *Air Force Basic Doctrine*, pp 65-66. See also OPJAGAF 1997/93, 22 July 1997 ("Examples of administrative control are UCMJ [Uniform Code of Military Justice] authority,...").

commander. When the former unit commander is no longer in Title 10 status, a new order should be published appointing the commander to his or her former position.

### **How Commanders Become Commanders**

Officers become commanders by either appointment to command or assumption of command. Appointment to command is an act by a superior commander. The Adjutant General of each state and Commanding General of each territory and the District of Columbia has been delegated authority to appoint commanders for Air National Guard units. Commanders of Major Commands, Numbered Air Forces, and Field Operating Agencies may appoint commanders of subordinate units. Since ANGRC is a field operating agency of USAF, ANGRC/CC is authorized to appoint commanders of subordinate units under his command, such as 201MSS and ANGRC detachments.

Commanders may be appointed from those senior in grade (*e.g.*, 0-6) on duty with the organization and eligible to command. They do not need to be the most senior in that grade (time in grade or rank). For example, if two colonels, eligible to command, are on duty with an organization, the superior commander can appoint the junior ranking colonel as the unit commander. The superior commander is not required to appoint the most senior colonel eligible to command as commander. The superior commander may not, however, appoint someone of lower grade to command an organization in which someone of higher grade eligible to command is assigned. In our example, if there is at least one 0-6 eligible to command and assigned with the organization, the superior commander may not appoint an 0-5 to command it.

Eligibility to command depends upon the nature of the organization and AFSC of the officer. Flying units, such as wings, operations groups and operations squadrons, must be commanded by a rated officer. Non-rated officers are ineligible to command flying units. Medical units may only be commanded by medical personnel, such as members of the Medical and Dental Corps, Nurse Corps, Medical Services Corps and Biomedical Sciences Corps. Chaplains are ineligible to command under any circumstances. Judge advocates may command with the approval of the Judge Advocate General, or under emergency field conditions, or if they are the senior ranking member of a group of prisoners of war.<sup>17</sup>

Assumption of command is a unilateral act, rather than one taken by a superior commander. Under assumption of command, the senior officer in both grade and rank (time in grade), eligible to command, assumes command of the organization to which he or she is assigned if the unit does not have an appointed commander. The authority to assume command is inherent in his or her status as the senior officer in both grade and rank who is eligible to command and who is assigned to the organization. If the unit has an appointed commander, even a more senior ranking officer may not assume command from the appointed commander. Officers may only assume command of those organizations to which they are assigned.

Appointment to command is the preferred means of delegating command authority. It is a clear direction from the superior commander. If a commander gained his or her office through assumption of command, there is the possibility that an officer of equal grade but senior in rank who is eligible to command may be assigned to the unit, causing confusion from a legal perspective about which officer has lawful command authority.

### **COMMAND OF “REGULAR” ACTIVE DUTY UNITS AND MEMBERS**

Any active duty organization, preexisting or newly created, to which the Air Force component members are attached, is considered to be a Regular Air Force Unit. Air National Guard officers never command organizations or members of the Regular Air Force. ANGUS officers on extended active duty (EAD), which is active duty for 90 days or more, can command organizations and members of the Regular Air Force.<sup>18</sup> ANGUS officers on EAD, if appointed to command a Regular Air Force Unit, as part of their command authority have disciplinary authority over regular Air force and all other members attached to their unit under specified ADCON.<sup>19</sup> ANGUS officers not on

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<sup>17</sup> AFI 51-604, para 4.6

<sup>18</sup> AFI 51-604, para 4.6.7.

<sup>19</sup> The concept of specified ADCON does not just apply to ARC members. It applies as well as to active duty members who are attached to units other than those to which they are assigned.

EAD cannot command organizations or members of the Regular Air Force.<sup>20</sup> Since ANGRC detachments or individual ANGUS members are always attached to a Regular Air Force Unit in the theater of operations, and many ANGUS officers are non-EAD, there are limited opportunities for ANGUS officers to command these units. To remedy this situation, especially in the context of an aerospace expeditionary force, AFI 51-604 is being reviewed for amendment in the near future to clarify the authority of non-EAD ANGUS officers to command Regular Air Force Units.

Whether an officer is considered to be on EAD for this purpose is determined by the length of the tour specified in his or her individual orders. As long as the orders bringing him or her onto active duty are for a period of 90 days or more, then he or she is eligible to command under AFI 51-604 as presently written. This eligibility to command starts from the first day of the active duty period<sup>21</sup>. If the tour of an ANGUS commander originally brought onto active duty should later be shortened to less than 90 days, all command actions he or she may have taken from the first day of command are unaffected by the change in length of the individual tour. For example, most ANG members who deployed for Operation Allied Force were called up under a PRC. Their orders brought them onto active duty for 270 days. A number of ANGUS officers were appointed as commanders. When hostilities concluded, which for most members was less than 90 days after they had entered active duty, the ANGUS units redeployed to the CONUS and the members returned to ANG status. All command actions taken by ANGUS commanders during that time were valid, because the officers had originally been activated for 90 days or more.

## CONCLUSION

ADCON and OPCON in the deployed environment can be complex matters, especially if the command arrangements are not well planned and understood in advance. Careful planning and consultation with a judge advocate is critical to the successful exercise of command authority by and over ANGUS officers, members and units in a deployed environment.

***KWIK-NOTE: Know the rules regarding OPCON and ADCON before you deploy.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Command Succession	2-3
Status of National Guard Members	11-7
Mobilization of the Air National Guard	20-2
Military Justice Jurisdiction – ANG Members in Title 10 Status	8-2

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<sup>20</sup> OPJAGAF 1993/98, 8 Oct 93.

<sup>21</sup> OPJAGAF 1998/117, 17 Nov 98.

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## Law of Armed Conflict

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Updated by Col Cassie A. Strom, Oct 2007

**AUTHORITY:** DoD Directive 2311.01E, *DoD Law of War Program*, dated 9 May 2006; AFPD 51-4, *Compliance with the Law of Armed Conflict* (26 Apr 1993); AFI 51-401, *Training and Reporting to Ensure Compliance with the Law of Armed Conflict* (19 Jul 1994). See also DoDI 5240.4, *Reporting of Counterintelligence and Criminal Violations* (22 Sep 1992) (for reporting suspected criminal cases); DoDI 6055.7, *Accident Investigation Reporting and Record Keeping* (3 Oct 2000) (for reporting suspected friendly fire incidents).

**INTRODUCTION:** The “Law of Armed Conflict” (LOAC), also known as the “Law of War” (LOW), is that part of international law that regulates the conduct of armed hostilities. LOAC encompasses all international law for the conduct of hostilities binding on the U.S. or its individual citizens, including treaties, international agreements and applicable customary international law. LOAC is an attempt by nations to prevent or control conduct by parties to armed conflict and protect and minimize the suffering of innocent persons. The law of armed conflict is intended to make sure that the violence of war is used to defeat the enemy’s forces, and not merely to cause purposeless, unnecessary destruction. The law of armed conflict is an expression, in legal terms, of principles of war such as objective, mass, economy of force, surprise and security.

**RELATION TO RULES OF ENGAGEMENT:** The law of armed conflict is not the same thing as “rules of engagement.” Rules of engagement are guidelines that the U.S. imposes on its own military forces, while the law of armed conflict is binding on all nations and their armed forces. The U.S. government may change the rules of engagement. International law, on the other hand, can usually be changed only by international agreement or when a practice becomes so widespread that it is recognized as customary international law. In their final form, the rules of engagement usually reflect political and diplomatic as well as legal factors. Rules of engagement often restrict operations beyond the requirements of the law of armed conflict.

**RESPONSIBILITY:** The Judge Advocate General ensures the AF effectively implements the DoD Law of War Program. Pursuant to AFI 51-401, judge advocates should review all command plans, policies, procedures and operations in the coordination process to determine that they meet current U.S. legal obligations under LOAC.

**TRAINING REQUIREMENTS:** All commanders will ensure that assigned personnel are trained in the principals and rules of LOAC. Training will include, at a minimum, subjects required by the 1949 Geneva Conventions for the Protection of War Victims and the 1907 Hague Convention IV respecting the Laws and Customs of War on Land.

**REPORTING REQUIREMENTS:** Members of DoD Components must comply with the law of armed conflict during all armed conflicts, however such conflicts are characterized, and in all other military operations. The U.S. obligations under the law of armed conflict are also observed by DoD contractors assigned to or accompanying deployed Armed Forces. All reportable incidents committed by or against U.S. personnel, enemy persons or any other individual must be reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action. The on-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents pending transfer to appropriate U.S., allied or other authorities.

**Reportable Incidents:** DoDD 2311.01E defines a “reportable incident” as a possible, suspected or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that could constitute a violation of the law of war if it occurred during an armed conflict.

**Who Must Report:** All military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying DoD Components shall report reportable incidents through their chain of command.

**How to Report:** The commander of any unit that obtains information about a reportable incident through the applicable operational command and Military Department. Contracts should require contractor employees to report reportable incidents to the commander of the unit they are accompanying or the installation to which they are assigned or to the Combatant Commander. Reports may also be made through other channels such as the military police, a judge advocate or an inspector general.

AFPD 51-4 and AFI 51-401 further require that all AF personnel ensure that the judge advocate learns of apparent violations of LOAC. Each commander and staff agency that receives a report of a possible, suspected or alleged LOAC violation must report the facts promptly to the local SJA and the appropriate investigating agency. **Reporting requirements are concurrent.**

**KWIK-NOTE:** LOAC should be briefed to all personnel. Commanders should know the procedures for reporting a “reportable incident” through command channels for ultimate transmission to appropriate authorities.

<b>RELATED TOPICS:</b>	<b>SECTION</b>
<b>Asylum &amp; Refugee Requests - Aircraft Outside the United States</b>	<b>15-02</b>
<b>Code of Conduct</b>	<b>15-04</b>
<b>Foreign Criminal Jurisdiction</b>	<b>15-08</b>
<b>Judge Advocate Support for ANG Units Deploying Overseas</b>	<b>17-05</b>
<b>Status of Forces Agreement (SOFA)</b>	<b>15-14</b>
<b>War and Deployment Planning</b>	<b>15-17</b>

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# War and Deployment Planning – The Judge Advocate Role

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Updated by Walter D. Phillips, Esq., Colonel Andrew Turley and Lt. Col. Max Wood, July 2001

**AUTHORITY:** CJCSI 3121.01A, *Standing Rules of Engagement for US Forces; USAF War and Mobilization Plan*, Volume I (WMP-1), Annex P.

## INTRODUCTION

During contingency operations and periods of international tension and armed conflict, it is the mission of Air Force and Air National Guard Judge Advocates, supported and aided by their respective Paralegal specialists, to provide advice and assistance to Commanders at every level of command on a broad range of conflict-intensified legal issues.

Planners require legal advice in their planning. Host nation support agreements, status of forces agreements, overflight considerations, rules of engagement, compliance with laws of armed conflict, lawful targets, illegal use of weapons, and many other factors are incorporated into the war planning of most functional areas. All require input for compliance with existing laws, treaties, and agreements.

## REVIEW OF OPERATIONAL PLANS

The Judge Advocate must review the entire plan; not just the legal annex.

Get your JA involved in the planning early on. Why?

1. CJCSI 3121.01A states that legal advisors should attend mobilization planning conferences when ROEs and related topics are discussed, and mobilization planning shall include provision for legal advisors during the exercise.
2. Lawyers are generally fairly intelligent, think logically, and keep their mouths shut.
3. Also, JAGs provide comments from a different perspective and their legal training and skills are an integral part of the planning process.

## OTHER JUDGE ADVOCATE'S DUTIES TO COMMANDERS

Judge Advocate duties include, but are not limited to:

1. Advice to Air Force and Air National Guard Commanders on their right to employ force to achieve their objectives during periods of armed conflict;
2. Advice to Air Force and Air National Guard Commanders with regard to the interpretation and application of JCS, unified command, and component command rules of engagement (ROE) during all military operations, contingencies, terrorist attacks, or prolonged conflicts outside the territorial jurisdiction of the United States;
3. Advice to Air Force and Air National Guard Commanders and assistance in drafting Air Force component ROE;

5. Advice to Air Force and Air National Guard Commanders in interpreting the large body of wartime and emergency legislation granting expanded authority to Air Force and Air National Guard Commanders during periods of armed conflict;
6. Advice to Air Force and Air National Guard Commanders with regard to the implementation of existing international agreements for wartime host nation support, logistical support among allies, operating rights, and the status of U.S. forces;
7. Advice to and representation of Air Force and Air National Guard Commanders in the negotiation of new international agreements for wartime host nation support, logistical support among allies, operating rights, and the status of U.S. forces;
8. Advice to Air Force and Air National Guard Commanders relating to their right to exercise broader UCMJ jurisdiction over their forces during periods of armed conflict;
9. Advice to Air Force and Air National Guard Commanders regarding provisions of the UCMJ expanding the jurisdiction of court-martial to encompass civilians accompanying the armed forces in the field;
10. Liaison with host nation authorities in order to maximize criminal jurisdiction by Air Force and Air National Guard Commanders over U.S. Forces during periods of armed conflict;
11. Expeditious prosecution of criminal charges against individual service members in order to achieve and maintain the high level of good order and discipline necessary to effectively accomplish the Air Force and Air National Guard Commander's primary mission;
12. Expeditious processing of claims of conscientious objector status in order to achieve and maintain the high level of good order and discipline necessary to effectively accomplish the Air Force and Air National Guard Commander's primary mission;
13. Advice to Air Force and Air National Guard Commanders and adjudication of claims against the United States for damage caused by combat and noncombat activities associated with the arrival, employment and re-deployment of U.S. forces;
14. Advice to Air Force and Air National Guard Commanders and support regarding wartime acquisition and transfer of supplies and war material, including such issues as emergency procurement, emergency leasing, and extraordinary requisition of supplies;
15. Advice to Air Force and Air National Guard Commanders and assistance in the implementation of Air Force Noncombatant Evacuation Order (NEO) plans, including, but not limited to, providing legal assistance to evacuees, acquisition of transportation, feeding and billeting services, and negotiating safe havens in third countries.
16. Advice to deploying military personnel on legal assistance matters including, but not limited to, preparation of wills and powers of attorney;
17. Advice to Air Force and Air National Guard Commanders regarding limitations on use of armed force, the use of weapons, and the protection of civilians, the sick and wounded, enemy prisoners of war and other protected persons found in international law;
18. Advice to Air Force and Air National Guard Commanders on the identification and reporting of possible violations of the Law of Armed Conflict (LOAC);
19. Coordination of Air Force Office of Special Investigations (AFOSI) investigations of possible violations of the LOAC;
20. Advice and support to Air Force and Air National Guard Commanders on matters relating to the handling, billeting, feeding, and care of enemy prisoners of war (POWs);

21. Assistance to Air Force and Air National Guard Commanders in covering tribunals under Article 5 of the Geneva Convention Relating to the Treatment of Prisoners of War (POW) for the determination of captives' entitlement to POW treatment;
22. Advice to Air Force and Air National Guard Commanders regarding transfer of POWs to US Army elements and/or host nation forces;
23. Representation of Air Force and Air National Guard Commanders in liaison with visiting inspection and enforcement officials of the International Committee of the Red Cross (ICRC);
24. Advice and assistance to Air Force and Air National Guard Commanders in establishing communications with hostile forces to permit negotiation of protected status for aeromedical evacuation aircraft;
25. Assistance to Air Force and Air National Guard Commanders in processing requests by foreign nationals for political asylum during periods of international tension and armed conflict;
26. Advice to Air Force and Air National Guard Commanders with regard to the disposition of enemy defectors during period of armed conflict;
27. Advice to Air Force and Air National Guard Commanders with regard to requests by foreign nationals for temporary refuge during periods of international tension and armed conflict;
28. Advice and assistance to Air Force and Air National Guard Commanders in planning and conducting civil affairs operations during contingency operations and periods of armed conflict;
29. Identification of Judge Advocate and Paralegal specialist manpower assets and requirements, and reallocation of assets as required to support Air Force and Air National Guard Commanders; and
30. Such other duties as may be warranted or directed in support of the Air Force and Air National Guard Commanders' accomplishment of their primary mission.

**KWIK-NOTE.** *The above listed duties are just some of the ways JAGs can assist their Commanders In War and Deployment Planning.*

**RELATED TOPICS:**

**SECTION**

Civil Affairs	15-6
Host Nation Support – Peacetime and Wartime (NATO)	15-10
Interrelationship of U.S. Civil and Military Agencies – the U.S. Country Team	15-11

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## Loan of ANG Officers and Noncommissioned Officers to Allies

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Updated by Col Andrew Turley, Walter D. Phillips, Esq., and Lt Col Max Wood, July 2001

**AUTHORITY:** 8 U.S.C. 1481; OpJAGAF 1985/26, *Loan of ANG Weapon System Operators to the RAF* (27 Mar 85).

### INTRODUCTION

Occasionally the air forces of allied nations want to borrow personnel from ANG units to operate with the allied nation's forces. The ANG members who will be on loan often raise concerns about the effect on their United States citizenship from serving in the military of another nation, especially if that service includes engaging in hostilities on behalf of the ally. Generally speaking, a United States citizen may only lose citizenship by a voluntary act which demonstrates the giving up of American nationality in favor of allegiance to some foreign state. Congress has, by statute, listed categories of acts which show a shift in allegiance and therefore will result in the loss of United States nationality. One of the acts listed is entering or serving in the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or (B) such person served as a commissioned or noncommissioned officer. 8 U.S.C. 1481(a)(3).

### EFFECT ON U.S. CITIZENSHIP

In the unlikely event that the allied nation engaged in hostilities against the United States, the alliance would no doubt be at an end. In any case, the ANG members on loan would be bound not to participate, and to return to the United States, if able. Loss of citizenship would be a real possibility for members who did otherwise.

Acceptance of a commission, or of status as a noncommissioned officer, would also risk the loss of United States nationality. However, service with an allied force need not, and normally does not, involve commissioning by the ally or an oath of allegiance. Members on loan would imply be fulfilling their duty to the United States Air Force, assigned to the allied force.

ANG members who are on loan to an ally should not be deemed to have "entered or served in" that ally's armed forces for potential loss of citizenship purposes. If the Secretary of State and Secretary of Defense specifically authorize such service in writing, the member is fully protected. Before such duty is performed, very probably such authorization will be obtained.

Duty would be performed in a Title 10 status and the member's conduct and tour would be governed by the Air Force and its regulations.

The subject matter of this topic should not be confused with ANG units participating in joint exercises with foreign powers.

***KWIK-NOTE: Before ANG members will be "loaned" to foreign countries for service in their armed forces, there will likely be approvals required by the state Adjutant General, NGB, the gaining MAJCOM, HQ USAF, the Secretary of the Air Force and the Secretaries of State and Defense.***

**RELATED TOPICS:**

**SECTION**

Active Duty – Air National Guard Members

11-2

Citizenship

23-7

Host Nation Support – Peacetime and Wartime (NATO)

15-10

Training Outside the United States

26-3

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# Enemy Prisoners of War and Detainees

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By Major Jeffrey Knickerbocker & Col Cassie Strom, Sep 2007

**AUTHORITY:** DODD 2310.01E, *The Department of Defense Detainee Program* (5 Sep 06); AFI 31-301, *Air Base Defense* (15 May 02); and AFI 31-304(I), *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1 Oct 97) (See AR 190-8 at [http://www.army.mil/usapa/epubs/pdf/r190\\_8.pdf](http://www.army.mil/usapa/epubs/pdf/r190_8.pdf).)

The US Army is the executive agent responsible for DOD detainee operations policy regarding enemy prisoners of war (EPW), retained personnel (RP) and civilian internees (CI) (hereinafter referred to as detainees). However, the U.S. Air Force is responsible for detainees that are in its control until they are transferred to detainee collection points, holding areas or other detention locations operated by DOD Components. All persons captured, retained or detained will be given humanitarian care and treatment and will be provided the protections of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) until their status is determined by a competent authority. Therefore, captured and retained personnel should be referred to as detainees.

The capturing unit is responsible for initial processing, interim detention, medical treatment, and transfer to appropriate detention location. Chapter 2, AR 190-8, sets out the initial processing actions which must be taken upon capture. Holding areas will not be collocated where detainees could observe or assess defense force operations. Detainees must be searched immediately after capture. Use males to search males and females to search female prisoners, when possible. Weapons, ammunition, and equipment or documents with intelligence value should be confiscated and turned over to the nearest intelligence unit. Propaganda and other psychological operations (PSYOP) materials should be confiscated, identified by the detainee's name and internment serial number and turned over to the supporting EPW/CI PSYOP unit through intelligence channels. Currency will only be confiscated on the order of a commissioned officer and will be receipted for using DA Form 4137 (Evidence/Property Custody Document). Detainees are allowed to retain personal effects such as jewelry, helmets, canteens, protective mask and chemical protective garments, clothing, identification cards and tags, badges of rank and nationality, Red Cross brassards, articles having personal or sentimental or religious value, and items used for eating except knives and forks.

Detained personnel must be humanely evacuated from the point of capture and into appropriate channels as quickly as possible. Instructions given to prisoners during evacuation will be, if possible, in their own language and as brief as possible. When military necessity requires delay in evacuation beyond a reasonable period of time, health and comfort items must be issued, such as food, potable water, appropriate clothing, shelter, and medical attention. Detained personnel will not be unnecessarily exposed to danger while awaiting evacuation.

***KWIK-NOTE: Anyone captured and detained by Air Force units shall be given humanitarian care and treatment and provided the protections of the GPW until transferred to competent authorities. Their status may only be determined by competent authorities.***

## RELATED TOPICS:

Law of Armed Conflict

## SECTION

15-16

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# Rules of Engagement

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Updated by Col Cassie A. Strom - October 2007

**AUTHORITY:** CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces* (13 Jun 2005).

**REFERENCES and WEBSITES:** Army Operational Law Handbook 2007, <http://www.fas.org/irp/doddir/army/law2007.pdf>; Army Domestic Operational Law (DOPLAW) Handbook for Judge Advocates, 17 Feb 2005; HQ USAF/JAO Website, <https://aflsa.jag.af.mil/AF/lynx/jao/>; United Nations, *Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations* (May 2002); DoD Directive 5210.56, *Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties* (1 Nov 2001); AFI 31-207, *Arming and Use of Force by Air Force Personnel* (1 Sep 1999).

## INTRODUCTION

Rules of Engagement (ROE) are the primary tools for regulating the use of force. The legal factors that provide the foundation for ROE include customary and conventional law principles regarding the right of self-defense and the laws of war. However, they do not stand alone; non-legal issues, such as political objectives and military mission limitations, also are essential to the construction and application of ROE. As a result of this multidisciplinary reach, judge advocates (JAG) participate significantly in the preparation, dissemination and training of ROE.

In order to ensure that ROE are versatile, understandable, easily executable, and legally and tactically sound, JAGs and operators alike must understand the full breadth of policy, legal and mission concerns that the ROE embrace, and collaborate closely in their development, training and implementation. JAGs must become familiar with mission and operational concepts including force and weapons systems capabilities and constraints. Operators must familiarize themselves with the international and domestic legal limitations on the use of force and the laws of armed conflict.

This chapter will provide an overview of basic ROE concepts, survey the SROE and review the JAG's role in the ROE process. The Appendices to the Rules of Engagement Chapter in the Army Operational Law Handbook provide an unclassified extract of the Standing Rules of Engagement (SROE) and sample ROE pocket cards.

**NOTE:** The SROE are classified SECRET, and important concepts within it may not be reproduced here. The operational lawyer should ensure that he or she has ready access to the CJCS SROE publication. Once gaining that access, the operational lawyer should read it from cover to cover until he or she knows it.

## OVERVIEW

**Definition of ROE:** Joint Pub 1-02, *Dictionary of Military and Associated Term* defines ROE as directives issued by competent military authority that delineate the circumstances and limitations under which U.S. [naval, ground and air] forces will initiate and/or continue combat engagement with other forces encountered.

**Functions of ROE:** As a practical matter, ROE perform three functions: (1) provide guidance from the President and Secretary of Defense, as well as subordinate commanders, to *deployed units* on the use of force; (2) act as a control mechanism for the transition from peacetime to combat operations (war); and (3) provide a mechanism to facilitate planning. ROE provide a framework that encompasses national policy goals, mission requirements and the rule of law.

### **General Purposes of ROE:**

1. **Political Purposes.** ROE ensure that national policies and objectives are reflected in the actions of commanders in the field, particularly under circumstances in which communication with higher authority is not possible. For example, in reflecting national political and diplomatic purposes, ROE may restrict the engagement of certain targets or the use of particular weapons systems. Falling within the array of political concerns are such issues as the influence of international public opinion (particularly how it is affected by media coverage of a specific operation), the effect of host country law, and the content of status of forces agreements (SOFA) with the U.S.
2. **Military Purposes.** ROE provide parameters within which the commander must operate in order to accomplish his or her assigned mission. ROE provide a ceiling on operations and ensure that U.S. actions do not trigger undesired escalation, *i.e.*, forcing a potential opponent into a “self-defense” response. ROE may regulate a commander’s capability to influence a military action by granting or withholding the authority to use particular weapons systems, or by vesting or restricting authority to use certain types of weapons or tactics. ROE may also reemphasize the scope of a mission.
3. **Legal Purposes.** ROE provide restraints on a commander’s actions, consistent with both domestic and international law and, may, under certain circumstances, impose greater restrictions than those required by the law. For many missions, particularly peace operations, the mission is stated in a document such as a UN Security Council Resolution (UNSCR), *e.g.*, UNSCR 940 in Haiti or UNSCR 1031 in Bosnia. These Security Council Resolutions also detail the scope of force authorized to accomplish the purpose stated therein. Mission limits or constraints may also be contained in mission warning or execute orders.

### **CJCS STANDING RULES OF ENGAGEMENT (CJCS SROE)**

**Overview:** The 2005 CJCS SROE provide implementation guidance on the inherent right of self-defense and the application of force for mission accomplishment. They are designed to provide a common template for development and implementation of ROE for the full range of operations - from peace to war.

**Applicability:** Outside U.S. territory, the CJCS SROE apply to all military operations and contingencies. Within U.S. territory, the CJCS SROE apply to air and maritime homeland defense missions. Included in the 2005 CJCS SROE are Standing Rules for the Use of Force (SRUF), which apply to civil support missions as well as land homeland defense missions within U.S. territory and DoD personnel performing law enforcement functions at all DoD installations. The SRUF cancels the domestic civil disturbance ROE found in Operation Garden Plot.

**Responsibility:** The Secretary of Defense approves the SROE and, through the Joint Staff, may issue theater, mission, or operation specific ROE. The J3 is responsible for SROE maintenance. Subordinate commanders are free to issue theater, mission, or operation ROE.

#### **CJCS SROE are divided as follows:**

1. **Enclosure A (Standing Rules of Engagement).** This unclassified enclosure details the general purpose, intent, and scope of the SROE, emphasizing a commander’s right and obligation to use force in self-defense. Critical principles, such as unit, individual, national and collective self-defense; hostile act and intent; and the determination to declare forces hostile are addressed as foundational elements of all ROE. NOTE: The unclassified portion of the CJCS SROE, including Enclosure A without its appendices, is reprinted in the Army Operations Law Handbook.
2. **Enclosures B-H.** These classified enclosures provide general guidance on specific types of operations: Maritime, Air, Land, Space, Information, and Noncombatant Evacuation Operations as well as Counterdrug Support Operations Outside U.S. Territory.
3. **Enclosure I (Supplemental Measures).** Supplemental measures found in this enclosure enable a commander to obtain or grant those additional authorities necessary to accomplish an assigned mission. Tables of supplemental measures are divided into those actions requiring President or Secretary of Defense

approval; those that require either President or Secretary of Defense approval or Combatant Commander approval; and those that are delegated to subordinate commanders (though the delegation may be withheld by higher authority). Supplemental measures that are reserved to the President or Secretary of Defense or Combatant Commander are generally **restrictive**; that is, either the President, Secretary of Defense or Combatant Commander must specifically permit the use of a particular operation, tactic or weapon before a field commander may use it. Supplemental measures delegated to subordinate commanders are all **permissive** in nature; that is, they allow a commander to use any weapon or tactic available and to employ reasonable force to accomplish his or her mission, without having to get permission first. Supplemental measure request and authorization formats are contained in Appendix F to Enclosure I.

**NOTE: SUPPLEMENTAL ROE RELATE TO MISSION ACCOMPLISHMENT, NOT TO SELF-DEFENSE, AND NEVER LIMIT A COMMANDER'S INHERENT RIGHT AND OBLIGATION OF SELF-DEFENSE.**

4. Enclosure J (Rules of Engagement Process). The current, unclassified enclosure provides guidelines for incorporating ROE development into military planning processes and introducing the ROE Planning Cell. The JAG is designated as the “principal assistant” to the J3 or J5 in developing and integrating ROE into operational planning.

5. Combatant Commanders’ Theater-Specific ROE. The CJCS SROE no longer provide a separate Enclosure for specific ROE submitted by Combatant Commanders for use within their Area of Responsibility (AOR). Combatant Commanders may augment the SROE as necessary by implementing supplemental measures or by submitting supplemental measures for approval, as appropriate. Theater-specific ROE documents can be found on the Combatant Command’s SIPR website. Check with the Combatant Commander’s SJA for guidance on theater-specific ROE.

6. Enclosures L-Q (SRUF). Like Enclosure A, Enclosure L sets out the basic self defense posture under the SRUF. Enclosures M-O provide classified guidance on Maritime Operations Within U.S. Territory; Land Contingency and Security-Related Operations Within U.S. Territory; and Counterdrug Support Operations Within U.S. Territory. Enclosures P and Q provide a message process for RUF, as well as RUF references.

**Key Definitions and Concepts:** The SROE and SRUF adopt the definitions in Joint Pub 1-02 along with the definitions in Enclosures to the SROE.

1. *Self-Defense.* Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self defense by members of their unit. Both unit and individual self-defense include defense of other U.S. military forces in the vicinity.

2. *National Self-Defense.* The act of defending the United States, U.S. forces, and, in certain circumstances, U.S. citizens and their property, and U.S. commercial assets from a hostile act, demonstrated hostile intent or declared hostile force.

3. *Collective Self-Defense.* The act of defending designated non-U.S. citizens, forces, property and interests from a hostile act or demonstrated hostile intent. Only the PRESIDENT OR SECRETARY OF DEFENSE may authorize the exercise of collective self-defense. Collective self-defense is generally implemented during combined operations.

4. *Mission Accomplishment v. Self-Defense.* The SROE distinguish between the right and obligation of self-defense, and the use of force for the accomplishment of an assigned mission. Authority to use force in mission accomplishment may be limited in light of political, military or legal concerns, but such limitations have NO impact on a commander’s right and obligation of self-defense. Further, although commanders may limit individual self-defense, commanders will always retain the inherent right and obligation to exercise unit self defense.

5. *Declared Hostile Force.* Any civilian, paramilitary or military force or terrorist that has been declared hostile by appropriate U.S. authority. Once a force is declared to be “hostile,” U.S. units may engage it without observing a hostile act or demonstration of hostile intent; *i.e.*, the basis for engagement shifts from conduct to status. The authority to declare a force hostile is limited, the SROE should be consulted.

6. *Hostile Act.* An attack or other use of force against the United States, U.S. forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.

7. *Hostile Intent.* The threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.

8. *Imminent Use of Force.* The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all 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.

## **MULTINATIONAL ROE**

U.S. forces will often conduct operations or exercises in a multinational environment. Multinational force ROE will apply **for mission accomplishment** only if authorized by SecDef order. If not so authorized, the CJCS SROE apply. If there are inconsistencies between the right of self-defense contained in U.S. ROE and multinational force ROE, U.S. forces will continue to operate under U.S. ROE until the inconsistency is resolved through the U.S. chain of command. In all cases, U.S. forces retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.

Functioning within multinational ROE can present specific legal challenges. Each nation’s understanding of what triggers the right to self-defense is often different, and will be applied differently across the multinational force. Each nation will have different perspectives on the law of war and each nation is ultimately bound by its own domestic law and policy. With or without a multinational ROE, JAGs must proactively coordinate with allied militaries to minimize the impact of differing ROE.

The U.S. currently has combined ROE (CROE) with a number of nations, and is continuing to work on CROE with additional nations. Some CROE may apply to all operations and others only to exercises.

The United Nations, Department of Peacekeeping Operations, issued Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations which provide the parameters for the use of force by military personnel assigned to United Nations Peacekeeping Operations.

## **ARMING AND USE OF FORCE FOR PERSONNEL PERFORMING LAW ENFORCEMENT AND SECURITY DUTIES**

DoD Directive 5210.56, *Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties* (1 Nov 2001) and AFI 31-207, *Arming and Use of Force by Air Force Personnel* (1 Sep 1999) cover the arming and use of force by DoD and AF law enforcement and security personnel. These references **do not** apply to personnel engaged in military operations and subject to authorized rules of engagement or to personnel assigned duties in a combat zone in time of war, a designated hostile fire area when ROE apply, or a civil disturbance mission area.

## **ROLE OF THE JUDGE ADVOCATE**

JAGs at all levels play an important role in the ROE process. There are four major tasks with which the JAG will be confronted:

**1. Determining the Current ROE:** JAGs in operational units will typically be tasked with briefing the ROE to the commander during the daily operational brief (at least during the first few days of the operation). In preparing this brief, the JAG will want to consult the SROE related to self-defense; the enclosures of the SROE that deal with the type of operation (*e.g.*, Maritime, Space, or Counterdrug operations); the Combatant Commander's special ROE for his or her AOR; the base-line ROE for the particular mission as provided in the OPLAN, as promulgated by separate message, or as it exists for a particular mission (for example, the OIF ROE as promulgated by Multi-National Corps – Iraq (MNC-I)); and any additional ROE promulgated as the operation evolves or changes, or in response to requests for additional ROE.

During the first few days of an operation, the ROE may be quite fluid. JAGs should ensure that any ROE message is brought to his or her immediate attention. JAGs should periodically review the message traffic to ensure that no ROE messages were missed, and should maintain close contact with higher level JAGs who will be able to advise that ROE changes were made or are on the way. JAGs should adhere to the rules for serializing ROE messages (Appendix F to Enclosure J of the CJCS SROE).

**2. Requesting Supplemental ROE:** Commanders must look to their mission tasking and existing ROE when determining whether to request supplemental ROE. The commander may decide that the existing ROE are unclear, or too restrictive, or otherwise unsuitable for his or her particular mission. The drafting a supplemental ROE request message will often be tasked to the JAG and can only be accomplished with extensive command and operator input. The "ROE Planning Cell," consisting of representatives from all sections of the command, including the JAG, is ideal for the task of drafting an ROE request.

- ◆ Be especially careful about requesting supplemental measures that require President or SecDef approval, as these items already have received significant consideration.
- ◆ Justify why the supplemental measure is needed. As above, those at higher headquarters who have reviewed the ROE reasonably believe that they have provided the most suitable rules. It is your job to prove otherwise. For example, your unit may have a mission that earlier ROE planners could not have foreseen, and that the ROE do not quite fit.
- ◆ It is not necessary to request authority to use every weapon and tactic available at the unit level; higher headquarters will restrict their use by an appropriate supplemental measure if that is thought to be necessary.
- ◆ Maintain close contact with JAGs at higher headquarters levels. Remember that ROE requests rise through the chain of command until they reach the appropriate approval authority, but that intermediate commands may disapprove the request.
- ◆ Follow the message format IAW Appendix F to Enclosure I. Although it may seem like form over substance, a properly formatted message indicates to those reviewing it up the chain of command that your command (and you) know the SROE process.

**3. Disseminating ROE to Subordinate Units:** JAGs must determine the applicable ROE and broadcast them to all subordinate units. Joint Staff ROE, reflecting the guidance of the President or SecDef, are generally addressed to the Combatant Commander and Service level. The supported Combatant Commander takes those President/SecDef approved measures, adds appropriate supplemental measures from the group the Combatant Commander may approve, and addresses these ROE to his or her subordinate commanders, or to a subordinate JTF, as applicable. The subordinate commander/JTF commander will take the President/SecDef and Combatant Commander approved ROE, add any of his or her own, and distribute this ROE message throughout the rest of the force. NOTE: Combatant Commanders or other commanders sometimes place restrictions on the ability of subordinate commanders to modify, change, or restrict ROE at lower levels.

**4. Training ROE:** Once the mission-specific ROE are received, the question becomes: "How can I as a JAG help to ensure that the troops understand the ROE and are able to apply the rules reflected in the ROE?" The commander is responsible for training on the ROE. A JAG's first task may be to help the commander see the value in organized ROE training. Realistic, rigorous scenario- or vignette-driven training exercises have been much more effective than classroom instruction. Individuals should be able to articulate the meaning of the terms "declared hostile force," "hostile act," "hostile intent," and other key

ROE principles. Situational training can be used to help recognize hostile acts and hostile intent, and the appropriate level of force to apply in response.

## **POCKET CARDS**

ROE pocket cards are a summary or extract of **mission-specific** ROE. They should be developed as a clear, concise and UNCLASSIFIED distillation of the ROE, and serve as both a training and memory tool. ROE CARDS ARE NOT A SUBSTITUTE FOR ACTUAL KNOWLEDGE OF THE ROE. ROE cards are a particularly useful tool when they conform to certain parameters:

- ◆ Maintain brevity and clarity. Use short sentences and words found in the common vocabulary.
- ◆ Avoid qualified language. ROE are directives, advising subordinates of the commander’s desires and mission plan.
- ◆ Tailor the cards to the audience. ROE cards are intended for the widest distribution possible.
  
- ◆ Keep the ROE card mission-specific. Items which normally should be on the ROE card include: (1) any forces that are declared hostile; (2) any persons or property that should or may be protected with up to deadly force; and (3) detention issues, including circumstances authorizing detention and the procedures to follow once someone is detained. Be aware, however, that such information may be classified.
- ◆ Anticipate changing rules. If the ROE change during an operation, change the color of the card stock used to produce the new ROE card (and collect the old ones and destroy them) or ensure every card produced has an “as of” date on it.

**KWIK-NOTE: Deployed JAGs must ensure they are intimately familiar with the applicable ROE and mission requirements, and must be prepared to give advice and provide training.**

### **RELATED TOPICS:**

### **SECTION**

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# Chapter 16, Investigatory Matters

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## Aircraft Accidents and Safety Investigations Off-Base

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Donald C. Mobly, July 2007

**AUTHORITY:** 18 U.S.C. 1385; 50 U.S.C. 797; DOD 5200.8-R, *Physical Security Program* (May 1991); AFI 31-201, *Security Police Standards and Procedures* (4 Dec 2001); AFI 31-207, *Arming and Use of Force by Air Force Personnel* (1 Sep 99); AFI 10-2501 *Air Force Emergency Management (EM) Program Planning and Operations* (24 Jan 07); AFI 51-503, *Aerospace Accident Investigations* (14 Jul 04); OpJAGAF 1990/60, *Security* (1 Oct 1990); OpJAGAF 1997/118, *National Defense Area* (6 Oct 1997).

### INTRODUCTION

The impact of the Posse Comitatus Act (18 U.S.C. 1385) on aircraft accidents and safety investigations centers on the fact that if Title 10 status military members are used to guard a crash site off-base, they are restricted in their ability to actively prevent individuals from entering the site and possibly destroying or removing valuable evidence. The Posse Comitatus Act applies to the National Guard only when the National Guard is federalized.

Even though the prohibitions of the Posse Comitatus Act do not apply to the National Guard in state (Title 32) or state active duty status, there may nonetheless be other statutory or regulatory limitations on the use of National Guard personnel for certain purposes. Federal or state statutes or regulations may prohibit the intended conduct, and actions taken without proper authority may invalidate the protections from liability otherwise available under the Federal Tort Claims Act or similar state statutes for members of the National Guard who are negligent while engaged in such conduct. Commanders should proceed with extreme caution when engaging in conduct that would otherwise be prohibited by the Posse Comitatus Act, the ANG being in Title 32 or state active duty status. Thus, it is essential for all Commanders to know how the Posse Comitatus Act, the Federal Tort Claims Act and similar state indemnification statutes, and all statutes and regulations authorizing the specific conduct contemplated (*e.g.*, AFI 10-2501), affect their responsibilities during aircraft accidents and safety investigations. For the definition and derivation of the term "Posse Comitatus," see the topic "POSSE COMITATUS" in this Deskbook.

This topic first discusses the ways to properly secure an off-base accident site, and then suggests ways to preplan the securing of an off-base accident site.

### METHODS TO SECURE THE ACCIDENT SITE

There are two basic methods the military can employ to insure the accident site is secured and valuable evidence is not destroyed without violating the Posse Comitatus Act or other applicable regulations such as AFI 10-2501... One method is to have the civilian authorities secure and guard the area, while the other is to temporarily establish a federal area, called a National Defense Area.

### CIVILIAN AUTHORITIES

Air Force regulations are very specific as to the role of the civil authorities in response to accidents. AFI 10-2501 states that civil authorities oversee response and recovery operations for major off-base aircraft accidents. Unless a national defense area (NDA) is established, involvement of military resources in the accident gives the Air Force (ANG) no specific rights or jurisdiction. The Air Force (ANG) demands that its personnel recognize and respect the rights of civil authorities at the accident site. The Air Force (ANG) must work with civil authorities to protect military resources. Upon arriving, the Air Force (ANG) coordinates command and control requirements, debriefs civil response forces at the scene, and provides mutual assistance.

Each Air Force (ANG) installation Commander makes mutual assistance plans with civilian authorities to cope with emergencies and disasters. Civilian fire and rescue resources can be used to assist in on-base

emergencies, while Air Force (ANG) assets can be used in off-base emergencies. The Air Force (ANG) has unique capabilities in aircraft fire fighting and rescue, and the civilian community usually welcomes this aid in aircraft emergencies. Bases will normally set geographical limits off-base to which crash and fire units will be dispatched. When a military aircraft crashes within these limits, civil agencies will maintain the authority and responsibility to respond and control the scene, even though Air Force (ANG) assets respond. Regardless of the distance, however, the installation Commander of the nearest military installation will respond to all accidents involving military aircraft.

By way of an illustration, suppose that a single-seat, military fighter aircraft from another base and MAJCOM has crashed 30 miles from your base. Your base is the closest military installation to the crash site. The distance is beyond that to which your base's fire and crash equipment will respond. You as Base Commander have dispatched your Disaster Response Force (DRF) headed by the Incident Commander to the scene. Civil authorities have already advised you that they are at the scene, there are no survivors and the fire has been put out. You elect to send your base interim safety board to the scene to start preliminary investigation, pending arrival of the other MAJCOM safety investigation board.

As the Incident Commander arrives, the county coroner has just pronounced the pilot dead from impact injuries. The state highway patrol is performing its investigation and interviewing witnesses. Upon seeing the military arrive, the state police are eager to return to their normal duties. The county sheriff has an extremely small staff and does not wish to remain to guard the wreckage. The crash site is on private property adjacent to a county road. A growing group of curious people is beginning to press closer to view the wreckage. Several private vehicles have already driven over what appears to be ground scars from the crash. The temptation is to replace the state police with military personnel, and refuse entry to, and forcibly stop anyone from disturbing or removing anything from the wreckage.

One way to keep the area secure is to persuade the civil authorities to keep civilians out of the crash site. If the property owner can be reached, the property owner could request the civil authorities to keep the sightseers off the property, providing the property owner can be persuaded to do so. Then the military could be used to passively aid and help the civil authorities by "advising" people seeking entry that they will be trespassing and will be reported to the civil authorities. If the owner cannot be reached, the civil authorities may be persuaded to keep the area cordoned off to protect the public. In either case, the military cannot actively aid, or actively stop anyone from taking anything that is classified away from the crash. Therefore, the success of preserving the evidence is based on the cooperation of the civil authorities.

The above example is a very simple, but common one involving the off-base crash of a military aircraft. The actual situation is normally made much more complicated by a myriad of actual circumstances. Yet, it does give an example of how the Posse Comitatus Act can affect the safety investigation.

## **NATIONAL DEFENSE AREA**

The other method of securing the accident site is the establishment of a restricted area, known as a National Defense Area. The National Defense Area is a military zone that contains and secures Federal Government resources in US and US territorial areas that do not fall under the jurisdiction of the DOD. Installation commanders, in consultation with higher command, establish National Defense Areas through their on-scene commanders.

Although the establishment of a National Defense Area is normally associated with nuclear aircraft accidents, the National Defense Area can be established to protect against the loss of classified material or equipment that was aboard the aircraft. It should not be established if the only rationale for creating the National Defense Area is that the mishap aircraft was a priority A, B or C resource. Once the aircraft has crashed, it can no longer carry out its wartime mission and, thus, loses its priority classification.

The guidelines for the establishment of a National Defense Area may be found in DoD 5200.8-R.. The Incident Commander will define and mark the boundaries of the National Defense Area under the authority of the Commander of the unit that owns the aircraft. When establishing the National Defense Area, a temporary barrier marking the boundary of the area should be used. Additionally, it is important that the

landowners and users are advised of the nature of the actions being taken and the security controls in effect. The wishes of the landowners concerning the size, shape and location of the National Defense Area should be respected where possible but, if necessary, the National Defense Area must be established even without landowner consent/cooperation. The landowners should also be given assurances that once the classified material has been recovered, the federal control of the National Defense Area will terminate.

Where possible, civilian authorities should be asked to provide help in securing the National Defense Area. In maintaining security, Air Force (ANG) personnel will use the minimum degree of control and force which is reasonable and necessary under the circumstances. To the greatest degree possible, civilian authorities should handle the apprehension and arrest of civilians violating the security of the National Defense Area. If they are not available or refuse to help, the military personnel on-scene will apprehend and detain those individuals who violate or trespass the National Defense Area (see 50 U.S.C. 797).

It is very important that in the establishment of a National Defense Area, the civil authorities and landowners are given as much information and notice as possible. If the landowners do not agree with the establishment of the National Defense Area, they do have legal recourse and may attempt to secure an injunction against the Air Force (ANG). Legal action may be avoided if the landowners can be convinced that the need to establish the National Defense Area is for national security, and that once the classified material is recovered, the land covered in the National Defense Area will be returned to civilian control. However, legal action takes time even if done quickly, and the needs of national security may require the On-Scene Commander to establish the National Defense Area, while the disagreeing landowners pursue this course.

If a National Defense Area is established, safety investigators will get valuable time to make a preliminary investigation and preserve perishable evidence while the search for the classified material is underway. Once the National Defense Area has been returned to civilian control, the safety board will then need to turn to the civilian authorities for any protection of the site and evidence.

Further explanation of a National Defense Area in this Deskbook is under the topic "NATIONAL DEFENSE AREA."

### **PREPLANNING TO SECURE THE ACCIDENT SITE**

Preplanning can only aid in the response to an unexpected mishap. Each Air Force (ANG) installation is required to develop a pre-accident plan that identifies the required resources and plan of action to be taken in response to an accident. Each base is also required to publish a Comprehensive Emergency Management Plan (CEMP) 10-2. Annex A to CEMP 10-2 directs those actions to be taken if a major accident occurs. It is through these two documents that safety personnel have their opportunity to coordinate the security of the crash site and its evidence.

Both plans should establish liaison with local civilian authorities so that prompt notification of off-base accidents is received and that security and communication at the scene can be established. This liaison is established in the form of mutual assistance (aid) agreements (MAA) with local, county and state agencies. These agreements must be periodically reviewed by Air Force and ANG legal authorities to insure that the Posse Comitatus Act, or other applicable regulations, are not being violated. In the writing and review of these agreements, the safety staff can approach civilian authorities to present the safety staff's case for the security of the crash site and evidence.

The primary concern of the civilian authorities with off-base crashes is the initial response and lifesaving aspects of the emergency. Other demands may require their attention elsewhere once any fires have been put out and any casualties attended to. Often, the important interests of the Air Force (ANG) regarding an emergency, such as the integrity of the Air Force Safety Investigation, the security of the crash site, and the preservation of evidence, receive low priority from the civilian authorities. It is also quite difficult at the scene of an actual mishap to begin to explain to these civilian authorities the concepts behind the Air Force Accident Prevention or Safety Investigation Programs.

Thus, it is imperative during the initial establishment and annual review of the mutual aid agreements that the safety office make every attempt to brief civilian authorities on the Air Force Safety Investigation and Accident Prevention Programs and the need for security of the crash site and the preservation of evidence. These briefings may convince the civilian authorities to make efforts to aid in the safety investigation if, in the future, an off-base crash occurs.

The safety office should also insure that members of the disaster response force understand the need to preserve evidence and understand what they can do to help the safety investigation board. The Incident Commander is required to work closely with the safety investigation board and should know well beforehand what types of support the board will need to accomplish its investigation. The Incident Commander may be under extreme pressure in an off-base accident to begin the wreckage recovery operation as soon as possible, and detailed knowledge of safety board requirements will help in making that decision.

The Staff Judge Advocate and Finance Office representatives can also aid in the preservation of evidence by making on-the-spot agreements and payments to civilian landowners. This could be in the form of purchase of a right-of-way, or the leasing of land at the crash site which could place the site under control of the Air Force (ANG) for a limited time. However, both the SJA and Comptroller should, in the planning stages, have discussed questions of payment, authority, reimbursement, and procedures in these situations with the nearest active duty Air Force claims office. The SJA and Incident Commander should also discuss with safety personnel the possibilities and procedures of establishing a National Defense Area. The National Defense Area may be the only way to safeguard classified material and protect vital evidence. The SJA should also insure that all military personnel at the crash site understand the implications of the Posse Comitatus Act.

## **SUMMARY**

The Posse Comitatus Act and other regulations (*e.g.* AFI 10-2501) have an impact on off-base aircraft accidents and safety investigations. Generally, military forces are prohibited from taking active civilian law enforcement actions. Thus, if military personnel are used to secure an accident site in areas not under the control of the USAF, ANG or DOD, they legally cannot stop a civilian from entering the crash site and removing or destroying evidence that may be significant in the accident investigation. The Air Force (ANG) does not have any specific rights or jurisdiction at an accident site based solely on the fact that military personnel or material were involved in the accident.

The civilian authorities have jurisdiction over the crash site and are responsible for its control. If the site is to remain secure, these forces, passively augmented by military members, must insure vital evidence is not removed or destroyed. Civilian authorities, however, are not required to maintain the site security for the sole purpose of an Air Force (ANG) accident investigation. If close coordination and cooperation between military and civilian authorities have been previously accomplished through mutual aid agreements, site security and evidence preservation may be realized. But the rights and wishes of private landowners may take precedence over the Air Force (ANG) requirement for site security and evidence preservation.

If classified material was on the aircraft and has not been recovered, the Incident Commander, under the authority of the Commander exercising control of the aircraft, may establish a National Defense Area. The National Defense Area is a secure area and will be protected as such by military personnel. Even so, civilian authorities should be relied upon whenever possible to handle civilian arrest and detention. If a National Defense Area is established, the safety investigation board will have an additional opportunity to search for and preserve evidence necessary for the investigation of the accident. The National Defense Area cannot be established solely on the need for the protection of evidence for an investigation. A National Defense Area is a temporary measure and control of the site should be returned to civilian authorities as soon as possible.

The most positive method for insuring that an off-base accident site is kept secure is to convince the landowners and civilian authorities of the necessity to preserve the evidence for the purposes of the safety investigation and accident prevention. This requires that a relationship be established with the civil

authorities and the public in advance of a mishap, to explain the necessity of meaningful accident prevention and safety investigation programs.

***KWIK-NOTE: Periodically brief this topic to your DISASTER RESPONSE FORCE in the event of such accidents.***

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# Aerospace Accident Investigations and Reports

Lt Col Donald C. Mobly, Sep 2007

**AUTHORITY:** AFI 51-503, *Aerospace Accident Investigations* (16 Jul 04); DODI 6055.7, *Accident Investigation, Reporting and Record Keeping* (3 Oct 00); AFI 91-204, *Safety Investigations and Reports* (14 Feb 06).

## BACKGROUND

DoDI 6055.7, *Accident Investigation, Reporting, and Record Keeping*, requires each service to conduct safety mishap investigations and “legal mishap” investigations for specified accidents. The Services use different terminology to refer to legal mishap investigations. The Air Force uses the term “accident investigation” in lieu of “legal mishap investigation.” The Army uses the term “collateral investigation” and the Navy uses the term “JAGMAN investigation.” Accident investigations are separate from and independent of safety investigations. Air Force accident investigations are conducted through Accident Investigation Boards (AIBs) under the authority of AFI 51-503, which expressly applies as well to the ANG. An AIB is composed of a board president and advisory members. The AIB is a nonvoting board; the president is solely responsible for the contents of the AIB Report.

## PURPOSE OF ACCIDENT INVESTIGATIONS

The purpose of accident investigations is to provide a publicly releasable report of the facts and circumstances surrounding the accident, to include a statement of opinion on the cause of the accident; to gather and preserve evidence for claims, litigation, disciplinary, and adverse administrative actions; and for all other purposes. AIB Reports are:

1. Provided and personally briefed to the next-of-kin (NOK) of crewmembers and other military personnel and civilians killed, and to individuals seriously injured in the accident.
2. Released to members of Congress, upon request
3. Released to members of the public and media, upon request.
4. Released to other interested government agencies, upon request.
5. Used by the Air Force for adjudication of wrongful death, personal injury, and property damage claims resulting from the accident.
6. Used by Air Force commanders as a source document to assist them in assessing whether any punitive or administrative action should be taken against persons whose negligence or misconduct contributed to the accident.

## DISTINGUISHED FROM SAFETY INVESTIGATION

This investigation is distinguished from the Safety Investigation which is conducted pursuant to AFI 91-204 after an aircraft, missile, nuclear or space mishap, solely for the purpose of mishap prevention. Safety investigations determine the causes of accidents to prevent future accidents. Safety investigations normally take precedence over accident investigations. Usually the two investigations will overlap in time. In the event of conflicts between the two investigations regarding access to the scene, acquiring and examining evidence, and interviewing witnesses, safety investigations have priority.

Because the overriding purpose of safety investigations is accident prevention, no impediment to the gathering of timely and accurate information should occur. During certain types of safety investigations, promises of confidentiality may be granted to witnesses and contractors in order to promote full and timely disclosure of information. Statements and documents given under a promise of confidentiality are privileged and cannot be disclosed outside of Air Force safety channels. The Air Force does not use privileged safety information for line-of-duty determinations, claims adjudication, flying evaluation board proceedings, pecuniary liability determinations, or any other civil, criminal, or adverse actions. Access to

privileged safety documents is limited to those with a genuine need to know. The AIB is not authorized access to privileged safety documents.

### **MANDATORY AIBs**

In accordance with AFI 51-503, commanders must investigate Air Force aircraft, unmanned aerial vehicle (UAV), missile, or space accidents in the following instances:

1. All Class A accidents, as defined in DoDI 6055.7, paragraph E2.1.3.1 and AFI 91-204, Chapter 1, except those that result solely in damage to government property.
2. There is a probable high public interest.
3. All suspected cases of friendly fire, as defined in DoDI 6055.7, paragraph E2.1.16.
4. All accidents involving the loss of an Air Force aircraft, UAV (other than a subscale aerial target remotely piloted vehicle), or space launch system.

### **DISCRETIONARY AIBs**

1. There is anticipated litigation for or against the Government or a Government Contractor; or
2. There is anticipated disciplinary action under the UCMJ against any individual;
3. There are damages to third parties that likely will exceed \$250,000; or

Other aircraft, UAV, missile, or space accidents may be investigated under AFI 51-503 at the discretion of any Wing or higher commander.. When an accident results solely in damage to government property in an amount of \$2 million or more, the SJA for the Air Force MAJCOM responsible for the aircraft, UAV, missile or space system shall notify the MAJCOM commander of the accident and recommend in writing whether a discretionary AIB should be convened.

### **ACCIDENTS NOT REQUIRING AN AIB**

1. Death, injury, or property damage by action of an enemy or hostile force.
2. Intentional or expected damage to Air Force equipment or property (e.g. authorized testing or combat training, including missile and ordnance firing; destruction of weapon system to prevent capture by enemy or hostile force; etc)
3. Accidents investigated by another federal agency or military department resulting in a publicly releasable report

### **CONVENING AUTHORITY**

The convening authority for an AIB is the same commander who convened or would convene a corresponding safety investigation under AFI 91-204. For Class A accidents, the convening authority will be the MAJCOM commander. This responsibility may be delegated to the MAJCOM vice-commander, but may not be delegated to a subordinate commander or staff member. In cases involving ANG aircraft accidents, the gaining MAJCOM convenes the AIB; however the Air National Guard has the discretion to conduct accident investigations, using AFI 51-503 as a framework, for any accidents not investigated by the Air Force under AFI 51-503.

### **PROCEDURES**

The convening authority convenes the investigation and issues the appointment orders of the AIB.

The AIB president, as well as other AIB members, legal advisors, and technical advisors, should not be from the same wing or equivalent organization to which the accident aircraft, UAV, missile, space vehicle or crew members were assigned. Additionally, any member of the safety investigation board or the board's technical advisors or witnesses may not serve as accident investigation board members to the same accident. ANG and AFRC officers may be appointed by the convening authority to serve on AIBs.

AIB presidents should be field grade officers, senior in grade to persons involved in the accident, and must come from outside the mishap wing. The requirement that AIB Presidents come from outside the mishap wing may be waived by AFLOA/JACT in cases where the aerospace vehicle involved is one of only a few of its class (e.g. Predator, E-8, Global Hawk). For Class A accidents, AIB presidents must be O-5 or above and should, if possible, be the same rank as the corresponding SIB president. For any accident involving a fatality, the AIB president must be a General Officer or Brigadier General (Select). For aircraft accidents, AIB presidents must be a pilot or navigator and should have experience in the aircraft involved. Likewise, for missile, or space accidents, the AIB presidents should have expertise and experience in the system involved and must be a missile or space operations officer. AIB presidents must attend the AFSC Board President's Course prior to conducting a Class A accident investigation. Upon receipt of Part I of the Safety Report, the President will focus exclusively on the AIB and is relieved of all other duties.

A legal advisor is appointed by the convening authority who is responsible for insuring full compliance with AFI 51-503. The legal advisor must be a graduate of the AIB Legal Advisor Course. The legal advisor will normally be a field grade judge advocate from outside the mishap wing. A captain may serve if the accident did not involve a fatality. The legal advisor may be from the same wing as the President. The legal advisor is relieved of all other duties upon receipt of Part I of the Safety Report. Additionally, technical advisors from a variety of specialties such as maintenance, personnel, medical and operations will be appointed as necessary as will a technical advisor from the ANG for every accident investigation involving ANG aircraft. This appointment will be with the concurrence of the state Adjutant General concerned.

Safety investigations conducted under AFI 91-204 take priority over accident investigations. Safety investigation personnel are accorded first access to the accident scene, to the witnesses and other evidence involved in the accident.

Accident investigators are forbidden to review privileged documents and privileged source information given to safety investigators.

Before beginning the investigation, the AIB president should consult with the legal advisor appointed by the convening authority. The AIB president should contact the SIB president to determine the status of search and rescue, recovery of remains, and salvage operations. The AIB president at this point should also determine the status of the safety investigation and decide how to proceed. Although the SIB president may not discuss privileged safety information, he or she may relay the facts of the accident and describe the technical reports that will be in Part 1 (non-privileged) of the Safety Report. Upon receiving Part 1, the AIB president should determine which additional tests should be conducted (metallurgy, hydraulics, etc.) Additionally, the AIB president should obtain any other non-privileged information from the SIB, and should also obtain a list of all witnesses interviewed by the SIB.

SIB witnesses may not testify in accident investigations until released by the SIB president. Witnesses who have testified at the SIB must be advised by the AIB that their testimony might be used in potential adverse actions, litigation or claims and the witnesses should be specifically told the differences between testimony provided at a SIB and that provided to an AIB. Those witnesses, however, may not be asked and are not permitted to relate what they told the SIB. Witnesses may provide the same factual information to both safety and accident investigators, but the AIB must gather its information by independent questioning. AIB investigators may not offer confidentiality to witnesses. Witnesses who are suspected of criminal offenses are advised as appropriate of their privilege against self-incrimination.

The two primary sections of the AIB report are a Summary of Facts and a Statement of Opinion. It is written by the AIB president who is solely responsible for its content, including the Statement of Opinion. The latter represents the AIB president's personal opinion regarding the cause or causes of the accident; or if the evidence surrounding the accident is not sufficient to come to an opinion as to the causes of the accident, it provides a description of those factors, if any, that substantially contributed to or caused the accident. The Opinion will be publicly released along with the rest of the AIB report. However, the Opinion cannot be considered an admission of liability by the United States or of any person referred to therein. The Opinion may not be considered as evidence in any civil or criminal proceeding arising from the accident.

Prior to distribution, the AIB report should be submitted to the convening authority's SJA for review and ultimate approval. The remarks and comments of the convening authority and his staff on the draft report are not publicly releasable. The convening authority's approval does not suggest nor denote agreement by the convening authority with the Statement of Opinion of the AIB president. Rather, it is an indication that the report complies with applicable laws and regulations. Once the convening authority approves the report, the report is distributed to a number of offices throughout the Air Force and to next-of-kin and seriously injured personnel. Prior to public release of the report, next-of-kin and seriously injured personnel receive briefings of the results of the investigation. If requested, members of Congress may also receive copies of the report and informational briefings prior to public release.

Within 15 days of forwarding the final report, the AIB president must prepare a post-investigation memorandum to the convening authority's SJA. The purpose of the memorandum is to serve as a formal record of the transmittal of all evidence and other documents to the convening authority. It will contain a list of documents, an inventory of physical evidence, photographs, tape and audio recordings, and a description of the disposition and/or whereabouts of wreckage and other ancillary evidence.

***KWIK-NOTE: Legal advisors to the Accident Investigation Board President are required to be present during witness interviews, and must review all evidence, documents and transcript, and statements prior to inclusion in the President's report.***

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## Boards – Investigative

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**Lt Col Donald C. Mobly, Sep 2007**

**AUTHORITY:** AFI 51-602, *Boards of Officers* (2 Mar 94); AFI 91-204, *Safety Investigations and Reports* (14 Feb 06); AFI 51-503, *Aerospace Accident Investigations* (16 Jul 04); AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 05).

### **PURPOSE AND USE**

Commanders need to be familiar with the concept of administrative boards. Air Force and Air National Guard regulations provide for use of investigative boards in connection with a number of personnel, administrative, and other actions. For example, boards are used for some administrative discharge actions under AFI 36-3209, for investigation of Air Force accidents under AFI 91-204, AFI 51-503, and for other purposes. Commanders have general authority to use a board of officers to investigate other matters where an individual member may face unfavorable consequences in the event of an adverse finding.

### **POLICY AND PROCEDURES**

#### **When to Use and When Not to Use AFI 51-602**

It is Air Force and Air National Guard policy that because of the potential adverse consequences, it is necessary to ensure that each respondent is afforded a full, fair and impartial hearing. AFI 51-602 provides general procedural guidance for such hearings by boards of officers. This directive must be used in conjunction with the specific regulation governing the proposed action, such as AFI 36-3209 for administrative discharges.

AFI 51-602 is specifically made applicable to board proceedings involving (1) separating military personnel from the Air Force; (2) imposing monetary liability on military and civilian personnel, except actions pursuant to AFI 34-202, Protection of Assets, or as to military personnel for Article 139, Uniform Code of Military Justice (UCMJ) claims under AFI 51-502, Personal and Government Recovery Claims; (3) taking any other administrative action where it applies to Air Force military personnel either by regulation or appointing orders.

Since many of the boards provided by specific regulations are covered in other topics in this Deskbook, as reflected in the Related Topics below, this topic will focus on (1) boards governed by AFI 51-602, and (2) general guidance for all types of board proceedings.

#### **Participants**

A board convened under AFI 51-602 must consist of at least three officers, who must be senior in grade to the respondent. Enlisted members may be permitted to serve as board members if permitted by the specific regulation governing the proposed action. Board members may be challenged for cause only. Boards also include a legal advisor, who is a Judge Advocate and acts in a role similar to a military judge in a court-martial. The legal advisor rules on admissibility of evidence and other legal issues and may conduct hearings without board members to assist in clarifying matters. A recorder, who is also normally a Judge Advocate, presents the case on behalf of the government. A military respondent is entitled to be represented before the board, free of charge, by a military lawyer and also to have civilian counsel at the respondent's own expense. Respondents have the right to be present at board proceedings (except during the board's closed deliberations) and to present evidence in their own behalf. However, the right of the

respondent to be personally present is waived if the respondent is in deserter status or civilian confinement, although such a respondent is still entitled to be represented at the hearing by military counsel.

### **Rules of Evidence**

The rules of evidence for investigative boards are different from those applicable to courts-martial. The general rule is that all matters that are relevant and material are admissible before the board. Respondents cannot be compelled to testify against themselves. Any confession or admission by the respondent will be admitted into evidence if it was voluntary. Out-of-board statements by the respondent may be admitted even if the respondent was not advised of rights against self-incrimination under the applicable federal or state Code of Military Justice as long as the statement was voluntary. Hearsay evidence is admissible in boards as long as there is an adequate safeguard for its truth. All witnesses before a board are sworn.

### **Burden of Proof**

The burden of proof in a board is also different from that used in a court-martial. The government must establish the matter by a “preponderance of evidence,” and not the much stricter burden of proof “beyond a reasonable doubt” applicable to a court-martial. A preponderance of the evidence standard means any findings of the board must be supported by a greater weight of evidence than supports a contrary finding.

### **Findings of Fact and Recommendations**

Boards ordinarily make findings of fact concerning the matters referred to the board. For example, an administrative discharge board will be asked to find as a fact by a preponderance of the evidence whether or not the respondent was guilty of the conduct described in the letter of notification. In addition, many individual directives require the board to make recommendations to the appointing authority.

### **Record of Proceedings**

There must be a record of board proceedings and the record must be provided to the respondent. This record consists of at least a summary transcript (but a verbatim transcript, prepared by a court reporter, is required for certain boards), the evidence admitted, and the findings and recommendations of the board. The legal advisor authenticates the board report. The record must be reviewed for legal sufficiency by the Staff Judge Advocate on behalf of the authority who convened the board and appointed the board members.

## **SPECIALTY BOARDS - EXAMPLES**

### **Aircraft Accidents**

The investigation of U.S. Air Force aircraft, missile, nuclear, or space mishaps requires two kinds of special investigative boards. The safety investigation is convened under AFI 91-204. This investigation is distinct from the accident investigation board convened under AFI 51-503. The safety investigation board is designed solely to make findings of fact and recommendations to find the causes and prevent recurrence of mishaps. The investigation is privileged and not subject to release. In contrast, the AFI 51-503 accident investigation board is designed to provide a publicly releasable report of the facts and circumstances surrounding the accident. Further explanation of safety investigation boards and accident investigation boards in this Deskbook is in the topic entitled “AEROSPACE ACCIDENT INVESTIGATIONS AND REPORTS.”

Commanders should consult with their Judge Advocates about the use of investigative and administrative boards. Some of the Related Topics include areas where investigative boards may be used if Commanders determine use of an investigating or inquiry officer is insufficient.

***KWIK-NOTE: Commanders should know their authority to convene and appoint the various kinds of investigative boards.***

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## Commander's One-On-One Meeting with Member - Precautions

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**Lt Col Donald C. Mobly, July 2007**

**AUTHORITY:** Applicable state law and regulations; command discretion.

### INTRODUCTION

One of the important responsibilities of command is to look into and resolve incidents, offenses, complaints and other matters of official interest relating to the unit. Commanders may receive information from various sources, including, for example, anonymous letters or phone calls, Commander's or DoD Hotline communications, Congressional or other legislative inquiries, or complaints from the public or other unit members. When such information indicates that an individual member of the unit may have been responsible for an act or omission requiring an official response, the Commander may want to talk to the member in question and get the member's side of the story.

### PRECAUTIONS - LEGAL CONSIDERATIONS

#### Seriousness of Offense

Commanders must be mindful of several important caveats when considering whether to have a one-on-one meeting with a member to discuss a problem. The first issue relates to the seriousness of the incident or problem. If a member is suspected of committing a serious offense under state law or the state or federal Code of Military Justice, the Commander should let professional investigators, in coordination with the base Staff Judge Advocate, handle any interviews with the suspect. Members suspected of civilian criminal law violations should be questioned by civilian law enforcement authorities. Security Forces personnel or, in certain cases, OSI officials, should question members about military offenses.

#### Advice of Rights

##### Military Justice Actions

Even when the incident is minor, commanders should advise the member of his rights against self-incrimination if the commander suspects the conduct would be an offense under Code of Military Justice. In nearly all cases arising within the National Guard, the State Code of Military Justice will govern with regard to military offenses. Usually, a state Code includes a provision requiring that any person suspected of an offense under the Code be advised of the right to remain silent and the right to military counsel before being asked to give a statement. If a commander, or other military investigator acting in an official capacity, questions a member who is suspected of an offense without advising the member of these rights, any statement given by the member and any evidence resulting from the statement may be inadmissible in a court-martial.

##### Military Administrative Actions

There may be cases where the commander chooses to take administrative action against a member who has committed an offense, instead of prosecuting him/her under the state Code of Military Justice. Such actions may include for instance, administrative discharge. In such cases, the failure to advise the member of the right against compulsory self-incrimination will not automatically render the member's statement inadmissible in an administrative discharge board. The admissibility of a statement in such proceedings is based on its voluntariness. As long as the commander does not coerce the member to make a statement or order the member to confess, it is likely that the statement will still be admissible. However, it is good practice for the commander, or any other military investigator, to advise the member of his/her rights

anytime it is possible that either punitive (court martial) or administrative action will be taken against that member. This practice helps guard against coerced confessions and also helps to ensure that the military discipline system is fairly administered.

### **Civilian Personnel Actions**

In cases involving National Guard technicians who are members of employee union bargaining units, a technician may have the right, under either state law or regulation or pursuant to the applicable collective bargaining agreement, to have a union steward or other union representative present at an investigatory interview of that technician concerning incidents which arose while he/she was on technician status. When dealing with such cases, commanders should always consult with their state labor relations specialist or Support Personnel Management Office (SPMO) before holding a one-on-one meeting.

### **PRACTICAL PROBLEMS**

In addition to the legal considerations discussed above, there are practical problems with the one-on-one meeting.

#### **Problem – Conflicting Recollections**

Such meetings always involve the prospect of varying recollections of what was said and how it was said. The commander may say the member said one thing, but the member may insist on having said something else.

#### **Solution**

1. The presence of a third party observer-witness at your “one-on-one” meeting will reduce the impact of conflicting statements. The witness you select should possess a high level of maturity, as well as good verbal and written skills. The witness should be a person who can be trusted to keep sensitive matters confidential.
2. Another good practice is to make your own written summary of what was said by each party immediately after the meeting. This will refresh your recollection of what was said at the meeting should the need later arise to recall the events occurring at the meeting. The witness should likewise complete a written summary.
3. Commanders may also want to tape record these meetings, but should only do so with the member's knowledge and consent. In certain situations, tape recording the interview may not be advisable even with the member's knowledge because of the “chilling” effect it can have on the “give and take” the commander usually seeks from such a meeting.
4. To the extent possible, commanders should also avoid taking notes during these meetings because it may inhibit the pace of the give and take of the meeting, and interfere with the commander's ability to listen to, and maintain eye contact with the member.

#### **Problem – Member and Commander of Opposite Gender**

Commanders also must be cautious about meeting alone behind closed doors with members of the opposite sex.

#### **Solution**

For your own protection, have another member present who is the same sex as the member being questioned. The “witness” member should be of equal or higher rank to the member being questioned in

deference to the dignity of that member, and should be a supervisor or someone who will follow your direction not to reveal to other unit members what was said during the interview.

## CONCLUSION

The one-on-one meeting may be a good way to get to the bottom of a minor incident or problem, but commanders should be cautious in holding such meetings. Commanders are advised to contact their Staff Judge Advocate in any case where they may be thinking of conducting a one-on-one interview with a member suspected of some offense or misconduct.

***KWIK-NOTE: Commanders should be careful when meeting in private with someone under their command.***

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## Congressional and Legislative Inquiries

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**Lt Col Donald C. Mobly, Sep 2007**

**AUTHORITY:** AFI 90-401, *Air Force Relations with Congress* (1 Jul 98); 10 U.S.C. 1034; OpJAGAF 1997/106, *Privacy Act Concerns Regarding Congressional Correspondence* (16 Sep 97); applicable State law and regulations.

### INTRODUCTION

The Air National Guard receives thousands of legislative inquiries each year from United States Senators and Members of Congress, as well as state legislators. Because of the Guard's dual state and federal missions, the Guard must be responsive to both state and federal legislators. All legislative inquiries, regardless of source, must be handled promptly and with sensitivity.

### POLICY

Air Force and Air National Guard policy is to cooperate fully with the Congress, and to give full and timely responses to congressional inquiries, subject to the following limitations:

1. Classified information must be properly safeguarded. It can be given to Congress only with the consent of the Secretary of the Air Force.
2. Information designated as "For Official Use Only" (FOUO) generally may not be disclosed to the public if that information falls within exemptions 2 through 9 of the Freedom of Information Act (5 U.S.C. 552). However, the Air Force or Air National Guard may release such information to chairpersons or ranking minority members of congressional committees or subcommittees if the information relates to matters within their jurisdiction. If a Commander doubts whether particular "FOUO" information should be disclosed, it is sent to the Secretary of the Air Force for a decision.
3. Personal information about individual Air Force or Air National Guard members must be processed according to the guidelines of the federal Privacy Act (5 U.S.C. 552a, AFI 33-332, 8 Nov 00) and applicable state law or regulations. Without an individual's written consent to release information, the Air Force may provide only general information about the individual. However the Air Force may disclose an individual's records without the consent of the individual member when the information is requested by the chairperson or ranking minority member of a committee or subcommittee of Congress, if the information relates to matters within the committee's jurisdiction. When making such a disclosure, the Air Force should tell the committee or subcommittee members about any sensitive information and the need to safeguard it.
4. Locally sensitive information, such as information on changes in status of units, installations and facilities, may have an impact on states and congressional districts. Therefore, such information must not be released without approval from the Secretary of the Air Force.

### COMMANDER'S RESPONSIBILITIES

Upon a unit's receipt of a Congressional or legislative inquiry, most state headquarters require immediate notification to them for coordination of an appropriate response. In responding to these inquiries, Commanders should use effective writing techniques that avoid the use of military jargon and avoid providing irrelevant information. If a complete response to an inquiry requires research, the Commander should send an interim response pending completion of the full response. Commanders should ensure that the chain-of-command up to and including the Adjutant General, National Guard Bureau, and the Secretary of the Air Force legislative liaison office (SAF/LL) are made aware of congressional visits and matters of

interest to Congress and state legislatures. It is of particular importance to provide timely notice of any congressional investigations or requests for ANG members to appear before congressional hearings. Formal statements to congressional committees ordinarily must be reviewed by higher headquarters prior to distribution.

## **INDIVIDUAL COMMUNICATIONS**

Commanders sometimes become concerned when individual Guard members write to, or otherwise contact, their Senator or Representative about a problem with the unit. Federal law (10 U.S.C. 1034) provides that no person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or in violation of a national security regulation. Some states may have similar provisions with regard to the state legislature. Even in the absence of a particular restriction, it is almost always a serious mistake to try to discourage a member from communicating with a member of Congress.

## **LEGISLATIVE LIAISON OFFICERS**

In addition to the National Guard Bureau and the Secretary of the Air Force legislative liaison functions, many states will have Washington congressional liaison offices. These offices may be the source of some congressional inquiries, and they may provide Commanders with valuable assistance in dealing with Congress. In addition, the state agencies that oversee the National Guard in most states may have legislative liaison offices to deal with inquiries from Congress and from state legislators. Effective use of these resources can make it easier for Commanders to respond to legislative inquiries.

## **STAFF JUDGE ADVOCATE ASSISTANCE**

A unit's Staff Judge Advocate is an additional resource for dealing with congressional and legislative inquiries. JAGs are familiar with the legal and policy issues that may be of concern to Congressmen and legislators, and have information about restrictions on disclosure of information under the Privacy Act, applicable state laws and military regulations. Commanders should consult with their JAGs for assistance in answering congressional and legislative inquiries.

***KWIK-NOTE: Unit Commanders should coordinate with their state ANG headquarters to ensure prompt and accurate responses to congressional and legislative inquiries.***

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## Fraud, Waste and Abuse

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**Lt Col Donald C. Mobly, Aug 2007**

**AUTHORITY:** AFI 90-301, *Inspector General Complaints Resolution* (8 Feb 05); AFD 90-3, *Inspector General – The Complaints Program* (1 Nov 99); 10 U.S.C. 8014; DoDD 7050.1, *Defense Hotline Program* (4 Jan 99).

### INTRODUCTION

The Air Force fraud, waste, and abuse (FWA) prevention, detection, and remedies program is set forth in Air Force Instruction 90-301. Preventing FWA is the primary focus of the program. Detection and prosecution serve to deter fraudulent, wasteful or abusive practices; however, the key element of the program is preventing the loss of resources.

### DEFINITIONS

FRAUD is defined as “any intentional deception designed to unlawfully deprive the Air Force of something of value or to secure from the Air Force for an individual a benefit, privilege, allowance, or consideration to which he or she is not entitled.” Such practices include, but are not limited to:

1. The offer, payment, acceptance of bribes or gratuities or evading or corrupting inspectors or other officials.
2. Making false statements, submitting false claims or using false weights or measures.
3. Deceit, either by suppressing the truth or misrepresenting material facts, to deprive the Air Force of something of value.
4. Adulterating or substituting materials, falsifying records and books of accounts.
5. Conspiring to carry out any of the above actions.

WASTE is defined as “the extravagant, careless, or needless expenditure of Air Force funds or the consumption of Air Force property that results from deficient practices, systems, controls, or decisions. The term also includes improper practices not involving prosecutable fraud.”

ABUSE is defined as “intentional wrongful or improper use of Air Force resources.” This includes misuse of rank, position, or authority which results in the loss or misuse of resources such as, tools, vehicles, computers, and copy machines.

### OVERSIGHT RESPONSIBILITIES

The Air Force Inspector General system is the focal point for the FWA program. AFI 90-301 establishes an independent IG at all active duty and AFRC installations, although ANG units that are associate units on active Air Force installations may use the host Installation IG for complaints and assistance. The Installation IG is organized as a staff function and will report directly to the installation commander. For more information on the IG function, refer to the section in this chapter entitled “Inspector General.”

One of the chief duties of the ANG Installation IG is establishing an active and effective FWA program. IGs are responsible for encouraging unit members to be aware of and to report suspected fraud, waste and mismanagement. IGs are expected to establish an Installation Hotline for reporting suspected FWA and to

publicize the availability of both the installation hotline and the DOD Hotline Controls. The identity of individuals who request anonymity or confidentiality is to be protected to the extent possible. The IG must ensure that no reprisal is taken against those making FWA disclosures, that no one is prevented or hindered from making such a disclosure, and that disclosures are properly investigated and concluded.

The success of the program lies with each individual within the Air Force. Support by both military and civilian members is crucial in preventing and eliminating FWA. Any individual aware of FWA or lack of controls which could permit resources to be wasted or diverted should report the situation to proper officials. Air Force military and civilian members have a duty to promptly report FWA or gross mismanagement; violations of law, policy, procedures, or regulations; an injustice; abuse of authority; misconduct; inappropriate conduct; deficiencies or like conditions, to an appropriate supervisor or commander, to an IG or other appropriate inspector, or through an established grievance channel. Complainants should attempt to resolve complaints and FWA issues at the lowest possible level using command channels before addressing them to a higher level or the IG.

FWA issues may occasionally have an impact on labor-management relations. A person suspected of FWA may potentially file a grievance over investigation of the matter. The specific rights of bargaining unit employees should be considered pursuant to the collective bargaining agreement in effect; however, the possibility of a grievance should not keep the FWA allegation from being properly investigated.

The FWA program is good for you and your unit, despite the fact that it may sometimes seem to be bitter medicine. Let your Staff Judge Advocate assist you in keeping FWA issues in their proper perspective.

***KWIK-NOTE: Investigate and eliminate Fraud, Waste and Abuse.***

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## Freedom to Complain – Military Members

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**Lt Col Donald C. Mobly, Sep 2007**

**AUTHORITY:** 10 U.S.C. 1034; AFI 90-301, *Inspector General Complaints Resolution* (8 Feb 05); DoDD 7050.6, *Military Whistleblower Protection* (23 Jun 00).

### THE COMPLAINT

The Air National Guard permits, and even encourages, its military members and civilian employees to lodge complaints of alleged wrongdoing. Inquiries or investigations concerning complaints of fraud, waste and abuse, discrimination, including sexual harassment, ethics, environmental violations, and civilian labor problems have become common occurrences in today's Guard. Additionally, complaints are made to the Inspector General and to members of Congress, resulting in inquiries and investigations. Military members can also file a complaint of wrongs concerning their Commander's conduct toward them. Under federal and applicable state Whistleblower Protection laws, civilian employees and military members are protected from retaliation when they do lodge complaints.

### THE PROCESS AND SOME RECENT CHANGES

The FY 99 Defense Authorization Act expanded the protections of the Military Whistleblower Protection Act (10 U.S.C. 1034) to cover all Inspector General (IG) military reprisal complaints, regardless of where filed. Under the old statute, only military members who filed their complaint with DoD/IG were entitled to have the results of the investigation reviewed and approved by DoD, or to have the case reviewed by the Board for Correction of Military Records in connection with any related records correction request. As a result, members who initially submitted a reprisal complaint to an Air Force IG office had to be advised of their right to file with DoD and given the opportunity to do so. No longer. The revised statute and regulation gives the same protections to military reprisal complaints filed with any service level IG office.

Air Force IG offices must notify DoD/IG (through SAF/IGQ) within ten work-days of receiving a reprisal complaint and must "expeditiously" conduct a thorough complaint analysis to determine if a reprisal investigation is warranted. If the complaint analysis determines that investigation is warranted, the investigation is initiated by the Air Force. If the complaint analysis determines that further investigation is not warranted, a copy of the analysis must be forwarded to SAF/IGQ, which will in turn provide it to DoD/IG for review. If DoD/IG concurs, the case is closed and the complainant is notified of the result through Air Force channels. If DoD/IG disagrees, it may either retain the case for investigation or task the Air Force to conduct an investigation. Copies of all completed reprisal investigations conducted by the Air Force must be forwarded to DoD/IG (through SAF/IGQ) for review and approval. The Air Force guidance provides that commanders do not have to wait for completion of the DoD/IG review before taking appropriate corrective action. After DoD/IG approval, complainants are notified of the results of the investigation through Air Force channels. The above procedures governing processing of reprisal complaints by lower level Air Force IG offices do not apply to reprisal complaints against senior officials. Senior official cases will continue to be handled by SAF/IGS.

In addition, the FY 99 Authorization Act expanded the time goal for completion of reprisal investigations from 90 to 180 days and eliminated the requirement to conduct post-investigation interviews with complainants to determine if they were satisfied with the handling of their complaint. It also changed the definition of protected communications to include allegations of "gross mismanagement" instead of "simple mismanagement."

All of the above changes have been incorporated into AFI 90-301, *Inspector General Complaints Resolution*, dated 8 Feb 2005. Other changes in that instruction related to reprisal investigations are that it now includes definitions of "abuse of authority," "gross waste of funds," "gross mismanagement," and "lawful communications." In addition, the definition of "chain of command" for purposes of making protected disclosures has been changed to include any

military commander in the individual's chain, without regard to that commander's ability to impose punishment under the Uniform Code of Military Justice. It specifically includes Guard and Reserve commanders.

## THE ANALYSIS

Commanders should understand how the IG looks at complaints made under this statute. The test utilized is sometimes referred to as the 4-point test or the "Acid" test. Here it is:

### An Acid Test for Reprisal

- Did the military member make or prepare a communication protected by statute?
- Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld, following the protected communication?
- Did the official or officials responsible for taking, withholding, or threatening the personnel action know about the protected communication?
- Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?

When answering the fourth question, the following five (5) related questions regarding the personnel action must be addressed in the analysis as separate subheadings: (1) Reasons stated by the responsible official for taking, withholding, or threatening the action; (2) Reasonableness of the action taken, withheld, or threatened considering the complainant's performance and conduct; (3) Consistency of the actions of responsible management officials with past practice; (4) Motive of the responsible management official for deciding, taking, or withholding the personnel action; (5) Procedural correctness of the action. This will allow the IO to determine explicitly whether or not the adverse action was: (a) reprisal (in the case where answers to the first three questions are "yes"); or (b) an "abuse of authority" (in the case where the answer to either the first or third question is "no").

If the answer to the first three questions is "yes" and the answer to the fourth question is "no," then reprisal generally has occurred. If the answer to question 4 is yes, then there has not been reprisal. However, this question is often the most difficult to answer. In essence, this question examines why management or command officials acted as they did. Only if their actions were in retaliation for the member's prior protected communication is it "reprisal" within the meaning of the Military Whistleblower Protection Act and the implementing Department of Defense and Air Force regulations. In examining this issue, it is important for investigators, commanders, and supervisors to understand that this question, like the other three parts of the acid test for reprisal, stands on its own. An investigator will **not presume** the answer to the last question is either yes or no based on the answers to the previous three questions. The presumption would be dangerous. Rather, the investigator must examine, without bias, all of the attendant evidence to determine why an action was or was not taken and whether or not it constituted reprisal.

As an example, assume that Airman X talks to the inspector general on Tuesday—a protected communication—and Lieutenant Y, who knows about the visit, gives the airman a letter of reprimand on Thursday. Despite the timing of the reprimand, it would be dangerous to presume that it was in retaliation for the airman's complaint to the inspector general. The investigator must try to determine why the reprimand was given. The answer may be that the reprimand had nothing to do with the airman's complaint. Rather, the evidence may indicate Airman X is chronically late to work, was late yet again on Wednesday, and received the letter of reprimand for being late to work.

The danger attendant to false presumptions of reprisal in situations such as that described above goes beyond the possibility of finding reprisal where none really existed. Unless commanders are convinced inspectors general and investigating officers will not "presume" reprisal but will fully investigate why an action was taken, they may not take

otherwise appropriate corrective action out of fear that their motivation will be misinterpreted. Such a result could have a potentially disastrous impact on morale, good order, and discipline of the unit concerned. In the absence of appropriate corrective action, Airman X may continue being late to work. Morale would then begin to suffer as other unit members see Airman X's case handled with a different disciplinary standard. Others may even come to believe that making protected communications is a way to shield their own future misconduct from command action.

The Military Whistleblower Protection Act was meant to ensure military members are protected from reprisal. It was not meant to dissuade commanders and supervisors from taking timely and appropriate corrective actions for legitimate reasons. Make sure commanders, supervisors, and investigators at your installation understand the difference and act accordingly.

## **THE RESULT**

### **Substantiated**

The inquiries and investigations resulting from these complaints consume much time and money. Often they are successful in eliminating wrongful conduct or in bringing about necessary corrections in policies and procedures. When such happens, no one seriously argues that the improvements to the program outweigh the costs incurred. It is for that very reason that these laws and complaint procedures exist.

### **Unsubstantiated**

However, many times the complaint, after a thorough inquiry or investigation, is determined to be unsubstantiated. The inquiry or investigation conducted reveals either insufficient or no credible evidence to sustain the complaint. Likewise, if the official responsible for taking, withholding, or threatening the personnel action did not know about the protected communication, then reprisal cannot be substantiated. However, the IO should nonetheless proceed with the Acid Test to determine whether or not the adverse personnel action was otherwise an "abuse of authority." In cases where reprisal cannot be substantiated, the after-effects can nonetheless be painful. In the process of the investigation, commanders, senior NCOs, supervisors, and other military members or civilian employees have been accused of wrongdoing, and have been stigmatized, and in some cases, even vilified by these accusations. Sometimes the complainant is regarded as a stable and even model member, and sometimes not.

## **RETALIATION REMEDIES**

But regardless of who the complainant is, and regardless of the nature of the complaint, after it has been determined to be unfounded, the persons accused justifiably want to know what they can do about the complainant who has "dragged their name through the mud" and put them through the upset and anxiety of enduring an inquiry or investigation which has turned out to be "nothing." The answer, unfortunately, is "not much."

Some of the statutes and regulations creating these complaint procedures, e.g. Whistleblower Protection Act, have built-in protections against retaliation for having made the complaint. In absence of those protections, the shields of command responsibility and practicality effectively limit other remedies. Let's briefly run through the possible remedies for the person originally accused of what has turned out to be an unfounded complaint. No action - military or civilian - usually can be taken against the government, or Commanders who directed the inquiry or investigation, because they were just doing their job. Indeed, Commanders have a duty under the statutes or regulations governing such alleged wrongful conduct to inquire into or investigate these complaints.

Merely because the complaint is determined to be without merit does not necessarily mean the complainant acted out of malicious motive. The complainant may have acted from honest intentions, but with mistaken facts. The person lodging the complaint could have been misinformed, or possibly could not muster sufficient proof to convince the fact finder.

If during the inquiry or investigation of the original complaint, it is determined that the complainant has testified falsely, submitted false or altered documents, has made other misrepresentations, has violated a statute or regulation, or has counseled, encouraged or assisted other persons to do any of the foregoing, swift and appropriate military adverse action can and should be taken against the original complainant.

Absent deliberate falsehoods or misrepresentations by the original complainants, what can you do to them? Militarily, you could attempt some quality force management action, but, the result will likely be a claim of retaliation for having made the original complaint (whether or not the Commander imposing the quality force management action was the subject of the complaint); and the predictable outcome will be a reversal of such action by some higher level of command. Recognize that, for better or worse, institutional policy is to encourage complaints of alleged wrongdoing rather than to discourage them by the threat of adverse action if they later turn out to be unfounded.

Civilly, subjects of the complaint can try to bring a lawsuit against the complainant under applicable state law, perhaps based on some form of defamation of character or damage to their reputation, or for another reason applicable in your state. But, they will have to retain their own private attorney, foot the bill themselves for probably thousands of dollars in legal fees and disbursements (often up front), and even if they win, and obtain a large money award, the likelihood of collecting it from the original complainant is small. Chances are they may not win at all or, if they do, they will win a small money award. Why? Because in defamation or damage to reputation lawsuits, in many jurisdictions, plaintiffs must prove actual damage to their reputation. Yet in many, if not most, cases where the original military complaint is later determined to be unfounded, the original complainant recedes into the background, and the accused person is even more well-thought of, if for nothing else, than for having “weathered the process.” If the lawsuit was based on another cause of action, similar difficulties of proving actual damages may limit the monetary award.

The net result is whether plaintiffs win big (and don’t collect), win small, or not at all, they will probably spend more than they will get back. Additionally, such a lawsuit will only bring unwanted publicity to them, you, your unit and the Guard, and could open up a “Pandora’s Box” of matters better left closed. It can also pit the Commander against the unit members in an adversarial relationship which can only hurt the entire mission.

The bottom line is no matter how much it bothers the subject of the complaint, most often the best course is to just let it pass. Time heals. The only peace of mind may be to just chalk it up to the price that regrettably sometimes has to be paid for being a leader.

***KWIK-NOTE: Allegations of Reprisal are properly investigated by those higher up the chain of command rather than by the individuals who are the subject of the complaint. Upchannel such complaints immediately through IG or command channels for follow on action or investigation.***

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# Inspector General

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Lt Col Donald C. Mobly, Sep 2007

**AUTHORITY:** AFI 90-301, *Inspector General Complaints Resolution* (8 Feb 05)

## INTRODUCTION

Pursuant to AFI 90-301, which specifically applies to the ANG, the authority to direct an Inspector General (IG) investigation is vested only in individuals holding certain positions. These so-called “Appointing Authorities” have the authority to direct investigations, appoint Investigating Officers (IOs), and make final determinations on the findings of investigations directed under their authority. In addition to the Secretary of the Air Force, the Chief of Staff and Inspector General of the Air Force, authorized Appointing Authorities also include the following:

Chief, National Guard Bureau and State Adjutants General;

MAJCOM, NAF commanders and IGs;

Installation and wing commanders (active and AFRC);

IGs in authorized positions at installations and wings, and at State level **if designated in writing** by their respective commander.

Independent Installation IGs will be established at all active duty and AFRC installations and all ANG Wings. ANG units that are associate units on active Air Force installations may use the host Installation IG for complaints and assistance. Air Force Advisors to ANG units serving as Installation IGs will work all assistance cases but forward all IG complaints to the State IG for appropriate action.

## AIR FORCE IG'S AUTHORITY

AFI 90-301 clearly indicates that the IG Complaint Program may not be used for matters normally addressed through other established grievance or appeal channels, unless there is evidence that those channels mishandled the matter or process. If a policy directive or instruction provides a specific means of redress or appeal of a grievance, complainants must exhaust those procedures before filing an IG complaint. Complainants must provide some relevant evidence that the process was mishandled or handled prejudicially before IG channels will process a complaint of mishandling. Mere dissatisfaction or disagreement with the outcome or findings of an alternative grievance or appeal process is not a sufficient basis to warrant IG investigation. Types of inquiries or investigations that are not the proper subject of an IG complaint include but are not limited to the following:

- \*Commander-directed inquiries and investigations.
- \*AFOSI or Security Forces investigations.
- \*Investigations of civilian employees who have specific appeal rights under law or labor union agreements.
- \*Investigations under the authority of the Uniform Code of Military Justice (UCMJ) or the Manuals for Courts Martial (MCM).
- \*Line of Duty or Report of Survey investigations.
- \*Quality Assurance in the Air Force Medical Service Boards.
- \*USAF Mishap or Safety Investigations.
- \*Medical Incident Investigations.

If during the course of an investigation an Air Force Inspector General determines that punitive or judicial action may be warranted, the IG is to consult with both the appointing authority and that person's Staff Judge Advocate to

see if the case should be referred to the Air Force Office of Special Investigations, or if it should be investigated by the commander using the commander's inherent authority to investigate matters under his/her jurisdiction.

Note that special rules and procedures are set out in AFI 90-301 for reporting and processing all allegations or adverse information of any kind against colonel selects and above and GM/GS-15s and above, and complaints involving allegations of reprisal or improper referral for mental health evaluations.

## **THE ROLE OF THE INSTALLATION IG**

The Installation IG is to be the “eyes and ears” of the commander. The IG will keep the commander informed of potential areas of concern as reflected by trends based on analysis of complaint data. He/she is expected to function as the ombudsman, fact-finder, and honest broker in the resolution of complaints. Additionally, the IG is to educate and train commanders and members of the base population on their rights and responsibilities in regard to the Air Force IG system. Finally, the IG’s job is to help commanders prevent, detect, and correct fraud, waste and abuse, and mismanagement.

To fulfill these roles, the IG must be an integral member of the commander’s staff and have free access to the commander. Commanders must ensure their IG’s authority, duties, and responsibilities are clearly delineated. The independence of the IG must be firmly established and supported to overcome any perceived lack of autonomy that would discourage potential complainants and preclude wrongdoing from being disclosed to the IG. The concept of separate full-time Installation IGs (including ANG installations) was implemented to remove any perceived conflict of interest, lack of independence, or apprehension by Air Force personnel as a result of a previous practice of assigning chain of command and IG roles to the same official. To sustain a trustworthy relationship with Air Force personnel, the Installation IG must be independent. Air Force and ANG personnel must be free from any form of retribution, retaliation, or reprisal for communicating with the Installation IG. Where appropriate, the IG should afford complainants anonymity or confidential consideration. The focus of Installation IGs must be the Air Force Complaints and FWA Programs. Any activities that may diminish the effectiveness of Installation IGs in the performance of their complaints management and FWA responsibilities are not acceptable.

Newly assigned IGs and IG staff members are required to attend the Basic Installation IG Training Course, and should do so within 90 days of assignment. Training will be coordinated through the parent-level command IG. Air National Guard installation IGs must be appointed in writing by the wing commander (or equivalent) as the installation IG before attending the course. IGs will train acting, subordinate, or additional duty IGs, IG administrative support personnel, and investigation officers (IOs) to conduct investigations, provide assistance, process complaints, and resolve disputes, as appropriate.

## **RELEASE OF IG RECORDS**

SAF/IG has the authority to release IG records within the DoD and the Air Force to those requiring access to the records in the performance of their official duties. Only the Air Force Inspector General or his designated representatives can approve release of IG records out of IG channels. The Air Force Inspector General grants access to IG records as detailed in Chapter 4 of AFI 90-301.

***KWIK-NOTE: Installation IGs should maintain their independence and freedom to function.***

## **RELATED TOPICS:**

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## Investigation by Commander of Suspected Minor Offenses

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**Lt Col Donald C. Mobly, July 2007**

**AUTHORITY:** Applicable state law or regulation; United States Code, Titles 10 and 32; AFI 51-202, *Nonjudicial Punishment* (7 Nov 03); Uniform Code of Military Justice.

### COMMANDER'S ACTION

Members of the Air National Guard are part of their respective state's militia, but when in Title 10 status are members of the federal Air National Guard of the United States (ANGUS). Depending on their status at the time of a suspected criminal or disciplinary offense, members are subject to different criminal and/or administrative penalties. If you are aware that a member of the Air National Guard may have committed an offense, you should take appropriate action after consultation with the Staff Judge Advocate. Below are listed some of the actions which may be called for in a given case. Whether you, the commander, should undertake the following actions, or appoint another person to do so, depends on the particular circumstances of the case. Generally, because of time constraints and potential legal complexities, commanders will find that the most effective approach is to assign responsibility for investigating suspected minor offenses to the unit First Sergeant or to base-level Security Forces investigators. In the case of suspected serious criminal offenses, it may be appropriate to involve the AFOSI, as well as local, state or federal law enforcement officials. Before making **any** decision on the handling of a suspected minor or major offense, you should obtain the advice of your Staff Judge Advocate.

1. Investigate the facts and circumstances surrounding the incident in question. Seek "first-hand" sources where possible; reliance on hearsay evidence is not advisable. Obtain written statements-- sworn and signed, if possible;
2. Review the facts with the Staff Judge Advocate for the unit to determine if there may have been a violation of the Uniform Code of Military Justice (UCMJ), State military or civilian law, or State regulation;
3. Determine the status of the individual at the time of the incident. Was the member:
  - a. On State Active Duty; or
  - b. Training under Title 32 U.S.C.; or
  - c. In active federal service under Title 10 U.S.C.; or
  - d. In Civilian Status?
4. Determine the current status of the individual, which may have changed since the time of the incident being investigated;
5. Determine whether the member is subject to federal jurisdiction or state jurisdiction;
6. Determine whether administrative or criminal action is anticipated. Administrative actions are non-punitive in nature and include, for example, Letters of Counseling or Reprimand. Criminal action would include non-judicial punishment (*i.e.* "Article 15") under either the UCMJ or state military code, court-martial under the UCMJ or state military code, or prosecution by federal or state civilian authorities;

7. Interview the suspect:
  - a. If the suspect is subject to federal jurisdiction, advise the member of the legal rights under Article 31, Uniform Code of Military Justice.
  - b. If the suspect is subject to state jurisdiction, advise the member of legal rights under the Fifth Amendment to the United States Constitution, State law and regulation;
  - c. Terminate the interview if the suspect requests counsel and arrange for suspect to consult with counsel; and
  - d. Allow the suspect to present evidence;
8. Interview additional witnesses to complete the investigation; and
9. Evaluate the reliability of the evidence and make a recommendation or take appropriate action consistent with the governing state or federal laws and regulations.

### **CHOICES OF ADVERSE ACTION**

There may be a temptation on the part of some Air National Guard commanders to want to court-martial ANG members under the UCMJ. However, ANG members may only be prosecuted under the UCMJ for offenses committed while on active duty under Title 10. If an ANG member commits a UCMJ offense while on active duty but subsequently goes off active duty prior to being charged under the UCMJ, it may be possible to involuntarily recall the member to active duty for purposes of a UCMJ prosecution. You should consult your Staff Judge Advocate if you are presented with such a situation. While the general inapplicability of the UCMJ may frustrate the ANG Commander in the exercise of discipline, it is consistent with the statutory charter of Title 32. For most purposes, ANG members serve under the authority of Title 32, not Title 10. As a result they are subject solely to the jurisdiction of the State military code, if any, for military offenses committed while in a state duty status. You should remember, though, that depending on the offense committed, the member may also be subject to prosecution under federal and/or state civilian law. Once again, your Staff Judge Advocate is the resource you should look to for advice and recommendations.

While a Commander with jurisdiction over a member who has committed an offense has broad discretion to determine the type of action proposed and the severity of the punishment anticipated, the Commander's action must be tempered, well-conceived, just and conducive to good discipline. Since the status of National Guard members is critical in defining the scope of the Commander's options to discipline members, the Commander should review the investigative file with the supporting Staff Judge Advocate before taking administrative or disciplinary action. The Staff Judge Advocate is charged with advising and assisting the Commander in evaluating disciplinary options, but the final decision remains with the Commander.

***KWIK-NOTE: In most cases, the Commander who would take adverse action against the offender should NOT PERSONALLY perform Investigations.***

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## Investigations and Inquiries

Lt Col Donald C. Mobly, July 2007

**AUTHORITY:** AFI 90-301, *Inspector General Complaints* (8 Feb 05); SAF/IGQ “CDI Guide” and “IO Guide.” various specific AFIs and ANGIs authorizing investigations.

### INTRODUCTION

Air Force Instruction 90-301, *Inspector General Complaints*, formally recognizes that Commanders have inherent authority, based upon military custom and tradition, to investigate matters within their own commands, unless preempted by a higher authority. These so-called “commander-directed” investigations and inquiries (CDI) are conducted for the primary purpose of gathering, analyzing, and recording relevant information about matters of significant interest to command authorities. Ultimately, CDIs help the commander to ensure mission capability of the unit. CDIs are the sole prerogative of command and no other authority is required. They are conducted outside Inspector General channels. In fact, AFI 90-301 indicates that except for formal Inspector General Investigations, AFI 90-301 is not to be cited as authority for the commander-directed investigation since its use would undermine the commander’s inherent right to direct investigations. There is no official format for conducting the investigation, but the commander and any investigating officer (IO) appointed under his/her authority are encouraged to use AFI 90-301 as well as the “CDI Guide” at the SAF/IGQ website ([www.ig.hq.af.mil/igq](http://www.ig.hq.af.mil/igq)) as guides. Commander-directed investigations should be conducted at an echelon of command capable of conducting a complete, impartial, and unbiased investigation. AFI 90-301 provides that only SAF/IGS can investigate allegations of misconduct against “senior officials” (O-7 and above and various civilian equivalent categories). Commanders may not involuntarily remove a complaint submitted to an IG and transfer it to command channels for investigation. If an investigation or inquiry is conducted pursuant to a specific regulation that prescribes the procedures to be followed, that regulation should be used.

A CDI should be conducted any time the commander needs facts to make a decision and those facts cannot be easily gathered through established reporting procedures. Commanders should consult with their Staff Judge Advocate before initiating a CDI and appointing an IO. Since the IO is not required to follow the requirements of AFI 90-301 (unless the commander so directs), he should be able to quickly and efficiently gather information and make recommendations to solve the commander's problem.

While historically there has been a distinction between the terms "inquiry" and "investigation," it is not necessary under AFI 90-301 to be concerned about "pigeon-holing" the IO's actions into one of those categories.

The appointment of the IO should be in writing and should outline the scope of the investigation and the particular nature of the allegations and matters to be inquired into or investigated. The IO should be told to make findings of fact and whether the commander desires conclusions and recommendations. Commanders must not appoint IGs or IG staff members as IOs.

The IO should be assigned a specific suspense date.

Investigating Officers should be able to function impartially and give the commander the benefit of their "call them as I see them" efforts.

Generally speaking, there are three main phases of any investigation. These are:

1. Gathering the facts, to include questioning witnesses through oral testimony and obtaining documents;
2. Analyzing the facts, making findings as well as conclusions and recommendations (if requested); and

### 3. Writing the report.

Prior to beginning the investigation, the IO should contact the Staff Judge Advocate for advice. This is especially important if criminal conduct may be involved in the investigation. The IO will need to know under what circumstances a person questioned should receive a rights advisement and what form that rights advisement should take. AFI 90-301, the CDI Guide and the IO Guide provide guidance in this area.

The report of an IO in a CDI case is not privileged although it typically will receive “For Official Use Only” status.

The CDI Guide found on the SAF/IGQ website [www.ig.hq.af.mil/igq](http://www.ig.hq.af.mil/igq) contains comprehensive script formats for questioning suspects and non-suspect witnesses.

***KWIK-NOTE: Every person who conducts an Investigation or Inquiry should have and read AFI 90-301, and the CDI Guide, and should consult with the SJA BEFORE beginning the Investigation or Inquiry.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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## Surveillance

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**Lt Col Donald C. Mobly, July 2007**

**AUTHORITY:** 18 U.S.C. 1385; Executive Order 12333, 46 Fed. Reg. 59941, *United States Intelligence Activities* (4 Dec 81); NGR 500-2/ANGI 10-801, *National Guard Counterdrug Support* (31 Mar 00); AFI 33-219, *Telecommunications Monitoring and Assessment Program (TMAP)* (1 May 2006); Coacher, *Permitting Systems Protection Monitoring: When the Government Can Look and What It Can See*, 46 A.F. Law Review 155 (1999); applicable state law.

### **GENERAL LIMITATIONS**

Surveillance is an activity that implies a security or law enforcement purpose of some type. As such, the *Posse Comitatus* Act may come into play to the extent surveillance activities are engaged in by National Guard personnel serving in a Title 10 status. In general, Title 10 military members may not directly engage in civilian law enforcement activities. Additionally, in connection with National Guard counter-drug operations, NGR500-2/ANGI 10-801 strictly prohibits National Guard personnel serving in Title 32 status from pursuing or targeting specific persons for surveillance.

### **PERMITTED COUNTERDRUG ACTIVITIES**

ANG personnel working in counter-drug are permitted to conduct aerial and surface reconnaissance/observation of airspace, maritime or surface areas (land and internal waterways of the US and territories) for illegal drug activities which include, but are not limited to, cultivation of marijuana or delivery of illegal drugs, suspected drug trafficking airstrips/drop zones/corridors, illegal drug laboratories, suspicious aircraft, watercraft, or motor vehicles. Approved aerial reconnaissance equipment and techniques include, but are not limited to:

1. Radars.
2. Unmanned Aerial Vehicles (UAVs).
3. Aerial visual techniques, including infrared/thermal imagery, and photographic reconnaissance.
4. Photo reconnaissance/film processing.

However, it bears repeating that permissible reconnaissance/observation activities by National Guard personnel **DO NOT INCLUDE THE PURSUIT OR TARGETING OF SPECIFIC PERSONS FOR SURVEILLANCE**. It should also be remembered that military members (both active and ARC) are encouraged to be watchful and report concerning unlawful or unusual activities they become aware of while on duty. For example, if a unit is going to perform an exercise in the desert, there is no prohibition against it performing such an exercise in a known drug trafficking area so that it can report unusual people in the area. Likewise, pilots can be asked to fly a pre-scheduled sortie in a particular area and report back if they see marijuana fields or out-of- the-way airstrips.

This is a complex area of the law. It is vitally important to rely on the Staff Judge Advocate's advice in this area. The SJA should assist in planning missions involving counter-drug activities.

### **MILITARY MEMBERS AND BASES**

Surveillance efforts directed at military personnel or on military installations are not prohibited by law or policy and are permissible. However, physical surveillance of military members should not be initiated

without close coordination with the servicing SJA. The SJA's involvement is necessary in order to avoid potential violations of an individual's constitutional rights.

## COMPUTER MONITORING

As the military's dependence on computers and electronic communication continues to grow, issues relating to the misuse and security of government computers have become more commonplace. The monitoring of military members' computer usage may be employed as a tool to detect computer abuse and maintain secure systems. The general rule is that a government employee using a government computer has no expectation of privacy with regard to information uncovered in the course of official monitoring. All government computer users are repeatedly advised that their use is for official purposes only and is subject to monitoring for lawful purposes, including to ensure that the use is authorized, for management of the system, to guard against unauthorized access, and to verify security procedures, survivability and operational security.

Even though military computers may be monitored for systems protection purposes, it is important to remember that to the extent the monitoring shifts to law enforcement or detection of criminal activity, different rules apply. Systems monitors should not act as an instrument of law enforcement. After initial discovery through systems monitoring of some suspected criminal act, further monitoring becomes a law enforcement activity and must comply with the legal requirements for conducting criminal investigations.

Once again, you are encouraged to seek the assistance of your SJA on issues pertaining to computer monitoring.

***KWIK-NOTE: Before engaging in surveillance activities make sure you have checked with your Staff Judge Advocate for advice and recommendations.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Computer Acquisition and Security	25-6
Criminal Investigations, Prosecution and Reporting – DOD and DOJ	8-12
Ethics	7-3
Fraud, Waste and Abuse	16-7
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United States Property and Fiscal Officer (USP & FO)	25-20
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# Chapter 17, Judge Advocate Matters

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## An ANG Commander's Guide to the SJA

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 Oct 03) (IC 21 Oct 08); AFPD 51-5, *Military Legal Affairs* (27 Sep 93); TJAG Policy Memorandum: TJAGC Standards – 2, *Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct* (17 Aug 05)(with attachments); TJAG Policy Memorandum: TJAGC Standards – 5, *TJAGC Professional Responsibility Program* (17 Aug 05)(with attachments); TJAG Policy Memorandum; Air Reserve Component 1, *Rules and Standards of Professional Conduct for Air Reserve Component Judge Advocates* (17 Aug 05); applicable state law; command discretion.

### INTRODUCTION

This article is specifically intended for Air National Guard (ANG) Wing Commanders. It is provided here in the hope that the SJA will continue to become a more effective component of his/her Commander's team.

### THE SJA AS LAWYER

As the "Advocate" in Staff Judge Advocate implies, SJAs are engaged in the practice of law. From "A" to "Z," they must know the law as it pertains to the military; from "Administrative Discharges" to "Zoning," and everything in between.

Unlike the staff physician or base engineer, SJAs are typically civilian generalists who actively practice a military specialty with which they do not ordinarily encounter in their day-to-day private practice. Consequently, as developments occur while SJAs are at their civilian occupation, they must also stay abreast of the many changes in military law "during the month."

A military lawyer can never stop learning. Military law is constantly evolving, and the SJA must cultivate a "learner's attitude" in order to maintain currency in this specialty. Statistics show SJAs are driven individuals. Indeed, they generally maintain a busy civilian practice or position, while also keeping abreast of developments in military law.

There has been a great deal of discussion concerning the concept of "volunteerism" in the Guard. Overwhelmingly, Air National Guard Judge Advocates "donate" a healthy amount of time and resources from their civilian jobs to the Guard. In fact, few other staff officers will typically devote as much time between drills, necessary to stay current and informed in their particular field, as the SJA. SJAs do not consider themselves as "weekenders" or "part-timers." SJAs are never too busy during the month to solve an urgent problem for their Commander.

SJAs have access to a variety of "Cyberguard" military law resources which keep them informed of breaking developments in military law. For example, all ANG JAGs can log onto FLITE, an electronic legal research tool which brings the universe of recorded law to the SJA's keyboard. Through FLITE, SJAs have access to an e-mail system designed specifically for JAGs to communicate and interact with each other. It's worked so well, an ANG JAG workgroup was developed to share ORI information, on-line, which has opened up new areas for similar on-line sharing.

All JAGs have various Continuing Legal Education (CLE) opportunities, which are actually career requirements, to insure judge advocates remain current in their specialty. In order to maintain their certification, all judge advocates must regularly attend the Annual Survey of the Law (ASOL), and the Reserve Forces Judge Advocate Course (RFJAC) or Staff Judge Advocate Course (SJAC). In addition, many states require their judge advocates to attend state ANG/JA CLE conferences in order to stay abreast of significant state law developments. (These learning experiences are in addition to Professional Military Education requirements.).

### **THE SJA AS “KEEPER OF THE FLAME”**

Your SJA has taken the oath as an “Officer,” but has also been further sworn as an “officer” to uphold the law. To SJAs, their position is not merely a job requiring performance of certain duties. It’s even more than the career as an officer, although that in itself is worthy. More than the requirements of a job or the mandates of a career, the SJA’s professional duty is to maintain the integrity of the military as an institution.

Without detracting from the duty of the Chaplain, as a military legal officer, the SJA also adheres to a “Higher Calling.” SJAs have a dual role of staff officer, with a duty of loyalty to their Commander, and a concomitant independent professional duty, acting as an impartial advisor to their client. The SJA must serve as the “conscience of the Commander,” not only advising the Commander, but also representing the core values of the Air Force as an institution.

The SJA serves directly under the Commander in a support role, and the activities the SJA performs are done to enhance the Commander’s leadership position. The Commander is the direct leader of the indirect client, the Air Force. At a minimum, the SJA is duty-bound to obey the orders of the Commander. Yet, in the same instance, the SJA carries an obligation which transcends merely obeying the Commander’s orders. The SJA has an obligation to exercise independent judgment, and offer advice which is legally sound, even if the solutions are unpleasant to the listener. The lawyer is not called to be an agent of change and has no ethical obligation to give legal advice until asked to do so. However, a good SJA will volunteer legal advice, even without being asked. It’s this independence which differentiates the SJA from other staff officers.

The SJA’s ultimate client is the organization. The SJA supports the Commander; that is, the human being with authority to direct the organization. However, the ultimate client is the organization itself. If the SJA learns that an individual intends to act in a way that will violate the law, the SJA has a higher duty to protect the interests of the ultimate client: the organization, not the individual. One example of this duality is found in the Board or Courts Martial setting, where an SJA’s overriding obligation to justice insures that a Commander does not play any role in influencing the board hearing or courts martial.

Fortunately, the interests of the organization ordinarily reflect those of the Commander. The Commander’s individual goals ordinarily will coincide with those of the institution. But, there may come a time when the Commander proposes action which contradicts the goals of the Air Force. And if in the unlikely event the Commander suggests, pursues or acquiesces to an agenda that is not in harmony with the law, it is the duty of the SJA to act as an “inner voice,” *i.e.*, as a source of self-control which must act independently. But the SJA may have to be the “naysayer” when needed, declining to agree with the boss when necessary.

This duality of loyalty and independence can either make or break a relationship, creating either trust or doubt between the SJA and Commander. But in the unlikely event SJAs feel compelled to exercise this obligation of interposing themselves between the Commander and the ultimate client, the SJA may possibly avoid the occurrence of illegality. Moreover, most Commanders will appreciate the opportunity to openly discuss potential legal problems with a lawyer in the protected environment of attorney-client confidentiality.

Regardless of the independent aspect of the SJA’s duties, it is important to emphasize that the SJA has an overriding duty of confidentiality with respect to the SJA’s client. The SJA has a duty of confidentiality to the Commander. And even if the action proposed by a Commander is illegal, the SJA is under an

overriding duty not to disclose it. The SJA and the Commander enjoy a non-violable, non-disclosable Lawyer/Client Relationship. The information discussed between Commander and SJA is protected under doctrine of attorney-client confidentiality. SJAs may be required, under the applicable rules of ethics, to withdraw their representation, but the SJA must not discuss the basis for taking that action.

### **THE COMMANDER'S COUNSEL**

Having discussed the more onerous duties of the SJA in lengthy detail, it is important to recount some of the more positive aspects of the Commander/SJA relationship.

The Commander and the SJA typically are experienced officers, who have risen through the ranks as fellow unit officers. Frequently, in Guard units, the SJA and the Commander have known each other for a very long time. In many cases, the Commander and SJA have developed a personal friendship over a period of years, serving within the same unit. Having served together in a wide variety of drills, exercises, inspections and deployments over the years, the Commander and SJA have worked through numerous problems together, and have built a relationship of mutual trust and respect.

The SJA's most immediate need is to be a problem-solver. When something gets "broke," the SJA should be considered an integral part of the repair team. Good SJAs are used to being inserted into challenging and responsible activities, and will have honed their problem-solving skills, having learned the art of developing alternative approaches to problems, and pinpointing the best solution. Few other officers can offer the sophisticated analysis that the SJA's training and experience provide.

To do this job, the SJA must be prepared to apply a flexible rule of law and common sense to a variety of tactical or strategic situations. As a result, the SJA should be an experienced field grade officer. The SJA should be a legal generalist, with experience, including a strong background in various areas of the law, with an ability to compose workable solutions "on-the-fly."

After getting the facts in a particular issue, the SJA will need to discuss strategy with the Commander. Does the Commander have in mind a particular result to be accomplished, where the SJA must achieve a desired outcome, if possible? Or, does the Commander want to know all the possible solution scenarios, and then make a selection?

In either case, it's a developed skill to be able to accurately "read" a situation. The SJA must be able to provide understandable, practical assistance to the Commander, along with the flexibility to address unique situations and circumstances. The SJA must have the courage to "tell it like it is," even if he or she expects that the Commander may not agree with the SJA's analysis or recommendation. Lawyers need to be blunt and candid with their clients. But they can still be respectful of that individual as a person.

An SJA may have a preferred solution in mind, and at the same time be able to express a personal preference without appearing pushy or imposing. Good SJAs will know both the limits of their authority as advisor, and possess the wisdom to allow the Commander to call the shots.

### **THE SJA AS STAFF OFFICER**

First and foremost, the SJA must understand the unit mission. Commanders must not only be advised on the full panoply of actions at their disposal, which shall accomplish the mission, they must understand what the right thing to do is. SJAs can meet this need only if they understand the mission and its scope.

The SJA typically is an experienced field officer, steeped in Air Force tradition, and fully committed to duty as an officer in the Air National Guard. The Commander sometimes calls on the JAG to perform non-legal duties. The SJA is committed to being an active participant as a staff operator. The SJA should demonstrate the "we're all in this together" attitude, and should expect to perform selected general staff (line officer) duties.

Judge Advocates have a wide background. While they are professional officers, they continue to be team-players. While SJAs should not be placed in command positions (this would conflict with the watchdog function of judge advocates), they can fulfill a variety of line/field officer functions, at the order of the Commander. However, the legal abilities your SJA can bring to enhance the mission will provide the most benefit. The Commander should understand that the SJA has background in more than the "law." The SJA typically is a skilled diplomat, negotiator, business and management advisor, and public speaker. In short, the SJA is a resource which can advance the unit mission in a variety of ways.

Finally, the SJA's primary superior is the Commander. However, simultaneously, SJAs may have reporting requirements to a variety of superiors. It has been observed that no one can serve two masters. Yet, the base SJA has numerous clients in various higher echelons, some of whom will be making simultaneous demands. These include: NAF/JA, MAJCOM/JA, NGB/JA, TJAG's ANG Council, STATE Military Department, and STATE ANG/HQ JA. Additionally, your SJA may be "plugged into" the Army Civil Affairs mission. However many masters the SJA may serve, the SJA must keep them all balanced, and keep the unit mission in primary perspective.

### **THE SJA AND THE CLIENT**

One of the most common complaints about SJAs is the time it takes to respond and perform an assigned task. The SJA's job is to bring solutions to the Commander, but in some cases, the SJA may become part of the problem itself.

There will always be limiting factors, both internal and external, which encroach on performing the job. Internal limiting factors include problems such as lack of equipment. External factors may include getting the cast of characters assembled to conduct a Board.

These limiting factors are all issues about which the SJA must continue to keep the Commander informed. However, it is not enough for the SJA to identify problems. The SJA should not be shy about asking the Commander for help in getting the things which allow the legal office to better accomplish its job. By articulating solutions to limiting factors, the SJA can help solve problems before the boss is left to fix them in an inspection (or other embarrassing) situation.

It's important for the SJA to discuss the necessary time frame to accomplish a task, whether researching an issue or trying a board. The Commander can't be accused of unfair expectations in concluding a matter if the SJA hasn't provided a realistic time of completion. It's important for the SJA to establish a deadline for completion which is satisfactory to the Commander, and stick to it.

Eliminating breakdowns in communication is the key to avoiding a crisis situation between SJA and client. All too often, things occur to "work-in-progress" during the month, at both the base and in the SJA's private office. The evolving issue can get disoriented and confused. SJAs have to understand that they have been given possession of the ball. That means the SJA must keep all the team-members of the client informed and working the issue together.

One of the SJA's biggest challenges is to prevent problems before they arise. The lawyer has no ethical obligation to give legal advice until asked to do so. But a good SJA will volunteer legal advice without being asked, and will maintain an active program which provides solutions to questions before they are asked. By focusing 20% of the SJA's time on preventive law, this effort will avoid 80% of base's legal problems. A good preventive law program is a cost-effective means of avoiding future trouble, and should be a high priority for both the Commander and SJA.

### **THE SJA AS MANAGER**

The SJA is the operating head of a business unit, the legal office. Managerial competence is measured by productivity. Getting things done on time, and done correctly the first time, are the best measures of an SJA's managerial competence.

Undoubtedly, the biggest day-to-day problem faced by the SJA is balancing competing priorities. As a leader and manager, the SJA must be productive, learning to keep afloat in a sea of requests, deadlines and demands, even when everything has to be done "right now." While there are things Commanders can do to assist their SJAs to gain control over their day, the SJA has the primary responsibility of accomplishing the legal office workload.

Time is a limited resource, and optimizing it is a goal. For example, there are ways in which to control the effect of telephones, meetings, and other interruptions from throwing an SJA off-schedule. There are numerous books and tapes discussing the use of crisis-management strategies to control stressful emergencies and unforeseen problems.

## **THE SJA AS LEADER**

The SJA has a daily relationship with commissioned and enlisted subordinates. SJAs must be fair and approachable to their subordinates, but they still have the right to get things done "their way."

The SJA is the coach on a team typically composed of high achievers. Diversity can foster creativity in solving organizational and operational problems. Professional, cultural and positional differences will occur. The SJA must seek to harness the collective genius of the organization. It's important to involve everyone in the legal office and incorporate their inputs into solutions which will resolve operational problems positively. The SJA must develop and maintain a balanced atmosphere of healthy creativity and dedicated cooperation. Finally, moving staff toward self-leadership and accountability is the only way an SJA can grow the organizational leaders of tomorrow.

The ultimate legal authority is the base SJA, who has the obligation of determining how the law will be interpreted and applied on base. Lawyers do not always agree, and the SJA must define means of resolving differences of professional opinion among JAGs in the legal office. Differing opinions and competing viewpoints are germane to lawyering, and the SJA has the difficult job of keeping them in perspective. The SJA must motivate the staff to be creative team members while retaining overall authority.

One of the biggest managerial problems encountered by SJAs is the inability to delegate. The SJA must overcome the "I can do it better and faster myself" syndrome. Communication between the SJA and subordinates is important. Giving and getting clear instructions, and getting good feedback from co-workers are the only ways to control chaos and develop a cohesive, productive base legal office.

The job of running a base legal office is too complex for a micro-managing SJA. Higher performance in the legal office can only come when the SJA provides the opportunity for everyone to be creative, and makes everyone personally accountable for the end result. At that level, the SJA can capitalize on the freedom that a well-run team creates, by allowing the SJA to focus more attention on larger challenges rather than day-to-day matters.

## **CONCLUSION**

The Air National Guard (ANG) is being asked to do more with less. At the same time, the demands of a base Staff Judge Advocate (SJA) in the Air National Guard are great, and ever-increasing. The ANG is typical of many institutions, facing frequent, cumbersome and complex legal questions. SJAs are called to help Commanders deal with some of their most perplexing problems. Thus, there exists a synergistic effect which makes the Commander/SJA relationship more dependent than ever before.

***KWIK-NOTE: Commanders should actively support their Staff Judge Advocates and rely on them in solving the complex issues which face ANG Base Commanders.***

## **RELATED TOPICS:**

Ethical Guidelines for ANG Judge Advocates  
Ethics

## **SECTION**

17-2  
17-3

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Legal Assistance Program	17-8
Legal Assistance to Unit Members and the Role of the Judge Advocate to the Commander	17-9
Legal Office Operational Guidance	17-10
Paralegals	17-14

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## Ethical Guidelines for ANG Judge Advocates

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** TJAG Policy Memorandum: Air Reserve Component-1, *Rules and Standards of Professional Conduct for Air National Reserve Component Judge Advocates* (15 Oct 02); State Bar Professional Rules of Responsibility and Ethical Conduct.

### INTRODUCTION

On March 31, 1997, the Judge Advocate General of the USAF established 12 ethical guidelines specifically applicable to ANG Judge Advocates. These guidelines have been distributed to all ANG Judge Advocates and contain detailed explanations and examples of prohibited and permissible conduct. The guidelines are applicable to ANG JAGs in Title 32 status (UTA, ADT, two week annual tour, etc.) and also while in civilian status.

They are discussed here because adherence to them will favorably impact your unit and its mission.

### ETHICAL GUIDELINES

The guidelines are summarized as follows:

1. These Rules for Professional Conduct for Air National Guard Judge Advocates [ANG JA] apply when an ANG JA is “not in Federal service.” In the event of conflict between any of these Rules and any state ethics rule, the more restrictive of the two shall govern. When in Title 10 status, the rules of professional conduct applicable to active duty judge advocates apply.
2. An ANG JA is bound by the ethics rules and guidance of each state where admitted to practice and of the state of permanent military assignment. If these rules are in conflict, the rules of the state of permanent military assignment normally would govern. The ABA Model Rules of Professional Conduct should be consulted by an ANG JA for guidance on proper professional conduct.
3. An ANG JA should avoid conduct which may not involve an actual conflict of interest but which may give an appearance of improper representation of adverse interests, and which may have a negative impact on the reputation of the Air Force, Air National Guard, or state military department.
4. An ANG JA in his or her civilian capacity shall not represent a client in a matter adverse to the Air Force or state military department when such representation would create a conflict of interest with respect to duties actually performed by the ANG JA.
5. Except as applicable law or state ethical rules may otherwise permit, an ANG JA acting in his or her civilian capacity shall not represent a client in connection with a matter in which the ANG JA participated personally and substantially on behalf of the Air Force or the state military department.
6. An ANG JA shall not, in the performance of official duties or while in a duty status, participate in a matter in which the ANG JA previously participated in his or her civilian capacity where there is a conflict of interest.
7. An ANG JA, having acquired non-public information through his or her association with the Air Force or National Guard, which information could not have been known to the ANG JA but for that association,

shall not represent a civilian client in a matter in which the information so acquired could be used to the material disadvantage of the Air Force, the National Guard, or any employee, officer, contractor, or agent of either, nor shall the ANG JA reveal such information to any unauthorized person.

8. An ANG JA shall not advertise his or her affiliation as an ANG JA or assignment to a particular ANG unit.

9. An ANG JA should avoid conducting private business during duty hours while on active duty or inactive duty status.

10. An ANG JA shall not solicit clients for his or her private practice or business while in duty status or while in uniform, nor shall an ANG JA solicit clients on military installations, nor in any other manner which trades on his or her military status (other than through advertising permitted under Rule 8).

11. An ANG JA shall not, for compensation, knowingly agree to represent a member of his or her state's military department in connection with a matter for which the individual has an entitlement to legal assistance.

12. An ANG JA may represent both the state in which he or she serves as a member of the ANG and the Air Force when the state and federal interests coincide. In the event of divergent interests, the ANG JA should represent his or her state.

#### **IMPLEMENTATION AND ENFORCEMENT**

A complaint of violation of any of these ethical guidelines will be referred to the state ANG Headquarters Staff Judge Advocate who will notify the appropriate state authorities and forward it, with comments, to the ANG Assistant to TJAG. The ANG Assistant to TJAG shall provide comments and recommendations which will be forwarded, together with the information related to the violation, to TJAG's Ethics Administrator (AFLSA/JACA) for review and final disposition by The Judge Advocate General.

Review of the information/allegation by TJAG's Advisory Committee on Ethics and Standards (Advisory provisions of TJAG Policy Letter No. 2, *Professional Responsibility*). References in Policy Letter Number 2 to "MAJCOM SJA" shall, for purposes of these Rules, mean the ANG Assistant to TJAG. All other provisions of Policy Letter Number 2 not inconsistent with these Rules or the applicable state laws shall apply.

TJAG shall notify the ANG Assistant to TJAG and The Adjutant General of the subject ANG JA's state of any final action taken before notifying the ANG JA of the ultimate disposition of the matter.

***KWIK-NOTE: ANG JAs are subject to adverse action for violating ANG JA ethical guidelines.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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## Inspections - Judge Advocates

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** ANGI 51-801, *ANG Judge Advocate Training Program* (31 Jul 97); AFI 10-401, *Air Force Operations Planning and Execution* (7 Dec 06, IC-2 dated 26 May 09); AFI 90-201, *Inspector General Activities* (17 Jun 09).

### INTRODUCTION

Independent inspections are conducted by MAJCOM/IGs, AFIA, and functional staffs to provide the SECAF, CSAF, and MAJCOM/CCs a status report on unit efficiency, effectiveness, and combat readiness. Inspection types include Compliance Inspection (CI) and the Operational Readiness Inspection (ORI).

### COMPLIANCE INSPECTION (CI)

CIs are used to evaluate unit compliance with higher headquarters directives. They focus primarily on those items identified by the MAJCOM/FOA/DRU commander and functional staffs, and those actions required by law, executive orders, DoD directives, and safety guidelines that, if not complied with, could result in significant legal liabilities, penalties or significant mission impact. Minimum Air Force-level Compliance Inspection Items (CIIs) are outlined in AFI 90-201. It is Air Force policy to minimize inspection footprint to the extent practical, commensurate with MAJCOM/FOA requirements. The use of sampling techniques, combined inspections, credit for unit activity in conjunction with exercises and contingencies, and other measures are encouraged. When used, MAJCOMs will determine the minimum level of unit activity required for inspection credit/ratings.

### OPERATIONAL READINESS INSPECTION (ORI)

ORIs evaluate the war-fighting capability of a unit. Judge Advocates are involved in all phases of the inspection, including deployment and ability to survive and operate (ATSO). The inspection team will evaluate the performance of the unit legal office in scenarios which could include on or off-base disaster response, a hostage situation, an international incident, or any other situation where participation by a Judge Advocate in a command decision is appropriate. The team will also expect the SJA to review the Rules of Engagement (ROEs), and to have briefed unit members on the Law of Armed Conflict (LOAC).

***KWIK-NOTE: Your legal office will be an important element in the unit's CI or ORI.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Legal Office - Operational Guidance	17-10
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# Judge Advocate Support for ANG Units Deploying Overseas

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Updated by Maj John W. Erickson, Jr., July 2009

AUTHORITY: AFI 10-403, *Deployment Planning and Execution* (13 Jan 08);

## PRE-DEPLOYMENT PLANNING

Commanders are encouraged to include the unit's Staff Judge Advocate in the development of overseas deployment plans. Including an analysis of the host country's laws and treaty provisions in the planning process is essential for managing local customs and preventing an unintentional violation of civil and criminal laws in the host country.

## BRING YOUR OWN LAWYER

TJAG and NGB-JA support the policy that whenever possible, ANG Judge Advocates should deploy with their units overseas. Working with the unit at the deployed location provide the Judge Advocates invaluable experience and Commanders have their own lawyers with them during these deployments. For Air Expeditionary Force Deployments, some locations include slots for ANG Judge Advocates.

## PROJECT PITFALL

The deploying commander should insist that before deployment the Staff Judge Advocate contact the local Staff Judge Advocate of the sponsoring unit and become familiar with the foreign laws and customs of the host country. Every ANG JA has access to "Project Pitfall Letters" to assist in this process. Where available, "Project Pitfall Letters" provide brief summaries of legal and cultural concerns in various overseas locations. The letters are available through FLITE, which may be accessed from the TJAG home page. While these documents provide valuable insight, they do not substitute for in-country briefings to deploying personnel which should be obtained in advance of the deployment from the local Staff Judge Advocate of the sponsoring unit.

## NECESSARY BRIEFINGS

Commanders may wish, in coordination with their JAs, to compile the topics listed in the Table of Contents in this Deskbook under "INTERNATIONAL OPERATIONS LAW" together with the "Project Pitfall Letters," for each aircraft commander, to take OCONUS in a "Traveling International Law Kit."

Since personnel deploying overseas *must* serve under Title 10 orders, the commander should ensure that members of the unit are briefed on the Uniform Code of Military Justice (UCMJ), the Law of Armed Conflict (LOAC) and other matters relevant to the deployment. In addition, the members of the unit should be briefed on the need for powers of attorney, wills, and other legal documents which are necessary to protect their families during the member's absence due to the deployment. Sample briefings can be found on the ANG page on FLITE.

Deploying personnel overseas is a serious matter. Because the members of the unit may not be aware of their potential civil and criminal liability during the deployment, complete understanding of these legal issues, before you deploy, is essential to a successful mission. Many of the Related Topics listed below contain items that should be briefed to all deploying personnel before a deployment.

***KWIK-NOTE: Bringing your JAG on a deployment not only provides valuable training for the JAG, but gives Commanders their own lawyer while in a foreign country.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Host Nation Support – Peacetime and Wartime (NATO)	15-10
Interrelationship of U.S. Civil and Military Agencies – The U.S. Country Team	15-11
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Status of Forces Agreement (SOFA)	15-14
War and Deployment Planning – The Judge Advocate’s Role	15-17
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## Judge Advocate Training

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** AFI 51-801, *Training of Air Reserve Component Judge Advocates and Paralegals* (1 May 99); AFPD 51-8, *Assignment, Training, and Management of Members of the Judge Advocate General's Department Reserve (TJAGDR)* (1 Apr 99); ANGI 51-801, *ANG Judge Advocate Training Program* (31 Jul 97).

### REQUIREMENTS ESTABLISHED

ANGI 51-801 establishes the training requirements for ANG Judge Advocates. There are three types: day-to-day performance of the JA's peacetime mission, periodic on-the-job training in an active duty or functionally equivalent environment, and periodic formal school training. Each Judge Advocate is required to the following formal training in each 4 year training cycle: The Reserve Forces Judge Advocate Course (RFJAC) or the Staff Judge Advocate Course (SJAC), two Annual Surveys of the Law, and a two week tour of duty in an active duty legal office or its functional equivalent.

### TRAINING AT ACTIVE DUTY BASE

Training tours must be at least one week (five consecutive, full-business days excluding travel days) in duration, and the two week tour requirement may be performed in separate or consecutive weeks during a training cycle. Tours may be performed in active duty Air Force legal offices or their functional equivalents to include NGB, CONUS, or OCONUS deployments with the ANG JA's assigned unit or with another active or air reserve component unit. While JAGs receive much valuable training at their units, training in areas such as federal military justice law, civil law and claims can only receive adequate attention at an active duty legal office. Remember, while the peacetime role of your JAG is to provide legal services and support to you and your unit, the JAG must also be prepared for a wartime role as an active duty military lawyer. Training at an active duty legal office is usually scheduled directly by JAGs with their active duty counterpart. This training can also be accomplished if JAGs accompany their unit on a deployment to an active duty base. The JAG would then be assigned to work at the base legal office for the duration of the deployment. ANG Judge Advocates in the grades of Major and above are also encouraged to perform a training tour at a MAJCOM or a numbered Air Force legal office.

Training at the active duty legal offices is documented by in the training record maintained in a training folder. At the end of the training tour the JAG will receive a Letter of Evaluation (LOE) from the active duty supervising Staff Judge Advocate. This LOE should be addressed and sent to the ANG JAG s Wing or Group Commander and ANG MAJCOM Assistant.

### REQUIRED CONTINUING LEGAL EDUCATION COURSES

In addition to training at active duty legal offices and at their units, JAGs are required to attend the Annual Survey of the Law every other year and the Reserve Forces Judge Advocate Course or Staff Judge Advocate Course every four years. These schools are sponsored by the Air Force Judge Advocate General's School at Maxwell AFB, Alabama and provide mandatory continuing military legal education for JAGs.

**EFFECT OF FAILURE TO COMPLY**

Any ANG JA who fails to comply with the requirements of AFPD 51-8, *Assignment, Training, and Management of Members of the Judge Advocate General's Department Reserve*, AFI 51- 801, *Training of Air Force Reserve Judge Advocates and Paralegals*, or ANGI 51-801, *ANG Judge Advocate Training Program*, is subject to removal from TJAGDR.

Because compliance with the training requirements is mandatory for all ANG Judge Advocates, Commanders are strongly encouraged to support their JAGs in meeting the requirements necessary for them to remain qualified as JAGs.

***KWIK-NOTE: The training requirements are designed to ensure that all ANG JAGs are continuously trained and kept current in all areas of military law.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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# Law Libraries

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** AFI 51-105, *Automated Legal Information Services and Library System* (09 May 02).

## INTRODUCTION

Every legal office, whether Guard, Reserve, or Active Duty, should maintain a law library with a collection of law books, periodicals, and other materials maintained and primarily used by Air National Guard, Air Force Reserve and Air Force lawyers. Each legal office should have a law library accountable officer (LLAO) who is responsible for conducting an inventory, annual update service and ongoing upkeep of the library materials. The availability of the internet and computer assisted legal research service has allowed a dramatic reduction in the number books needed for an individual office. Each Air National Guard Judge advocate should have reliable access to FLITE, which includes access to Lexis-Nexis and Westlaw. For information on obtaining a FLITE and Lexis-Nexis account, the unit Staff Judge Advocate should contact FLITE at: DSN 493-4179; or: [helpdesk@jag.af.mil](mailto:helpdesk@jag.af.mil).

The law library records should include an acquisition file, started at the beginning of each year, and consisting of invoices or other documents received with publications. The records should also include a disposition file, which is started at the beginning of each year and consists of documents about the disposition of publications in the law library. AF Form 1025, Law Library Shelf List, is a card file form maintained on all publications in the law library. The cards should be filed alphabetically by title, with updates to be shown in addition to any deletions.

All publications in the law library are U.S. Government property. Whether donated or purchased from appropriated funds, each publication must be stamped on the inside cover and on the front edge of the pages to indicate that it is U.S. Government property. Periodicals must be similarly stamped on the front cover.

## ALTERNATE METHODS OF BUILDING AND MAINTAINING THE LAW LIBRARY

Air National Guard legal offices may choose one of two ways to order and obtain materials for their law libraries.

### Local Purchase

One method is to submit a purchase request for the materials needed to the base Contracting Officer using AF Form 9, Request for Purchase. The LLAO should attach any brochure or order form received from the commercial publisher to the AF Form 9. The Contracting Officer will process the request and, if it is approved by the appropriate commander, order the material. The LLAO should keep a copy of the AF Form 9 in a "Suspense" file until the material is received, then mark the AF Form 9 to indicate that the material has been received, and return the Form 9 to the Contracting Office so that the bill may be paid.

The LLAO should maintain a file of all completed AF Form 9s (which lists titles of publication, addresses of publishers and quantities) to facilitate ordering necessary updates for said materials the following year.

Disposition of the law library materials no longer needed is done locally by the LLAO, with the approval of the Staff Judge Advocate, if the LLAO and SJA are not the same person.

The advantages of using the local purchase method are ease in administration, speed of obtaining materials, and local unit control over ordering and disposing of library materials. The disadvantage is that the cost of materials is paid for by the unit.

### **Purchase through the Air Force**

The other method of obtaining law library materials is through the Air Force. In essence, the Air Force through AFLSA/JAS at Maxwell AFB, Alabama, acts as the middleman between the ANG base legal office and the commercial publisher. Any request for purchases of new publications must be made in writing with the name of the item, the address, the telephone number, the cost, the author, a justification for acquisition, and must be sent to the MAJCOM/JA for approval. If the request is not adequately justified, it will be returned.

As each publication is ordered, AFLSA/JAS will send to the LLAO a computer printout showing the title of the publication ordered, the type of publication, the publisher, the book code number, the contract number, and the date of the order. The LLAO should ensure that the publications ordered are received within the time period indicated for receipt on the computer printout. If a publication is not received within the prescribed time period, the LLAO must note the discrepancy on a copy of the printout or in a letter of non-receipt and send it to AFLSA/JAS.

Communications to AFLSA/JAS about law library matters must be routed through the MAJCOM/JA. LLAOs must include their name, the account number, the book code if known, and their DSN number. The communication should be limited to one subject. For example, if it asks for a new publication, it should not also request instructions on how to dispose of excess law library publications.

When books are found to be obsolete or non-serviceable, they must be transferred to the Defense Re-utilization and Marketing Office (DRMO) for disposal. However, the LLAO is authorized to destroy obsolete hard cover law library books that are not needed by any federal agency, including the Free Public Library of the District of Columbia, if their commercial value is less than the cost of destruction. Prior to destruction, the LLAO must ensure the servicing DRMO has determined within the last six months that such books are not needed by any federal agency and their commercial value is less than the cost of destruction.

The advantage of this method is that the Air Force, rather than the ANG unit, pays for the material. The disadvantages include the channels that must be gone through to purchase or inquire about materials, lack of local unit control over the kinds of materials obtainable, the additional time and effort to obtain materials, and the concomitant additional time the legal office is without these materials necessary to provide better legal services to Commanders and unit members.

Commanders should discuss with their Judge Advocates the most practical method of building and maintaining materials for the legal office's library.

### **CORE LAW LIBRARY**

There is a recommended Core Law Library for ANG base level Judge Advocates. Many of these publications are available on the internet, FLITE and/or Lexis-Nexis. The list is not all inclusive and includes the following:

AFI 37-161	<i>Distribution Management</i>
AFI 36-2903	<i>Dress and Personal Appearance of Air Force Personnel</i>
AFI 40-502	<i>The Weight and Body Fat Management Program</i>
AFI 36-2115	<i>Assignments Within the Reserve Components</i>
AFI 36-3209	<i>Separation Procedures for Air National Guard and Air Force Reserve Members</i>
AFI 36-2612	<i>USAFR Reenlistment and Retention Program</i>
AFI 36-3206	<i>Administration Discharge Procedures for Commissioned Officers</i>
AFI 36-3208	<i>Administrative Separation of Airmen</i>

AFI 51           Entire Series (LAW)  
AFI 91-204      *Safety Investigations and Reports*  
AFMAN 23-220 *Reports of Survey for Air Force Property*  
AFI 36-2855     *Judge Advocate General Awards*

Manual for Courts-Martial United States (Most Current Version)  
*The Air Force Law Review*  
*The Reporter*  
USAF/JA Numbered Letters  
Title 10, United States Code  
Title 32, United States Code  
Black's Law Dictionary  
Appropriate state laws and regulations

Additionally, this Deskbook, the *ANG JAG Deskbook*, the active duty version, *The Military Commander and the Law*, and the *Army Operations Law Handbook*, are publications that should be maintained in the law library.

## CONCLUSION

If you facilitate the SJA's acquisition of needed books for the law library, the legal office will be better equipped to provide legal assistance, pre-mobilization legal counseling and preventive law programs on your base, and will better serve your needs and those of your unit members.

***KWIK-NOTE: The adequacy of the base legal office library has a direct effect on the ability of the Judge Advocate or Paralegal to perform effectively.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Contracting Pitfalls	25-8
Counseling	24-7
Federal Government Property Furnished to the ANG	25-10
Fraud, Waste and Abuse	16-7
Inspections - Judge Advocates	17-4
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## Legal Assistance Program

Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** 10 U.S.C. §§ 1044 and 1054; AFD 51-5, *Military Legal Affairs* (27 Sep 93); AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 Oct 03); ANGI 51-504, *Air National Guard Legal Assistance Program* (14 Dec 01); applicable state law; command discretion.

### INTRODUCTION

10 U.S.C. 1044 is the statutory basis for the Air Force to provide (subject to the availability of legal resources) legal assistance to service members in connection with their personal civil legal affairs. The Air Force Legal Assistance Program is set forth within AFI 51-504 and ANGI 51-504 and applies to the Air National Guard.

### LEGAL ASSISTANCE AND PREVENTIVE LAW PROGRAMS DISTINGUISHED

While legal assistance is often given to unit members in a preventive law context, and many of the preventive law materials can be used for legal assistance, the two programs are separate and distinct. The Preventive Law Program provides general information and advice to unit members; and, no-attorney client privilege is created. The Legal Assistance Program establishes a means of assisting individual unit members and entitled family members to advice and limited assistance with civil legal matters (and in limited circumstances, advice regarding criminal matters). An attorney-client relationship is established, and the member is entitled to the attorney-client privilege.

### COMMANDER'S RESPONSIBILITIES

AFI 51-504 states that base legal offices must provide mission-related legal assistance. Mission-related legal assistance is limited to wills and powers of attorney. Non-mission related legal assistance can be provided as resources and expertise permit. Where resources are available Commanders should authorize their SJA to render non-mission-related legal assistance. The authorization should be in writing to the SJA, and should delineate the scope of the SJA's legal assistance duties. This writing will be clear evidence that all legal office personnel rendering legal assistance will be doing so within the scope of their employment and will afford maximum protection from liability for both the legal office personnel and the Commander. Finally, the Air Force, through the respective Commander, is the primary legal client. As a result, legal assistance must be provided as resources and expertise permit.

ANGI 51-504 states that Title 32 status reservists and Guard personnel are entitled to Pre-Mobilization Legal Assistance and Post-Mobilization Legal Assistance only when performing inactive duty for training or full-time National Guard duty. Furthermore, ANGI 51-504 extends the parameters of legal assistance.

### DUTIES OF THE STAFF JUDGE ADVOCATE IN ADMINISTERING THE LEGAL ASSISTANCE PROGRAM

The SJA is responsible for:

1. Determining the scope, extent and hours of the program and ensuring that the Pre-Mobilization and Post-Mobilization programs at the unit legal office provide the level of services specified in the ANGI 51-504;
2. Publicizing the limitations of mission-related and non-mission-related legal assistance;

3. Briefing the other Staff Judge Advocate(s) and paralegal(s) in the legal office on their role in the program;
4. Maintaining reference materials and a local lawyer referral system;
5. Ensuring adherence to the American and state Bar Association Codes of Professional Responsibility and the Ethical Guidelines pertaining to legal assistance which are applicable to all Air National Guard Judge Advocates; and
6. Maintaining liaison with local bar associations, if appropriate.

### **ELIGIBLE CLIENTS**

ANG members of the unit in Title 32 status are *entitled* to mission-related legal assistance. Until the member is called to Federal (Title 10) duty status, this is limited to wills and powers of attorney unless additional legal assistance has been authorized in writing by the appropriate commander.

### **SERVICES PROVIDED**

Non-mission-related legal assistance is generally limited to consultation and advice on personal civil (not criminal) legal matters, and preparation of basic documents. That consultation, advice, and preparation of basic documents is further limited as follows:

### **ADVICE TO MEMBERS**

1. No advice may be given to a member concerning a civilian criminal matter that the member is the subject of; and
2. Unless the Judge Advocate is assigned as that member's counsel in a disciplinary or adverse administrative action, no advice may be given to the member who is the subject of such action. There is one exception to this limitation. Where there is no other Judge Advocate available, a Judge Advocate may be called upon to advise members of their rights in a disciplinary or adverse administrative action without forming an attorney client relationship. This exception only permits the advice of rights. Statutes, regulations, and command discretion governing particular adverse actions prescribe in what adverse actions members are entitled to the assistance of military counsel.
3. Legal assistance attorneys must make clear to the client and third parties that they do not represent the Air National Guard's interests in resolving the client's concerns.

### **DOCUMENTS**

The mission-related assistance authorized for unit members in Title 32 status under the Legal Assistance Program covers wills, powers of attorney, living wills (directives of physicians), notary services, dependant care plans, casualty affairs (death incident to the performance of military duty), employment problems arising from the performance of military duty and subject to the Uniformed Services Employment and Reemployment Rights Act or a similar state statute, landlord tenant problems specifically related to deployment, tax problems specifically related to deployment, matters arising from the performance of military duty and subject to the Servicemembers Civil Relief Act (SCRA) or a similar state statute. Commanders, in their discretion and consistent with AFI 51-504, may permit their Judge Advocates to prepare non-mission-related documents, such as bills of sale and income tax returns. Free notary services to unit members is an effective and economical way for the legal office to enhance its services to base

customers. Non-mission-related legal assistance may also include preparation of letters to third parties. Official unit letterhead will not be used in such letters.

### **COURT APPEARANCES OR REPRESENTATION**

Judge Advocates, as such, are prohibited from making any civilian court appearances in person or in legal documents for unit members, and are prohibited, as Judge Advocates, from representing any unit member in a civilian legal matter.

### **REFERRAL OF CLIENTS TO THE PROGRAM**

Legal assistance is normally available during drill weekends on an appointment basis. The schedule should be left to the SJA's discretion. Be careful with even "genuine" emergencies for legal assistance when the Judge Advocate is not in a duty status, since these situations could lead to the liability protection problems discussed above.

### **REFERRAL OF CLIENTS FROM THE PROGRAM**

At times it is necessary to refer eligible clients to other sources, because the service required is beyond the scope, resources, or expertise of the local Legal Assistance Program.

Other sources include:

1. For court representation or other civilian civil or criminal matters, the Lawyer Referral Service of the local bar association or a list of local attorneys (more than three) if such Referral Service does not exist;
2. Local Legal Aid Society or Public Defender for indigent clients with civil or criminal matters, as appropriate;
3. Other staff agencies as appropriate, such as the:
  - a. Commander;
  - b. Inspector General;
  - c. Military Personnel Flight;
  - d. Chaplain; or
  - e. Social Actions Officer;
4. Outside federal or state agencies, such as the U.S. Department of Labor's Veterans Reemployment Rights Office; and
5. Assigned military counsel for disciplinary or adverse administrative actions that entitle the member to such counsel.

### **CONFIDENTIALITY**

The attorney-client relationship applies to services provided under a unit's legal assistance program.

Information received from clients, attorney work-product, and the files pertaining to the persons served are treated and considered as confidential and privileged and may NOT be disclosed to anyone, except upon the express permission of the client, pursuant to court order, or as otherwise permitted by regulation.

Disclosure may NOT be lawfully ordered by any superior military authority, including Commanders.

All Air National Guard Judge Advocates are bound by the American Bar Association Code of Professional Responsibility the Rules and Standards of Professional Conduct for Air Reserve Component Judge Advocates and their own State Bar Rules.

## CONCLUSION

The above guidance applies to the legal assistance that ANG Judge Advocates may provide while in Title 32 status at ANG bases. ANG Judges Advocate must adhere to AFI 51-504 and ANGI 51-504 when rendering legal assistance. Upon mobilization, ANG members and dependents are eligible for all services permitted under the Air Force Legal Assistance, Notary, and Preventive Law Programs (AFI 51-504).

**KWIK-NOTE: ANG Legal Offices are authorized to provide other categories of mission-related Pre-Mobilization and Post-Mobilization legal assistance, as approved by the State Headquarters Staff Judge Advocate, the Wing Commander, or other appropriate commander, and the unit SJA. Commanders should give their Staff Judge Advocate discretion to determine the scope, extent and administration of nonmission-related legal assistance.**

## RELATED TOPICS

## TOPICS

Advising Suspects of Their Rights	8-02
Confidentiality and Privileged Communications	14-06
Ethical Guidelines for ANG Judge Advocates	17-02
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Legal Assistance to Unit Members and the role of the JAG to the CC	17-09

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## **Legal Assistance to Unit Members and the Role of the Judge Advocate to the Commander**

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**Updated by Maj John W. Erickson, Jr., July 2009**

**AUTHORITY:** AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 Oct 03); ANGI 51-504, *Air National Guard Legal Assistance Program* (14 Dec 01); AFPD 51-5, *Military Legal Affairs* (27 Sep 93); Title 10 U.S.C. §§ 1044 and 1054

Members of National Guard units have certain entitlements to legal assistance. The commander is responsible for informing members of the scope of these legal services within the unit. Members need to know their legal rights and obligations under selected federal and state statutes and regulations. This is particularly important in the event of a call to federal active service, since this change in status can have a dramatic impact on the lives of the members of the unit.

There are a number of methods a commander can use to inform members about the legal assistance program. Articles in unit newsletters, e-mails, briefings at a Commander's Call or a staff meeting are appropriate ways to provide this information.

The services available under legal assistance varies depending on the status of the military member. AFI 51-504 states that "mission-related" legal assistance for Title 32 status Reservists and Guard personnel is restricted to wills and powers of attorney. Dependents are not authorized any legal assistance until the Title 32 member is put into a Title 10 status. ANGI 51-504 states that Title 32 status Reservists and Guard personnel are entitled to Pre-Mobilization Legal Assistance and Post-Mobilization Legal Assistance only when performing inactive duty for training or full time National Guard duty. Furthermore, ANGI 51-504 extends the parameters of legal assistance to include wills, powers of attorney, living wills (directives of physicians), notary services, dependant care plans, casualty affairs (death incident to the performance of military duty), employment problems arising from the performance of military duty and subject to the Uniformed Services Employment and Reemployment Rights Act or a similar state statute, landlord-tenant problems specifically related to deployment, tax problems specifically related to deployment, matters arising from the performance of military duty and subject to the Servicemembers Civil Relief Act (SCRA) or a similar state statute. 10 USC 1044(a)(4) also entitles members of the reserve component and their dependents to legal assistance following a period of mobilization in excess of 30 days for a period not less than twice the length of period served on active duty.

ANG Legal Offices are authorized to provide other categories of mission-related Pre-Mobilization and Post-Mobilization legal assistance, as approved by the State Headquarters Staff Judge Advocate, the Wing Commander, or other appropriate commander, and the unit SJA. However, ANGI 51-504 restricts Judge Advocates from entering into attorney-client relationships on issues involving personal commercial enterprises, unless related to the SCRA or similar state law; criminal matters under the Uniform Code of Military Justice, the local state military code, or any other Federal or State criminal law; standards of conduct issues; law of armed conflict issues; official matters in which the Air Force or ANG has an interest or is involved in the final resolution; legal issues raised on behalf of another individual, even if that other individual is eligible for Pre-Mobilization or Post-Mobilization; and representation of the client in a court or administrative proceeding. For legal assistance that exceeds the scope of ANGI 51-504, the Judge Advocate may refer the member to qualified civilian counsel, or if available in the local area, to a bar referral service.

The Air Force must remain the SJA's primary client. Non-mission-related advice on contracts, leases, estate matters, marital matters, residency issues and tax matters can consume vital legal assets. Such areas of legal assistance must be provided only as resources and expertise permit. The commander may determine the unit is better served if these matters are referred to local civilian counsel through the use of a Lawyer Referral Service of the local Bar Association. Using the local Lawyer Referral Service, rather than referring a member to a particular attorney, avoids the appearance of the Air National Guard favoring one civilian attorney over another.

## **ADVICE ON CIVIL PROBLEMS**

As a result of the consultation, an attorney-client relationship is formed. This means that the communications between the attorney and the member are confidential. The extent of the legal advice provided is within the professional discretion of the Judge Advocate providing the assistance. However, Judge Advocates may not appear in a civilian court or have their name appear on documents submitted to a civilian court as a result of the Judge Advocate advising a unit member in a legal assistance matter. If the matter will require an inordinate amount of attention, is complex, or is beyond the expertise of the Judge Advocate, the matter may be referred to local counsel through the local Lawyer Referral Service for appropriate action.

## **ADVICE ON MILITARY PROBLEMS**

National Guard members do have certain rights to military counsel for military-related legal advice, which impacts their rights as members of the National Guard; or, which is the result of their participation in the National Guard. The classic, but not only, example of this occurs when the Judge Advocate represents the member in an administrative board proceeding. When there is ACTUAL REPRESENTATION of a member by a Judge Advocate, the attorney-client relationship is formed, and all communications between attorney and client are confidential.

However, the MERE ADVICE to a member of rights and options in a military disciplinary action or adverse administration action or the MERE EXPLANATION of regulations, statutes or case law may not necessarily cause the formation of an attorney-client relationship mandating that the attorney-client communications are confidential. The Judge Advocate providing such advice or explanation should so advise the member at the outset. Advice on applicable ethics statutes and regulations never creates an attorney-client relationship.

## **ROLE OF THE JUDGE ADVOCATE**

Commanders should make it clear to the members of the unit that the Staff Judge Advocate is primarily the commander's attorney. As a result, the Staff Judge Advocate may be restricted from providing advice to members of the unit in order to avoid a conflict of interest. Since most units now have two judge advocates assigned, the Staff Judge Advocate should delegate responsibility for legal assistance and adverse actions to the Judge Advocate (Deputy) to retain the ability to advise the Commander on legal issues without a conflict of interest.

While the Staff Judge Advocate is the commander's attorney, after an attorney-client relationship is formed with a unit member, all communications between attorney and client are confidential. Attorney-client communications may be not disclosed to the commander or any third party without the express permission of the client. This restriction binds all attorneys under their professional code of ethics and is essential to the successful operation of this program. A commander may not lawfully order an attorney to disclose such communication, or take adverse action - direct or indirect - against a Judge Advocate for failure to disclose such client communications.

Judge Advocates are required to comply with the code of professional responsibility imposed by the states where they are licensed. All Judge Advocates are licensed attorneys admitted to practice law in a state and are qualified to practice before the highest court of that state. In addition, they are trained military attorneys, designated by the Judge Advocate General of the United States Air Force to represent the government and members of the National Guard for certain purposes. Depending on the jurisdiction of the matter in question, as well as the duty status of the Judge Advocate, Judge Advocates may appear in courts-martial and administrative proceedings. As a result, Judge Advocates must balance a number of legal interests and obligations when providing advice to clients who are also members of the National Guard.

**KWIK-NOTE: The unit's legal assistance program is an important element in achieving mission-readiness. The SJA is the commander's lawyer. The ANG State Headquarters SJA is responsible for monitoring the Pre-Mobilization and Post-Mobilization programs at all ANG legal offices in the State.**

**The Unit SJA is responsible for ensuring that the Pre-Mobilization and Post-Mobilization programs at the unit legal office provide the level of services specified in ANGI 51-504.**

**RELATED TOPICS**

**SECTION**

Command Influence

2-02

Counseling

24-07

Legal Assistance Program

17-08

Preventive Law Program

17-15

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## Legal Office – Operational Guidance

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** *See generally*, AFI 51 Series (Law)

### COMPOSITION OF THE OFFICE

The senior Air National Guard Judge Advocate on a commander's staff is the Staff Judge Advocate (SJA). Other Judge Advocates assigned to the unit are Assistant Staff Judge Advocates. Generally a legal office also has assigned at least one Paralegal Non-Commissioned Officers.

### RESPONSIBILITIES

The SJA provides legal services to the commander, the deputy commanders, the commander's staff, and others as appropriate. Legal services include those duties imposed by law, regulation, judge advocate and command authority, customs in American military jurisprudence, and all tasks related to legal matters as directed by the commander. At the operations Wing or Group level in the Air National Guard, the specific nature of these duties may include, but is not limited to, involvement in:

1. Providing legal support and counsel to the Wing or Group **contracting** activities in all phases of the acquisition process;
2. Reviewing requests filed with the unit under state and federal **Freedom of Information Acts (FOIA) or Privacy Acts**;
3. Reviewing information to determine if a **report of survey** is required, providing legal assistance to report of survey officers, and reviewing reports of survey;
4. Providing advice on strike, **protest and dissident activities** at ANG bases;
5. Providing advice to comptrollers concerning **fiscal law** matters;
6. Providing counsel, furnishing legal advice to commanders and respondents, and affording assistance in **administrative actions** which may **adversely affect individuals**, including boards, hearings and quality force management actions;
7. Providing legal advice and assistance to the **Security Forces (SF)**, reviewing SF reports of investigation, obtaining evidentiary extracts from SF-controlled reports and advising commanders of disposition;
8. Advising commanders and providing support concerning incidents that affect **on-base privileges**, such as driving privileges, use of base exchange, and access to base;
9. Reviewing **enlistment, re-enlistment and retention eligibility**;
10. Advising approved and authorized **private organizations on the base or within the unit** and reviewing their respective constitutions and bylaws;
11. Acting as **Air National Guard liaison** with the **U.S. Attorney, legal departments of all other federal and state agencies**, and administrative or judicial bodies at the local level;
12. Supporting and coordinating with the state headquarters SJA on such matters as **environmental compliance, utility rates, labor law, and personnel issues**;
13. Advising commanders on options in **disciplinary matters**, to include conducting courts-martial, preparing charge sheets and assisting in preparing nonjudicial punishment forms, and advice concerning **search and seizure and inspection questions**;

14. Maintaining an effective **legal assistance program**, to include consultation for personal non-criminal legal matters, preparing wills and powers of attorney, and preparing and presenting articles, briefings, and seminars in support of the **preventive law program**;
15. Providing **periodic briefings** as may be required by law, regulation, policy, or direction;
16. Drafting and reviewing **operations and exercise plans** for compliance with the **law of armed conflict**;
17. Providing advice to commanders and their staff on **international law matters**, such as foreign criminal jurisdiction, host country law, civil litigation, negotiations, treaty interpretation, and agreement interpretation;
18. Providing advice to commanders on all **investigations and inquiries** under their inherent authority or any regulation, methods of initiating and conducting such investigations; and providing legal advice and assistance to investigating and inquiry officers;
19. Reviewing information to determine if a **line-of-duty** (LOD) investigation is necessary, providing assistance and legal advice to officers conducting LOD investigations, and reviewing LOD investigations;
20. Providing legal briefings, advice and counsel to participants in **mobility and contingency operations, and drug interdiction support operations**;
21. Advising commanders on **Posse Comitatus, National Defense Area, and off-base disaster preparedness** legal issues;
22. Providing advice on **Ethics** issues (*See* DoD 5500.7-R, Joint Ethics Regulation );
23. Supporting and coordinating with the Military Equal Opportunity Office in all **EEO matters** including **sexual harassment** and other forms of **illegal discrimination**;
24. Coordinating and monitoring the base **urinalysis program** to ensure compliance with all applicable regulations;
25. Reviewing **unit regulations** and **unit supplements**; and
26. Advising unit members on their **civilian employment rights** as members of the Air National Guard.

*\* Note that except for purely state claims processed by state authorities, the only involvement of Air National Guard Judge Advocates with **claims matters** is to assist in their being forwarded to the nearest active duty Air Force Claims Office or the State Claims Officer for processing and adjudication.*

## **DUTY ASSIGNMENTS**

Judge Advocates **MUST NOT** be assigned additional duties which interfere or conflict with their duties as Judge Advocates.

**The senior Staff Judge Advocate's primary responsibility is to the Wing or Group Commander** as a fair and impartial advisor and member of the Commander's Staff.

The proper roles of the Staff Judge Advocate and Assistant or Deputy Staff Judge Advocate in administrative board proceedings and courts-martial sometimes vary depending on the circumstances of the case and the needs of the applicable commander. However, the variations in those roles must not present ethical problems or conflicts of interests for Judge Advocates and their primary responsibilities.

For example, the senior SJA may properly act as the recorder for a board or prosecutor at a court-martial, or act in the role of the reviewer of the board proceedings or record of court-martial. However, since the senior SJA is primarily the commander's attorney, fulfilling the role of legal advisor to a board or judge in a court-martial will probably be perceived as a compromise of the required impartiality of such roles. Likewise, the senior SJA should not act as respondent's or defendant's counsel, as such role will directly conflict with the senior SJA's primary responsibility as the commander's attorney.

The Assistant SJA may properly act as respondent's or defendant's counsel, or as the recorder for a board or prosecutor at a court-martial; and, may also serve as legal advisor to a board or judge in a court-martial, but only if the senior SJA is not the recorder of that board or prosecutor at that court-martial, since otherwise, the Assistant SJA would improperly function in a reviewing capacity of the actions of the senior SJA.

Of course, even when the Assistant SJA assumes any of the roles suggested above there still remains the potential for at least the perception of a conflict of interest since the Assistant SJA is in the same office as the SJA, reports to the SJA, and normally assists the SJA in advising the commander.

In essence, the SJA should work closely with the State Headquarters SJA in matching needs with available legal resources, while keeping in mind the potential for the perception of a conflict of interest as discussed above.

For support of administrative boards and courts-martial, the SJA should arrange for **defense counsel** representation of the respondent, legal advisors or judges, and recorders or prosecutors, if needed, **through other Air National Guard bases in the state, the Air Force Reserve, or other reserve components in other branches of the service (e.g., Army National Guard), or active duty Judge Advocates**, if available.

If a member of the Judge Advocate's office serves as respondent's counsel, that Judge Advocate should not be involved in evaluating the file or advising the commander about it in any way. Likewise, if a Judge Advocate has evaluated the file or advised the commander in any way, that officer should not act as respondent's counsel without the express, written informed consent of both the commander and the respondent after full disclosure of the potential or actual conflict.

## **EFFICIENCY RATINGS**

The SJA of the Wing or Group should **monitor the training of the Assistant Judge Advocate and Paralegals**, and act as their **rating official**. The SJA's reporting official should be as designated by the senior commander in the Wing or Group.

***KWIK-NOTE:*** *The Legal Office actively serves the commander and the unit in a broad range of issues.*

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Inspections - Judge Advocates	17-4
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Law Libraries	17-7
Legal Assistance to Unit Members and the Role of the Judge Advocate to the commander	17-9
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Staff Assistance Visits - Judge Advocate	17-16

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# Legal Reviews

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** Applicable regulations.

## TYPES

Legal reviews are either formal written memoranda setting forth the Judge Advocate's (JAG) opinion as to the legal sufficiency or insufficiency of a proposed action, or an informal review by the JAG of a letter or proposed action. Formal legal reviews are typically done on reports of survey, line of duty determinations, nonjudicial punishment actions, administrative discharge actions, court-martial records, appeals of performance evaluations, and a wide variety of other administrative actions, investigations and inquiries.

## CONTENT

Sometimes the need for and contents of the legal review is contained in the applicable regulation. Having certain documents reviewed by the JAG is a sound management practice for every commander. A good formal legal review will set forth the regulation or statute that governs the action, the facts of the case at hand, a discussion of the law and how it applies to the facts presented, and finally, a statement of whether the action being taken is in accordance with the regulation. If the JAG finds the action is not legally sufficient, there should be a clear statement of the reason for legal insufficiency and a recommendation, if possible, for corrective action.

## EFFECT

A formal legal review is attached to the action and forwarded for approval or further action. While a legal review is an opinion and not necessarily binding on the approving authority, it is generally given great weight. A finding of not legally sufficient should not be overridden without further discussion with the Judge Advocate. Commanders should keep in mind that a legal review is a way for the JAG to protect the commander, by ensuring that the action to be taken meets the requirements of the law. Commanders who act in contravention of a JAG's legal review may later have to account to higher headquarters or a civilian court, if such actions are the subject of further review or later legal proceedings.

## USE

Commanders increasingly request legal review for proposed unit regulations, unit supplements to regulations, and policy letters to be widely distributed or sent to higher headquarters. This is due to the seemingly ever-burgeoning legal implications -- sometimes apparent to the non-attorney, and sometimes not -- of almost everything a commander does.

For these reasons, it is important for commanders and their JAGs to have a good working relationship with each other, and for commanders to actively seek the legal reviews of the JAGs, and to follow, and have confidence in those reviews.

***KWIK-NOTE: Before acting, the commander should first ask whether the proposed action has legal implications. If the answer is yes, have your JAG review it - formally or informally, as necessary - before taking that action.***

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## Military Justice Authorized Activities of ANG Judge Advocates in Non-Federalized Status

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** Title 10 U.S.C.; Title 32 U.S.C.; AFI 51-201, *Administration of Military Justice* (21 Dec 07); AFI 51-103, *Designation and Certification of Judge Advocates* (7 Dec 04); ANGI 51-801, *ANG Judge Advocate Training Program* (31 Jul 97); ; Articles 27 and 64, Uniform Code of Military Justice (UCMJ); Rules for Courts-Martial (R.C.M.) 405, 406, 502, 506, 1106, 1112.

### INTRODUCTION

ANGI 51-801 requires that Air National Guard (ANG) Judge Advocates perform a two-week training tour with an active duty Staff Judge Advocate (SJA) office at least once every four years. This topic discusses the military justice activities ANG Judge Advocates may perform while on their training tour with an active duty SJA office while in “Title 32” status, and while in “Title 10” status where the individual has been activated as a federal officer; and, for military justice purposes, has a status identical to active duty Judge Advocates.

### TITLE 32 STATUS

Generally, ANG Judge Advocate training is conducted in Title 32 status under the command of the Governor of the state. (32 U.S.C. § 502). Most ANG Judge Advocates who perform their training tours with an active duty SJA office will be in this status. While in this status, an ANG Judge Advocate is not in federal status for the purpose of UCMJ jurisdiction and are not subject to the Air Force regulations unless applicable to the Air National Guard, or even the orders of superior active duty officers (*See* OpJAGAF 1998/117, 17 Nov 98, RESERVES).

This Title 32 status *is* considered a federal status for other purposes; such as Federal Tort Claims Act protection and eligibility for federal benefits such as retired pay. It is distinguished from state status or “state active duty” when the member is serving pursuant to the state code and is actually being paid with state dollars. In many states a guard member serving on state active duty under the state statute is considered a state employee.

### Permitted Activities

ANG Judge Advocates may perform as a staff attorney for the active component SJA. They may also provide legal assistance to federal active duty personnel and their dependents; pretrial prosecutorial and nonjudicial punishment functions and many post-trial duties.

However, even while in Title 32 status, ANG Judge Advocates can gain experience as members of the trial team. They may be designated representatives of the government under Military Rules of Evidence (M.R.E.) 615, and assist the prosecution in that capacity. Furthermore, R.C.M. 506(e) allows an accused to have persons not qualified to serve as defense counsel under R.C.M. 502 seated at the defense counsel’s table. The accused may also waive the qualifications required for assistant defense counsel. An ANG Judge Advocate may also serve as defense counsel in a summary court-martial if an accused waives the qualifications required for defense counsel.

### Impermissible Activities

An ANG Judge Advocate, while in Title 32 status, may not serve as trial or assistant trial counsel in general or special courts - martial; or as detailed defense counsel, associate or assistant defense counsel, in general

courts-martial; or as summary court officer, defense counsel in summary courts, or the government representative in summary courts; or as an Article 32 investigating officer or government representative; or as a military judge unless certified by TJAG. Paragraphs 3.3 and 3.5 allow TJAG to certify a reserve component JAG for a period of time or for a specific assignment. Nor may the ANG Judge Advocate perform post-trial legal reviews under Article 64, UCMJ, and R.C.M. 1112; or review Article 15s for legal sufficiency without appropriate certification. Written requests for certification for ANG Judge Advocates should be made by the active component SJA 10 days in advance.

### **TITLE 10 STATUS**

In Title 10 status, the ANG Judge Advocate becomes an officer of the United States serving in federal status subject to the UCMJ, Air Force Regulations, and the orders of superior active duty officers. During mobilizations, deployments (OCONUS) and other situations in which active duty legal offices are augmented by ANG Judge Advocates, special care should be taken to insure that ANG Judge Advocates are in Title 10 status before being assigned to specific tasks.

### **CONCLUSION**

ANG Judge Advocates who train at an active duty SJA office in a Title 32 status may obtain valuable experience from the functions they may perform while in such status. However, because in Title 32 status they are not commissioned federal officers on active duty, the scope of military justice duties they are permitted to perform is limited.

***KWIK-NOTE: Because of the restrictions on ANG JAs performing certain military justice activities on training tours at active duty bases while in Title 32 status, commanders may wish to authorize their JAs to be in Title 10 status during these training tours to avoid these restrictions.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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## Notarial Acts

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** 10 U.S.C. §§ 936 & 1044(a); Article 136, UCMJ; AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 Oct 03, IC-1 21 Oct 08)); ANGI 51-504, Air National Guard Legal Assistance Program (14 Dec 01); applicable state statutes.

### INTRODUCTION

This topic summarizes the authority of U.S. Armed Forces members to administer oaths; to take affidavits, sworn statements, depositions, and acknowledgments; and to perform other notarial acts.

### WHO CAN PERFORM NOTARIAL ACTS

- All judge advocates, including reserve judge advocates when not in a duty status
- All civilian attorneys serving as legal assistance officers
- All adjutants, assistant adjutants and personnel adjutants, including reserve members when not in a duty status
- All other members of the armed forces, including reserve members when not in a duty status, who are designated by regulations of the armed forces or by statute to have those powers

Special authority to administer oaths for military justice purposes is outlined in UCMJ Article 136. Title 10 Commanders and persons to whom the general authority to order searches upon probable cause has been granted under MRE 314(d) are authorized to administer oaths or authorizations for this purpose.

Generally, notarial acts provided by the foregoing individuals will be valid for all purposes. A raised seal need not be used however a notary log must be maintained.

### WHO CAN NOTARIAL ACTS BE PERFORMED FOR

- Members of any of the armed forces
- Other persons eligible for legal assistance under 10 U.S.C. §1044 or DOD regulation
- Persons serving with, employed by or accompanying the armed forces outside the U.S. Puerto Rico, Guam and the Virgin Islands
- Other persons subject to the Uniform Code of Military Justice outside the U.S.

Your state law may also authorize certain members of the National Guard to act as notaries under certain circumstances. Check with your SJA to see if your state law has such a provision.

### SUMMARY

The above statute and regulation authorizes certain individuals by virtue of their military status alone to perform notarial acts. Regardless of the source of authority to perform notarial acts - federal or state statute or regulations - if the person is authorized to perform a notarial act, that notarial act is VALID.

***KWIK-NOTE: At least one person, and preferably both attorneys and paralegals in the legal office should be Notaries Public in the state where your base is located.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Investigations and Inquiries	16-11
Living Wills	23-17
Mailing or Delivery - Affidavits and Certificates of Service	24-10
Paralegals	17-14
Powers of Attorney	23-19
Status of National Guard Members	11-7
Wills	23-21

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# Paralegals

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Updated by SMSgt Frank Lehto, October 2009

**AUTHORITY:** AFI 36-2101, *Classifying Military Personnel (Officers and Airmen)* (7 Mar 06); AAFP 51-8, *Assignment, Training, and Management of Members of the Judge Advocate General's Department Reserve 9TJAGDR* (1 Apr 99); AFI 51-801, *Training of Air Reserve Component Judge Advocates and Paralegals* (1 May 99); TJAG Policy Letter 4, *Paralegal Personnel Recruiting* (4 Feb 98).

## INTRODUCTION

As the work load of ANG Judge Advocates has increased over the years, so has the need for well-trained paralegals. This topic discusses the training, tasking and skill level requirements of Paralegals in the Air National Guard. Presently, each ANG flying unit is authorized two Paralegals: the Law Office Superintendent (LOS) with an authorized grade of E-7 (MSGt) and a technician, with an authorized grade of E-6 (TSgt).

## DUTIES

The Paralegal Career Field encompasses all functions relating to the practice of law, including, but not limited to: military justice, administrative boards, accident and other investigations, depositions, and other legal proceedings; conducting legal services for Commanders and Air National Guard members as authorized by applicable state and federal law; preparing and maintaining legal documents under the direct supervision of Air National Guard attorneys, in compliance with American Bar Association Standards; investigating claims filed for and against the Air National Guard; and investigation and trial assistance in support of both judicial and non-judicial punishment actions under applicable state or federal law.

## REQUIREMENTS

Basic requirements for entry into the 5J0X1 Career Field include the ability to type at a minimum rate of 25 words per minute, good speaking ability, no previous military judicial or non-judicial convictions, and no civilian convictions (except for minor traffic or similar offenses). Also required is an interview with an affirmative recommendation by an ARC or active duty SJA and LOS. Since Air National Guard paralegals are the only paralegals assigned to ANG legal offices, they must also possess excellent organizational skills, have a working knowledge of the Air Force filing system, be familiar with the maintenance of a functional publications library, be able to attend all scheduled Unit Training Assemblies (UTAs), and possess a high degree of self-motivation. Paralegals should also maintain the highest standard of dress and personal appearance.

The major commands have determined that paralegal positions are essential in ANG units gained by the respective MAJCOMs in time of national emergency, and expect paralegals to be qualified to perform these duties with minimum training upon assignment to active duty legal offices. In the event of mobilization, ANG paralegals could be assigned OCONUS or as backfill for deployed active duty forces.

## TRAINING

Paralegals **must** be trained to perform the functions of civil law, military justice, claims and other related tasks. Training in these subject matter areas, as well as periodic exposure to an active duty legal office environment, is an important aspect of paralegal training. Additionally, Paralegals should be knowledgeable in the areas of contract law, fiscal law, labor law, environmental law, as well as in the law and military justice codes of their respective states.

Paralegals are **required** to complete a training tour of not less than ten (10) working days shall be performed by each paralegal with an active duty legal office at least once every four (4) years. More frequent tours are encouraged

if circumstances permit.

Training tours must be coordinated through the NAF liaisons or MAJCOM ANG Assistant and are subject to the prior approval and concurrence of the affected active duty legal office. The LOS of the active duty legal office must be contacted in advance to arrange a training schedule in those areas in which the paralegal requires training. The training schedule will include not more than twenty-five percent (25%) of any "front desk-reception" duties. If circumstances permit, paralegals are encouraged to deploy overseas with their units. Deployments provide invaluable experience for paralegals working in an active duty legal office in a foreign country. All overseas deployments must be coordinated with the TJAG ANG Council OCONUS Deployments Coordinator, or similar position.

Paralegals are placed in positions of high visibility and are expected to possess a depth of knowledge, wide ranging experience, speaking and writing ability, counseling skills and managerial talent. Professional military education and paralegal qualification training, whether in-residence or by correspondence course, are essential to obtaining and maintaining these skills. Paralegals are to be encouraged to take PME courses in-residence and as soon as possible after becoming eligible. Mandatory skill level requirements and refresher courses offered by the United States Air Force such as the law office management course (LOMC), claims and tort litigation course (CTLC), and computer training classes should be accomplished in those years between training tours in active duty legal offices. The Reserve Forces Paralegal Course (RFPC) must be attended at least every four (4) years. Each Paralegal must also attend the Annual Survey of the Law (ASL) every other year.

The **Staff Judge Advocate is responsible** for the training of paralegals; however, paralegals are individually responsible for developing and maintaining the skills and currency of experience to be immediate and effective performers in accordance with all tasks outlined in the Paralegal CFETP. The Staff Judge Advocate is also responsible for seeing that the paralegal attends required periodic paralegal courses and conferences.

The Air Force Form 623 (OJT) is maintained for all paralegals until they are promoted to MSgt. For MSgt paralegals in a retraining status, training records are to be maintained until they have attained their 7 level. A training record file, separate and apart from the records maintained in Air Force Form 623, is to be set up and maintained by each paralegal regardless of grade. A record of the paralegal's annual training accomplishments (end of tour report), school tours, PME and correspondence course completion, conference attendance, additional duty assignments, and military/civilian recognition must be maintained in the file.

ANG paralegal training is an item of special interest during staff assistance visits. The Senior Judge Advocate should set up a training program of a one (1) hour period during each UTA day. This one (1) hour period should be utilized for proficiency training in specific areas (*i.e.*, environmental law, board preparation and presentation, military justice, labor law, contracts, fiscal law, LOAC, ROE, etc.), review of upgrade training and PME, compliance with the Paralegal CFETP, and projection of mandatory in-resident schools (*i.e.*, Paralegal Apprentice, Craftsmen Course, RFPC), and other areas of specific interest regarding training.

ANGI 51-504

### **PROMOTABILITY TO MSgt**

Paralegals in the LOS position are authorized to be promoted to MSgt. All commanders, upon the advice of their Staff Judge Advocate, should promote qualified paralegals to this authorized grade.

### **CONCLUSION**

Because of the ever-increasing necessary training requirements for paralegals, commanders should not only help recruit and retain superior personnel for these positions, but should also provide maximum support and encouragement to ensure paralegals are able to fulfill these training requirements.

***KWIK-NOTE: Paralegals are extremely valuable to the Air Force and Air National Guard. Recruit and retain only superior personnel for these positions, and support their training.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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# Preventive Law Program

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**Updated by Maj John W. Erickson, Jr., July 2009**

**AUTHORITY:** AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 Oct 03); AFPD 51-5, *Military Legal Affairs* (27 Sep 93); TJAG Policy Letter 18, *Preventive Law and Legal Assistance Policy* (4 Feb 98); applicable state law; command discretion.

## INTRODUCTION

The purpose of the Preventive Law Program is to educate commanders, members and their families on legal issues to prevent problems and reduce the time and resources needed to resolve legal problems. Preventing legal problems enhances Command effectiveness and readiness, especially during periods of mobilization and deployment.

## UNIT MEMBERS AND PREVENTIVE LAW

### Commander's Responsibilities

All ANG Commanders, through their Staff Judge Advocate, should establish a Preventive Law Program for their unit which covers a defined range of permissible subjects, and should encourage their members to contact the SJA with any legal problem they have; and perhaps more importantly, that they think they might have.

### Objective of Preventive Law Program

The objective of your program is to provide information to educate Air National Guard members about laws and legal procedures they need to know to avoid unnecessary problems in their personal and military lives.

### Who Runs Your Program?

The unit Preventive Law Program should be administered by your Staff Judge Advocate. The SJA should be responsible for obtaining the necessary materials for an effective program responsive to the needs of the unit members, and for disseminating the information in ways that will fulfill those needs.

### Sources of Materials

Fortunately, there is a wealth of material available, much of it free.

#### Air Force Judge Advocate General Project Pitfall Letters

These are a series of letters highlighting the laws, customs and practices in almost any country where ANG members travel in the performance of duty. The letter for the particular country should be briefed to personnel deploying to that country, and all aircraft commanders should have an updated set of the letters included in the materials they take on overseas missions.

### In-Country Law Studies

These are in-depth analyses of the laws, customs and practices of foreign countries, and should be briefed to all personnel deploying to these countries. You should advise your Judge Advocate of upcoming foreign deployments far enough in advance so your Judge Advocate can contact and obtain, from the active duty base legal office at or nearest the deployment site, the in-country law study for that country.

### TJAG Policy Letters

These are a series of letters written by the Judge Advocate General of the United States Air Force on a variety of subjects affecting all Judge Advocates and “blue-suit” military members. They are periodically updated and every ANG base legal office should have access to them.

### Paired-Base System

Each ANG unit legal office should be paired with an active duty base legal office, and the personnel from each office should arrange for the active duty legal office to regularly send the ANG unit Staff Judge Advocate all pertinent materials the active duty legal office receives from the gaining MAJCOM and Numbered Air Force (NAF). This system was established because there is no other way for ANG unit legal offices to receive these MAJCOM and NAF materials.

### Your Base Law Library

As discussed in the topic in this Deskbook entitled “LAW LIBRARIES,” Commanders should support the obtaining of the required materials for the base law library. In addition to the required materials constituting the “Core Law Library,” which every ANG base law library should have, there is much valuable material published by the Bar Association in your state which is usually not too expensive, and in some states may be discounted or even free for government or military organizations. These materials consist of pamphlets, books, forms books, etc., and provide a wealth of specific information about your state’s laws.

### Training

You should send one of your JAGs to training courses offered by both the Air Force at Maxwell AFB and the Army at Charlottesville, Virginia. Such courses provide a wealth of information for judge advocates, commanders and unit members.

### ANG Commander’s Legal Deskbook

The vast majority of the topics in this Deskbook, when supplemented by applicable state law, are suitable, with appropriate adaptations, for your Preventive Law Program. Indeed, the major premise of the Deskbook is preventive law -- for commanders and unit members. The Deskbook is ANG-specific, offers a lot of practical advice, and provides many topics in briefing formats and with forms and checklists. You may wish to include topics on international law related matters in the materials that aircraft commanders take with them overseas.

### **Methods of Dissemination**

Some of the methods of getting the preventive law information out to the field include:

1. Oral presentations at:
  - a. Commanders’ Calls;
  - b. Staff Meetings;
  - c. Base Committee Meetings;

- d. Meetings of Private Organizations and Clubs;
  - e. Newcomer's Briefings;
  - f. Ancillary Training Briefings;
  - g. Commander and First Sergeant Seminars; and
  - h. Pre-Mobilization Legal Counseling Briefings;
2. Written Presentations through:
    - a. Base Newspaper Articles;
    - b. Periodic Bulletin Notices;
    - c. E-Mailed Information;
    - d. Unit Bulletin Boards; and
    - e. Handouts and Pamphlets on Appropriate Topics of Interest;

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3. Base Television and Radio Presentations; and
4. Cooperative Efforts with Other Staff Agencies.

### **“Guts” of the Program**

The frequent dissemination of a wide range of materials on topical subjects in a variety of media, and permitting unit members full access to the Staff Judge Advocate for legal assistance are the two main ingredients of any effective preventive law program. Commanders can ensure the effectiveness of their programs by encouraging their Judge Advocates to obtain and disseminate the necessary materials, and to provide legal assistance to unit members consistent with the needs of those members and the Judge Advocates' other duties.

In today's society, almost everything we do, personally or professionally, has potential legal ramifications. Our conduct is controlled by law, and deviations from appropriate conduct in a given situation, however innocent, often have adverse and far-reaching legal consequences. It is the avoidance of these adverse consequences that is the major premise of the concept of preventive law.

The basic premise of preventive law is that education will help our military members to avoid situations that may have adverse legal consequences and to take care of their affairs in manner that avoids legal issues.

This topic will be discussed in two parts: (1) the commander, and the decision-making process, and (2) the commander encouraging all unit members to practice preventive law in their personal and professional lives.

## **COMMANDERS' DECISIONS AND PREVENTIVE LAW**

### **Law is Pervasive**

Not many institutions today are more heavily regulated than the military. As an Air National Guard Commander, your actions are governed by rules issued by multiple levels and governments, and include:

#### **Federal**

1. Statutes;
2. Regulations (Civilian);
3. Directives;
4. Air Force Instructions;
5. Air National Guard Instructions;

6. Local Policy Directives;
7. Court Decisions;
8. Messages; and
9. Policies from Civilian Agencies; DoD, the Air Force and the NGB.

### **State**

1. Statutes;
2. Regulations (Civilian);
3. Instructions and Policy Directives (Military);
4. Court Decisions; and
5. Policies.

### **County and Municipal**

1. Ordinances;
2. Regulations; and
3. Rules.

To compound matters, you have to deal with different rules for military and civilian personnel. To make things a “bit” more complex, for military personnel you need to know the different rules for AGRs, technicians and traditional Guard members, and for civilian personnel, the different rules for federal technicians and state employees. You also need to know which set of rules applies to which individuals based upon their status at a given time. What is more, the rules often overlap in application.

### **The Modern Commander**

Today’s ANG Commanders accept the fact that because so much of what they do may have legal consequences, an ever-increasing part of their overall responsibilities involves taking steps to prevent problems from occurring. They realize, that in the long run, prevention is less expensive and time-consuming, and more conducive to effective mission accomplishment .

### **Think Preventive Law – the Step-by-Step Process**

But what steps can you take to help recognize a situation that has potential adverse legal consequences?

What we are proposing here is a sequential problem-solving or decision-making technique or approach for you to use for EVERY problem which confronts you and for every decision you have to make. The initial steps involve your mental approach to problem-solving and decision-making. If you develop this approach or technique and follow these steps, you should virtually eliminate the likelihood of getting “burned” later for not having considered the potential legal consequences of a given situation.

Because so much of what you do has legal consequences, the first step in your decision-making process is to assume, until you are advised otherwise, that EVERY SITUATION YOU DEAL WITH has some legal consequence. You may not know what those consequences are, or if they will affect your decision making process but if you proceed from the outset as if there may be those consequences, you will drastically decrease the likelihood of adverse consequences occurring later because you did not consider them before you made your decision.

With all the sources of law that may impact one of your decisions, it is impossible for you to know “off the top of your head” when you are first confronted with a matter that requires your decision, where all the pitfalls lie or how deep they are. Your experience may have already provided you with some sense of potential legal consequences but you may not always know the exact nature or extent of those consequences..

The second step is to fully educate yourself on the subject area; this usually means that you should consult with your Staff Judge Advocate to help you identify specific legal issues or guidance.

Before you talk to your Staff Judge Advocate you can use this Deskbook, and other resources to assist you in understanding some of the legal issues that may be involved in that situation. After reading the materials relating to your subject, you should have more knowledge and practical insight about it, and you will know what staff people you need to consult, and what to focus on with them when you do.

Finally, consult your staff including your Staff Judge Advocate. Since you will have educated yourself on the subject area before the consultation, you will know what questions to ask to make a decision that fully considers any legal consequences involved.

It saves you and your staff time if you learn the basics of a subject yourself before consulting them for one thing it will help you identify what facts or factors are important to you analysis and decision making process.

### **Effect of the Process on Commanders**

As you use this approach more and more, it will become second-nature. You will find that the more you use it, the keener your “feel” will be for when a decision before you has or may have adverse legal consequences. As you use this approach and gain experience as a commander, you will develop the “sixth sense,” “red flag” or “bells and whistles” system to help you recognize and seek to avoid adverse legal consequences. No matter how well developed your “sixth sense” becomes you should always consult your Staff Judge Advocate to make sure you are on target and that there has not been a change to the relevant laws or regulations. This process is designed to facilitate communication between you and your SJA.

### **CONCLUSION**

Commanders who develop the decision-making approach suggested in this topic will reduce the number of adverse legal consequences emanating from their decisions. Commanders who, in coordination with their Staff Judge Advocates, establish an effective preventive law program will have unit members better able to perform their duties, improve retention, and will more effectively accomplish their missions.

This topic should be read in conjunction with the topic entitled “LEGAL ASSISTANCE PROGRAM” in this Deskbook since much of the legal assistance provided your unit members is related to preventive law.

***KWIK-NOTE: Commanders and unit members should THINK PREVENTIVE LAW.***

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## Staff Assistance Visits - Judge Advocate

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** Staff Assistance Visits (SAVs) are accomplished by custom and are a function of Supervisory Authority by HQ USAF, MAJCOM or a NAF over base legal offices.

### PURPOSE

Staff Assistance Visits (SAVs) have been occurring more frequently in recent years at ANG legal offices. While such visits may be conducted by high-ranking active duty Judge Advocates in conjunction with their SAVs to nearby active duty stations, the more likely visitor is an ANG Judge Advocate Colonel assigned to the MAJCOM as the ANG Assistant to the MAJCOM Staff Judge Advocate. The purpose of the visits is to ASSIST RATHER THAN CRITICIZE.

### JUDGE ADVOCATE'S DUTIES

Base level ANG Judge Advocates have very specific guidance to help them prepare for SAVs and may also obtain tips on preparing for such visits from the ANG liaison to the numbered Air Force for your base. Your Judge Advocates should also have sample briefing formats and checklists to prepare for SAVs.

### COMMANDER'S PARTICIPATION

As commander, you should anticipate a personal conference with the officer conducting the SAV, usually at the end of the day, when the visitor has had an opportunity to evaluate your Judge Advocate function and related areas such as the urinalysis program and the weight control program. As commander you should anticipate and be prepared to discuss inquiries concerning the status of computerization in the legal office, the quality and ambiance of the legal office facilities, and your use of your staff within the Judge Advocate office. If you want to demonstrate the high regard you have for your legal office staff, you may want to volunteer to personally "in brief" the visitor on your operational mission and possibly share a meal with your legal office staff and the visitor if the visitor's and your schedules permit. A letter from you to the visitor in advance of the visit can also help set the tone for a cooperative and helpful SAV.

### CONCLUSION

A successful SAV results in the legal office receiving valuable tips for more effective operation, which leads to better legal services for your unit.

***KWIK-NOTE: Commanders should actively support their Judge Advocates during SAVs from other units, components or higher headquarters.***

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## TJAG's ANG Council

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Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** ANGSCR 110-1, *Air National Guard Judge Advocate General's Council (TJAG's ANG Council)*.

### FUNCTION

The TJAG's ANG Council counsels and advises The Judge Advocate General (TJAG), United States Air Force, and the Director, Air National Guard (NGB/CF), concerning matters regarding the Air National Guard Judge Advocate and Paralegal programs, policies and training, and performs other special assignments for TJAG and NGB/CF as directed.

The Council is the pulse of the ANG Judge Advocate and Paralegal programs as well as the eyes and ears of TJAG and NGB/CF for ANG Judge Advocate and Paralegal affairs. The Council has developed and implemented, and monitors the ANG Judge Advocates' and Paralegals' Training Regulation and the Rules for Professional Conduct for all ANG Judge Advocates. It was under the auspices of the Council that the ANG Commander's Legal Deskbook has been published and maintained.

### MEMBERSHIP

The TJAG's ANG Council is composed of the ANG Assistant to TJAG, currently a Major General's position, who is also chair of the Council, ANG JAG MAJCOM Assistants, who are the ANG JAG Liaisons to those major commands, and a Senior Enlisted Advisor who is also the Paralegal Career Field Manager, in the grade of E-9. There may also be up to six other regular members of the Council who usually are ANG Judge Advocates in the rank of lieutenant colonel or higher, and who serve on the Council as an extra duty in addition to their normally assigned duties as State Headquarters or Wing Judge Advocates. In the discretion of the Chair, associate and adjunct members may be appointed to the Council for an ongoing or temporary project in which the Council has an interest.

Membership on the TJAG's ANG Council is normally for a period of three years and at the discretion of the Chair.

The ANG Assistant to TJAG is designated the ANGSC/CC point of contact and coordinator for all TJAG ANG Council members.

### MEETINGS

The Council meets quarterly on dates set by the ANG Assistant to TJAG. The Council records its proceedings in Minutes which are distributed to TJAG, NGB/CF, all members of TJAG's Department and all ANG Commanders. The Council's Minutes may be found on the web by all personnel at: <https://ang.law.af.mil> and by judge advocate and paralegal personnel on the ANG webpage on FLITE at: [https://aflsa.jag.af.mil/GROUPS/NATIONAL\\_GUARD/ANG/SOURCE/ANG1/minutes.htm](https://aflsa.jag.af.mil/GROUPS/NATIONAL_GUARD/ANG/SOURCE/ANG1/minutes.htm). A quorum for the Council consists of six members, and is required for the conduct of Council business.

The Council has quarterly meetings which are held within various USAF MAJCOMs and the ANG to familiarize the Council and its invited guests with the Air Force and ANG missions.

Official travel necessary for Council business is normally supported by each Council member's home state or unit.

***KWIK-NOTE: The Council sets policy, guidance and direction for all ANG Judge Advocates and Paralegals with the concurrence of TJAG and NGB/CF.***

<b>RELATED TOPICS</b>	<b>SECTION</b>
ANG Assistants	1-4

# Witness Preparation

Updated by Maj John W. Erickson, Jr., July 2009

**AUTHORITY:** Collective attorney trial experience.

## INTRODUCTION

This topic is presented in two parts: The first concerns general pointers or guidelines all witnesses should follow when testifying in any kind of proceeding; and, the second explains why and how Commanders and Supervisors should testify in administrative board proceedings.

## POINTERS FOR ALL WITNESSES

All attorneys have their own method of witness preparation. These guidelines are not meant to substitute for those methods but are offered as some common things witnesses should know before testifying. "Preparing a witness" does not mean telling the witness what to say. It does involve telling the witness what to expect and how to best prepare for their testimony. The ultimate goal is to have the witness tell the truth.

Witnesses should be prepared to testify not only for the side that calls them as a witness (called direct examination), but also to answer questions asked by the opposing side (called cross examination). Direct examination generally begins with asking the witness their name, duty position and perhaps personal background. A witness may be asked to identify documents which will be introduced into evidence. During cross-examination the opposing attorney will have two possible goals. The attorney may attempt to obtain testimony favorable to their version of events; and, sometimes to cast doubt on the witness' credibility.

1. **BE PREPARED.** Tell the truth to the best of your ability. Don't try to memorize what you are going to say, but do refresh your memory on those matters you will be asked questions about. Try to recall the scene, the objects there, the distances, and just what happened. If the question is about distances or time and if your answer is only an estimate, be sure to say it is only an estimate. Don't guess. Be as specific in your answers as the question calls for and your memory permits. If you have notes, pictures or other documents that you created or that were done to help you remember you can consult those as well. Make sure your attorney knows about and has seen anything that you use to refresh your memory.
2. **PRESENT A PROPER APPEARANCE.** Dress neatly. Military witnesses should be in a clean and pressed uniform and epitomize AFI 36-2903. Civilian witnesses should be well-groomed and dress conservatively. Do not overdress,; but, dress befitting the occasion. Females should avoid flashy jewelry and heavy make-up. Males should not wear earrings or open-collared shirts with ostentatious neck jewelry. Do not come into court or testify while chewing gum or tobacco or with anything in your mouth. When taking the oath, stand upright, pay attention and say "I do" clearly. When testifying, be conscious of, and avoid nervous mannerisms, which distract the panel, board, or jury.
3. **SPEAK UP CLEARLY AND LOUDLY ENOUGH SO THAT THE FARTHEST JUROR CAN HEAR YOU EASILY.** Keep your hands away from your mouth. Don't nod for a "yes" or "no." Be serious in the courtroom and respectful in your answers to the attorneys and the Judge. Do not argue with an attorney.
4. **LISTEN CAREFULLY TO THE QUESTIONS ASKED OF YOU.** No matter how nice attorneys may seem on cross-examination, they probably are trying to discredit you. That's their job. Understand the question, and if you don't say so. You can ask to have a question repeated, if necessary; either because you didn't hear or understand it. Do not rush to answer the question, think about your answer before you give it. Do not anticipate questions Wait for the attorney to finish asking the question. Do not give a snap answer without thinking. Don't rush into answering; but, do not answering a simple question if you know the answer. If a question makes you angry, do not answer until you can answer rationally and reasonably.

5. **EXPLAIN YOUR ANSWER, IF NECESSARY.** Give the answer in your own words. Do not be forced into answering a question “yes” or “no” you have the right to explain or qualify your “yes” or “no” answer.
6. **ANSWER ONLY THE QUESTION ASKED.** Do not volunteer information not actually asked for. If your answer was not correctly stated, correct it or clarify it immediately.
7. **DON’T SAY “THAT’S ALL OF THE CONVERSATION” OR “NOTHING ELSE HAPPENED.”** Instead say, “that’s all I recall,” or “that’s all I remember happening.” It may be that after more thought or another question, you will remember something important.
8. **DON’T GET ANGRY.** Keep calm and courteous, even if the lawyer questioning you appears discourteous. Don’t appear to be a “cocky” witness. Any lawyer who can make a witness angry will probably cause the witness to exaggerate, appear biased and possibly even emotionally unstable.
9. **GIVE POSITIVE, DEFINITE ANSWERS WHEN AT ALL POSSIBLE.** Every material truth should be readily admitted, even if not to the advantage of the party calling you. Do not stop to figure out whether your answer will further help or hurt your side. Just answer to the best of your memory without exaggerations. If asked about little details which a person naturally would not remember, it is best to just say so if you don’t remember.
10. **IF YOU DON’T WANT TO ANSWER A QUESTION, DO NOT ASK THE JUDGE WHETHER YOU MUST ANSWER IT.** If the question is improper an objection will be made. Don’t look at the attorney who has called you or at the Judge for help in answering a question or for approval after answering a question. You are on your own. Rarely will you have the option not to answer a question put to you under oath.
11. **SOMETIMES AN ATTORNEY MAY ASK YOU “HAVE YOU TALKED TO ANYBODY ABOUT THIS CASE?”** If you say, “no,” the Judge or jury knows that probably isn’t true because you have probably spoken to one or both attorneys prior to your testimony. When asked you should answer frankly that you have talked with the lawyers, your family, other witnesses, or whomever, but that no one told you what to say.
12. **FINALLY, BE YOUR SELF!** If you try to imagine you are talking to friends or neighbors on the jury you will be more convincing and will do a fine job. Try to make eye contact with the board, panel or jury members. People naturally tend to believe individuals who appear frank and forthright and look them in the eye when speaking.

## BOARD TESTIMONY - COMMANDERS AND SUPERVISORS

There are few considerations in administrative discharge board proceedings which are more crucial to an effective presentation of the government’s evidence than your preparation before testifying in front of the board.

You set the process in motion by recommending the discharge of an airman, and you should be both willing and able to forthrightly testify before the board about the **reasons for your recommendations**. The discharge action is still very much dependent on your participation, notwithstanding that other staff agencies are now responsible for its processing. A board will always be interested in the problems which caused you to decide on discharge, and how you dealt with the individual. Although it can read your recommendation letter, it will want to hear from you **personally**.

As commander, you must be prepared to cite **specific examples** of the respondent’s **misconduct or unsuitability**. You should be **familiar enough with the respondent’s military record** that you are not caught unaware when asked to state your appraisal of any aspect of the respondent’s documented behavior, either while being interviewed by the recorder or while actually testifying in the presence of a board.

Preparation includes your **attitude** while giving testimony to the board. If you present the appearance of an unconcerned, noncommittal officer who is merely going through the motions of testifying, the board is less likely to favorably consider your recommendation than if you give the impression that what you seek is in the best interests of

your unit, the Air National Guard, and the individual before the board. If you are prepared to elaborate on any feature of the case, you are more likely to persuade others of the merits of your recommendations.

Equally important to the presentation of the case are the respondent's **immediate supervisors**. They work most closely with the respondent and should be prepared to testify about the respondent in that context. Supervisors must be prepared to explain their recommendations. Of special interest will be any inconsistencies between prior reports and the action being taken. The supervisors should be prepared to testify concerning those inconsistencies.

***KWIK-NOTE:*** *If you are called to testify at any proceeding, contact your Staff Judge Advocate for further advice.*

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Administrative Discharge of Officers	24-4
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# Chapter 18 - Lawsuits and Liability

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- 18-4 Indemnification Agreements
- 18-5 Judicial Review of Military Administrative Actions
- 18-6 Lawsuits Against National Guard Personnel
- 18-7 Liability of National Guard Legal Office Personnel
- 18-8 Liability of National Guard Medical Personnel
- 18-9 Personal Liability of Federal and State Officials
- 18-10 Relief From Civil Liability
- 18-11 Transportation of and Liability to Foreign Military Nationals and Their Dependents

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# Claims

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**Updated by Lt Col Neal Kirkpatrick, March 2001**

**AUTHORITY:** AFI 51-501, *Tort Claims* (1 May 96); ANGR 112-1, *Claims Against or in Favor of the United States Arising From National Guard Activities* (10 Jul 89); applicable state law.

## **CLAIMS AGAINST THE GOVERNMENT BY THIRD PARTIES**

Claims for property damage, personal injury, or death allegedly caused by the action or inaction of ANG members, including AGRs, who are performing training or duty under 32 U.S.C. 316, 502, 503, 504, 505; 10 U.S.C. 672(b) or (d) or other federally funded training, and who are acting within the scope of their employment, are covered by ANGR 112-1 and AFI 51-501. Air National Guard claims are addressed in Section 5C of AFI 51-501.

**CAVEAT:** These regulations do not cover claims for negligent activities of Guard members who are, at the time of the alleged negligence, in non-federally funded state service. For claims arising from activities of Guard members in active state service, state law provides the exclusive remedy. This topic covers claims made against members arising out of some type of federal (Titles 10 or 32) duty.

Should you learn of a potential claim incident or receive an actual claim against a member of your unit, any component of your unit, or the unit itself, immediately notify your State Claims Officer. This will probably be a full-time person at State Headquarters, usually the full-time Judge Advocate. ANG units do not adjudicate claims, but send them forward for processing.

The State Claims Officer must report all potential claims incidents to the nearest active duty claims office, which has the responsibility to process a resultant claim. You should submit the following information to your State Claims Officer, if available, in your initial report:

1. The date, time, location, and nature of the incident;
2. A brief description of the damage, loss, injury, and/or death which occurred;
3. The names, addresses, and telephone numbers of any:
  - a. ANG personnel involved and documentation of their duty status;
  - b. Potential claimants; and
  - c. Witnesses to the incident forming the basis of the claim; and
  - d. Law enforcement personnel who investigated the incident forming the basis of the claim.

You should use the most expeditious means possible to get this information to the State Claims Officer. Many states have regulations or written guidance on the processing requirements for claims. Check yours. Any questions you have or receive concerning the status of a claim against your unit or any member in it should be referred to the State Claims Officer.

While the active duty forces have primary responsibility to investigate and pay claims, the ANG will give necessary support to the active duty claims office.

## **CLAIMS AGAINST THE GOVERNMENT BY GUARD MEMBERS**

Guard members have the right to present claims under the Military Personnel and Civilian Employees Claims Act for damage and/or loss to their personal property while in the performance of their duties. Should any member of your unit wish to make such a claim, refer the member to your State Claims Officer or the nearest active duty claims office. AFI

51-501 will govern such claims. Your Staff Judge Advocate will have a point of contact at that active duty claims office and have established a working relationship with the claims office.

## CLAIMS IN FAVOR OF THE GOVERNMENT

If the negligence of a third party results in damage to federal government property, report this to the State Claims Officer for processing in accordance with AFI 51-501.

Should the negligence of a third party result in personal injury to a Guard member who is subsequently treated at a military medical facility, a report should be made to the State Claims Officer. If the medical care is rendered by a civilian medical facility, send a copy of the authorization for admission of the member for treatment to the State Claims Officer. You also need to advise the member: (1) not to sign a release or settle any claim resulting from the incident without notifying the active duty base claims officer; (2) that he or she must give the claims office a complete statement regarding the facts and circumstances surrounding the incident; and (3) that he or she is required to cooperate in the United States' attempts to recover the reasonable costs of the military medical care from the third party. (AFI 51-502, paragraph 5.4.2). Additionally, a Line of Duty Determination pursuant to AFI/ANGI 36-2910 will likely be necessary.

Any questions concerning claims should be referred to your unit SJA, your State Claims Officer, and the nearest active duty claims officer, who is also a Judge Advocate at that active duty base legal office. The Related Topics below are some of the areas affected by claims.

***KWIK-NOTE: Your responsibilities for claims are two: (1) DOCUMENT the claims for or against the government IAW established guidance; and (2) NOTIFY your State Claims Officer or the nearest active duty claims office immediately upon receipt of a claim.***

RELATED TOPICS:	SECTION
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## **Feres Doctrine**

Updated by Lt Col Sandra Marsh, May 2001

**AUTHORITY:** Feres v. United States, 340 U.S. 135 (1950); Chappell v. Wallace, 462 U.S. 296 (1983); U.S. v. Stanley, 483 U.S. 669 (1987); applicable state law.

### **INTRODUCTION**

Although the federal government has waived its sovereign immunity from lawsuits through the Federal Tort Claims Act (FTCA) and permitted individuals to sue the United States in certain situations, the U.S. Supreme Court, over forty (40) years ago in Feres v. United States, ruled that a military member could not recover under the FTCA for injuries “which arise out of or are in the course of activity incident to service.” The reasons given by the Court for prohibiting suits by military members include the adverse impact on military discipline if such suits were allowed, and the availability of an alternate compensation system for injured service members. This ruling has come to be known as the “Feres Doctrine.”

### **APPLICABILITY**

The Feres doctrine applied initially only to common law tort claims, such as medical malpractice, slip and fall cases, and accidents involving injury or property damage. Later rulings by the Supreme Court have applied the rationale behind the doctrine to find a similar intra-military immunity in Constitutional tort cases (Chappell v. Wallace, 103 S.Ct 2362 (1983) and U.S. v. Stanley, 107 S.Ct. 3054 (1987)). The Supreme Court has never addressed whether this immunity applies to National Guard members sued under the Civil Rights statutes (42 U.S.C. 1981 and 1983), but the majority of federal circuit courts of appeals have ruled that it is.

### **CLAIMS OR LAWSUITS BY GUARD TECHNICIANS**

Although there have been limited exceptions, the federal courts of appeals have increasingly held that damages claims brought by National Guard technicians are barred by the Feres doctrine, in view of the military aspects of their dual-status positions. See Fisher v. Peters, 2001 WL 392034 (6<sup>th</sup> Cir. Apr. 9, 2001)(“Plaintiff’s claim is non-justiciable because she is a National Guard technician and, thus, her position is irreducibly military in nature.”); Oram v. Alsip, 1994 WL 596853 (10<sup>th</sup> Cir. Nov. 2, 1994)(unpublished opinion)(noting that the “incident to service” rule announced in Feres has broad application and applying it to bar technician’s claim against Adjutant General); Wright v. Park, 5 F.3d 586 (1<sup>st</sup> Cir. 1993)(technician could not maintain claim against federal or state officers for injuries arising out of or incident to military service; “[W]hile a technician’s job is a composite, containing both civilian and military pieces, the job’s dual aspects are inseparable; they are, like Chang and Eng, joined at the chest.”); Wood v. United States, 968 F.2d 738 (8<sup>th</sup> Cir. 1992)(holding technician’s claims against the United States and the Adjutant General barred, noting that under the Feres doctrine, “claims under the Federal Tort Claims Act, negligence claims, claims brought under 42 U.S.C. [section] 1983 [constitutional or federal statutory claims against state officers], and Bivens [constitutional tort] claims [against federal officers] are nonjusticiable if they involve injuries which ‘arise out of or are in the course of activity incident to service.’”)(citations omitted).

### **CLAIMS OR LAWSUITS BY DEPENDENTS**

The Feres Doctrine extends not only to claims by the service (including National Guard) members themselves, but also to dependents and beneficiaries of the member if their claims are derived from or based on the alleged negligence committed upon the member. If dependents have a separate or independent claim under the law, they may present it under the FTCA, and are not barred by the Feres doctrine.

For example, service member #1 on duty drives a car on base and is hit by a government motor vehicle driven by service member #2 on duty, who was negligent. Service member #1 thereby sustained injuries. Service member #1 is barred by the Feres doctrine from successfully suing service member #2 or the U.S. government for damages. Any claim of the non-military spouse of service member #1 for loss of the services of service member #1 due to those injuries is likewise barred by Feres because the spouse's claim is derived from or could not be brought without

the claim of service member #1. However, if the non-military spouse of service member #1 was physically injured as a result of service member #2's negligence, whether the spouse was alone in the car or with service member #1 in the car, Feres would not bar the claim of the spouse because the spouse's personal injury claim is not derived from, but is independent of the claim of service member #1.

### **CLAIMS OR LAWSUITS BY RETIREES OR SEPARATED MEMBERS**

Retirees or those separated from the Guard may sue under the FTCA for alleged negligence which occurs after their retirement or separation. If however, their claims are based on acts that occurred during their period of service, the claim will be barred by Feres.

### **GOVERNMENT RESPONSE**

When a claim or lawsuit is filed which the Government believes is barred by the Feres doctrine, the Government will make a motion in court to dismiss the claim or suit based on its immunity from suit because of the Feres doctrine.

### **COMMANDER'S ACTION**

Federal courts have carved out some unusual exceptions to the Feres doctrine, usually where they perceive an injustice. Should a member of your unit submit a claim pursuant to the FTCA, you should immediately contact your unit SJA and State Claims Officer. Even though you are now aware of the potential bar against such claims, you have no authority to deny them. You must refer the claim to the nearest active duty base claims office. The Air Force has the denial authority over these claims. If subsequent to or in lieu of filing a claim, the member files a lawsuit, you should notify the State Claims Officer who will in turn notify NGB-JA.

***KWIK-NOTE: Immediately notify your State Claims Officer if you or a unit member receives any claims or lawsuits based on acts allegedly committed during the performance of duty. You have no authority to deny a claim based on the Feres Doctrine, or to even respond to such claim or lawsuit.***

### **RELATED TOPICS:**

### **SECTION**

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Injuries To Civilian Employees	5-4
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# Indemnification Agreements

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Updated by Lt Col Neal Kirkpatrick, March 2001

**AUTHORITY:** Applicable state law and regulations.

## **PURPOSE**

An Indemnification Agreement binds the parties to pay damages to one party to the agreement who was injured as the result of acts or omissions of the other party to the agreement. Absent an Indemnification Agreement, the injured party would have to rely on state law or federal law for a right of recovery against the party who caused the injury.

As a general rule, Commanders do not have authority to sign Indemnification Agreements whereby the state or federal government agrees to pay damages for injury to the other party, unless they have express authority from the state or the federal government to do so. Such authority usually is given in the procurement area presided over by the base Contracting Officer.

## **ANG INDEMNIFIES**

Commanders may be requested to sign contracts which include Indemnification Agreements, in their capacity as agents of the state or federal government. Also, Commanders at times may be asked to sign Indemnification Agreements when outside organizations volunteer their services to a unit. That is the usual scenario in which this issue arises. If, for example, the Boy Scouts volunteer to clean up the unit's facilities, the Boy Scouts may want the Commander to agree to indemnify the Boy Scouts if one of their members is injured, injures another Boy Scout, or injures a member of the unit. By signing that Indemnification Agreement, the Commander has exposed the unit, the state and potentially the federal government to an unnecessary liability.

## **ANG IS INDEMNIFIED**

Rather than agreeing to indemnify the Boy Scouts, the Commander might insist that the Boy Scouts indemnify the National Guard to relieve the National Guard from liability in the event of an injury arising from the Boy Scouts' activities in or on the unit's facilities. While such a request appears harsh in this set of facts, it would be reasonable and proper if the Boy Scouts were asking to use the armory or weapons were being handled. In fact, some states require such an indemnification as a matter of state law and may require a surety bond as well as additional conditions for any private party to use state armories or bases. See Attachments 1 and 2 in the topic in this Deskbook entitled "USE OF FIRING RANGE BY LOCAL POLICE, BOY SCOUTS, AND OTHER NON-MILITARY PERSONS OR GROUPS" for sample Indemnification Agreements which are also sometimes referred to as "hold harmless" agreements. The forms in that topic also include general releases from liability of the ANG and the state and federal government to be signed by the non-military users of the ANG's facilities.

## **EFFECT**

If state law permits the Commander to sign an agreement where the ANG indemnifies others, the Commander should carefully review it with the Staff Judge Advocate before signing it. When individuals perform acts or services relying on Indemnification Agreements, the courts will try to find a way to enforce them even if the indemnifying party (usually the state or the ANG) signed the agreement without proper authority. Similarly, when the unit allows the use of a facility by private parties pursuant to a lease or armory use agreement where the private party indemnifies the Air National Guard and the state, the courts will also try to find a way to prevent recovery against the state or federal government by those private parties in the event they are injured.

Remember, whenever you, as Commander are asked to sign something calling for you, in your official capacity, to agree on behalf of the state or federal government to indemnify some individual or organization, your mental RED FLAG should be raised. Consult with your Staff Judge Advocate before signing such a document to determine your authority to do so; and even if you have the authority, whether you should sign such an agreement.

***KWIK-NOTE: Never sign an Indemnification Agreement obligating the government to pay damages to third persons without first consulting with the SJA. This topic should be supplemented with applicable state law and regulations.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Lawsuits Against National Guard Personnel	18-6
Leases And Armory Use Agreements	3-12
Personal Liability Of Federal And State Officials	18-9
Relief From Civil Liability	18-10
Use Of Firing Range By Local Police, Boy Scouts, And Other	Non-Military Persons Or Groups 3-17

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# Judicial Review of Military Administrative Actions

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Updated by Lt Col Sandra Marsh, May 2001

**AUTHORITY:** Speigner v. Alexander, 248 F.3d 1292 (11<sup>th</sup> Cir. 2001) and cases cited therein.

## JUDICIAL REVIEWS ARE DECREASING

In the past, disgruntled military personnel could, subject to a judicial balancing test, obtain federal court review of military administrative personnel actions, if they alleged a violation of their constitutional rights or that the military had acted in violation of applicable statutes or its own regulations. See Mindes v. Seaman, 453 F.2d 197 (5<sup>th</sup> Cir. 1971). Over the last decade or so, however, the Supreme Court and the lower federal courts have demonstrated an increasing reluctance to impinge on military decision-making through judicial review.

## ACTIONS SEEKING DAMAGES

In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that the United States is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to military service. In 1983, the Supreme Court expanded this doctrine significantly by applying it outside the Federal Tort Claims Act context to bar constitutional claims for damages against superior officers. Chappell v. Wallace, 462 U.S. 296 (1983). Thereafter, in United States v. Stanley, 483 U.S. 669, the Supreme Court clarified that the broad “incident to service” test established in Feres applies to constitutional claims brought by military members against federal officers. After Stanley, several federal circuit appeals courts determined that state officers, like federal officers, are entitled to the same degree of immunity from civil suits. As a result of these cases, a military member has no judicial cause of action for monetary damages based on an injury that is incident to his or her service.

## INCIDENT TO SERVICE

In deciding whether an injury is “incident to service,” courts generally consider: (1) the duty status of the service member; (2) the place where the injury occurred; and (3) the activity the member was engaged in at the time of the injury. While all of these factors are clearly relevant when the injury is a traumatic injury such as that caused in an automobile or industrial accident, the first factor – the duty status of the member – is the prime determinant when the injury alleged is that inflicted by a personnel decision, such as a failure to promote or decision not to retain a member. See Speigner (Where action against Adjutant General was based on selective non-retention of an officer, the court applied the above factors and found the injury “incident to service”).

## ACTIONS SEEKING INJUNCTIVE RELIEF

In some cases, the military member may not seek monetary damages but may, instead, ask the court to order injunctive relief, such as reinstatement or promotion. There is presently a split among the various circuit courts of appeals which have decided the issue as to whether such a claim may be maintained in the court. The majority view is that such claims are not cognizable (Second, Fifth, Eighth, Seventh, and Eleventh Circuits), while two circuits presently allow such claims (Third and First). Therefore, until the Supreme Court resolves the dispute, whether such a claim brought by a member of your unit will be entertained by the court depends on your geographic location.

**KWIK-NOTE:** *Military members may not maintain lawsuits seeking monetary damages for adverse personnel actions. However, in some states, they may be able to obtain injunctive relief.*

**RELATED TOPICS:**

**SECTION**

Active Duty - Air National Guard Members  
Claims  
*Feres* Doctrine  
Lawsuits Against National Guard Personnel  
Quality Force Management Actions

11-2  
15-7  
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18-6  
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# Lawsuits Against National Guard Personnel

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Updated by Lt Col Neal Kirkpatrick, May 2001

**AUTHORITY:** 32 U.S.C. 502-505; 28 U.S.C. 1346(b), 2402, 2671, 2672, 2674-2680, *Federal Tort Claims Act*; Federal Rules of Civil Procedure, Rule 4; ANGR 110-24, *Litigation* (31 Aug 84); AFI 51-501, *Tort Claims* (1 May 96); applicable state law.

## INTRODUCTION

National Guard personnel may, from time to time, be sued in either their official National Guard capacity or their individual capacity for wrongful acts or omissions (called “torts”) allegedly committed in the performance of their official duties. Lawsuits are a fact of modern life. Therefore, you should not be surprised if your unit or one or more of your members are served with notice that they are being sued by a third party (referred to as a plaintiff) claiming damages from the unit and/or the member(s). If and when this happens, both the Commander (who often will be sued as an individual defendant as well as in their official capacity as Commander), and the other Guard personnel sued need to know their rights, duties and exposure.

The Federal Tort Claims Act (FTCA) offers personal immunity from suit for common law torts to Guard members who were in Title 32 or Title 10 status and acting within the scope of employment at the time of the alleged conduct giving rise to the lawsuit. In such suits against a member, the federal government will be substituted as defendant, and if filed in state court, the suit will be removed to Federal court. The reality of most situations is that the plaintiffs will be looking to the “deep pocket” (*i.e.*, the government) for payment of damages. However, if the suit against the government is otherwise barred (certain causes of action, primarily intentional torts, may not be brought under the FTCA), the plaintiff may attempt to show that the service member was acting “outside the scope” of employment, to prevent substitution of the government as a defendant.

If National Guard personnel are sued for acts allegedly committed in the performance of their duties, there are two basic things they want and need to know: who will represent them in the lawsuit, and will anyone instead of them pay any money judgment or claim adjudicated against them. The answers to these questions depend upon:

1. The status the member was in at the time of the alleged wrong;
2. Whether the member is a state employee;
3. Whether the member was or was not acting within the scope of employment at the time of the alleged wrong;
4. The timeliness of the member’s notification to the appropriate state or federal authorities of being sued; and
5. The cooperation by the member with those authorities during the lawsuit.

## FEDERAL TORT CLAIMS ACT OR SIMILAR STATE LAW

The Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2402, 2671, 2672, 2674-2680, is a federal statute that waives what is referred to as “sovereign immunity” against the U.S. Government. That means people can sue the federal government in certain cases. Your state may have a similar law which permits an individual to sue the state under certain circumstances. National Guard personnel, including AGRs in Title 32 status, are deemed state employees under many states’ laws. Your Staff Judge Advocate can advise if such is the case under the law in your state.

The FTCA provides coverage for personal injury or property damage caused by the negligence of government employees. However, the status of the individual claimant or the individual being sued, and the nature of the incident may take the claim out of the coverage provisions of the FTCA. For example, as is more fully explained in the topic

in this Deskbook entitled “FERES DOCTRINE,” claims BETWEEN service members arising out of acts incident to service, although otherwise payable under the FTCA, are barred under the Feres Doctrine.

### **CLAIMS BY FEDERAL CIVILIAN EMPLOYEES**

Claims for personal injury or death incurred in the performance of duty by a civilian employee of the federal government are not covered under the FTCA. But civilian employee claimants are not without a remedy for these claims since the Federal Employees’ Compensation Act (5 U.S.C. 8116) provides the exclusive remedy for these claims.

Claims by civilian employees for property damage to their privately owned vehicles or other personal property incurred incident to service may be payable under the Military Personnel and Civilian Employees Claims Act, or if not incident to service but caused by the negligence of Government personnel, under the Military Claims Act.

### **CRITERIA FOR FTCA COVERAGE**

1. The status of the claimant and the defendant;
2. How the claim arose and on what it is based;
3. Whether the government (including the ANG) employee was acting within the scope of employment;
4. Which statute or regulation, if any, provides coverage for the claim; and
5. Whether any doctrine, such as Feres, bars recovery.

### **HOW DO YOU KNOW IF YOU ARE BEING SUED, AND WHAT YOU DO IF YOU ARE?**

If you or a member of your unit receives a letter from an attorney complaining about activities of the unit or of one or more of your members causing injury or property damage to the attorney’s client, call your unit SJA and the State Claims Officer immediately. While this letter is not the official paperwork to start a lawsuit against you (referred to by lawyers as a “summons”, “complaint”, or “petition”), some state statutes require notice to the government or its agencies within a certain period prior to starting a lawsuit against them. Of course, if you are presented with legal documents (such as a summons, complaint or petition) by a sheriff, sheriff’s deputy, or other legal process server, that indicate a lawsuit against you may have been filed, you should immediately notify your unit SJA and the State Claims Officer.

### **NOTIFICATION REQUIREMENT**

#### **State Claims Officer or Nearest Active Duty Air Force Claims Office**

Each state National Guard has a State Claims Officer. This is the individual you need to contact immediately should you or any member of your unit receive notice of being sued for actions arising out of ANG duties. The processing of a lawsuit will depend upon the status of the Guard member alleged to have been negligent at the time of the alleged occurrence. In some cases, the matter will be referred to the State Claims Officer for handling through State channels. In other instances, the nearest active duty Air Force installation Claims Office will be contacted.

### **NGB-JA**

ANGR 110-24 requires all lawsuits and potential lawsuits involving the National Guard, including ANG personnel, to be reported by telephone to NGB-JA immediately upon receipt by the State of any information indicating that a suit has been, or will be, filed. Whether or not a federal interest appears to be involved, this necessary lead-time will permit the NGB to participate in the decision to request any necessary Department of Justice legal representation for the persons being sued. Contact with NGB-JA will be made through your State Headquarters.

## **Why the Rush?**

Many states and the federal courts require defendants in civil suits to answer within twenty (20) days of being served with the lawsuit. If an answer is not filed, the plaintiff(s) could enter a default judgment against the unit and the individual Guard member being sued. More importantly, you may have much less time than that to notify the State Claims Officer if you want to secure government (free) legal representation for you, and trigger the applicable protections you may have regarding governmental or personal immunity from suit or governmental indemnification of your personal liability for the payment of damages.

The investigation of any claim or lawsuit against the unit or a member of the unit will be made by the State Claims Officer or the nearest active duty claims officer located in that base's legal office. The principal objectives of a full and complete investigation are to gather, preserve and protect evidence. This is a necessary step to protect both the Guard members involved and the government's interest.

Because of the differences between federal and state law, a claimant or plaintiff may "shop" for a convenient forum in which to file suit. Thus, unit members served with court papers involving their ANG service must timely notify their Commander so that both state and federal officials can determine how to, and who will defend the member in the lawsuit.

## **REPRESENTATION AND INDEMNIFICATION**

As a result of their status, Guard members may, in many cases (1) be defended by their State Attorney General or the U.S. Department of Justice (DoJ), depending in part on whether state or federal interests or issues are involved, and in what court the lawsuit is filed; (2) have their name removed from a lawsuit and the government substituted as a defendant; (3) be indemnified (the government might pay any judgment against the Guard member), by the state or federal government in any civil lawsuit in any state or federal court, if the lawsuit arose out of any act or omission which occurred, or is alleged in the lawsuit to have occurred, while the Guard member was acting within the scope of public employment or duties, or if the lawsuit is brought to enforce a provision of 42 U.S.C. Sections 1981 or 1983 (Civil Rights cases).

### **Representation – Official Capacity versus Individual Capacity**

If you, as Commander, or an individual of your unit has been sued in an individual capacity, you may be entitled to representation by the DoJ or State Attorney General's office. Therefore, you need to contact your unit SJA and State Claims Officer immediately upon receipt of notice of a lawsuit to ensure a timely request for such representation is made by all those who are sued in their individual capacity. If you or members of your unit are sued in an official capacity, no such request for government representation may be required. The determination of whether you are being sued in an individual or official capacity will ultimately be made by the court. Do not attempt to decide this yourself.

The protections for representation and indemnification have no effect on the privileges and immunities conferred upon the members of the Air National Guard by other legislation (For example, recent amendments to the Federal Tort Claims Act make recovery against the United States the exclusive remedy of the injured party for torts committed by the negligence of a Guard member in Title 32 or Title 10 status acting within the scope of employment). To avoid potential personal liability if later proceedings in the suit so indicate, **ANY TIME YOU OR A MEMBER OF YOUR UNIT IS SUED IN EITHER AN OFFICIAL OR INDIVIDUAL CAPACITY, IMMEDIATELY NOTIFY YOUR STATE CLAIMS OFFICER.**

Often, as conditions of invoking the State Attorney General's or DoJ's authority to defend a Guard member, the Guard member must deliver to the State Attorney General or DoJ the original or a copy of any summons, complaint, petition, process, claim, notice, demand or pleading within a short time (sometimes as little as five (5) days) after being served with such document, and must cooperate fully in any subsequent proceeding in which the government is defending the member.

Guard members may be entitled to representation by private counsel instead of representation by the State Attorney General or DoJ, if the Attorney General or DoJ declines to appear; for example, for reasons of conflict of interest. If such representation is approved, the State or federal government will pay your attorney. You may be somewhat

restricted in your choice of attorney, because the fees paid by the government are capped by law at a level below the going rate in many areas. If a private counsel is not approved by the State Attorney General or DoJ, such counsel is at the member's own expense.

### **Indemnification**

The state or federal government may agree to pay a judgment obtained against its military members in any state or federal court, or to pay any claim settlement, provided the act or omission which is the basis of the lawsuit or claim against the Guard member, occurred while the member was performing authorized duty. However, this is discretionary on the part of the government, and there is no absolute responsibility to indemnify, even if the agency position is that the individual did nothing wrong. And the government is unlikely to indemnify a member when the injury or damage to a third person resulted from intentional wrongdoing or other misconduct by the military member. In this case, the military member is PERSONALLY liable for any money judgment awarded.

Generally, indemnification is not an issue for Guard members who fall within the coverage of the FTCA since the federal government will normally be substituted as a defendant in the suit.

### **BOTTOM LINE**

Your timely notification to the appropriate officials of being sued will avoid the waiver of your rights to representation and indemnification, whether you are sued in an individual or official capacity.

### **SETTLEMENT MUST BE APPROVED**

Any settlement usually must have the prior approval of the State Attorney General or DoJ, and of the State's Adjutant General, before payment by the state or federal government will be authorized. The state or federal government will usually not be responsible for parts of settlements, awards or judgments to the extent they consist of punitive or exemplary damages, fines or penalties.

### **CONCLUSION**

In summary, once a military member is sued, immediately notify the next higher headquarters. Retain the suit or claim papers received. A determination will be made if, and which agency, federal or state, will defend the military member. Failure to timely notify the appropriate officials, may forfeit any rights to free legal representation and, ultimately, indemnification.

ANG members may be sued for what they do. Do not fret. Anybody can be sued for anything, in or out of the military. If you have acted within the scope of your employment and timely report receipt of lawsuit papers, the federal or state government should provide you a free legal defense and provide either immunity or indemnification from any money judgment entered against you.

Any questions on the processing of claims or litigation arising from military operations or training should be referred to your Staff Judge Advocate.

***KWIK-NOTE: Upon receipt of ANY indication, orally or in writing, that you or a unit member has been or may be sued, either in an official or individual capacity, IMMEDIATELY notify your SJA and State Claims Officer. DO NOT LET EVEN ONE DAY PASS.***

### **RELATED TOPICS:**

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## Liability of ANG Legal Office Personnel

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Updated September 2003

**AUTHORITY:** 10 U.S.C. 1054; ANGI 51-504, *Legal Assistance Program* (14 Dec 01); AFI 36-8002, *Telecommuting Guidelines for Air Force Reservists and Their Supervisors* (1 Jul 98); *See also*, AFMAN 36-8001, *Reserve Personnel and Training Procedure* (14 Mar 03); T-Jag Policy Letter, ARC-3, *Use of Telecommuting (Distance Training) for IMA Training* (15 Oct 02); and the former ANGI 36-5, *Telecommuting Policy for the Air National Guard* – revoked and under revision.

### INTRODUCTION

Their military status notwithstanding, judge advocates, paralegals, and other members of the legal staff may find themselves named as defendants in actions brought in federal or state court. Thus, they retain an interest in malpractice protection even outside their civilian practice arenas.

### PROTECTION

Title 10 of the United States Code, Section 1054, provides *the exclusive* remedy for damages for injury or loss of property caused by the negligent or wrongful act or omission of an attorney, paralegal, or other member of a legal staff in connection with providing legal services while they are acting within the scope of their duties or employment.

If sued, the legal staff member will be defended in any court by the Attorney General of the United States. Certain states have also enacted laws providing for legal representation and indemnification against loss resulting from such malpractice law suits.

### REQUIREMENTS:

Two procedural requirements must be met for defense by the Attorney General. First, all process received by the legal office defendant must be timely delivered to the Attorney General, among others, through that person's supervisor or an official designee. Second, the Attorney General must certify that the defendant "was acting in the scope of such person's duties or employment at the time of the incident" in order to allow removal to the local federal district court and determination of the action as a tort claim.

The second of these requirements demands that the legal office member was in a Title 10 or Title 32 duty status at the time the legal assistance was rendered. *There are no exceptions to this requirement.* [Note that under AFI 36-8002, *Telecommuting Guidelines for Air Force Reservists and Their Supervisors*, AFMAN 36-8001, *Reserve Personnel and Training Procedure* and T-Jag Policy Letter, ARC-3, *Use of Telecommuting (Distance Training) for IMA Training*, commanders may authorize Judge Advocates to provide legal services in a duty status away from the official duty location.] Further, the legal services provided and at issue must have been within the scope of the legal staff member's employment. For example, wills and powers of attorney prepared by the JAG on behalf of a unit member who is preparing for mobilization are considered mission-related. Indeed, their preparation is mentioned in both AFI 51-504 and ANGI 51-504.

### DUTY STATUS

The extent of legal assistance provided to unit members on civilian legal matters is discretionary with the commander. JAG's routinely render legal assistance during UTA and AT periods. However, the risk of a possible absence of protection from malpractice looms when a unit member contacts a JAG for advice at the JAG's civilian law office or at home between duty periods. The effect of any alleged negligent advice probably may not be evident until months or even years after the advice is given, and orders may not be prepared retroactively to cover the legal office member. Since there will likely be no protection against malpractice in such situations, commanders are

encouraged to prohibit unit members from seeking legal assistance from the legal staff between duty periods. [Legal assistance is advice on personal, civil legal problems to eligible military personnel and beneficiaries and does not include advice to commanders or other unit members on any other legal concern where the Air Force or the National Guard remains the client].

***KWIK-NOTE: JAG's and other legal office personnel must be in a duty status when providing legal assistance in order to be covered for malpractice.***

**RELATED TOPICS :**

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LEGAL ASSISTANCE PROGRAM	17-8
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# Liability of National Guard Medical Personnel

Updated by Lt Col Neal Kirkpatrick, May 2001

**AUTHORITY:** Federal Tort Claims Act (28 U.S.C. 2671 et seq); Gonzalez Act (10 U.S.C. 1089); Federal Employees Liability Reform and Tort Compensation Act of 1988 (28 U.S.C. 2679).

## PROTECTION

Under the Federal Tort Claims Act (FTCA) the victims of medical malpractice (other than military personnel) are able to present claims against and to sue the United States for their damages. The FTCA always applied to medical personnel in Title 10 status, as they were considered employees of the United States. In 1976 Congress passed an immunity statute, the Gonzalez Act (10 U.S.C. 1089), which made suit under the FTCA the victim's exclusive remedy. Therefore, the Title 10 physician had immunity from personal liability. In 1981, 10 U.S.C. 1089 was amended to include National Guard medical personnel performing duty or training in Title 32 status as employees of the United States. The FTCA was simultaneously amended to include torts (civil wrongs like negligence or medical malpractice) committed by National Guard personnel in Title 32 status who, as a result, have immunity from personal liability for covered acts.

The FTCA applies only to torts committed within the United States. The problem with 10 U.S.C. 1089 is that it does not clearly state what the result should be with respect to malpractice committed outside the United States. As a result, there were a series of lawsuits in the 1980s involving the issue of the military physician's individual liability for acts committed outside the United States. Several United States District Courts held opposite views on the matter. One of these cases was appealed to the Supreme Court, and in March 1991 that court ruled that physicians are not liable to be sued in their individual capacity under such circumstances (United States v. Smith, 499 U.S. 160 (1991)). The Supreme Court relied on the language of the Federal Employees Liability Reform and Tort Compensation Act of 1988 which provides immunity of government employees from suit.

## DUTY STATUS

As long as the health care personnel, including AGR personnel, are performing treatment as part of their regular duties as National Guard members, then the treatment is within the scope of their employment and health care personnel are covered by the FTCA. However, in order for the treatment given to be deemed within the member's scope of employment for FTCA purposes, it must be authorized treatment. Also, the personnel providing that care must be in a training or duty status category to be covered. If the care is provided by the National Guard medical personnel while not in a training or duty status, they are not covered by the FTCA and are personally liable for any torts they may commit, subject to any state laws which may provide liability protection for such health care personnel in such situations.

National Guard medical personnel in a Title 10 or Title 32 status who render medical treatment within the scope of their duties CANNOT be personally liable for negligence or malpractice committed inside or outside the United States.

***KWIK-NOTE: Make sure your medical personnel know what treatment they are authorized to render. Their protection from liability for negligence depends upon it.***

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# Personal Liability of Federal and State Officials

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Updated by Lt Col Neal Kirkpatrick, May 2001

**AUTHORITY:** Federal Tort Claims Act, Title 28, United States Code, Sections 1346(b), 2402, 2671, 2672, and 2674-2680; Feres v. United States, 340 U.S. 135 (1950).

## INTRODUCTION

One of the tactics used by individuals who feel they have been wronged by a military member for any number of reasons is to file suit against the ANG, the individual member, and the individual's Commander for a violation of their constitutional or common law rights. Individuals may sue military members in their individual capacities or official or representative capacities seeking money damages for alleged violations of these rights. The state or federal government normally will represent military employees sued for acting within the scope of their employment. "Scope of employment" generally refers to those official and authorized activities which further the business of the government. The employee may retain independent counsel if desired, but at the employee's own expense.

## LAWSUITS FROM OUTSIDE THE GOVERNMENT

Lawsuits seeking money damages against federal officials are far more frequent today than they were twenty years ago. Generally speaking, officials get sued for constitutional torts (deprivation of rights), common law torts, (negligence and personal injury), or for a combination of these. Plaintiffs' attorneys are becoming more creative in alleging causes of action against the government and its officials.

Persons beginning lawsuits centered around alleged harm to them by the Government usually do so under authority of the Federal Tort Claims Act, by which the federal government has waived its sovereign immunity. In so doing, they seek redress directly against the Government and its large treasury, and there is no ironclad guarantee that this will be the full scope of their attack. Adjutants General and ANG Commanders become targets of opportunity when an angry plaintiff wants to make a public statement against them by suing them "in their individual capacity." What follows is a general discussion of current law and practice about this particular exposure to an official's INDIVIDUAL capacity rather than just the official's representative capacity.

## Immunity and Indemnification

"IMMUNITY" is protection from the lawsuit itself. If immunity applies, there is no liability, and the lawsuit will be dismissed. "INDEMNIFICATION" means that although there is no immunity from the lawsuit, if liability is found against the official, any money damages awarded will be paid by the government on behalf of the official. In either case, the official will not personally have to pay a money judgment. However, a decision on whether to indemnify an official is not made until after the lawsuit is resolved and a money judgment is rendered.

Immunity for public officials against being successfully sued is not automatic. Generally, **absolute** immunity for government officials applies only when (1) the official acted within the scope of official duties, and (2) the conduct was discretionary in nature. More than "minimal discretion" is required as to acts for which the defendant seeks this protection. Absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the employment. By statute, government drivers and doctors while performing official duties, and attorneys, paralegals or other members of a legal staff within the ANG, while engaged in legal services within the scope of their duties, may not be sued in their individual capacity. (See the topics in this Deskbook entitled "FERES DOCTRINE," "MOTOR VEHICLE ACCIDENT REPORTING," "LIABILITY OF NATIONAL GUARD MEDICAL PERSONNEL" and "LIABILITY OF NATIONAL GUARD LEGAL OFFICE PERSONNEL" for more detailed analyses in these areas). Absolute immunity is normally not available to federal officials as a defense in suits alleging constitutional violations.

Even if absolute immunity from suit is not available as a defense, **qualified** immunity may be available. To obtain qualified immunity, an official must show that by objective standards the official did not violate “clearly established” constitutional or statutory guarantees of which a reasonable person would have known. “Objective standards” mean whether a reasonable official could have believed the conduct was lawful. A military member sued for a constitutional tort may defend on the basis of qualified immunity. If a violation of constitutional rights is established, qualified immunity may apply if the federal employees sued can prove that they neither knew nor should have known of the relevant legal standard.

Immunity from suit may also be present through application of the Feres Doctrine when a military member sues another military member for injuries occurring incident to military service. See the topic “FERES DOCTRINE” in this Deskbook.

The Federal Employees Liability Reform and Tort Compensation Act of 1988 now gives federal employees absolute immunity from liability for state common law torts (*e.g.* negligence, libel, slander, assault, battery, trespass), as long as they acted within the scope of employment. The Act does not apply to constitutional torts (civil wrongs violating a person’s federal constitutional rights) or to acts violating a federal statute (*e.g.* environmental torts).

### **Legal Representation**

Federal defense representation will normally be provided by the Department of Justice to a military Commander, member, or employee who is sued. For this representation to be provided it must be asserted and shown that the defendant’s actions were within the scope of federal employment, the action was not a violation of a federal criminal statute, and that it is in the interest of the United States to provide representation. At this time, the payment of money judgments on behalf of a non-successful federal defendant in the lawsuit is not necessarily guaranteed by the federal government. Private insurance (at the official’s own expense) is available to protect against civil (not criminal) liability, but the Department of Justice does not recommend purchasing it because of the extensive immunity of federal employees.

The U.S. Supreme Court has held in the case of Hafer v. Melo, 112 S. Ct. 358 (1991), that state officials sued in their individual capacities may be PERSONALLY liable for damages in actions under 42 U.S.C. 1983 based upon actions taken in their official capacities.

### **LAWSUITS FROM INSIDE THE GOVERNMENT**

Thus far the discussion has related to suits from outside the government against the military Commander. However, the Commander may be the subject of adverse action by the government itself.

While the major environmental statutes (Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act of 1976 (RCRA)) either contain immunity provisions for federal employees acting in the scope of their employment or have been held by courts to grant immunity, federal officials have been held CRIMINALLY liable for violations of various environmental statutes that contain criminal penalties (Aberdeen Proving Grounds cases, United States v. Carr, 880 F.2d 1550 (2d. Cir. 1989), cert. denied, 110 S.Ct. 869 (1990)). For a more detailed discussion of potential liability for environmental violations, see the topic entitled “CRIMINAL LIABILITY OF COMMANDERS FOR ENVIRONMENTAL VIOLATIONS “ in this Deskbook.

Thus, under current ENVIRONMENTAL LAWS, it is possible for the federal government or for a state government to commence criminal or civil action against a military Commander for violations for which the Commander is responsible and either knows of or should know of. Federal representation may not be provided in such cases and the Commander may NOT be indemnified. In these cases, the Commander is subject to criminal penalties, including incarceration and fines, as well as civil money judgments, for all of which the Commander may be PERSONALLY liable.

Another area which is becoming of increasing concern to commanders is violations of the Anti-Deficiency Act (31 U.S.C. 1341 *et. seq.*). The federal government has been prosecuting commanders and others in the budgetary process for criminal violations of this act. Any time a commander uses funds for a purpose other than that which

they were appropriated for, or fails to investigate suspected violations by his subordinates immediately, the commander is subject to such prosecution. In these cases, it is doubtful that government representation will be offered, and nearly certain that there will be no indemnification.

If served with a summons and complaint from any court, the recipient should immediately contact a Judge Advocate for initiation of appropriate notifications to the National Guard Bureau and requests for representation. TIME IS OF THE ESSENCE.

***KWIK-NOTE: Commanders are NOT ALWAYS IMMUNE from lawsuits. Moreover, just because the government represents you in a lawsuit does not automatically mean you will be indemnified for any judgment rendered against you.***

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# Relief from Civil Liability

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Updated by Lt Col Neal Kirkpatrick, May 2001

**AUTHORITY:** Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appendix, Sections 501-591; Federal Tort Claims Act, 28 U.S.C. 1346 (b), 2402, 2671, 2672, 2674-2680; applicable state law.

## INTRODUCTION

Depending upon their duty status, while National Guard members are performing their duties they enjoy certain protections from the adverse effects of the civilian world. The types and extent of those protections also vary based upon state law. These protections usually fall into one of several types: immunity and indemnification from liability arising from their actions performed within the scope of their National Guard duties; temporary relief in the forms of postponements in complying with their personal civilian obligations; interest limits on loans incurred before the duty was performed; and exemption from civil process (such as summonses or subpoenas).

## IMMUNITY AND INDEMNIFICATION

This protection may be available whether the member is performing active federal service (Title 10), any duty in Title 32 status, and under many state laws, such as active state service, as long as the acts or omissions for which it is claimed the member is liable were performed within the scope of the member's military duties or employment. Depending on the duty status of the member, the Federal Tort Claims Act or state law equivalent may apply. See the section in this Deskbook entitled "PERSONAL LIABILITY OF FEDERAL AND STATE OFFICIALS" for more information on this topic.

## TEMPORARY RELIEF - POSTPONEMENTS IN COMPLIANCE WITH CIVILIAN OBLIGATIONS AND INTEREST LIMIT ON LOANS

### Postponements

This protection is pursuant to the federal Soldiers' and Sailors' Civil Relief Act (SSCRA) when the member is called into active federal service under Title 10, or in many states, under a state law equivalent of the SSCRA, when the member is called into active state service under state law. This protection does not apply to AGRs simply because of their full-time Title 32 status unless they are called to active federal service, and does not apply to any National Guard member in a training status under Title 32.

This protection may permit members to delay court appearances and certain financial obligations during their active federal or state service, upon proper application. The protection does not excuse members from paying just debts, or ultimately answering civil process or lawsuits, and provides no protection at all for criminal violations. It merely postpones the time the member has to satisfy debts or answer claims or civil charges until after the active federal or state service is completed.

### Loan Interest Limit

This federal SSCRA protection only applies when the member is in active federal service. The interest rate on any loan made before such service will be no more than 6% per year for the duration of the active federal service, upon the member's proper application therefor, and if the lender is unable to show a court that the member's active federal service does not materially affect the member's ability to continue to pay interest at the rate in effect before active federal service. While this protection equally applies to AGRs called to active federal service, they may have difficulty in successfully claiming this protection (because their base pay does not substantially change), unless the AGR can show that additional money earned from permissible off-duty employment at home station cannot be continued because of the active federal service.

This limit on loan interest protection does not apply to loans made during the period of active federal service, *e.g.*, such as finance charges on credit card purchases that were made during active federal service.

A more detailed explanation of these protections can be found in the topic "SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (FEDERAL AND STATE)" in this Deskbook.

Consult your Staff Judge Advocate to determine whether your state has a law similar to the SSCRA and whether its provisions apply when Guard members are called to active state service.

## **EXEMPTION FROM STATE CIVIL PROCESS**

Some state laws may preclude civil process upon a member while going to, or remaining at, or returning from the place of required military duty. However, such state laws typically do not exempt the member traveling to, remaining at, or returning from duty, from traffic tickets or other violations of law committed during such periods.

The Commander should consult with the Staff Judge Advocate for a full explanation of these protections and their applicability.

***KWIK-NOTE: Based upon the status of the ANG member and the type of duty performed, ANG members may enjoy certain protections from civilian statutes. Consider supplementing this topic with applicable state law.***

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# Transportation of and Liability to Foreign Military Nationals

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Updated by Lt Col Neal Kirkpatrick, May 2001

**AUTHORITY:** NATO Status of Forces Agreement; 28 U.S.C. 1346(b), 2402, 2671, *et. seq.*, Federal Tort Claims Act; AFI 51-501, *Tort Claims* (1 May 96), Chapter 4.

## INTRODUCTION

This topic discusses the legality of transporting foreign military aircrew members and their dependents from an aircraft having landed at a United States military installation, to either billeting or off-base quarters, and the liability of the United States in the event of an accident during the transportation.

Claims matters and other requirements involving foreign nationals - be they aircrew members, members of a civilian component of a foreign military force, or dependents of either - are determined by applicable treaties, law or regulations.

International treaties between the United States and a foreign country which govern the conduct of service members from the signatory countries are known as Status of Forces Agreements (SOFAs). While all the SOFAs between the United States and foreign countries govern the rights and liabilities of U.S. service members in foreign countries, **ONLY THE NATO SOFA GOVERNS THE RIGHTS AND LIABILITIES OF NATO FOREIGN NATIONALS WHILE THEY ARE IN THE UNITED STATES.**

## TRANSPORTATION OF NATO FOREIGN NATIONALS

Article IX, paragraphs 3 and 6 of the NATO SOFA, require the United States, on a priority basis, and subject to existing agreements, to transport foreign aircrews of NATO countries to billeting or off-base quarters, or other appropriate housing at CONUS bases. While the SOFA is silent on the subject of transportation of foreign dependents, the inherent authority and responsibility of the base Commander to facilitate the movement of incoming and outgoing personnel on base--especially those dependents accompanying foreign aircrews--and to provide for maximum base security, seem to dictate the exercise of that authority to transport **BOTH** the foreign aircrews and their dependents.

## TRANSPORTATION OF NON-NATO FOREIGN NATIONALS

Since only the NATO SOFA governs the rights and liabilities of foreign nationals from NATO countries while in the U.S., the rights and liabilities of non-NATO foreign nationals - aircrew members, members of a civilian component of a foreign military force, or dependents of either - are **NOT** governed by treaty, but by United States law and regulations.

In general, the same rationale supporting the transporting of dependents of NATO foreign aircrews applies to transporting non-NATO foreign aircrews, civilians, and their dependents. Therefore, the inherent authority and responsibility of the base Commander seem to dictate the transportation of non-NATO foreign aircrews and their dependents.

## LIABILITY TO NATO FOREIGN NATIONALS

### Aircrew Members

Pursuant to Article VIII, paragraph 4, of the NATO SOFA, each country which is a party to the SOFA waives all claims against the other for injury or death suffered by a member of its armed services while the member was

performing official duties. Thus, the United States would have no liability for claims of NATO governments for injury or death to a NATO aircrew member.

### **Non-Aircrew Members – Civilians and Dependents**

Under Article VIII, paragraph 5, of the NATO SOFA, the United States does have liability for injury or death to third parties (e.g., civilians and dependents) arising out of acts or omissions of members of a force in the performance of official duty or caused by other acts for which the force is legally responsible. Therefore, injuries or the death of a civilian, or dependent of either a foreign aircrew member or civilian should be processed under applicable claims procedures.

### **LIABILITY TO NON-NATO FOREIGN NATIONALS**

Since non-NATO foreign nationals are subject only to U.S. law and regulations, they are treated as civilians for liability and claims purposes if they suffer injury or death arising out of acts or omissions by a member of the U.S. military. Thus, the United States is liable to all foreign nationals from non-NATO SOFA signatory countries in the event of an accident. Claims arising from such accidents should be processed under applicable claims procedures.

### **SUMMARY**

In summary, and regardless of the legal basis - treaty, statute, regulation, or inherent authority and responsibility - all foreign nationals must be transported from the aircraft to the appropriate housing area, and the United States is liable for injury or death to all foreign nationals except those from NATO SOFA signatory countries who are military members of that country's military force.

In the event of an accident resulting in injury or death to a foreign national while being transported on, to, or from an Air National Guard installation by Air National Guard members, Commanders should immediately consult with their Staff Judge Advocates, who should immediately report the accident to the nearest active duty Air Force claims office. Further guidance in investigating the accident will be given by that office.

***KWIK-NOTE: Commanders may wish to brief this topic to unit personnel who may transport foreign nationals to and from the aircraft to billeting or housing facilities.***

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# Chapter 19, Medical Matters

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# HIV

**Major Mary Scott Hunter, Sep 2007**

**AUTHORITY:** AFI 48-135, *Human Immunodeficiency Virus Program (12 May 2004)*; DoDD 6485.1 *Human Immunodeficiency Virus-1 (HIV-1)*.

## **ACCESSION & RETENTION**

The AF tests all applicants and members for antibodies to the human immunodeficiency virus, medically evaluates all infected members, and educates members on means of prevention. All applicants for enlistment or appointment to the AF or ARC are screened for evidence of HIV infection. Applicants infected with HIV are ineligible for enlistment or appointment to the AF and the ARC. Waiver for HIV infection is not authorized. Force-wide, HIV-infected employees may be allowed to continue working as long as they are able to maintain acceptable performance and do not pose a safety or health threat to themselves or others in the workplace. If performance or safety problems arise, managers and supervisors address them using existing personnel policies and instructions.

## **SCREENING DISEASE SURVEILLANCE AND HEALTH EDUCATION**

ARC personnel are screened for serological evidence of HIV infection at an interval not to exceed five years, preferably during their PHA (Reserve Component PHA or ARCPHA). ARC members will have a current HIV test within two years of the date called to active duty for 30 days or more. Civilian employees are tested for serological evidence of HIV to comply with host nation requirements for screening of DoD employees and in occupationally related exposures.

**ARC** personnel testing positive are counseled by a physician, preferably the MTF designated HIV physician, regarding the significance of a positive test. They are given information on modes of transmission, appropriate precautions, and future risks. ARC members may be administered an order to follow preventive medicine requirements **after** their unit commander has determined they can be utilized in the Selected Reserve, and have been found medically qualified for nondeployed military duty by the appropriate ARC SG. All eligible beneficiaries are offered counseling. Spouses and contacts of HIV infected ARC members are notified

of potential exposure to HIV infection when permitted by state or local law and offered the opportunity for HIV screening and counseling at the supporting ARC or AD MTF. Secretarial designee procedures are used to provide this service to spouses of HIV infected ARC members in AD and ARC medical facilities.

## **HEALTH CARE PROVIDERS**

HIV-infected healthcare workers should be relieved from patient care responsibilities until counsel from an expert review panel has been sought.

## **DUTIES AND ASSIGNMENTS**

All ARC members on extended active duty testing positive for HIV, are referred to WHMC for medical evaluation and medical evaluation board (MEB) to determine fitness for duty. ARC members not on extended duty are evaluated to determine their fitness for duty only after their immediate commander has determined whether or not the member may be utilized in the selected reserve. In the case of an ANG member, it is only required if the state identifies a nonmobility, nondeployable position in which the member can be retained. ARC members not on extended active duty must obtain a medical evaluation from their civilian healthcare provider but only if the state identifies a nonmobility, nondeployable position in which the member can be retained.

An epidemiological assessment (including sexual contacts and history of blood transfusions or donations) is conducted to determine potential risk of HIV transmission. ARC members not on extended active duty or full-time ANG duty shall be transferred to the Standby Reserve only if their immediate commander determines the member cannot be utilized in the Selected Reserve. ARC members retained in the Selected Reserve must be medically evaluated semiannually, and assigned within the continental United States (CONUS), and Alaska, Hawaii, or Puerto Rico. ARC HIV infected members may not be deployed outside of CONUS (except for Alaska, Hawaii, and Puerto Rico) or perform tours of active duty for more than 30 days duration. HIV-infected members shall not be assigned to mobility positions, and those on flying status must be placed on Duty Not Including Flying (DNIF) status pending medical evaluation. Waivers are considered using normal procedures established for chronic diseases. Members on the Personnel Reliability Program (PRP) or other security sensitive positions shall be removed pending medical evaluation. Unit commanders, with medical advice from the Medical Facility Commander (MFC), evaluate each individual on a case-by-case basis for return to PRP or other security sensitive positions. The Secretary of the Air Force may, on a case-by-case basis, further limit duties and assignment of members to protect the health and safety of the HIV-infected member or other members. Routine HIV testing is suspended in declared combat zones, defined as those areas where hostile pay is authorized.

### **ORDER TO FOLLOW PREVENTATIVE MEDECINE REQUIREMENTS**

After the member is notified by a health care provider that he or she has tested positive for HIV infection, and the significance of such a test, the MFC expeditiously notifies the member's unit commander of the positive test results. An order by their immediate commander to follow preventive medicine requirements is issued after their immediate commander determines the member will be retained in the Selected Reserve. When the order is given, a credentialed provider is present to answer any medical concerns of the member. Use the order at AFI 48-135. Attachment 14. It is signed and dated by the commander and member. If the member refuses to sign, the commander notes that the member refused to sign in the acknowledgment section. The order is securely stored to protect the member's privacy and confidentiality. A copy of the order is provided to the member. Upon the individual's reassignment, the unit commander forwards the order in a sealed envelope to the gaining commander. The envelope is marked "To Be Opened By Addressee Only." Upon the individual's separation from the Air Force, the order is destroyed.

### **SAMPLE ORDER TO FOLLOW PREVENTIVE MEDICINE REQUIREMENTS**

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

As a military member who has been diagnosed as positive for HIV infection, you are hereby ordered: (1) to verbally inform sexual partners that you are HIV positive prior to engaging in sexual relations. This order extends to sexual relations with other military members, military dependents, civilian employees of DoD components or any other persons; (2) to use proper methods to prevent the transfer of body fluids during sexual relations, including the use of condoms providing an adequate barrier for HIV (e.g. latex); (3) in the event that you require emergency care, to inform personnel responding to your emergency that you are HIV positive as soon as you are physically able to do so. (4) when seeking medical care, you may wish to inform the provider that you have HIV so that the provider can use that information to optimize your evaluation and treatment; (5) not to donate blood, sperm, tissues, or other organs. Violating the terms of this order may result in adverse administrative action or punishment under the Uniform Code of Military Justice for violation of a lawful order.

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Signature of Commander and Date

I have read and understand the terms of this order and acknowledge that I have a duty to obey this order. I understand that I must inform sexual partners, including other military members, military dependents, civilian employees of DoD components, or any other persons, that I am HIV positive prior to sexual relations; that I must use proper methods to prevent the transfer of body fluids while engaging in sexual relations, including the use of

1. Military personnel entitled to military medical care (AGR and EAD members only) will be medically retired or medically discharged with an honorable characterization. Specific instructions will be provided with each case;
2. ANG personnel not entitled to military healthcare (traditional and technician Guard members) may either retire, if eligible, or be discharged. If separated, the characterization of service shall never be less than that warranted by the member's service record;
3. Military personnel with serologic evidence of HIV infection who are found not to have complied with lawfully ordered preventive medicine procedures for individual patients (AGRs and EAD members only) are subject to appropriate administrative and disciplinary action which may include separation (See Attachment 3 to this topic); and
4. Members with serologic evidence of HIV infection may request voluntary discharge. These members will be issued an honorable discharge certificate.

## **LIMITATIONS ON THE USE OF INFORMATION**

### **Epidemiological Assessment Information**

Pursuant to the Defense Authorization Act of 1987, Section 705 (effective 18 October 1986), information obtained from an AGR or EAD member during or as a result of an epidemiologic assessment (EA) interview, and who has been identified as having been exposed to the virus associated with AIDS, may NOT be used to support any ADVERSE PERSONNEL ACTION against that member (Remember, the EA occurs after the member tests positive, and since traditional and technician Guard members do not have EAs - they are normally separated upon a positive test - this guidance does not apply to them).

Adverse personnel actions include:

1. Court-martial;
2. Nonjudicial punishment;
3. Involuntary separation for other than medical reasons;
4. Administrative or punitive reduction in grade;
5. Denial of promotion;
6. Unfavorable entry in a personnel record;
7. Denial of reenlistment;
8. Line of Duty determination; and
9. Any other action considered by the Secretary of the Air Force to be an adverse personnel action.

### **Laboratory Test Results**

Laboratory test results confirming the serologic evidence of HIV infection may not be used as the sole basis of separation of the AGR or EAD ANG member and the tests results may not be used as an independent basis for any disciplinary or adverse administrative action against such member.

## **Privacy Act**

Air Force and ANG policy strictly safeguards results of positive HIV testing. There is NO release to persons outside the Air Force or ANG without the member's consent. The Air Force and ANG will neither confirm nor deny testing results of specific service members. This no release policy has some limited exceptions listed below.

## **PERMISSIBLE USES AND DISCLOSURE OF INFORMATION**

### **Epidemiological Assessment Information**

However, EA information must be provided to the member's immediate Commander for proper consideration of those personnel actions deemed to be nonadverse. EA information may be used for the following non-adverse personnel actions:

1. Disqualification (temporary or permanent) or withdrawal from Personnel Reliability Program (PRP);
2. Denial, suspension, or revocation of security clearance;
3. Reassignment;
4. Suspension or termination of access to classified information;
5. Removal (temporary or permanent) from flight status or other duties requiring a high degree of stability or alertness;
6. Transfer between Reserve components; and
7. Removal (temporary or permanent) of AFSC.

These nonadverse actions cannot be accomplished by unfavorable entries in the member's records. But recording information that the member is HIV positive or appropriate words to that effect is not an unfavorable entry and is permitted; but the information should not be placed in records that are easily accessed (i.e., unit records). Nonetheless, the fact that the member is HIV positive will be coded in the member's medical records.

EA information may also be used for or disclosed to:

1. Rebuttal in court or at a board proceeding when the member first introduces evidence of drug abuse or relevant sexual activity, or lack thereof;
2. The member's Unit Commander and other DoD healthcare beneficiaries;
3. Various communicable disease reporting facilities in accordance with local law, but these agencies must get approval from the ASECDEF for Health Affairs before release is required; and
4. Any disciplinary or other action based on independently derived evidence.

### **Laboratory Test Results**

Results obtained from laboratory tests for HIV may be used for other purposes including:

1. In a separation for physical disability;
2. In a separation under the accession testing program;
3. In a voluntary separation for the convenience of the government;

4. In any other administrative separation action authorized by DoD policy; and
5. In any other manner consistent with law or regulation (e.g., the Military Rules of Evidence), including:
  - a. To establish the HIV positive status of a member who disregards the preventive medicine counseling or disobeys the preventive medicine order, or both (Attachments 1 and 2 to this topic), in an administrative or disciplinary action based on such disregard or disobedience;
  - b. To establish the HIV positive status of a member as an element of any other permissible administrative or disciplinary action (e.g., as an element of proof of an offense charged under your state Code of Military Justice, or applicable regulation); and
  - c. To establish the HIV positive status of a member as a proper ancillary matter in an administrative or disciplinary action (e.g., as a matter in aggravation in a court-martial in which the HIV positive member is convicted of an act of rape committed after the member is informed of being HIV positive).

### **Privacy Act**

There are limited exceptions to the rule that the medical or personnel records of an HIV positive member cannot be disclosed. They are:

1. Very limited release within the Air Force and ANG on a need-to-know basis only, i.e., the unit Commander should NOT inform First Sergeants and/or Supervisors unless a determination is made that those individuals truly need to know (the unit Commander should consult with the DBMS);
2. Disclosure is required under the Freedom of Information Act (FOIA), 5 U.S.C. 552. Note, that Section 552(6) exempts from disclosure under FOIA personnel and medical files that would constitute a clearly unwarranted invasion of privacy;
3. Compelling circumstances that affect the health or safety of an individual;
4. Routine use (the Air Force has established reporting to state and local health agencies as a routine use);
5. For civil or criminal law enforcement purposes where a violation of law is indicated; and
6. To a Congressional Committee for a purpose within its area of responsibility.

### **ORDER TO FOLLOW PREVENTIVE MEDICINE REQUIREMENTS**

The Order to Follow Preventive Medicine Requirements is issued to all HIV positive AGR and EAD Guard members who remain on active duty.

This Order (Attachment 2 to this topic) sometimes has misleadingly been called the Safe-Sex Order. This Order is much broader in that it not only covers safe sex, but also requires disclosure of being HIV positive to healthcare providers in emergency and normal treatment situations, and prohibits the donating of bodily fluids and organs.

These orders have consistently been held to be enforceable by the military courts, including the Court of Military Appeals (now called the Court of Appeals for the Armed Forces). The parts of the Order most frequently violated are the parts that require HIV-infected members to tell their prospective sexual partners, whether military or civilian, of their condition before having intercourse and to take precautions when engaging in sexual activity, whether the intercourse or other sexual activity is heterosexual or homosexual. Remember, the safe-sex part of the Order requires two things: to WARN and to TAKE PRECAUTIONS. Violations of either requirement have led to court-martial convictions of military members for aggravated assault, conduct prejudicial to the good order and discipline of the Armed Forces under Article 134, UCMJ (U.S. v. Woods, 28 MJ 318 (1989)), disobeying a superior commissioned officer under Article 90, UCMJ (U.S. v. Womack, 29 MJ 88 (CMA 1989)), and failure to obey a lawful order under Article 92, UCMJ. The rationale in

part is that these Orders constitute a lawful exercise of a Commander's authority. The references to the UCMJ are for information purposes only; state Codes of Military Justice should be consulted in similar instances.

Most, if not all, violations of these Orders will involve only AGR or EAD Guard members rather than traditional or technician Guard members. The reason is that since the latter members are usually immediately separated after testing positive for the HIV, *No Safe-Sex Type Order* is given, since once the member is separated, there is no basis to enforce violations of the Order. The exception is for those members for whom the state has identified a nonmobility, nondeployable position in which the member can be retained.

Here is what happens regarding the initiating, processing, and retaining of the Order:

1. The member is notified by the healthcare provider of the positive test;
2. The DBMS notifies the member's unit Commander;
3. The unit Commander issues the Order to follow preventive medicine requirements;
4. The Order should be signed and dated by the Commander and the member;
5. The unit Commander is responsible for storing and safeguarding the Order to protect the privacy and confidentiality of the member. The Order may be filed with the unit PIF or in a classified safe, and **MUST BE PLACED** in a sealed envelope marked "FOR THE EYES OF THE COMMANDER ONLY," with the unit Commander's signature across the envelop seal; and
6. Upon reassignment, the unit Commander forwards the Order in a sealed envelope to the gaining Commander marked "TO BE OPENED BY ADDRESSEE ONLY."

#### **HIV -- AIR FORCE AND AIR NATIONAL GUARD CIVILIAN EMPLOYEES**

Civilian employees are tested for serological evidence of HIV to comply with host nation requirements for screening of DoD employees.

HIV positive status is a handicap under federal civil rights laws such as the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq. and the Civil Rights Restoration Act of 1988, Pub.L.No. 100-259 (1988) which prohibit discrimination on the basis of physical or mental handicap.

Court decisions concerning other kinds of handicaps are instructive on how HIV handicap issues will be handled.

In the case of *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987), the Supreme Court determined that a person with a contagious disease (tuberculosis) was handicapped within the meaning of the statute. The Court held that fear of contagion did not justify discriminatory treatment.

The statute also protects an otherwise qualified employee from discrimination because of a physical or mental handicap. In the *Arline* case above, the Court set forth an individualized inquiry to determine whether persons are otherwise qualified, i.e., whether they can perform the essential functions of the position. The inquiry must be based on factual findings from reasonable medical judgments about the:

1. Nature of the risk (how the disease is transmitted);
2. Duration of the risk (how long is the carrier infectious);
3. Severity of the risk (the potential harm to third parties); and
4. Probabilities the disease will be transmitted and will cause varying degrees of harm.

The trial court must decide in light of these findings whether the employee can perform the essential functions of the job, and if not, whether any reasonable accommodation can be made. The Court said that a person who poses a significant risk of communicating an infectious disease to others in the workplace would not be an "otherwise qualified employee."

In *Chalk v. U.S. District Court*, 840 F.2d 701 (1988), the U.S. Court of Appeals for the 9th Circuit specifically ruled that teachers could not be reassigned from their teaching duties simply because they had AIDS.

In March 1988, the U.S. Office of Personnel Management issued guidelines for federal agencies on handling AIDS in the federal workplace (FPM Bulletin 792-42):

1. Extensive HIV Information and Education Program;
2. HIV Positive employees may continue to work provided they are able to do so. Specifically:
  - a. They may not be denied employment or fired because they have AIDS or are seropositive; and
  - b. Their privacy and confidentiality must be protected;
3. Employees should be granted sick or annual leave or leave without pay the same as other employees with medical conditions. This is the accommodation of the handicap, and is the same concept as job restructuring or reassignment;
4. Employees are eligible to receive disability retirement if the medical condition warrants and they have the required number of years; and
5. On issues of co-employee refusal to work with infected employees, there must be information and counseling, and if they still refuse to work with infected employees, they may be disciplined.

#### **HIV TESTING OF U.S. MILITARY PERSONNEL VISITING FOREIGN COUNTRIES**

Public health concerns of host nations have resulted in occasional requests that visiting military units demonstrate that unit personnel are free of the HIV.

By message from the Secretary of Defense, retransmitted by ANGSC/SG by message dated 172100Z December 1987, guidance was provided for responding to expressions of concern, official action, or other efforts by host nations to condition U.S. military visits on HIV testing. In response to questions concerning communicable diseases on visiting U.S. military aircraft, a host government can be informed that:

1. Commanding officers of a U.S. military aircraft are required to report at once to local health authorities any condition aboard their aircraft which presents a hazard of introduction of a communicable disease outside the aircraft. Commanding officers, if requested, will certify that there are no indications that military personnel entering the host nation from their aircraft will present such a hazard; and
2. Concealment of any circumstances which might subject a U.S. military aircraft to quarantine is strictly prohibited under regulations.

If asked what the U.S. is doing to prevent the spread of HIV by U.S. service personnel, the following statement may be given to the host country by Commanders and Public Affairs Officers:

"U.S. Department of Defense policy requires all military personnel to be screened for serological evidence of human immunodeficiency virus (HIV) infection. Those with positive serological evidence of HIV infection are assigned within the United States. In implementation of this policy, U.S. military personnel enroute to permanent overseas duty are tested prior to deployment."

The United States views its military aircraft as sovereign. Therefore, the U.S. will refuse requests to permit inspections of its aircraft, to provide specific information on individual crew members, and to undertake other requested actions since

the certification of the Commanding Officer is definitive. For security and other reasons, the U.S. does not release for any reason detailed lists of personnel embarked on U.S. military aircraft visiting foreign nations.

In using this guidance and addressing host nation queries, Consular posts should be sensitive to and resist measures which discriminate against U.S. military personnel or units. Examples include:

1. Requiring more information about U.S. military personnel than visiting military personnel from other countries; and
2. Treating U.S. military personnel as a higher risk group than commercial aircrews.

Media queries concerning DoD policy on HIV testing and subsequent government to government discussions beyond the above statements should be referred to the U.S. State Department or the appropriate U.S. Embassy pursuant to Secretary of Defense message retransmitted by Chief, NGB dated 061955Z November 1987.

*COMMANDERS ARE ADVISED TO HAVE ALL AIRCRAFT COMMANDERS POSSESS ON ALL OCONUS FLIGHTS THE ABOVE PERMITTED STATEMENTS PREPRINTED IN SUFFICIENT SUPPLY IN THE EVENT OF SUCH HOST NATION INQUIRIES CONCERNING THESE MATTERS.*

## CONCLUSION

This topic has tried to list the highlights of the many areas in which HIV affects the military. It is not a substitute for the ever-changing guidance in this area. Questions concerning the accession, retention, separation, limitations on use of information, or other matters concerning HIV infected Air National Guard personnel, should be directed to your Staff Judge Advocate.

***KWIK-NOTE: The segments of this topic have been written in a briefing format. Use them as you see fit in your Ancillary Training and Preventive Law Programs.***

RELATED TOPICS:	SECTION
Administrative Discharge of Enlisted Personnel	24-3
Administrative Discharge of Officers	24-4
Assignments	1-5
Barring Reenlistment	24-6
Blood Drives	19-4
Classified Material	14-2
Courts-Martial	8-15
Drug Abuse	10-4
Enforceability of Orders by Air Force Officers to ANG Personnel Not In Federal Service	11-5
Enlistment And Reenlistment	1-13
Foreign Search, Inspections And Customs Duties Of U.S. Aircraft	15-9
Homosexuality	1-18
Interrelationship Of U.S. Civil And Military Agencies - The U.S. Country Team	15-11
Judicial Review Of Military Administrative Actions	18-5
Medical And Dental Care From Civilian Sources	19-9
Medical And Dental Care To Persons Authorized	19-10
Medical Evaluation (Profile Change)	19-11
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Personnel Security Access Program	1-28
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Relationship With Other Military Components	11-6
Revocation Of Security Clearance	24-13
Travel Expenses	27-11

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Page 1 of 3

**PREVENTIVE MEDICINE COUNSELING RECORD**

**PURPOSE:** To record the preventive medicine counseling provided each Human Immunodeficiency Virus antibody positive military healthcare beneficiary.

**INSTRUCTIONS:** The counselor will obtain and record the administrative information required in Part I from official military records or from the patient's identification card. If the patient is not active duty military, the sponsors information will also be included. Each item in Part II will be individually explained to the patient by the counselor. Certifying signatures of the counselor and patient will be affixed as indicated in Part II. The patient will receive one copy, and the other copy will be filed in the patient's inpatient medical record.

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**PART I - PATIENT IDENTIFICATION**

NAME OF PATIENT \_\_\_\_\_

NAME OF SPONSOR \_\_\_\_\_

GRADE \_\_\_\_\_ SSAN \_\_\_\_\_

UNIT \_\_\_\_\_

LOCATION \_\_\_\_\_

DATE OF DIAGNOSIS \_\_\_\_\_

TIME AND DATE OF COUNSELING \_\_\_\_\_

LOCATION OF COUNSELING \_\_\_\_\_

---

COUNSELOR: NAME \_\_\_\_\_

GRADE AND COMPONENT \_\_\_\_\_

TITLE \_\_\_\_\_

UNIT \_\_\_\_\_

## PART II - PREVENTIVE MEDICINE COUNSELING RECORD

I have been informed of my confirmed positive laboratory result for the Human Immunodeficiency Virus (HIV) antibody. I understand that I have a responsibility to prevent transmission of the infection to others with whom I may have contact. Specifically:

1. My positive HIV antibody test with Western Blot confirmation means that I have been infected with HIV. Current medical knowledge indicates that once a person has been infected, it is assumed that he or she continues to harbor the virus. This means that I am infectious, or capable of transmitting the virus through any behaviors potentially involving the sharing of body fluids;
2. It has been explained to me that HIV infection is primarily transmitted through three routes: intimate sexual exposure; perinatal exposure (from infected mothers to their infants); and parenteral exposures (transfusion of contaminated blood or blood products, or sharing of needles by intravenous drug abusers). Since the virus has been isolated from various body fluids, to include blood, semen, saliva, tears, and breast milk, personal items such as toothbrushes, razors and other personal implements which could become contaminated with blood or other fluids should not be shared with others, even though the risk appears low. I have been informed that casual contact such as hugging, shaking hands or other common non-sexual personal contacts pose a negligible risk of transmission;
3. I have been informed that the percentage of those infected with HIV, which will progress to clinical illness or suffer impaired immunity, is unknown. If I am now asymptomatic, and later develop unexplained fever, weight loss or infections, I must seek immediate medical attention;
4. Although I may have no symptoms presently, I may still transmit this infection to others through sexual intercourse, sharing of needles, donated blood products, and possibly through exposure of others to saliva through oral-genital contact or intimate kissing. I have been informed that transmission of HIV infection through sexual intercourse can be avoided only through abstinence. If I cannot abstain, then I must engage only in protected sexual relations, i.e., using a condom. Males must always use a condom, and females must insist that their partners use condoms. While the ability of condoms to prevent transmission of infection is unproven, they may reduce the chance of transmission, and I must always use them or insist on their use during all intimate sexual encounters;
5. I have been informed that I, as an HIV infected person, have the responsibility to always verbally inform my sexual partners of my infection prior to engaging in any intimate sexual behavior;
6. I realize that I may have infected others before I knew I was infected. For that reason, I am obligated to reveal the identity of all persons with whom I have had sexual relations or shared needles, so that they too can receive testing and counseling to break the chain of transmission. In addition to revealing their identities, I will personally inform all my contacts of the likelihood of their exposure to HIV as soon as possible, and recommend they seek testing and counseling;
7. I, as an HIV infected person, will not donate blood, sperm, tissues or organs; and
8. Whenever I seek medical or dental care from any source, I must inform the healthcare provider of my HIV infection, so that appropriate evaluation and precautions are taken to protect the provider and other patients. If the husband or wife or both are HIV infected, pregnancy should be avoided because of the high possibility that a newborn infant of an infected mother will also be infected. New mothers, who are HIV infected, should avoid or discontinue breast feeding to prevent potential transmission to an uninfected infant.

I acknowledge that I, \_\_\_\_\_, have been counseled and understand that the preventive medicine measures listed in paragraphs 1. through 8. above, which were explained to me, are necessary to preclude transmission of HIV infection.

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SIGNATURE OF PATIENT

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DATE

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SIGNATURE OF COUNSELOR

---

DATE

Attachment 2  
Page 1 of 1

**ORDER TO FOLLOW PREVENTIVE MEDICINE REQUIREMENTS**

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

As a military member who has been diagnosed as positive for HIV infection you are hereby ordered:

1. To verbally inform sexual partners that you are HIV positive prior to engaging in sexual relations. This order extends to sexual relations with other military members, military dependents, civilian employees of DoD components or any other persons;
2. To use proper methods to prevent the transfer of body fluids during sexual relations, including the use of condoms;
3. In the event that you require emergency care, to inform personnel responding to your emergency that you are HIV positive;
4. When you seek medical or dental care, to inform healthcare providers that you are HIV positive before treatment is initiated; and
5. Not to donate blood, sperm, tissues, or other organs.

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

\_\_\_\_\_  
Commander's Signature  
Block and Date

**ACKNOWLEDGMENT**

I have read and understand the terms of this order and acknowledge that I have a duty to obey this order. I understand that I must inform sexual partners, including other military members, military dependents, civilian employees of DoD components, or any other persons, that I am HIV positive prior to sexual relations; that I must use proper methods to prevent the transfer of body fluids while engaging in sexual relations, including the use of condoms; that if I need emergency care I will inform personnel responding to my emergency that I am HIV positive; that when I seek medical or dental care that I must inform healthcare providers that I am HIV positive before treatment is initiated; and that I must not donate blood, sperm, tissues, or other organs. I understand that violations of this order may result in adverse administrative actions, punishment under the Uniform Code of Military Justice, and/or \_\_\_\_\_ State Code of Military Justice.

\_\_\_\_\_  
Member's Signature Block and Date

## Ambulance Response Off-Base

Updated by Major Sonya Batchelor, October 2008

**AUTHORITY:** AFI 41-115, *Authorized Health Care and Health Care Benefits in the Military Health Services System* (28 Dec 01); AFI 32-2001, *Fire Emergency Services Program* (9 Sep 08); applicable state law.

### AUTHORITY TO RESPOND

The use of ambulance equipment and personnel poses several complicated problems; they include the potential for personal liability for ANG members, and the potential for federal and state liability. To the best of our knowledge, there is no regulation that authorizes the execution of an agreement between the Federal government and local municipalities for either the mutual or unilateral commitment of ANG ambulance equipment and personnel.

AFI 32-2001 authorizes reciprocal Fire Protection Agreements for off-base ambulance responses in emergency situations and includes a template agreement. Any such agreement must be of the non-obligatory type, with mutual waivers of claims for negligence and losses for injuries or damages. AFI 41-115 provides for medical treatment of civilians by Air Force medical personnel if the treatment is necessary “to save a person’s life, limb, or sight, or to prevent undue suffering or loss of body tissue.” This provision of the regulation may allow for dispatch of Air Force (ANG) ambulances to civilian emergencies. However, providing medical treatment to civilians should be the exception, not the norm especially where ANG medical personnel are not licensed by the state in which they are responding. .

As has been discussed in other topics in this Deskbook, unauthorized off-base ambulance response could be deemed not within the member’s scope of employment. The members involved, including all Commanders in the member’s chain of command, could be subject to personal liability for malpractice or negligence, including motor vehicle accidents, to and from the off-base site of the response.

### EMERGENCIES

Off-base ANG ambulance responses should be limited to EMERGENCY situations, as there is a danger of personal liability of military members in treatment of civilians. However, nothing in this topic is meant to suggest that in off-base disasters involving military personnel or equipment, ANG ambulances should not respond to the scene. Indeed, in such situations, it is part of their duty to do so. Upon arrival at the off-base site, medical assistance rendered even to civilians should be limited to emergencies or life-threatening situations, or transportation of civilians to civilian hospitals *when no civilian ambulances are available.*

### LIABILITY AND PROTECTION

When an ANG ambulance leave the base, they may lose their protection under the Federal Tort Claims Act (FTCA) from liability for negligence and the members concerned may become personally liable. FTCA protection is lost when the conduct performed is not within the scope of the military member’s duties. If there is a valid and mission based reason for the ANG ambulance to leave the base to respond to render assistance, in an emergency or disaster, or in a disaster preparedness exercise, then it more likely that the response will be seen as in scope of employment should an FTCA liability question later arise. The medical facility Commander who makes the decision in each case should consult the Staff Judge Advocate and must be reasonably certain of the following before dispatching Air Force (ANG) ambulances:

1. The accident or emergency poses serious threat to life, limb, or sight or is causing undue suffering; and
2. This threat cannot be dealt with *except* by the dispatch of an Air Force (ANG) ambulance.

Consult your Staff Judge Advocate to determine if your state has statutory requirements concerning medical equipment installed in ambulances. If your state has enacted such laws, you should not dispatch ambulances that do not comply with the states standards unless there is life and limb at risk and no other responder available. If other responders become available your medical staff should turn over any patient care and withdraw. Second, under the general principles of tort law, individuals who come to the rescue of people in peril or trouble can be held liable for their acts of negligence unless there are state statutes, generally referred as "Good Samaritan laws," to protect them. In the absence of "good Samaritan laws" individual ambulance personnel could be held liable for their negligence in emergency response situations. Members in Title 32 or Title 10 status acting within the scope of their employment would have personal immunity from suit under the Federal Tort Claims Act.

***KWIK -NOTE: The Staff Judge Advocate should also be consulted to determine if there are any statutes or regulations in your state which permit, authorize, or protect your medical personnel for off-base ambulance responses.***

<b>RELATED TOPICS :</b>	<b>SECTION</b>
Aid To Civilian Authorities	6-2
Aircraft Accidents And Safety Investigations Off-Base	16-2
Feres Doctrine	18-3
Indemnification Agreements	18-4
Lawsuits Against National Guard Personnel	18-6
Liability Of National Guard Medical Personnel	18-8
National Defense Area	25-15
Personal Liability Of Federal And State Officials	18-9
Posse Comitatus	6-7
Reciprocal Fire Protection	25-18
Relief From Civil Liability	18-10

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## Blood Drives

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Updated by Lieutenant Colonel Ron M. Feder, March 2001

**AUTHORITY:** Applicable state law and regulations.

### **BASIS OF ANG INVOLVEMENT**

It has been the custom of the Air National Guard to support blood drives sponsored by bona fide health organizations such as the Red Cross and local blood banks. Generally, members are permitted to donate blood while in a duty status.

### **GUIDELINES**

It should be noted that Commanders or the government should not face any undue legal exposure as long as the following guidelines are followed:

1. Members may not be coerced or ordered to give blood. They are only being provided an opportunity to volunteer;
2. Only bona fide and recognized agencies are allowed to solicit donations;
3. All procedures including screening of donors are handled by employees or volunteers of the outside agency and not by military personnel; and
4. If a Commander is aware that an unsuitable individual wishes to volunteer (for example, a member with an infectious condition), the Commander should direct the member not to donate blood. Communication of this fact between the Commander and third parties outside the government (for example, the Red Cross or local blood bank) may be deemed a breach of the member's privacy.

Some units periodically throughout the year invite the local Red Cross onto their base to conduct blood drives. The unit advertises it within the unit, and the Red Cross advertises it to the local civilian community. The Red Cross supplies all the equipment and personnel. Military members and civilians donate blood, on a certain date which is usually during the week, as many Commanders need monthly drill time for required training. While state law may permit blood drives at local hospitals off-base at which military members participate, use of base facilities for blood drives may require a lease or armory use agreement (probably at no rental fee) under your state's law or military regulations.

Since these activities involve advance planning and coordination, Commanders are well-advised to include their Staff Judge Advocate in the process.

***KWIK-NOTE: The ANG has only a PASSIVE ROLE in conducting blood drives.***

### **RELATED TOPICS :**

### **SECTION**

HIV	19-2
Cooperative Agreements	25-22
Leases And Armory Use Agreements	3-12

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# CPR Training and Potential Liability

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Updated by Lieutenant Colonel Ron M. Feder, March 2001

**AUTHORITY:** Applicable state laws.

## INTRODUCTION

There are two concerns Commanders may have with CPR:

- (1) May I or should I establish or permit a general CPR training program at the base?
- (2) Whether or not I do, what is the potential liability of a unit member who performs CPR?

## TRAINING

The regulations require medical and other select unit personnel to know how to perform CPR as part of their military duties. This part of the topic does not address CPR training of those whose military duties require it. But, it is obviously good for everyone to know how to perform CPR. May or should you as Commander, establish or permit CPR training to be conducted on the base by and for all military members? If you do, can or should it be done on duty hours or on off-duty time?

As a general rule, Commanders may, subject to applicable federal and state laws and regulations, permit activities on their bases that are not illegal. In absence of a state's specific laws, nothing prohibits conducting CPR training on a base. Depending upon who will be trained, there may be state law or regulatory requirements regarding the use of base facilities for the training.

As a practical matter, CPR training programs available to the general unit population may have to be conducted on off-duty time, since there may not be sufficient time in a duty day to accomplish the required training essential to your mission.

Members who participate in such CPR training, either as instructors or trainees, may be in a duty status by virtue of their status (for example, AGRs or those on Annual Training orders). If members are not already in a duty status, they should not be placed on orders to participate in CPR training conducted during off-duty time.

CPR training should only be conducted by qualified instructors.

As with any activity permitted on base by the Commander, unit members who are injured on or off-duty during the course of the activity may be entitled to medical and other line of duty benefits, depending on their status at the time of the injury.

## POTENTIAL LIABILITY

If a participant in a CPR training program on base (whether the program was open to the general unit population or only for those whose duties required the training) or a person who was assisted by a unit member using CPR is injured, is there any liability on the part of the individual performing CPR, the Commander, the State, or the Air National Guard?

### INJURY TO PARTICIPANT IN TRAINING PROGRAM

Since the CPR training program on base was permitted by the Commander and the participants are military members, liability for negligent injury to a participant may be precluded by the *Feres* Doctrine which is discussed in a topic entitled "FERES DOCTRINE" in this Deskbook. The *Feres* Doctrine precludes suits where the injury was sustained in

connection with military related activities by a military member and allegedly caused, in whole or in part, by a military member.

Even if liability potentially exists, there can be no liability without someone other than the injured party being NEGLIGENT. Even if negligence exists, liability will probably be assumed by either the state or federal government because the individuals were participating in an activity lawfully authorized by the Commander.

### **INJURY TO PERSON ASSISTED BY CPR**

Many members of the National Guard are familiar with CPR and are encouraged to use that training in the event of an emergency. As long as members act in good faith, perform CPR consistent with their training, and continue CPR for a reasonable period of time, there is a very small possibility of legal exposure and a very large possibility that a life will be saved.

If a member is negligent in the performance of CPR, however, then both the member and the unit may have exposure to liability.

If the act and the injury were by and between military members, then the *Feres* Doctrine may apply to preclude liability, if the CPR provider was negligent and was acting within the scope of employment at the time. Line of duty benefits may apply to the injured member. Assuming there was negligence on the part of a member in a duty status at the time of the CPR assist, given the humanitarian intent of the assist and the general training in the military, the assisting member will likely be found to have been acting within the scope of employment. If so, the member should be indemnified by the state or federal government for any liability.

If the member was not in a duty status at the time of the assist, there probably will be no state or federal indemnification of the member if the member is found negligent, and the member may be personally liable. However, in order to establish negligence, the party bringing the suit generally has to prove the following:

1. Duty - that the member had a duty to the person injured;
2. Breach of Duty - that the member of the unit failed to live up to that duty and actually breached it with regard to the person injured;
3. Damages - that the person bringing the suit suffered some discernible form of injury; and
4. Proximate Cause - that there was some cause and effect relationship between the breach of duty and the actual injuries (damages) suffered by the injured party.

Unless members have a duty to provide emergency care as part of their mission responsibilities, members of the unit do not have a legal duty to come to the aid of a dying stranger. Most people trained in CPR would aid such a stranger anyway. However, once aid is initiated, the member has a duty to perform in a reasonable and prudent manner. If the member is trained in CPR and does not check the victim's airway, breathing, and circulation before commencing CPR (i.e., does not follow the correct CPR procedures), there is a potential issue of negligence since a reasonable and prudent person trained in CPR should take that action. While no court has held that a rescuer must ensure that the victim recovers, the courts do require that trained rescuers perform in a reasonable and prudent manner consistent with their training.

***KWIK -NOTE: Commanders and their Judge Advocates should ensure that members of the unit who are trained in CPR understand their potential exposure in the event they come to the aid of a stranger or conduct CPR Training programs on base.***

**RELATED TOPICS**

**SECTION**

HIV	19-2
Cooperative Agreements	25-22
<i>Feres</i> Doctrine	18-3
Indemnification Agreements	18-4
Lawsuits Against National Guard Personnel	18-6
Leases And Armory Use Agreements	3-12
Liability Of National Guard Medical Personnel	18-8
Line Of Duty Determinations	1-19
Morale, Welfare And Recreation (MWR) Programs, Activities and Facilities	22-4
Personal Liability Of Federal And State Officials	18-9
Relief From Civil Liability	18-10

# Healthcare Practitioners

Updated by Major Sonya Batchelor and Capt Elliot Selle (AFPC/JA), October 2008

**AUTHORITY:** 42 U.S.C. 11131, *et seq.*; Health Care Quality Improvement Act of 1986; 45 C.F.R. 60, reference (f), National Practitioner Data Bank; AFI 44-119, *Medical Quality Operations* (24 Sep 07); DoDD 6025.13-R, *Clinical Quality Management Program (CQMP) in the Military Health Services System (MHS)* (11 Jun 04), which incorporated *DoDD 6025.14, Department of Defense Participation in the National Practitioner Data Bank (NPDB)*; applicable state law and regulations.

## INTRODUCTION

All privileged providers in the Air National Guard who can make independent medical decisions concerning patient care must be granted privileges before they can practice medicine in their healthcare specialty. Privileges are permission to provide medical and other patient care services in the granting institution, within defined limits, based on the individual's education, professional license, demonstrated clinical experience, clinical competence, ability, health, and judgment. Although the focus on this topic is on privileged providers, non-privileged providers can be removed from patient care pursuant to AFI 44-119, Ch 9D through similar procedures.

This topic discusses:

1. The circumstances and procedures leading to a loss of those privileges or credentials; and
2. The notices the Air Force is required to make to licensing boards whenever a healthcare provider separates from the Air National Guard.

## LOSS OF PRIVILEGES

AFI 44-119, Chapter 9, contains the regulatory guidelines for examining clinical adverse actions (privileged or non-privileged) where the authority to practice for the Air Force Medical Service (AFMS) is adversely affected. This regulation applies to all reserve components. Clinical adverse actions are taken in response to a threat to patient safety or to the integrity of the AFMS related to clinical incompetence, professional misconduct, or impairment. The process has five steps: inquiry period (optional), professional review process (credentials function or non-privileged provider review function), hearing procedures, appeal procedures through the Medical Practice Review Board, and final NGB/SG or Senior Corps Chief review.

## MEDICAL FACILITY COMMANDER'S (MFC's) OPTIONS

Depending on the urgency and scope of the problem with the practitioner's conduct, Commanders have a few choices.

### Immediate Action: Summary suspension or abeyance

When a practitioner's conduct requires that immediate action be taken to protect the health or safety of any patient, employee, or other person in the medical facility, the Credentials Function Chairperson or ANG designated senior physician may summarily hold in abeyance or suspend all, or any portion of the clinical privileges of this practitioner. This summary action becomes effective immediately upon notice to the practitioner, and written notice should be given as soon as possible thereafter. The notice of abeyance or suspension should include the reasons why, the scope of affected privileges, the duration of the suspension/abeyance, and the impact the alleged problems could have on patient care or safety.

A suspension is an adverse action and is therefore a reportable event for the National Practitioner Data Bank (NPDB) and the application of future privileges, licensure/certification/registration, or insurance. An abeyance is NOT an

adverse action and is used when available information on the provider's case is insufficient. An abeyance is good for 30 days, after which it becomes a summary suspension. Since abeyance is not an adverse action, providers may not be required to disclose a period of abeyance when applying for future licensure, privileges, or insurance, depending on the nature of the inquiry on any such application. AFI 44-119 provides a format for formal written notice in Attachments 10 and 11.

### **Professional Review Process:**

The role of the Credentials Function Review Process is to examine information obtained from an inquiry and/or other sources, and to make recommendations to the Credentials Function Chairperson or ANG designated senior physician regarding the provider's clinical privileges. The Credentials Function must be composed of at least three privileged provider members. At least one member shall be a professional peer of the individual who is the subject of the action. Members may be brought in from other Medical Treatment Facilities (MTFs) to meet this requirement,

The Credentials Function Committee Chairperson or ANG designated senior physician may not serve on the Credentials Function. However, the Credentials Function Committee Chairperson can be self-designated or can designate another to be an investigating officer (IO) if they feel additional evidence should be gathered to help the Credentials Function make informed recommendations to the Credentials Function Chairperson or ANG designated senior physician. Likewise, the Credentials Function may refer the case back to the IO for further inquiry if they feel additional information is needed.

Based upon investigation and deliberation, the Credentials Function may recommend any of the following to the Credentials Function Chairperson or ANG designated senior physician:

1. Reinstatement of the affected privileges (to include monitoring and evaluation)
2. Restrictions - temporary or permanent limitations to some or all of privileges
3. Reduction – permanent removal of a portion of privileges
4. Revocation – permanent removal of all patient duties
5. Denial – denial is applicable if pursuant to an initial application for privileges or a request for renewal.

The Credentials Function Chairperson or ANG designated senior physician is not bound by the recommendations of the Credentials Function.

### Clinical Adverse Action Hearings

If, after reviewing the recommendation of the Credentials Function, the Credentials Function Chairperson or ANG designated senior physician intends to either restrict, reduce, or revoke the provider's privileges, then a written notice of proposed adverse action (in accordance with AFI 44-119, Atch 12) must be issued to the provider within prescribed time frames.

Any provider whose clinical privileges the Credentials Function Chairperson or ANG designated senior physician intends to deny, reduce, restrict, or revoke is entitled to a hearing. The provider has *30 calendar days* after receipt of the clinical adverse action notification letter to request a hearing. This *30 calendar days* affords him or her opportunity to meet with legal counsel.

The following guidelines, which do not confer substantive rights upon a practitioner, apply to all Clinical Adverse Action Hearings:

The Hearing Panel must include at least three privileged providers including one member of the practitioner's discipline.

The members must be impartial with respect to the reviewing personnel. As with the composition of the Credentials Function, certain personnel may not serve on a Hearing Panel or vote or decide on recommendations to suspend or terminate privileges. They include:

1. Members of the staff who are in the practitioner's OPR chain;
2. A member who has taken summary action to suspend the practitioner's privileges;
3. An investigation officer; or
4. A person whose testimony plays a significant part in the action against the practitioner.
5. Any officer/member who is participating, or has participated, in other administrative proceedings (court-martial board or administrative review board) regarding the provider under review.
6. Any member who is reviewing, or has reviewed, the provider's actions under consideration by the Credentials Function.
7. The Credentials Function Chairperson or ANG designated senior physician.

The ANG Staff Judge Advocate (SJA) will appoint a legal advisor (usually a Medical Law Consultant) to rule on any procedural issues that are raised prior to or during the hearing, to administer oaths to the hearing panel and witnesses, keep the record clean, and rule on challenges for cause, except those against the legal advisor. The legal advisor does not play the role of a recorder/judge. The Chairperson (senior ranking member of the Hearing Panel), with the help of the legal advisor, arranges for the orderly presentation of evidence. AFI 44-119 and the Hearing Script at Atch 14 provide a procedural guide.

A legal representative (usually another Medical Law Consultant or Judge Advocate from the legal office) will represent the Government's case against the provider under review. The provider under review can be represented by a military attorney at no cost or a civilian attorney at the member's own expense. The provider under review may present evidence and witnesses to the Hearing Panel at his/her own expense.

A verbatim record of the proceedings is required. The MTF is responsible for obtaining court reporting services for the hearing. Court reporters may be used from the SJA office, if available. All deliberations are closed and not recorded. The Hearing Panel may only seek legal or procedural advice from the legal advisor.

Recommendations are by majority vote, and a minority report may be submitted. Recommendations are limited to one or more of the following: 1) Reinstatement, 2) Restriction, 3) Reduction, 4) Revocation, or 5) Denial. Restriction, reduction, revocation, and denial are reportable to the NPDB.

Any recommendations adverse to the practitioner are reviewed by the Credentials Function, which makes recommendations to the Credentials Function Chairperson or ANG designated senior physician. The Credentials Function action should take place after the transcript is prepared, because the member has a right to a copy of the Findings and Recommendations and hearing record. The practitioner has 10 duty days after receiving the hearing transcript, including all exhibits, the findings and recommendations worksheet and any additional recommendations, if any, to prepare and submit in writing a statement of exceptions, corrections, or any other matter desired to be presented to the Credentials Function Chairperson or ANG designated senior physician. The Credentials Function Chairperson or ANG designated senior physician is not bound by the Hearing Panel or Credentials Function.

If the final action includes denying, reducing, restricting, or revoking privileges, the provider must also be notified of the right to submit a written appeal to the final decision to NGB/SG through the Credentials Function Chairperson or ANG designated senior physician to AFMOA/SG3OQ. In addition, the provider must be notified that the action may be reportable to regulatory agencies IAW DoD directives. The local SJA must make sure that the practitioner is served with a copy of the Credentials Function Chairperson or ANG designated senior physician's decision, advised of appeal rights in writing, and receives a copy of the transcript if requested.

## **PROBLEMS AND PITFALLS**

Prior to proceeding with any adverse action listed in this section, for either privileged or non-privileged providers, coordination shall occur with the wing Staff Judge Advocate, the regional Medical Law Consultant, and Surgeon General's office. *See* AFI 44-119, para 9.3, Coordination with legal advisors should continue through the resolution of any adverse action or abeyance issue.

The Chairperson of the Hearing Committee with the help of the legal advisor (Judge Advocate) may arrange for the orderly presentation of evidence. This does not mean that the legal advisor can act as a recorder or as an advocate for the Government. Information and testimony from this hearing is Quality Improvement information gathered specifically for that purpose and as such is protected from release by 10 U.S.C. § 1102..

It is essential to have a strong personality as the Committee Chairperson. Physicians tend to give everyone, especially their peers, every benefit of the doubt. Respondent's counsel can exploit this with the result being an excessively long hearing that regularly wanders away from matters of relevance. The legal advisor and the chairperson should keep the committee hearing on track. The ANG SJA is encouraged to contact the nearest active duty Air Force Medical Law Consultant for assistance and insight into these proceedings as early as possible.

Clinical adverse actions are entirely independent from any administrative and UCMJ actions. Joint processing of other administrative or judicial action may be appropriate, along with action to discharge physicians.

## **REQUIRED NOTIFICATIONS**

The Health Care Quality Improvement Act of 1986, as amended established an alert system to facilitate a comprehensive review of healthcare practitioners' professional credentials and create a data bank of medical malpractice payments, adverse licensure actions, adverse clinical privilege actions, adverse professional membership actions and Medicare/Medicaid exclusion reports. This data bank, known, as the National Practitioner Data Bank (NPDB), is governed by the regulations of DHHS (45 CFR Part 60).

Reports shall be made to the NPDB and the Centralized Credentials Quality Assurance System (CCQAS) in cases of adverse privileging actions in accordance with the following:

1. A practitioner who separates from active duty or whose business relationship with the Department of Defense ends, and whose clinical privileges are suspended at the time, shall be reported to the NPDB and appropriate State licensing boards. Clarifying or correcting notification of the NPDB and State licensing boards shall be made, if indicated, following completion of hearing procedures.
2. The Surgeon General shall report to NPDB and the CCQAS all final adverse privileging actions consistent with the NPDB reporting. Reporting shall occur within 30 calendar days of the date of Surgeon General approves the adverse privileging action.
3. The Surgeon General shall report adverse privileging actions taken against providers with alcohol and/or chemical-related impairments who do not self-refer into a rehabilitation program, or those who self-refer, but do not complete the rehabilitation program.
4. The Surgeons General shall provide, at least annually to the DoD Risk Management Committee for review, management information outlining the number of adverse privileging actions taken, the number reported to the NPDB, the timeliness of the reports, any backlog, and any problems with reporting.
5. Practitioners shall have benefit of due process procedures for professional review activities under requirements of the Military Departments' regulations and healthcare entity professional staff by-laws in cases of adverse clinical privileging actions.

6. Information on professional review actions or adverse privileging actions for healthcare practitioners shall be reported to the appropriate State licensing boards, professional boards, Federation of State Medical Boards, the NPDB, and the DEFENSE PRACTITIONER DATA BANK.

7. Privileging actions resulting from a provider's medical disability that affects or could affect adversely the health or welfare of a patient or patients shall be reported to the NPDB.

The Department of Defense is required to report to the NPDB medical malpractice payments; professional review actions that adversely affect a physician's or a dentist's, or other healthcare provider's clinical privileges for more than 30 days; and the acceptance of a healthcare provider's surrender or restriction of clinical privileges while under investigation for possible professional incompetence or improper professional conduct, or in return for not conducting an investigation or professional review action. Revisions to such actions must also be reported.

Medical malpractice claims: A report shall be made to the NPDB in the name of the practitioner when a malpractice payment is made for the benefit of a healthcare practitioner. When a malpractice payment is made it is presumed to be made for the benefit of a healthcare practitioner. This presumption becomes conclusive 180 days after the Surgeon General concerned receives notice of such payment unless, prior to that date, the Surgeon General makes a final determination that the malpractice payment was not caused by the failure of any practitioner(s) significantly involved to meet the standard of care

In *Feres* barred cases (when a military patient is injured or dies due to medical malpractice), money cannot be paid on a claim. Therefore, a report shall be entered by the Surgeon General into the disability sub-module of the Risk Management module of the CCQAS in the name of the practitioner.

#### **.NOTICE TO LICENSING BOARDS**

When healthcare providers separate from the National Guard the Commander is required to notify HQ AFMPC/SG who, with the concurrence of HQ USAF/SG, notifies the appropriate licensing boards of the practitioner's identity and the status of the practitioner's credentials as of the date of separation. This notice is required whether or not any decertification action has been taken. For military and civilian physicians, HQ AFMPC/SG notifies the Federation of State Medical Boards and the appropriate medical board certification agency.

***KWIK-NOTE: Ensure Clinic Commanders know of the procedures for loss of privileges and notice to licensing boards for all their practitioners.***

#### **RELATED TOPICS:**

#### **SECTION**

Evidence - Differing Standards And Burdens of Proof  
Investigations and Inquiries  
Judicial Review of Military Administrative Actions  
Legal Reviews

8-4  
16-11  
18-5  
17-11

# Hospital Assistance Agreements

Updated by Major Sonya Batchelor, October 2008

**AUTHORITY:** AFPD 41-1, Health Care Programs and Resources (15 Apr 94) AFI 41-106, *Unit Level Management of Medical Readiness Programs* (14 Apr 08), Incorporating Change 1 (25 Sep 08); AFI 10-2501, *Air Force Emergency Management (EM) Program Planning And Operations* (24 Jan 07); AFI 10-2603, *Emergency Health Powers On Air Force Installations* (7 Dec 05); AFI 10-2604, *Disease Containment Planning Guidance* (6 Apr 07); applicable state law.

## PURPOSE

In the event of disaster, ANG medical clinics not located on an active duty facility are required by AFI 41-106 to arrange agreements to provide assistance between military installations and local civilian hospitals near the base. These agreements should be part of the Disaster Preparedness Operations Plan (Base OPlan 32-1).

## PROVISIONS

These agreements will be one-sided since most ANG clinics do not provide extensive or long-term treatment. Thus, the formalities and provisions of similar civilian assistance agreements, *e.g.*, Reciprocal Fire Protection, are not necessary. Provisions pertaining to a hospital's liability for negligence or malpractice and payment for services should not be part of these agreements. ANG units do not have the authority to waive hospital's liability for negligence (such as the case of a Reciprocal Fire Protection Agreement) on behalf of the government nor do they have the authority to agree in advance to payment. Avoid including any liability or payment provisions in the agreement. An example is attached at Attachment 1.

Before proposing these agreements, consult your Staff Judge Advocate concerning state statutes and regulations that govern the following issues:

1. Authority of a civilian hospital to enter mutual aid or assistance agreements with the ANG;
2. The requirement that all general hospitals treat patients in that facility and not transfer them to another facility solely due to inability to pay;
3. Rate of fee provisions;
4. "Good-Samaritan" laws - generally, any voluntary assistance in an emergency by physicians outside their offices or outside a hospital, rendered without any expectation of compensation, exempts the physician for liability or damages due to negligence. (Usual exception: gross negligence);
5. State defense emergency programs in the event of a disaster or attack;
6. Reciprocal mutual aid between two or more political subdivisions (e.g. cities, towns, villages) with the approval of the state Civil Defense Commission or similar body; and
7. Immunity from liability for personal injury, wrongful death or property damage, if a party acts pursuant to a mutual aid agreement in preparation for, or in furtherance of civil defense.

While no specific format for the agreement is prescribed by AFI 41-106 or AFI 10-2501, Attachment 1 can be modified to comply with varying state requirements. These agreements and the regulations should be reviewed every 12 months and updated as necessary. When agreements are updated as a result of changes ask the hospital to re-execute the agreement and complete an updated questionnaire. It is a good idea to include the earlier agreement for quick reference.

## **PRACTICAL TIP**

Always contact the hospital before sending the proposed letter agreement and questionnaire. Make written summaries of the calls. If the hospital will not sign the agreement, a personal visit from the Clinic Commander, Wing and/or Group Commander may be necessary to secure the agreement. Document all visits. The documentation can be used during an inspection to explain the absence of an agreement. If unsuccessful one year, try again the next year.

***KWIK-NOTE: Assign ONE person in the Clinic to obtain and annually update these agreements.***

## **RELATED TOPICS:**

## **SECTION**

Aid To Civilian Authorities	6-2
Aircraft Accidents And Safety Investigations Off-Base	16-2
Indemnification Agreements	18-4
Medical And Dental Care From Civilian Sources	19-9
Memoranda Of Understanding (MOUs)	6-6
Payment For Healthcare Treatment Of ANG Members	4-7
Relationship With Other Military Components	11-6



Attachment 1  
Page 2 of 2

**DISASTER PREPAREDNESS QUESTIONNAIRE**

Please fill in the appropriate information for each blank and mail to:  
Point of Contact (unit) USAF Clinic/(state ANG) (unit address)

NAME OF FACILITY: \_\_\_\_\_

STREET ADDRESS: \_\_\_\_\_

CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP CODE: \_\_\_\_\_

TELEPHONE NUMBER (\_\_\_\_) \_\_\_\_\_

DAYTIME CONTACT PERSON: \_\_\_\_\_

NIGHTTIME CONTACT PERSON: \_\_\_\_\_

NUMBER OF PHYSICIANS ON DUTY: DAY: \_\_\_\_\_ NIGHT: \_\_\_\_\_

NUMBER OF REGISTERED NURSES ON DUTY: DAY: \_\_\_\_\_ NIGHT: \_\_\_\_\_

NUMBER OF LICENSED PRACTICAL NURSES ON DUTY: DAY \_\_\_\_\_ NIGHT: \_\_\_\_\_

NUMBER OF HOSPITAL BEDS: \_\_\_\_\_

NUMBER OF ICU BEDS: SURGICAL: \_\_\_\_\_ MEDICAL: \_\_\_\_\_

NUMBER OF AMBULANCES IN SERVICE: DAY: \_\_\_\_\_ NIGHT: \_\_\_\_\_

NUMBER OF AMBULANCE PERSONNEL ON DUTY: DAY: \_\_\_\_\_ NIGHT: \_\_\_\_\_

APPROXIMATE NUMBER OF CASUALTIES THAT YOUR STAFF AND FACILITY/SERVICE COULD ACCOMMODATE: \_\_\_\_\_

ADDITIONAL COMMENTS: \_\_\_\_\_  
\_\_\_\_\_

NAME OF HOSPITAL

BY: \_\_\_\_\_  
HOSPITAL ADMINISTRATOR OR AUTHORIZED AGENT                      DATE

# Medical and Dental Care During Inactive Duty Training

Updated by Major Sonya Batchelor, October 2008

**AUTHORITY:** AFI 41-115, *Authorized Health Care and Health Care Benefits in the Military Health Services System* (29 Dec 01).

## AUTHORIZED CARE

ANG personnel, except when on active duty (i.e. Title 10) or full-time National Guard duty (i.e. Title 32), are not authorized recipients of military medical care. Accordingly, MEDICAL CARE DURING UTAs is NOT AUTHORIZED except for a line of duty injury or emergency situations. ANG medical personnel are authorized to perform required physical examinations and associated diagnostic tests, to administer required immunizations, and train for mobilization. This training, however, may not include the provision of routine medical care to personnel not authorized to receive it.

## ADVERSE CONSEQUENCES

*NATIONAL GUARD UNITS MUST NOT RUN SICK CALL FOR UTA PERSONNEL TO TREAT INJURIES, ILLNESSES, OR DISEASES INCURRED OR CONTRACTED IN CIVILIAN STATUS AND WITH WHICH THE MEMBER REPORTS TO DRILL.* This practice exposes our medical personnel to considerable risk. Medical personnel who undertake to provide this unauthorized care face the risk of being sued for malpractice, to include a missed diagnosis. Furthermore, the supervisors of medical personnel providing unauthorized care, up through the unit commander, the State Surgeon, the Adjutant General, and the State itself, might also successfully be sued for negligent supervision.

Commanders confronting this situation should advise the member who reports for drill in such condition to seek civilian medical help and, subject to consultation with their Staff Judge Advocates, may assist the member in getting to an appropriate medical care provider. A member who comes to drill in need of medical care is not fit for full duty on that day. Questions of pay, points, excused absences and light duty should be resolved on a case-by-case basis with input from the member's supervisors, unit Commander, medical personnel, CBPO Chief, and Staff Judge Advocate.

While ANG medical personnel are entitled to personal immunity from suit under 10 U.S.C. 1089, this applies only to care provided within the scope of employment. The Department of Justice (DoJ) will view the provision of routine medical care to an individual not authorized to receive it as being outside the scope of employment. DoJ may decline to represent the military member who is sued, and the member may be personally liable, because it is unlikely that the state or United States will provide indemnification to the member.

## SPECIAL SITUATION

At times, ANG Commanders and medical personnel are confronted with a member who either reports for a UTA ill or becomes ill during a UTA. Two questions arise from this situation.

### Pay

The first question involves pay. Do you pay the member who reports for the UTA ill? That is the Commander's call. For this discussion, assume the illness renders the member unable to perform duty. Some members will report for drill although ill, just to get paid even though they know they cannot perform duty. Although ill, some will report with the legitimate intention of trying to perform duty. Regardless of the intent of the member, the general rule, pursuant to ANGI 36-2001, *Management of Training and Operation Support Within the Air National Guard* (15 Jan 97), is for the member to perform at least two hours of duty to be eligible for UTA pay. This first question is the easier of the two to resolve.

## Send Member Home – Liability Problem

The second question concerns treatment, send the member home and potential liability that could result. Does the ANG have the obligation to ensure the ill member arrives home safely? The analysis of these issues is the same whether the member reports for the UTA ill or becomes ill during the UTA.

ANG medical personnel are not authorized to render medical treatment to ANG members in an inactive duty training status in non-line of duty (LOD) situations. Even the determination by ANG medical personnel that a member who reports to the UTA ill or becomes ill during a UTA is too ill to perform duty may constitute unauthorized treatment by ANG medical personnel.

Thus, the unit Commander is left with the decision of whether the member is unable to perform duty due to illness. The Commander probably should give the member the benefit of the doubt in most situations. If you decide to release the member from duty, how does the member get home? If you decide the member is too ill to perform duty, is the member too ill to drive home alone? Should you contact a member of the family to come and get the member? Do you arrange for one of your members to leave that member's duty station and drive the ill member home? Each choice presents a problem.

If you let the member drive home alone, and the member gets into an accident attributable to the illness, you (the ANG or the State) may be subject to liability for not taking adequate precautions to ensure the member safely got home. There may be no family member available to pick-up the member, and you may not wish or be able to spare another member to drive the ill member home.

From a liability standpoint, the rule is to act reasonably under the circumstances. Thus, each case is evaluated differently. We have tried to set forth the factors and their ramifications to help you to make the best choice if and when this problem confronts you. Because of the potential liability these situations present, thoroughly document the occurrence and the basis for your decision, only after consultation with your Clinic Commander and Staff Judge Advocate.

***KWIK-NOTE: Do not run sick call during UTA periods.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
<i>Feres</i> Doctrine	18-3
Indemnification Agreements	18-4
Lawsuits Against National Guard Personnel	18-6
Liability of National Guard Medical Personnel	18-8
Line of Duty Determinations	1-19
Medical And Dental Care From Civilian Sources	19-9
Payment For Healthcare Treatment of ANG Members	4-7
Personal Liability of Federal And State Officials	18-9
Relief From Civil Liability	18-10
Medical Evaluation Boards	19-11
Medical Evaluation (Profile Change)	19-12

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## Medical and Dental Care from Civilian Sources

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Updated by Major Sonya Batchelor, October 2008

**AUTHORITY:** AFI 41-115, *Authorized Health Care and Health Care Benefits in the Military Health Services System* (28 Dec 01) AFI 36-2910, *Line of Duty (Misconduct) Determination* (4 Oct 2002); ANGI 36-3001, *Air National Guard Incapacitation Benefits* (31 May 1996).

### WHEN AUTHORIZED

Civilian medical and dental care for active duty Air Force personnel, members of the Air Force Reserve, and eligible members of the Air National Guard as defined below, is authorized at U.S. Government expense only when the required treatment cannot reasonably be obtained from uniformed services medical facilities. These facilities include the Departments of the Air Force, Army, and Navy, or Uniformed Service Treatment Facilities, or from other government medical facilities, such as Veterans Administration (VA) hospitals. The only exception is when treatment under uniformed services or other government medical facilities will create an unnecessary hardship or greater expense to the government by virtue of lost duty time, and the related transportation and per diem costs.

### ELIGIBLE MEMBERS OF ANG

1. ANG members who are injured or become ill in the line of duty when on active duty (AGR personnel) or inactive duty personnel performing an Air Force directed mission (such as ferrying aircraft or responding to a runway alert, or an ANG member serving on an active duty tour under 32 U.S.C. Section 502f or 503).
2. ANG members who are on active duty for training, or on inactive duty training, including travel to and from that duty, are also eligible for medical and dental care from civilian sources according to ANG directives, at ANG expense. Such medical care may be authorized by the ANG organization Commander.

Payment for medical or dental care furnished to ANG patients not on extended active duty with the Air Force will be made from funds in the ANG appropriation by the United States Property and Fiscal Officer (USP&FO) of the state concerned, or the assistant USP&FO assigned to the ANG activity.

### TYPE OF CARE AUTHORIZED FROM CIVILIAN SOURCES

Medical and dental care from civilian sources is provided to those eligible to the same degree it would be provided in the direct care system as outlined in AFI 41-115. The services of chiropractors are not authorized. If the case is not an emergency, refer the request to a competent medical authority for an advance determination.

**KWIK-NOTE:** *Eligible ANG members may only receive medical and dental care from civilian sources if government care is not reasonably available or is not cost-effective.*

### RELATED TOPICS:

### SECTION

TRICARE And DEERS	4-3
Disability Of National Guard Members	4-4
Hospital Assistance Agreements	19-7
Line Of Duty Determinations	1-19
Medical And Dental Care During Inactive Duty Training	19-8
Medical And Dental Care To Persons Authorized	19-10
Payment For Healthcare Treatment Of ANG Members	4-7
Relationship With Other Military Components	11-6
Travel Expenses	27-11
United States Property And Fiscal Officer (USPFO)	25-21

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# Medical and Dental Care to Persons Authorized

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Updated by Major Sonya Batchelor, October 2008

**AUTHORITY:** AFI 41-115, *Authorized Health Care and Health Care Benefits in the Military Health Services System* (29 Dec 01); OpJAGAF 1981/1.

## MEDICAL CARE

### When Authorized

Guard members who incur or aggravate an injury or illness in the line of duty while performing active duty, active duty for training or inactive duty for training or while traveling directly to or from such duty are entitled to the medical or dental care appropriate for treatment of the condition, including hospitalization or re-hospitalization, until the resulting disability cannot be materially improved by further treatment.

### How Long Authorized

A tour of duty is not extended to cover hospitalization beginning during a tour and extending beyond the termination of such a tour. When Guard members are hospitalized beyond the termination date of an active duty tour, active duty for training, or inactive duty training, their status is that of a Guard member not on active duty or inactive duty for training. See the topic "LINE OF DUTY DETERMINATIONS" in this Deskbook for a discussion of the other benefits for which Guard members may be eligible in these situations.

### Lengthy Care Situations

Individuals who are hospitalized beyond their training period and appear disqualified for further service because of injuries or diseases incurred or contracted in the line of duty, should meet a Medical Evaluation Board (MEB). Contact HQ USAF/SGHA for assistance if necessary.

Civilian medical care expenses (to include supplemental care charges) are authorized for Reserve Component members as specified in AFI 41-115. The National Guard pays for National Guard member's civilian medical expenses unless the medical treatment facility is referring the patient for care. In the latter case, the medical treatment facility pays for the care.

## DENTAL CARE

Complete elective dental care may not be available during tours of active duty or active duty for training for the correction of dental defects which have accumulated prior to the start of a tour. A dental officer may elect to provide treatment, but may also defer. Each case is evaluated on individual merit.

***KWIK-NOTE: Coordination with Finance, MPF and the Clinic is essential to ensure appropriate medical care expenses are paid for authorized unit members.***

### RELATED TOPICS:

### SECTION

TRICARE and DEERS	4-3
Disability of National Guard Members	4-4
Line of Duty Determinations	1-19
Medical And Dental Care During Inactive Duty Training	19-8
Medical And Dental Care From Civilian Sources	19-9
Medical Evaluation Boards	19-11
Medical Evaluation (Profile Change)	19-12
Payment For Healthcare Treatment of ANG Members	4-7
Travel Expenses	27-11

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## Worldwide Duty Medical Evaluations

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**Updated by Major Sonya Batchelor and Mr. Rick Becker (AFPC/JA, Chief Counsel, Physical Disability Evaluation) October 2008**

**AUTHORITY:** AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation* (2 Feb 06); AFI 48-123, *Medical Examination and Standards, Vols 1-4* (5 Jun 06); AFI 41-210, *Patient Administration Function* (22 Mar 06); HQ NGP/SGP Consolidated Memorandum SG Log Letter 06-030 (9 Nov 06); DoDD 1332.18, *Separation or Retirement for Physical Disability* (4 Nov 96); DoDI 1332.38, *Physical Disability Evaluation* (14 Nov 96); DODI 1332.39, *Application of the Veterans Administration Schedule for Rating Disabilities* (14 Nov 96); Secretary of Defense Policy Memorandum: *Policy Memorandum on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008* (Pub. L. 110-181 (14 Oct 08); AFI 44-157, *Medical Evaluation Boards (MEB) and Continued Military Service* (1 Jun 00).

### INTRODUCTION

The purpose of the Disability Evaluation System (DES) is to maintain a fit and vital force, remove members that have unfitting medical disabilities, and ensure fair compensation. Traditional ANG members who are on active duty for more than 30 days and who are medically disqualified for impairments related to their military status or performance of duty may enter the DES. All services use the Veteran's Administration Schedule for Rating Disabilities (VASRD) to quantify the percent of disability. The Department of Defense (DoD) also provides supplements to the VASRD.

ANG members not on active duty for more than 30 days and who are medically disqualified for impairments unrelated to their military status or performance of duty may choose to have DES make a "fitness" determination. Lines of duty are very important in determining whether a case should be processed as a disability evaluation or a fitness case. Failure to conduct a line of duty when warranted could deny the member the benefit of a disability evaluation and related compensation.

### OVERVIEW OF DES

Title 10 USC § 1216, Chapter 61 allows a member to be removed from service due to inability to perform the duties of the member's office, grade, or rank, or a rating due to disease or injury that was incurred or permanently aggravated while the member was entitled to basic pay and: the disability is permanent; and the disability did not exist prior to military service (EPTS). Under Title 10 United States Code, Section 1207, members who incur an unfitting disability that was caused by intentional misconduct or willful neglect or was incurred during a period of unauthorized absence shall be separated without entitlement to any benefits under Chapter 61 and any implementing Department of Defense Directive or Instruction.

All members who enter the DES process are appointed a Physical Evaluation Board Liaison Officer (PEBLO) to assist the member through the entire process. They will also have a VA Military Services Coordinator (MSC) to assist them with the DES process and transition to veteran status.

On occasion, the member may also be involved with military justice issues. If serious enough to lead to a court-martial, the member will be dropped from the DES but may reenter if the court-martial has a positive outcome. With an involuntary administrative discharge, the member remains in the DES, but the Secretary of the Air Force (SAF) Personnel Council will make the final determination as to the member's service characterization.

Depending on the member's condition, the member will be assigned a disability rating from the VASRD that determines the level of compensation that the member will receive. If the member is assigned a 30% or higher disability rating, the member may qualify for early or temporary retirement, regardless of length of service. If the

member receives less than a 30% disability rating, the member will receive severance pay unless they have earned a retirement for years of service (over 20 active duty years). Severance pay is the member's base pay multiplied by two and then multiplied by the number of years of service (maximum of 19 years and minimum of 3 years or 6 if disability was incurred in combat). Severance pay is not taxed, but taxes are withheld by defense finance service (DFAS) and can be recovered from the IRS once the disability is rated by the Veteran's Administration (VA). Severance pay is offset by benefits paid by the VA but only for the same condition the AF rated; other conditions are not offset. (For example, let's say that the AF medically discharges someone for a back condition and rates them at 10%. Later, the VA rates the back condition at 10%, a hearing condition at 10% and a knee condition at 10%. The VA will only reduce/offset the 30% by 10% (the 10 % rated by the AF.)) Also, under the Wounded Warrior Act of 2008, severance pay is not offset if the disability was incurred in combat.

## DES CASE PROGRESSION

The DES system consists of a Medical Evaluation Board (MEB), an Informal Physical Evaluation Board (IPEB), and a Formal Physical Evaluation Board (FPEB). Time standards are set out in DODI 1332.38. Total processing is not to exceed 130 days, except in unusual circumstances. The MEB consists of two or more physicians who review the person's entire medical record and information gathered in a physical examination. (To ensure members transition to the VA goes smoothly, the Wounded Warrior Act of 2008 requires the SAF to ensure that medical examinations for the DES meet the minimum criteria outlined in the VA General Medical Exam.) The MEB determines whether the member should be returned to duty or whether the case should be forwarded to the IPEB located at Randolph AFB TX. If the MEB returns the member to duty, the member can appeal that decision to the SAF authority at Randolph. If the member is not returned to duty, the case is forwarded to the IPEB for further review. The IPEB will again review the member's medical information and determine whether the member should be returned to duty or discharged. The four possible decisions that the IPEB could make include: return to duty; discharge with severance pay (less than 30% disability rating and not earned 20 year retirement); permanent retirement (30% or greater disability rating or less than 30% but has an earned 20 year retirement); or temporary retirement (30% or greater disability rating or less if has earned 20 year retirement). The IPEB consists of at least three members with at least one being a medical doctor. If there is a mental health condition, there must be a psychiatrist on the board. If the IPEB determines that discharge is appropriate, the IPEB will assess a disability percentage based on DOD directives/instructions and the VASRD. The member is notified of the IPEB's decision, and the member has up to 10 days to either accept or appeal the decision to the FPEB.

If the IPEB recommends retirement and that recommendation is approved by the Secretary of the Air Force (SAF) authority, they will receive either the % rating from the IPEB or a % based on their "years of service" whichever is more advantageous. "Years of service" is defined in Table 5.4 of AFI 36-3209 (14 Apr 2005) at Rule 4.

At the FPEB, located at Lackland AFB TX, the member is permitted to pursue the appeal *in absentia* or in person. The member is provided military counsel at no cost to the member. The member may hire civilian counsel at the member's expense. There are four or more government attorneys located at the FPEB. Their job is to represent active duty, reserve and ANG members before the FPEB. These attorneys are extremely knowledgeable of the nuances of the DES process. It is a good idea to get a member in contact with that office early in the process.

The FPEB consists of two line officers and one physician. When an ANG member is before the FPEB, one of the board members must also be either a reservist or an ANG member. The member may testify, bring other witnesses, or present other documentary evidence. If the member disagrees with the FPEB's decision, the member may appeal to the SAF Personnel Council.

The SAF Personnel Council usually consists of four line officers and one physician. If an appeal is requested, the FPEB will forward the file to the SAF Personnel Council for review. Even if the member does appeal, the SAF authority at Randolph can decide on their own to forward the case for such a review. The SAF Personnel Council's decision is final. Although the member may still pursue an appeal to the Air Force Board of Correction of Military Record (AFBCMR), the member is immediately processed according to the SAF Personnel Council's decision.

A "return to duty" determination by the MEB, IPEB, FPEB, or SAF Personnel Council does not mean that the member is automatically returned to duty. NGB/SG must validate and approve that determination before the member is actually allowed to return to duty.

## **PHYSICAL DISABILITY BOARD OF REVIEW**

The Physical Disability Board of Review (PDBR) has been recently established and should be accepting applications for review by December 2008. The PDBR was established to reassess the accuracy and fairness of the combined disability ratings assigned members who were discharged as unfit for continued military service with a combined disability rating of 20 percent or less and were not found to be eligible for retirement. The PDBR is to recommend corrections where discrepancies and errors in ratings occurred. The PDBR does not review determinations of fitness for continued military service. Eligible members must have been: separated from the Armed Forces during the period beginning September 11, 2001 and ending on December 31, 2009 as unfit for continued military service resulting from a physical disability; received combined disability rating of 20 percent or less from the IPEB, FPEB, or SAF Personnel Council; and was not found to be eligible for retirement. Additional information may be obtained from <http://www.health.mil> by clicking on Physical Disability Board of Review.

## **DES DOCUMENTATION**

The ANG/MDG and MPF are responsible for forwarding the following information: member's health records; completed AF Form 348 (Line of Duty Determination); Commander's letter (current within 30 days of MEB) describing the impact of the member's medical condition on the member's ability to perform his or her normal military duties and the member's ability to deploy or mobilize; and the member's orders when line of duty illness, injury, or disease occurred. Although ANG MDGs do not have primary responsibility for the narrative summary (SF 502), they are not precluded from drafting or initiating this document. The narrative summary must be completed and must be current within 30 days of when it is received by AFPC/DPSD. The summary must describe a clear picture of the member's disease process. It must include all of the following: date and circumstance of the occurrence, response to treatment, current clinical status, proposed treatment, prognosis and the extent the condition interferes with the member's duty performance. Any required consultations cannot be older than 90 days from the date it is received by AFPC/DPSD, unless otherwise reviewed and updated. A current profile should also be included. All members undergoing a disability evaluation should be put on a 4T profile (AF Form 422), and their individual restrictions (duty limiting conditions) must be determined and documented by the HAWC (AF Form 469) with the AF Form 469 signed by a health care provider, force health manager and profile officer.

## **FITNESS CASE PROGRESSION**

ANG members identified with a questionable or disqualifying medical condition must have an evaluation accomplished and forwarded to ANG/SG for review. The information provided to ANG/SG for review includes: the SF 502 Narrative Summary (which includes date and circumstance of occurrence); response to treatment; current clinical status; proposed treatment; current medications; the extent to which the condition interferes with performance of military duty (see AFI 48-123V4 Attachment 5); prognosis; and a written statement from the member's immediate commanding officer describing the impact of the member's medical condition on normal duties and ability to deploy or mobilize. ANG members undergoing a disability evaluation should be put on a 4T profile (AF Form 422), and their individual restrictions (duty limiting conditions) must be determined and documented by the HAWC (AF Form 469) with the AF Form 469 signed by a health care provider, force health manager and profile officer.

An ANG member with a known medical condition who refuses to comply with a request for medical information or evaluation is considered medically unfit for continued military duty and is referred to their immediate commander for processing under AFI 36-3209, *Separation and Retirement Procedures For Air National Guard and Air Force Reserve Members*.

The member may elect to enter DES for a fitness determination. The information is then forwarded to AFPC/DPSD and heard by the FPEB at Lackland AFB TX. Although the member is provided military counsel at no cost to the member, the member must pay travel expenses to the FPEB. The member's only contention at the FPEB is that he/she is fit for duty. The FPEB is not authorized to make cross-training or line of duty determinations but may comment on such at their discretion.

If the FPEB finds the member fit for duty, the case is then forwarded to NGB/SG for validation. Members found fit

for duty may be retained in a non-deployable position, if one is available. If the FPEB finds the member not fit for duty, the member will be discharged. Members who have over 15 years of service and are discharged for a non-duty related (fitness) condition, may be eligible for a “gray zone” retirement (like the regular age 60 retirement). This authority is at the SAF’s discretion, and those otherwise eligible will have to check with HQ AFPC/DPP to see if it is being offered at any given point in time. (See Title 10 United States Code, Section 12731b).

Dual Status members who are medically retired may also be medically retired from their technician position.

***KWIK-NOTE: Lines of duty are important to ANG members that go through this process. ANG members could be denied benefits if a line of duty is warranted and not accomplished. Moreover, this area of law is constantly evolving. Members who develop a medical condition rendering their fitness for worldwide duty questionable should contact their Staff Judge Advocates’ offices and/or the FPEB attorneys as soon as possible..***

**RELATED TOPICS:**

**SECTION**

Line of Duty Determinations  
Medical Evaluation (Profile Change)

1-19  
19-12

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## Medical Evaluation (Profile Change)

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Updated by Major Sonya Batchelor, October 2008

**AUTHORITY:** AFI 48-123, *Medical Examination and Standards*, Vols 1-4 (5 Jun 06); AFI 10-250, *Individual Medical Readiness* (17 May 07); HQ NGB/SGP SG Log Letter 06-030, *Consolidated Memorandum* (9 Nov 06); NGB/SG Log Letter 07-010, *Medical Evaluation Boards (MEB) and 4T Profiles* (30 Apr 07); NGB/SG Log Letter 07-013, *4T Profiles for Noncompliance* 17 May 07)

### IDENTIFICATION AND PROCESSING OF MEMBERS WITH MEDICAL PROBLEMS

The unit Commander, unit medical personnel and local supervisor are responsible for prompt identification of members whose physical qualification for continued military service is in doubt, and timely referral of those members for disability processing. Identification of questionably qualified members is accomplished by means of an AF Form 422 containing a profile of "4" and by referral to a Medical Evaluation Board (MEB) for Title 10 ANG members, AGRs, and members with an approved line-or-duty medical condition, and by referral for a Worldwide Duty Medical Evaluation for all other members. The purpose of the profile change is to inform the personnel system of the member's unavailability for assignment and other personnel actions.

### ACTION ON PHYSICAL PROFILE

A physical profile is reviewed, validated, or revised when the following events occur:

1. A standard or special purpose physical examination is accomplished;
2. The member returns to normal duties after any illness or injury that significantly affected duty performance or qualification for worldwide duty; or
3. A member is selected for remote, isolated, or combat zone assignment.

Commanders, Social Actions, and the Staff Judge Advocate should be notified of personnel identified as being in drug experimenter, user or addict status, for appropriate action.

***KWIK-NOTE:*** *When you become aware of a medical condition which may render a member unqualified for deployment or continued military service, refer the member to the medical squadron for medical evaluation and profile change.*

### RELATED TOPICS:

### SECTION

Worldwide Duty Medical Evaluations

19-11

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## Mental Health Evaluations

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Updated by Major Sonya Batchelor, October 2008

**AUTHORITY:** DoDD 6490.1, *Mental Health Evaluations for Members of the Armed Forces* (1 Oct 97; certified current as of 24 Nov 03); DoDI 6490.4, *Requirements for Mental Health Evaluations of Members of the Armed Forces* (28 Aug 97); DODD 7050.6, *Military Whistleblower Protection* (23 Jun 00; certified current as of 20 Feb 04) AFI 44-109, *Mental Health, Confidentiality and Military Law* (1 March 00).

### INTRODUCTION

The 1993 National Defense Authorization Act directed the Secretary of Defense to revise regulations to incorporate certain procedures when military members are directed to undergo a mental health evaluation (MHE). DoD subsequently issued Directive 6490.1, which was implemented by the Air Force in AFI 44-109, applicable to the ANG. AFI 44-109 has been substantially modified to reflect recognition of the physician-patient privilege, which is incorporated into Military Rule of Evidence 513. This represents a substantial change in military medical practice.

The revisions to the regulations were necessary because of past abuses where MHEs were used as reprisal against members for whistleblowing and allowable conduct. This topic provides guidance to assist commanders who have reason to refer one of their members (AGR or traditional Guard member) for a **non-emergency mental health evaluation** on an outpatient basis. The authorities cited above provide the necessary forms and also cover in-patient MHE referrals. Since non-emergency outpatient referrals are by far the more common of the two that will be encountered in the ANG, the guidance in this topic covers that type of referral. You should consult your Staff Judge Advocate before deciding to initiate a mental health evaluation.

### STEP 1: BASIS FOR REFERRAL

When commanders believe one of their members should undergo an MHE (an examination), because there is a question whether the member continues to be fit for duty, the Commander's first step is to prepare a **letter** to a "mental health professional" (MHP) as defined in the AFI, and who is properly privileged to conduct MHEs for DoD activities. This MHP will usually be located at the active duty facility nearest to your unit. Coordinate with your Clinic Commander on a proper MHP.

**Practical Tip:** Call the active duty hospital and speak to the MHP to whom you will send this letter before you send it (without getting into the merits of the referral on the telephone), to give the MHP a "heads-up" that it is coming.

The letter should be factual and refer to and include a brief statement of the member's prior record and the circumstances of your request. Such circumstances may include prior civilian or military treatment related to mental health (with the provider's records of such treatment attached if you can obtain them) and how you came to believe the MHE request is necessary. Your concluding question to the MHP in this letter should in substance be whether based on this information you, the commander, have a basis for a mental health referral. [Note, since this is DoD-wide guidance -- though separately implemented by each service -- MHPs from other services should be familiar with these requests from commanders of any service or component]. Request the MHP to provide a written response to your request.

**Practical Tip:** There usually is no reason for you to notify the member of your request to the MHP until after the MHP has responded favorably to your request (you are not required to advise the member of the MHP's negative response to your request). But if there was prior civilian treatment for mental health reasons, the records of which you wish to attach to your letter request to the MHP, the only way you will be able to obtain them (unless you have them already or they are military records you can use without the member's consent), is through the written consent of the member. It is then that you should reveal to the member why you want those records, i.e. you are requesting

an MHP to determine if there is a basis to refer the member for an MHE. If you must reveal your request for an MHE to the member before the MHP's response because you need or want the member's prior mental health treatment records, you should advise the member of the right to have free military counsel (and/or civilian counsel at the member's expense) before you ask the member to consent to release to you or the MHP the civilian records for the MHP to use to evaluate the referral. If the MHP favorably responds to your MHP referral request, when you notify the member of your referral, the notice must include the member's right to counsel. So if you need these civilian records for the MHP to determine whether there is a basis for the MHE referral, you lose nothing by the advance notice to the member of the right to counsel.

## **STEP 2: MHP RESPONSE**

The MHP will either respond that there is or there is not a basis for a MHE of the member based on the information you provided in and/or attached to your letter request. The response may be (and probably will be), one sentence, as it is unlikely the MHP's response to your request will then discuss the merits of the basis you provided for your request.

Upon receipt of a favorable response from the MHP, schedule an appointment for the member's out-patient MHE. If it cannot be done on a UTA weekend because the facility is closed, you must put the member on **military orders** for the MHE.

## **STEP 3: NOTICE TO THE MEMBER**

Enclosure 4 to DoD Instruction 6490.4 is a format for the notice to the member. Follow it.

In the first paragraph of the notice letter to the member include the time, date and place of the MHE, and in a subparagraph include the basis of the referral. **Practical Tip:** Use the same reasons (and wording) for your referral in the notice letter to the member as you used in your initial letter request to the MHP.

The second paragraph is the name and title of the MHP you consulted. Note: the MHP you consulted does not have to be the same MHP who later personally performs the MHE of the member.

The remaining paragraphs advise the member of the right to consult with counsel and other officials, to also (not instead of your MHP) consult with an MHP of the member's choice and possibly at the member's expense, and the meaning and effect of those rights.

If the member is traditional Guard member include a paragraph in the letter (anywhere) that the member is ordered to attend the appointment. Be sure to include the military orders with the notice letter. The purpose clause of the orders should read in substance "to attend a mental health evaluation at time, date, place and with whom."

Specify a time for the member to send you written acknowledgment of receipt of the notice and the orders. **Practical Tip:** While the DoDD and AFI require at least two business days from the member's date of receipt of the notice to the date of the MHE to allow the member time to consult with appropriate officials listed in the notice, you should give yourself and the member (especially a traditional Guard member) sufficient time before the appointment (which you should have scheduled before sending the notice letter to the member) for you to prepare the notice letter (and military orders, if necessary), for the member to receive it, for you to receive the member's acknowledgment of receipt of the notice (and orders). Remember, as with other situations discussed in other topics in this Deskbook, the member's failure to acknowledge receipt of the notice does not invalidate your notice or the effect of your order, but such failure should not be a basis for separate adverse action against the member. Simply note on your copy of the notice that the member failed to acknowledge receipt.

If the member does not appear for the MHE, treat it as you would any other failure to report pursuant to a lawful order (for example: with urinalysis testing). The failure to report is a failure to obey a lawful order and independently subjects the member to adverse action, including nonjudicial punishment; or to administrative discharge based on misconduct, because failure to obey a lawful order is a "serious offense" under AFI 36-3209.

#### **STEP 4: ACTION UPON RESULTS OF ACTION MHE**

Remember just because the MHP initially determined you had a basis to refer the member for an MHE that does not necessarily mean the MHP will determine after the MHE the member is not fit for duty. The MHP should, however, provide a written report of the MHE, including any courses of action or treatment the member should follow.

If the MHP determines the member is fit for duty, your quality force management actions are limited. As Commander, you still, however, have the inherent discretion to change a duty assignment or work station, since you can do that without an MHE.

MHEs that result in findings by the MHP of the member's unfitness for duty may provide a basis for administrative discharge processing, a medical evaluation board or profile change, but should not be basis for punitive action against the member.

#### **CONCLUSION**

This area is sensitive and poses for Commanders issues of physician/patient privilege, adverse action alternatives, and proper use of quality force management actions and a medical diagnostic tool. As such, Commanders should consult, initially and throughout the MHE process, their Staff Judge Advocate and Clinic Commander.

***KWIK-NOTE: Commanders should never use MHEs as reprisals against their members and should closely consult their SJA and Clinic Commander throughout the MHE process.***

#### **RELATED TOPICS:**

#### **SECTION**

Administrative Discharge of Enlisted Members	24-3
Administrative Discharge of Officers	24-4
Medical Evaluation Boards	19-12
Medical Evaluation (Profile Change)	19-11
Quality Force Management Actions	24-12

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# National Marrow Donor Program

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Updated by Major Sonya Batchelor, October 2008

**AUTHORITY:** Assistant Secretary of Defense (ASECDEF) Memorandum: DoD National Marrow Donor Program (18 June 1991); ASECDEF Memorandum: Policy on Implementation and Administration of DoD Marrow Donor Program (DMDP), The C.W. "Bill" Young Marrow Donor Recruitment and Research Program (18 June 1991); ASECDEF Memorandum: Amendment to the Policy of Implementation and Administration of DoD Marrow Donor Program (DMDP), The C.W. "Bill" Young Donor Recruitment and Research Program (19 August 1993).

## INTRODUCTION

Established by Congress on 25 May 1990, Public Law 101-302 directed the DoD to recruit and HLA type DoD volunteers as part of the overall national effort. Specifically the law required expansion of the Navy medical research program to improve the technology of identifying donors; provide support to increase the number of civilian donors with an emphasis on improving American minority donor recruitment; and support programs tied to the National Marrow Donor Program to improve military contingency and Homeland Security capabilities to respond to both ionizing radiation and chemical-induced (mustard containing chemical warfare agents) marrow damage.

On behalf of the Department of Defense, the Navy operates and manages the Marrow Donor Center for the Department of Defense (MDCDD) located at Nicholson Lane in Kensington, MD. The donor center is commonly referred to as the C. W. Bill Young Marrow Donor Recruitment and Research Program (BYMDC). The mission of BYMDC is to "recruit and enroll eligible Department of Defense (DoD) members, active duty personnel and their dependents, reservist, Coast Guard, National Guard and DoD civilian employees into the National Marrow Donor Program Registry; support the DoD contingency requirement for unrelated stem cell donations and tissue typed matched blood platelets; support and contribute to ongoing research in tissue typing techniques and unrelated marrow transplantation efficacy (especially as it relates to donors; and to provide outstanding management services to those members who are selected as potential marrow donors.". Interested persons may obtain further information by calling The C.W. "Bill" Young Marrow Donor Center at 1-800-MARROW-3 (1-800-627-7693) or by visiting the Center's website at <http://www.dodmarrow.com>.

The Program originally applied to active duty members, reserves on active duty status for more than 60 days (e.g. AGRs) and all DoD civilian employees (e.g. federal technicians). By the DoD policy amendment on 19 August 1993, it was made applicable to the National Guard.

## COMMANDER DISCRETION

It is entirely within a Commander's discretion to allow the Program's recruiter to come to the base and allow the unit to participate in the Program. "Interference with mission accomplishment" is a valid reason for Commanders to elect not to participate. In deciding whether to participate, Commanders should coordinate with the Clinic Commander.

## PARTICIPATION IN THE PROGRAM

Participation of unit members is **voluntary and they can elect to participate even if you do not sponsor a unit drive**. If you decide to sponsor a unit drive only military members can participate in the unit drive, although spouses and other family members can participate in drives at other locations. Everyone participating in the Program, i.e. the Clinic and potential donors should do so in a duty status.

## EDUCATIONAL PHASE

If you approve unit' participation, designate a member of the unit (POC) to contact the Center and obtain the educational materials. You may then wish to appoint a PAT to determine how best to disseminate this information to members of the unit, such as through an article in your base newspaper. Each squadron may designate a representative to make the information available to members of that squadron and record squadron members who are interested in volunteering. This process may take up to three months (Education and advance "sign-up").

## COLLECTION PHASE

Once a reasonable amount of time has passed to disseminate and receive back requests to volunteer, the Wing's POC should speak to the Center recruiter and arrange a mutually convenient Sunday UTA for the Program representative to come to the base with the necessary materials to extract the samples.

All materials including syringes, vials, labeling and other costs for collection and shipment of samples will be borne by the Program, but the unit's Clinic personnel will be drawing the blood from the volunteers. To minimize delay on that Sunday, you should advise the Program representative to come to the base on Saturday where in a large room on base, the Program's representative can pass out the informed consent forms, go over them and answer any questions that any volunteer has regarding the forms or the Program in general, and have all the forms completed and signed. This should take approximately one hour. Before the group departs, it can be advised to appear at the Clinic at a certain time on Sunday.

Samples must be collected on a Sunday of a UTA weekend as opposed to a Saturday and shipped Sunday night to arrive within 24 hours of collection in order to be properly tested. Again, the Program handles all costs of shipping. The unit's only obligation is time and labor in extracting the samples. Two to three hundred samples can be collected at any one time based upon the lab's capability. If the number of unit volunteers exceeds 200 to 300 people, the Program's personnel will schedule another Sunday for the balance of samples to be collected.

Review of the informed consent form and its completion takes the majority of the time involved in collection of the samples per donor. The Program's experience is that if more Clinic personnel extract samples, things go faster. Collection of 300 samples could take most of the day with four to five Clinic members extracting samples. Assuming there are five people taking the samples, you can designate 30 people every half hour to come to the Clinic to minimize the delay waiting in line and time away from their other duties.

As ANG Clinics usually "train" on Sundays and perform physicals on Saturdays, the actual day of collection would need coordination with the Clinic Commander's training schedule.

The Program's recruiter will be there to supervise go over with Clinic personnel the labeling and collection procedures.

## SJA COORDINATION

Participation in this Program is worthwhile but presents issues of potential liability and duty status, and state law issues of usage of the base, all of which are resolvable if Commanders involve their SJA throughout the process of the unit's participation in the Program.

## CONCLUSION

It must be reiterated that participation in the Program is voluntary. That means that members who volunteer during the educational phase may decide later not to participate. Samples are tested and later cross-checked and kept in a national registry for a future match. "Voluntary" also means if the "volunteer" is notified that they are a suitable donor, that individual can decline to participate.

***KWIK-NOTE: Participation in the National Marrow Donor Program is considered by DoD and the Program to be a very personal matter and is strictly voluntary.***

**RELATED TOPICS:**

**SECTION**

Liability of National Guard Medical Personnel  
Status of National Guard Members

18-8  
11-7

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# Anthrax

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**Updated by Major Sonya Batchelor, October 2008**

**AUTHORITY:** DoD Directive 6205.3, *Immunization Program for Biological Warfare Defense* (26 Nov 93), DoD Directive 6205.02E, *Policy and Program for Immunizations to Protect the Health of Service Members and Military Beneficiaries* (19 Sep 06); AFJI 48-110, *Immunizations and Chemoprophylaxis* (29 Sep 06); AFI 48-123, *Medical Examination and Standards*, Vol 2 (5 Jun 06); Memorandum, Department of the Air Force Air National Guard, *Implementation of the Anthrax Vaccine Immunization Program* (6 Mar 07); Memorandum, Deputy Secretary of Defense, *Anthrax Vaccine Immunization Program* (12 Oct 2006); Memorandum, Under Secretary of Defense, *Implementation of the Anthrax Immunization Program (AVIP)* (6 Dec 06); Memorandum, Headquarters US Air Force, *Implementation of Mandatory Anthrax Vaccine Immunization Program (AVIP)* (16 Feb 07); Memorandum, Department of their Force, *Expanded Anthrax Vaccine Immunization Program (AVIP) Guidance* (4 Apr 07); Memorandum, Under Secretary of Defense, *Change in Policy for Pre-Deployment Administration of Anthrax and Smallpox Vaccines* (10 Sep 2007); Department of the Air Force, *Plan for Implementing the Anthrax Vaccine Immunization Program (AVIP)* (18 Jan 07); Biological Products; Bacterial Vaccines and Toxoids; Implementation of Efficacy Review; Anthrax Vaccine Adsorbed; Final Order, 70 Fed. Reg. 75180 (19 Dec 05); Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack with Anthrax; Extension; Availability, 70 Fed. Reg. 44657 (3 Aug 05); All States (Log Number P00-0020) *National Guard Immunization Refusal Policy* (18 May 00). See also AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 Apr 05).

## INTRODUCTION

The biological warfare (BW) threat to United States forces is real. At least seven countries, including several hostile to Western democracies now possess or are pursuing offensive BW capabilities. Anthrax is within the reach of not only rogue nations, but also transnational terrorist groups. Anthrax tops the DoD's biological threat list. Anthrax spores are highly lethal. Small amounts can produce large numbers of casualties. Anthrax is the easiest biological agent to produce and weaponize. Production of anthrax as a biological weapon does not require special equipment or advanced technology. It is extremely stable and can be stored almost indefinitely as a dry powder. It can be loaded in advance, as a freeze-dried powder, in munitions or disseminated as an aerosol with crude sprayers. While protective clothing and gas masks provide a good front-line defense, their effective use requires rapid and early detection of the agent. They may not detect an agent in time to warn personnel to don protective gear before exposure. Immunization consists of three injections given two weeks apart, followed by three injections given at the 6, 12, and 18 month point; thereafter booster shots are required ever year.

On 27 October 2004, the United States District Court for the District of Columbia issued an injunction against the ongoing operation of the Department of Defense Anthrax Vaccine Immunization Program (AVIP) concluding that the Food and Drug Administration (FDA) was procedurally required to solicit public comment before concluding the anthrax vaccine was safe. The Court's decision was not a comment on the safety of the vaccine. Due to the potential for a military emergency involving an attack on U.S. military forces with anthrax, the FDA issued an Emergency Use Authorization (EUA) on 27 Jan 05. On 6 Apr 05, the United States District Court for the District of Columbia modified the injunction against the anthrax vaccination, permitting limited resumption of the AVIP. On 25 Apr 05, the Deputy Secretary of Defense issued a memorandum directing the military services to resume the AVIP under the conditions set forth by the EUA and court order. On 15 Dec 05, the FDA issued a Final Rule & Order on the license status of the anthrax vaccine. After reviewing extensive scientific evidence and carefully considering

comments from the public, the FDA again determined that the anthrax vaccine could be licensed for the prevention of anthrax infection, regardless of the route of exposure.

On 16 Feb 07 and 6 Mar 07, respectively, the Air Force and Air National Guard issued plans for mandatory implementation of AVIP. Effective 29 Mar 07, anthrax vaccination became mandatory for all Guard members serving in the U.S. Central Command (USCENTCOM) Area of Responsibility (AOR) or the Korean Peninsula for 15 or more consecutive days.

The most current guidance on this issue can be found at [www.anthrax.mil](http://www.anthrax.mil) or toll-free information at 1-877-GET-VACC.

## **MEDICAL ISSUES**

Not all personnel are required to undergo the anthrax vaccine. Members with temporary health conditions, disease or pregnancy may defer vaccination until such time as the series may be safely taken. AFI 48-123 contains detailed guidance on these issues. The State Surgeon General and the Wing medical community leadership can provide guidance in this area. Personnel who are permanently and medically disqualified from taking the series are not deployable and may be medically disqualified from further military service.

## **DISCIPLINE AND SEPARATION ISSUES**

Ordering members to take the anthrax vaccine is a lawful order. Members who refuse should be counseled by medical personnel to ensure that they understand the importance and safety of the immunization. After such counseling, if the member persists in refusing the vaccine, the commander may give the member a direct order to submit to the immunization. If the member fails to obey the order, commanders have the full range of options, from taking administrative action to taking punitive action under the state or territory military code. Commanders should evaluate options on a case-by-case basis and should evaluate factors such as the nature of the offense, the existence of other charges, mitigating or extenuating circumstances and the character and military service record of the member involved.

Officers and enlisted members who refuse the vaccinations for other than authorized medical reasons may be separated, either voluntarily or involuntarily, in accordance with AFI 36-3209. Officers who have met all obligations may retire in accordance with AFI 36-3209. Officers requesting resignation may be separated pursuant to Section 2E, paragraphs 2.46.1.7 and/or 2.46.1.8 of AFI 36-3209. An enlisted member requesting resignation may be separated pursuant to Section 3C, paragraph 3.12.8 of AFI 36-3209. Except in unusual circumstances, the type of separation in these cases will be Honorable. Ordinarily, the state's Adjutant General may approve such separations; however, approval for separation of first term airmen must be forwarded to the National Guard Bureau for approval.

Members who do not choose to resign or retire may be separated involuntarily under the guidelines of AFI 36-3209. Refusal to obey a lawful order is misconduct which may form the basis for disciplinary action. Officers guilty of misconduct are separated under Section 2D, paragraph 2.29.4 for serious or recurring misconduct. Enlisted personnel are involuntarily separated pursuant to Section 3D, paragraph 3.21 for misconduct. Typically, separation under these provisions will warrant a General (under honorable conditions) Discharge. Members who attempt to publicize their efforts, and especially those who encourage other members to join in an organized resistance to a command authority's immunization plan may be guilty of more serious misconduct and warrant an Under Other Than Honorable Conditions Discharge (UOTHCD). Those discharged for failure to take the vaccine may have their discharge papers coded and may be denied permission to re-enlist elsewhere.

## **CONCLUSION**

The anthrax train has left the station and will not be recalled. Military members who are not on board should not expect relief from Congress. The Executive branch has determined the vaccine program to be mission essential and the Legislative branch now concurs. The Judicial branch has determined military personnel matters to be nonjusticiable and will not entertain lawsuits filed by disgruntled military members.

Individual counseling and command leadership must be employed to persuade all unit “stakeholders” that the anthrax vaccine is a well-conceived force protection program and will be a permanent requirement of the Air National Guard force.

***KWIK-NOTE: Commanders should consult with the SJA and Clinic Commander to deal with anthrax immunization resistance.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Medical Evaluation Boards	19-12

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# Suicide Prevention

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**Updated by Major Sonya Batchelor, October 2008**

**AUTHORITY:** ANGI 52-154, *Suicide Prevention and Violence Awareness Training* (28 Jul 03); AFI 44-154, *Suicide and Violence Prevention Education and Training* (3 Jan 03); AFI 44-153, *Traumatic Stress Response* (31 Mar 06); AF PAM 44-160, *Air Force Suicide Prevention Program*; AFPD 44-1, *Medical Operations* (1 Sep 99).

## INTRODUCTION

In recent years the United States Air Force has learned that suicide is the second leading causes of death among its personnel. In 2001, 35 Air Force members committed suicide. Suicide accounted for 13 percent of all ANG deaths between 1990 and 1997. In 2003, the ANG created its own Suicide Prevention Program in the Chaplain series applicable to Title 32 Air Reserve Technicians and all ANG units. AFI 44-154 still applies to members in Title 10.

The new program still focuses on education, identification and referral. Installation and Wing commanders establish an “Integrated Delivery System” (IDS) Committee to “identify[y] and resolv[e] individual and family related issues, needs and resources” (Paragraph 3.3.1.). The Installation Chaplain (HC) provides the units with information and resources for their local training in both suicide prevention and violence awareness. Public Affairs (PA) assists in disseminating suicide and violence prevention information. Each Squadron/Unit Commander is responsible to provide a “safe, healthful, and caring environment” for ANG personnel and insure their personnel receive training. Each ANG member is responsible to self-identify when they experience severe stress or depression and apply the “buddy care” concept.

Study of suicide on a case-by-case basis revealed that member suicide occurred in a predictable pattern of events that could be observed and monitored by command authorities. If alerted to the pattern of events, command can often successfully intervene and prevent this terrible loss of life. Statistics suggest that a dramatic savings in lives lost is possible if command will pay attention to the warning signs.

## TRAINING

ANGI 52-154 requires that all personnel receive Suicide Prevention and Violence Awareness Training annually. HC provides the materials and the IDS will designate and assist trainers. Core requirements for the training are in Attachment 2 and Attachment 3. The ANG has prepared comprehensive educational materials that are available at <https://airguard.ang.af.mil/hc>. Suicide risk factors identified in AFI 44-154 include: relationship difficulties, substance abuse, legal, financial, medical, mental health and occupational problems, along with depression, social isolation, and previous suicide threats/gestures that may increase the probability of self-harm. Training must also de-stigmatize help-seeking behavior among personnel, without de-stigmatizing the act or attempt of suicide itself. Buddy-care must include a suicide alert component so airmen can look out for fellow airmen in trouble.

## METRICS

Unit commanders must ensure that all personnel complete annual mandatory suicide prevention awareness training. The simple tracking metric is included in Figure 1 of ANGI 52-154.

## CONCLUSION

The increased operations tempo and frequent deployments continue to fuel suicide among military personnel and their families. Supervisors and commanders must insure a healthy, protective environment with proper emphasis on identifying risk factors and intervention as appropriate. This is just another force protection issue for which command is ultimately responsible. Mental health professionals frequently observe, “Suicide is a permanent

solution to a temporary problem.” Compassion and command responsibility demand that we take extra care to protect our people at risk for suicide.

***KWIK-NOTE: Commanders should be especially alert upon learning a member is having family problems. For Reserve Component personnel, lengthy deployments may be especially stressful.***

**RELATED TOPICS:**

**SECTION**

Mental Health Evaluations

19-13

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# AF Medical Service's Prevention Into Practice Initiative

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Updated by Major Sonya Batchelor, October 2008

**AUTHORITY:** AFI 44-102, *Community Health Management* (1 May 06); AFPD 44-1, *Medical Operations* (1 Sep 99); and Air Force Pamphlet 44-155, *Implementing Put Prevention Into Practice* (1 Feb 99)

## INTRODUCTION

Military medicine has adopted a strategic plan for the delivery of medical services to the military member and his/her dependents. This section does not address Tricare or benefits accorded the retired community. The new strategy puts emphasis on preventive medicine as proposed by the U.S. Public Health Service's Office of Disease Prevention and Health Promotion. Its purpose is to enhance the delivery of preventive care in primary practice and, by early identification of health problems, avoid the costs associated with aggravated illness and disease that might have been avoided by early detection and remedy. Understanding this approach will be useful to Reserve Component members on extended active duty who have dependent family members entitled to active duty military healthcare.

## PUTTING PREVENTION INTO PRACTICE

The active duty military medical service has totally revamped its procedures to achieve its prevention goal. Except for acute care/emergency cases all patients will be seen by a primary care physician. In addition to treating the problem complained of, a cold for instance, the physician will do an assessment of many factors known to be related to health. These factors include family history for certain disease, smoking, obesity, exercise, allergies, immunizations, etc. Primary care doctors will alert the patient to preventive medicine techniques and specific suggestions to create "wellness." Patients in need of specialists will be referred consistent with recognized medical practice, but all military physicians will encourage the patient to adopt healthy habits to achieve that state of wellness which will reduce need for future physician consultation.

***KWIK-NOTE:*** *Military medicine has adopted the same approach used by HMOs. Cost reduction is a major issue; wellness is seen as the best means to achieve cost savings. Understanding this can ease the anxiety members and dependants might experience when using military medical facilities.*

## RELATED TOPICS:

## SECTION

Medical And Dental Care To Persons Authorized

19-10

# Chapter 20, Mobilization Matters

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## Mobilization of Air National Guard (Federal and State)

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Updated by Lt Col Monte J. Boettger, October 2010

**AUTHORITY:** 10 U.S.C. 12301, 12302, 12304, 32 C.F.R. 44, 215, AFI 10-402, *Mobilization Planning and Readiness* (9 Aug 07); AFH 10-416, *USAF Personnel Readiness and Mobilization Handbook* (22 Dec 94); DoDD 1235.10, *Activation, Mobilization, and Demobilization of the Ready Reserve* (26 Nov 08); DoDI 1235.12, *Accessing the Ready Reserves* (19 Jan 96); see also 10 U.S.C. 331, 332, 333; Joint Federal Travel Regulations, applicable state law.

### BY THE PRESIDENT

The President may order or call the National Guard into federal service based upon constitutional or statutory authority. Mobilization encompasses all activities necessary for the orderly transition of forces from reserve category to active duty for war, emergency or operational purposes. Mobilization may also be utilized to cover operational missions of the active forces. Most units, UTCs and IMAs must report within 72 hours of notification of mobilization. The mobilization chain of command begins with the President who informs the Secretary of Defense, who in turn contacts the Secretary of the respective Services. The Chief of Staff, Deputy Chief of Staff for Operations, etc. would then notify the National Guard Bureau who would contact the Governors and State Adjutants General.

### MOBILIZATION PREPARATION

Commanders are required to continually screen members to insure their qualification for mobilization. Effective mobilization requires the identification of all persons required to assist in the mobilization process, correct identification of personnel to UTCs, currency in training requirements and correctly updated medical classifications. Annual training requirements for mobilization enable the member to plan effectively for mobilizations. Such auxiliary training should include training on the necessity for wills and powers of attorney, benefits under the Service Members Civil Relief Act (SCRA), protections under the Uniformed Services Employment and Reemployment Rights Act (USERRA), benefits accruing under mobilization and the applicability of the Uniform Code of Military Justice to those members activated.

Once the unit has been alerted that a mobilization order may be forthcoming, persons identified to assist in mobilization processing should be notified.

### MOBILIZATION ORDERS

Most recently the President has ordered the National Guard to active duty for operational purposes. Section 12304 of Title 10, United States Code, authorizes the President to order any unit of the National Guard to active duty for not more than 365 days. Under this authority, also known as Presidential Recall or PRC, units of the National Guard are ordered into Federal service. Although the law speaks of “a unit”, unit is defined as “any identified and managed group or detachment of one or more individuals, organized to perform a particular function whether or not such a group is part of a larger group.” Individuals not associated with a unit may also be called to active duty under this section. This section does not include authority to order persons to active duty for training.

Under the authority of 10 U.S.C. 12301, in time of war or national emergency declared by Congress, the Secretary of any service may order any unit of a reserve component to active duty for the duration of the war or emergency, and for six months thereafter. With the consent of the governor, the Secretary may also order any unit or reservist not assigned to a unit to active duty for a fifteen-day period. No congressional approval is required. A governor may not withhold his consent based upon objections to the location of the training.

Under the authority of 10 U.S.C. 12302, the President, during a time of national emergency or when otherwise authorized by law, may order any unit or member not assigned to a unit to active duty for up to 24 months. The

consent of the member is not required.

## **MEMBERS SUBJECT TO ORDER**

All military members are presumed to be eligible for mobilization. Once mobilization is ordered, no member will be exempted based upon his civilian employment. Officers and airmen receiving notification of mobilization may request exemption from the order. Officers must tender their resignation while enlisted members are discharged in accordance with AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*. See AFH 10-416. Delays of up to 30 days may be requested. Approval authority is ANGUS/USAFR.

## **EFFECTS UPON THE UNIT**

Units, when mobilized by Title 10 orders, lose their state identity. Such units become subject to both operational and administrative control by the active duty units to which they are assigned and/or attached. Commanders of the newly-constituted units may be drawn from other reserve components or from active duty units. Although members are mobilized with a unit, reassignment to meet the needs of the service may occur after being ordered to active duty.

Reconstitution of the unit occurs following mobilization and prior to deactivation. The commander is allowed 30 days for reconstitution. Individuals may request earlier release dates following mobilization from the commander.

## **EFFECTS UPON THE INDIVIDUAL**

Members must report when mobilized within the time frame set forth in AFI 10-402 (within 72 hours for selected reserve). During times of war or emergency the enlistment or obligation of members may be extended for the duration of the war or a period of six months.

Each mobilized member becomes entitled to the benefits of active duty service, which may include authorization for storage of household goods, authorization of TDY household goods, storage of POV, basic allowance for housing, family separation allowances, and immediate medical care for the member and his family. Medical care continues until 30 days after release from active duty or until coverage by an employer-sponsored health care plan resumes. Per diem may be authorized for full field duty declarations. Retention on active duty after deactivation may be possible IAW AFI 36-2008, *Voluntary Extended Active Duty (EAD) for Air Reserve Commissioned Officers* and AFI 36-2002, *Regular Air Force and Special Category Accessions*, or for hardship reasons. Individuals within sanctuary may not be involuntarily released from active duty unless such release is approved by the Secretary of the Air Force, but such individuals become eligible for worldwide duty.

Members mobilized for federal service may only be disciplined under the Uniform Code of Military Justice (UCMJ) for conduct committed by the member while on duty under Title 10 of the U. S. Code. Authority to discipline resides in the commander of the active duty unit to which the member is assigned or attached. When disciplinary actions are pending members may be retained on active duty without their consent. Members serving sentences will be retained on active duty without their consent.

Members of the National Guard in an alert status, but who have not been placed on active duty, remain subject to the military code of the state in which National Guard membership is held. Only officers serving under Title 10 of the U.S. Code may discipline a member under the UCMJ. Officers serving under Title 32 of the U.S. Code may not discipline any member under the UCMJ. Likewise, an officer serving under Title 10 may not discipline a member who is in Title 32 status.

## **DEMOBILIZATION**

Procedures for demobilization are found in AFH 10-416 and in the demobilization order if one is provided. Members may apply for retention on active duty for hardship reasons caused by activation. The handbook also discusses retention of members who enter sanctuary and medical hold for members who have medical conditions warranting consideration by the disability evaluation system.

## CALL

The President or Congress may also call the militia to suppress insurrections, repel invasions or to execute the laws of the United States.

Congressional approval is not required for a “call” and no warning or alert period need be given. During its period of service while under a “call,” the militia retains its State character. The State continues to appoint the officers, and neither the officers nor the enlisted members may be held in service beyond the terms of their existing commissions or enlistments.

Whenever there is an insurrection in any State, and its legislature, or Governor, if the legislature cannot be convened, so requests, the President may “call” the militia of other States into federal service and use them, together with other armed forces, to suppress the insurrection. The President may similarly use the militia of any State and other armed forces to suppress rebellion and unlawful obstruction of the enforcement of federal law, and to put down insurrection, domestic violence, unlawful combination or conspiracy that hinders the execution of State laws so as to deprive people of rights guaranteed by the U.S. Constitution, or obstructs the execution of federal law or impedes the course of justice under those laws. When the President uses the militia or armed forces under these provisions, the President must, by proclamation, order the insurgents to disperse peaceably within a limited time.

## BY THE GOVERNOR OR LEGISLATURE

Most states have provisions under state law permitting the Governor or Legislature to activate the Guard for specific purposes outlined in state law. Subject to some limits, federal assets may be utilized in the performance of state missions. See the topic entitled “AID TO CIVILIAN AUTHORITIES” for more guidance in this area. Consult your Judge Advocate for more information relevant to your state.

***KWIK-NOTE: Consult your Staff Judge Advocate if any questions arise concerning mobilization and/or disciplinary actions during or after mobilization.***

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## Personal Affairs Briefing

Updated by Lt Col Monte Boettger, October 2010

**AUTHORITY:** Collective advice and experience from attorneys and financial planners.

### INTRODUCTION

All military members must keep their personal affairs in order in preparation for mobilization or deployment. Such preparations insure that members will not be impaired from performing their military duties, and will enable family members to make an orderly transition in the event of death or disability.

The attachment to this topic is a briefing which should be an integral part of the Preventive Law and Pre-Mobilization Legal Counseling Programs.

**KWIK-NOTE:** *Ensure your unit members are briefed regarding keeping their personal affairs in order.*

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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## Personal Affairs Checklist

### HOW TO GET YOUR RECORDS IN ORDER

At one time or another, we have all said, “One of these days, I have got to get organized.” And we all know how easy it is to keep putting that day off. The usual reason is that organizing home records is such a formidable task, we just do not know where to start. But that is no longer an excuse. Here are some simple, efficient methods for classifying and storing your important documents.

First, gather all your records together - those bursting shoe boxes, bulging envelopes, or paper bags stuffed with receipts, check stubs, and other papers. Sort your records, putting aside canceled checks, documents substantiating tax returns over three years old, expired insurance policies, closed accounts, etc. Locate such documents in a folder marked “historical records.”

### THE RECORDS YOU NEED

Here are some suggestions on what files to set up and what to fill them with.

#### Personal Data

The following information should be maintained in the event of your disability or to assist your executor. Currently the Military Officers Association of America maintains a downloadable file which easily permits the recording of necessary data. The site is [http://www.moaa.org/usergroup/usergroup\\_fam/pubs\\_infoex/pubs\\_infoex\\_fammatters/default.htm](http://www.moaa.org/usergroup/usergroup_fam/pubs_infoex/pubs_infoex_fammatters/default.htm)

1. Date and place of birth and certified copy of birth certificates of you, your spouse and children;
2. Social security numbers of your spouse, children and other dependents (you should obtain social security numbers for all of your children);
3. Permanent home address, including a chronological list of your places of residence including dates you resided there;
4. Date and place of any adoption, adoption papers and/or legal guardianship records;
5. Certified copy of any court order giving you legal custody of any children from a previous marriage;
6. Date and place of your current marriage, and a certified copy of marriage license or certificate;
7. Information on your previous marriage(s), such as name and current address of former spouse(s), the date and method of termination of the former marriage(s) (i.e., divorce, annulment, death), divorce or annulment judgments, orders, decrees or agreements along with documents related to spousal and child support, or death certificates of former spouse(s);
8. Copies of your divorce or annulment decrees from prior marriage(s) of your present spouse along with documents related to spousal and child support;
9. Name, address, and telephone numbers of places where unmarried children, including adopted or stepchildren, are enrolled in a full-time course of instruction if they are over the age of 18 but under age of 23 years;
10. Statement from licensed doctor or medical officer for dependent children over 21 years of age who are mentally or physically disabled, including the period of disability and that such dependents are not capable of self-support as the result of their illness or injury;
11. For illegitimate children, copy of a court order that you are the natural parent, and a copy of the court decision

that you contribute to the child's support, or a written admission of parentage by you if there was no court order;

12. Naturalization and citizenship papers for you and your parents for those of you who were born outside the U.S.;

13. Full names, places and dates of birth of your parents;

14. Family health records to include records of vaccinations, operations, significant medical conditions, and past illnesses or injuries with names and addresses of doctors and hospitals, receipts and bills for healthcare providers, prescription drugs and medical appliances currently used; and

15. Address of your registrar of voters so you can arrange for absentee ballots.

This information will be necessary to claim many of the benefits to which you are entitled.

### **Bank Accounts**

For all your checking accounts, savings accounts, credit union accounts, certificates of deposit, and IRAs, prepare a list to include:

1. Name, address, and telephone number of the institution where they are located;

2. Account or certificate number;

3. Interest rate, principal, and maturity date of time deposits;

4. Current balances; and

5. Location of bankbook, passbook, certificates, and all statements received from the institution. Save canceled passbooks.

Keep an updated list of your bank accounts so that your heirs may claim moneys to which they are legally entitled. In most states, inactive accounts will be closed, and the money in them will be transferred to the state for its general use. The internet now affords a ready research tool to locate such accounts. Access to such state records can often be made through your state's webpage. For example, see [www.state.nj.us](http://www.state.nj.us). Substitute your state's abbreviation for "nj."

### **Securities**

Make a list for all securities, including stocks, bonds (municipal, corporate, U.S. Savings), mutual funds, and money market accounts, with:

1. Name, address, and phone number of the institution where the securities are located, including that of your broker or account representative;

2. Account number;

3. Number of shares;

4. Title of security (e.g. General Motors stock);

5. Serial number;

6. Dates bought, gross price paid, and commissions;

7. Dates sold, gross price received, commissions, and net proceeds;

8. Where the transaction papers are located;

9. Certificates or statements of the account;

10. Date on which interest or dividends are paid; and
11. All other expenses incurred in managing your investments.

Actual certificates or bonds should be kept in a safe or secure place. Many people leave these with their broker or account representative who holds them in the name of the institution and for your benefit. However, you should do so only do so with reputable brokers. In such cases, make sure you are fully protected, that the broker is insured, and that a monthly statement will reflect the status of your securities. We do not advise leaving such documents with agents you deal with only over the internet.

### **Real Estate**

Unless otherwise indicated, keep the following records for every residence or piece of real estate you currently own:

1. Deeds, mortgages, leases, easements (rights of way) in a safe or secure place, with copies in this file (expired leases on property you rented no longer need be kept, if they are outdated or are no longer applicable);
2. Address of property;
3. Date and place where deed, mortgages and easements were recorded;
4. Register number;
5. Names, address, and telephone number of persons in whose name the property is held;
6. The form of ownership in which the property is held (i.e., Joint tenancy, etc.);
7. Date property acquired;
8. Method by which the property was acquired (i.e., purchase, gift, inheritance, etc.)
9. Purchase price;
10. Record of all expenses incurred in acquiring the property, such as title insurance fees, real estate brokers' commissions, attorney's fees and other closing costs (In most acquisitions, you will receive a closing statement from your attorney and/or any bank involved, itemizing these expenses - save this statement);
11. Copies of title insurance policies and reports;
12. The percentage of the price paid for the property by any co-owner(s), and the source of the funds all co-owners used to buy the property (This becomes important if one of the co-owners dies and you are seeking to save estate or inheritance taxes payable to the state or federal government by proving which co-owner paid for what part of the property when it was purchased);
13. All encumbrances on the property, such as mortgages, liens and judgments, to include name and address of the holder of the encumbrance, the amount, and the date the encumbrance became such on the property;
14. All documents showing encumbrances on the property as satisfied or fully paid (These documents should be recorded in the same local government office where the original encumbrance was recorded);
15. Name, address, and telephone number of the holder of the mortgage, maturity date, original amount, balance due, monthly payment, mortgage account or loan number, and amortization or loan payment schedules;
16. Mortgage life insurance policy, and name, address, and telephone number of insurance company, policy number, policy limits and expiration date, and annual premiums;
17. Property insurance policy, including casualty, fire, theft, and liability, with name, address, and telephone number of insurance company, policy number, policy limits and expiration date, and annual premiums;

18. Receipts, canceled checks and other papers showing all capital improvements to your property while you have owned it. These will increase your tax basis (cost or purchase price), so that when you sell the property, the difference between the sales price and your original purchase or acquisition price will be less, and you will be subject to less taxes on the gain or profit from the sale. Even though the exemption for the sale of residences has greatly increased, circumstances may force you to rent a property subjecting it to taxation upon sale.

19. Property tax bills paid for the last three years;

20. Copies of appraisals;

21. For investment or business real estate, records of the costs of managing and maintaining the property;

22. For investment or business property, records of rental income received, mortgage income received, depreciation schedules and deductions;

23. For investment or business property, leases and information on tenants, such as names, period of rental, expiration date, and amount of rental received; and

24. For all property you have sold, the closing statement received from your attorney and/or bank involved showing sales price and the expenses of the sale.

The reasons for maintaining all these records in connection with your real estate are to budget your expenses upon mobilization, to facilitate any sale, and to minimize your taxes on any profits from such sale.

### **Employment Matters**

List all your employment (past or current, full-time or part-time) benefits which would pass to your survivors or which would inure to the benefit of your family if you were mobilized. Also, list the name, address, and telephone number of the person(s) at your employer, whom your family should contact. Such benefits may include:

1. Pension or Keogh plans, to include identifying numbers and amounts, and whether the plan is vested;
2. Profit-sharing, stock-option and deferred compensation plans, to include identifying numbers and amounts, and the terms of the plan;
3. Statements issued to you from the employer or plan administrator showing all the above;
4. Life and medical insurance policies for you and your dependents, to include type of insurance, policy numbers, premiums, and amount of coverage;
5. Name, address, and telephone number of union and person to contact, date of union membership along with evidence of membership and status, and list of union benefits (You may want to arrange suspension or adjustment of dues payment upon mobilization);
6. Business agreements to include partnership documents, agency or sales contracts, royalties or residuals, and employment contracts; and
7. Evidence of beneficial interest in any business or joint venture.

Keep your employer informed of your military obligations. As soon as you are alerted either through verbal or written orders, notify your employer and discuss with your employer your intention to return to work upon completion of military duty. Do not use mobilization as an opportunity to quit your job, thinking that you want to change jobs anyway. Circumstances of military service may make job searching while on active duty an impossible task.

### **Insurance**

Other than property insurance and mortgage and employment life insurance, list and have the following handy:

1. Include all private life, health, disability, or accident policies in this list to include ones you have privately, or through a union, religious or fraternal organization, a club, or through government or military service;
2. Name, address, and telephone number of insurance broker, agent or other person or entity to contact for questions or claims to benefits of these policies;
3. Keep all policies that are in force, and any old ones that may still provide further benefits. For policies that have expired or are no longer in force, write "canceled" and the date across the first page of the policy; and
4. For each life insurance policy, include the name of the insured, type of policy (term, whole life, etc.), face value, name, address, and telephone number of insurance company, policy number, effective date, expiration date, premium payments amounts, when they are due, and how they are made (quarterly, by allotment, etc.), owner of policy, beneficiary and location of policy.
5. Include instructions to your beneficiaries to check with all banks and credit unions in case the institutions have small insurance policies for account holders.

This information will enable your family to obtain the necessary claim forms for the benefits of these policies. Your life insurance beneficiaries may wish to consult with your accountant or attorney before deciding whether the proceeds should be paid out in a lump sum or in a series of distributions if they have a choice. Include in your list any veteran's benefits to which you are entitled, such as plot or burial allowances, and Social Security Administration death benefits.

Review your coverage with your agent periodically. Certain premiums may be covered under the Soldiers' and Sailors' Civil Relief Act (federal and state, if your state has one).

As with bank accounts and securities, your beneficiaries must know which policies you have to make a claim.

### **Automobiles**

1. Certificates of title, bill of sale, or lease;
2. Make, model, year, vehicle identification number, and state of registration;
3. Date acquired, price paid, location, and names, addresses, and telephone numbers of co-owners;
4. Financing information to include name, address, and telephone number of lien holder and amount financed, lessor, length of payment schedule, amount and frequency payments, and coupon book;
5. Insurance information to include name, address, and telephone number of insurance company, coverage amounts and types, effective date, expiration date, policy number, amount and frequency of premiums, and copy of the current policy;
6. Warranties; and
7. Tax receipts.

### **Other Personal Property**

#### Hard Assets

For your property such as gems, precious metals, collectibles, jewelry, furs, artwork, stamps, coins, boats, recreational vehicles and appliances, etc., keep a list and have the:

1. Type, quality, quantity, date purchased, gross price paid, commissions, and other costs of purchase; how acquired (purchase, gift, inheritance), date sold, net proceeds, location of assets, transaction slips, and evidences of ownership such as certificates of title, registration, sales receipts or bills of sale;

2. Photographs and appraisals of these items which are valuable in substantiating casualty and theft losses for claims under your property insurance and on your income tax return. Keep appraisals current by updating them annually;
3. Tax receipts, warranties, operating manuals and repair bills; and
4. Name, address, and telephone number of any joint owners, percentage owned and source of funds each owner used to purchase the asset.

### **Other Assets**

You should maintain a file for:

1. Notes receivable, mortgages, or other evidence of income producing property; and
2. Name, address, and telephone number of person or entity who owes you the money, amount, frequency of payment, interest, and when the debt is due to you.

### **Taxes**

In addition to your real estate taxes discussed above, you should keep:

1. Copies of your income tax returns filed with the federal and state government for the four previous years, including receipts, canceled checks, and diaries substantiating your deductions, depreciation, loss carry-over and other schedules, withholding and earnings statements, records of capital gains and losses, quarterly estimated tax forms, and correspondence with tax authorities. Put all older returns and their back-up documentation in a "dead storage" file;
2. Amount of all taxes you will have to pay for the current year, and whether they are estimated or withheld; and
3. Record the addresses of all taxing authorities, for your income taxes and property taxes. Upon mobilization, ensure that all taxes are paid to date and notify taxing authorities where further tax notices are to be sent. You may be granted an extension to pay certain taxes under the Soldiers' and Sailors' Civil Relief Act.

### **Credit Card Accounts**

Set up a separate file for each account. For each account, list and keep:

1. Names and addresses of all account holders, and specify if they are either joint accounts, or accounts on which another person(s) just has charge or user privileges;
2. Name, address, and telephone number of bank or entity that issued the card;
3. Type of account such as Visa, Mastercard, American Express or a store, gasoline, or telephone company card. For example, a Visa card is an example of a credit account on which you pay a finance charge on your outstanding balance each month, while American Express is an example of a charge account on which you are expected to pay the balance in full upon receipt of each statement;
4. Card or account number;
5. Credit limit and expiration date;
6. Telephone number of whom to contact to report lost or stolen cards;
7. Receipts, bills, and correspondence with the card issuer, and credit agreements;
8. Current Annual Percentage Rate (APR);
9. Note any cards that have "credit card life insurance" which either you have purchased or is included in your annual fee. This is insurance which the credit card company offers to automatically pay off outstanding balances

upon your death;

10. Location and number of cards issued; and

11. Instructions for your survivors to destroy cards in your name and to have them reissued in the survivor's name, if desired.

### **Bills and Debts**

All notes, judgments, liens, credit union accounts, bills, leases, purchase contracts, installment sales contracts, and other outstanding debts that must be paid should be listed and should include:

1. Written evidence of the debt;
2. Name, address, and telephone number of the creditor;
3. Total amount owed;
4. Payment terms, including frequency and amount, interest and maturity date;
5. All obligations that you have co-signed or guaranteed; and include name, address, and telephone number of the other debtor or the primary debtor, plus 1 through 4 above for these obligations also; and
6. Documents relating to any bankruptcy action you filed.

### **Safe Deposit Boxes**

For every box you have, include:

1. An inventory of the contents of the box and where the inventory is located (have more than one copy and keep them in different places with one in the box);
2. Name, address, and telephone number of where the box is located;
3. The number of boxes you have and the box number(s);
4. Location and number of keys; and
5. Name, address, telephone number and relationship to you of any person with joint access to the box.

Joint access may fit your needs in the event you are mobilized.

Under some states' laws, boxes are "sealed" upon the death of one of the boxholders. Employees of the bank where your box is located daily read the obituary pages of the local newspapers and cross-check names against their boxholders. If state law provides for the sealing of boxes, upon the bank learning of your death, the box may be sealed until a representative of the state tax department meets your representative at the bank and inventories the contents of the box, or until your representative obtains a court order to open the box. Because of this practice, you should not keep your will in a safe deposit box, nor should you keep documents your family will need immediately in such a box. If the state where your box is located seals boxes upon the death of one of the boxholders, and if you have a business which is incorporated, you should discuss with your attorney whether you should maintain your box in your corporate name rather than in your own name. If you put the box in your corporate name, you can have the person who would have joint access to the box if you held it in your own name, have joint access under your corporate name. This way, since your corporation will not "die" upon your death, the box will not be sealed and the person with joint corporate access will be able to obtain the contents of the box upon your death.

If the state where your box is located does not seal boxes upon the death of one of the boxholders, the above advice is not pertinent, since another person with joint access to your box will have access to it upon your death.

## **Business Expenses**

Maintain records to substantiate all potentially deductible or reimbursable outlays you make on your employer's behalf each year.

## **Net Worth Statement**

Annually appraise and assess your assets and liabilities, and indicate where the net worth statement is located.

## **Wills, Trusts and Powers of Attorney**

For your last Will and Testament, all Living Trusts, Powers of Attorney and your Living Will (if you have one), list:

1. The location of each document, and whom to contact to obtain the original and existing copies;
2. The date and place it was executed;
3. The names, addresses, and telephone numbers of the holder of your Power of Attorney, and your Will's executor(s), trustee(s) and guardian(s), and the alternates or successors to each; and
4. The name, address, and telephone number of your attorney and accountant.

For any Will, Trust or Power of Attorney of another in which you are designated an executor, guardian, trustee, beneficiary, or holder of the power, list:

1. The location of each document, and whom to contact to obtain the original and existing copies;
2. The date and place it was executed;
3. The name, address, and telephone number of the person who made this designation; and
4. The name, address, and telephone number of the attorney or accountant of the person who made the designation.

Keep originals of these documents in your safe, strongbox or that of your attorney. Keep copies in your home file.

## **Clubs, Organizations and Subscriptions**

### Clubs

List the name, address, and telephone numbers of all clubs or fraternal, service or professional associations to which you belong, such as golf, tennis, health, athletic, record or video clubs, so that memberships can be canceled and unused portions of paid dues or fees may be recouped. Include any benefits of membership to which your survivors or dependents may be entitled and whom they should contact to claim them.

### Organizations

If you hold files or other information for volunteer or business organizations, tell your spouse or personal representative where to find these files and information and to whom they should be returned.

### Subscriptions

List the magazines and other periodicals to which you subscribe, so they may be canceled and unused portions of fees paid may be refunded.

## **Military Benefits and Duties**

Include the following related to your ANG service:

1. Discharge certificates;

2. Your SGLI amount of coverage;
3. Civilian employment benefits upon being mobilized;
4. Dependent care responsibilities and executed documents reflecting these;
5. Any rights or obligations you have under the Former Spouses' Protection Act and Garnishment Orders;
6. Honorary memberships;
7. Turn-in of issue items, equipment, and ID cards;
8. Healthcare treatment to which your family is entitled under TRICARE and DEERS;
9. Benefits to which you and your family are entitled including Veterans benefits from the state and federal government, and Montgomery G.I. Benefits;
10. Location of Powers of Attorney you have executed;
11. If you owe a debt to the government, any applicable procedures for its waiver or remission;
12. Your military records;
13. The names, addresses, and telephone numbers of key persons at your base to contact for assistance, such as CBPO - Customer Service, Judge Advocate, Chaplain, and your Commander;
14. The location of information in the form of handouts you have received from your unit to assist your family with any of the above; and
15. Address of your local draft board, if in existence. You will need to notify them of your change of status.

#### **Summary – Names, Addresses and Telephone Numbers**

Even though described in the subjects to which they pertain, you should separately list this information for your:

1. Attorney;
2. Accountant;
3. Investment broker or account representative;
4. Insurance agent or broker;
5. Employer(s);
6. Banks where you have accounts;
7. MPF at your base;
8. Social Security Office;
9. Veterans Administration; and
10. Any other person or entity you think your survivors or family may need to contact.

You should give this list to those to whom you have entrusted the management of your affairs, and should indicate on the list who has copies of it.

## **Letter of Instructions**

If you were to be mobilized or die tomorrow, would your spouse or other family member or representative have the information needed to manage or wind up your affairs and make final arrangements on your behalf?

Even though you have established and maintained the files that have just been discussed, and you and that person have discussed these matters, it is a good idea to summarize the important details of where to find anything that is needed, whom to contact, and what is to be done should something happen to you. This summary should be put in the form of a letter of instructions and should be updated yearly, or sooner if something in it changes. Copies should be given to the person in your family who needs it to act and to one or more of your close advisors.

### Contents of the Letter

In the letter you can include or attach the list of names, addresses, and telephone numbers of persons to contact (See the above “SUMMARY - NAMES, ADDRESSES, AND TELEPHONE NUMBERS” section of this topic). In the first few paragraphs, consider including information that will be needed immediately after your death, such as your preference for funeral arrangements, whether you have purchased a cemetery plot, and where it and the deed or other evidence of its ownership is located, and your preference or lack of preference to make a gift of any of your body parts.

You should also include where to find important items such as your Will, insurance policies, bank books, credit union account passbooks, other vital documents, your safe deposit box keys, strongbox keys, and the combination to your safe.

## **CONCLUSION**

Admittedly, assembling and keeping these records current are not easy tasks. This takes time. The best way to approach it is to do it little-by-little and on a regular schedule over a set period of time.

If and once you set up this inventory, and can immediately put your hands on the papers you need, you will be better prepared to claim property insurance benefits in the event of a casualty, may be able to claim once-hidden tax deductions, withstand tax audits, uncover overlooked insurance or pension benefits, expedite tax return preparation (and avoid the April 15th panic), and improve your estate, financial, and tax planning.

Most importantly, you will have the peace of mind in knowing that your loved ones will know where everything is, and what to do about it in the event you are mobilized, or become deceased. You owe them that much.

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# Pre-Mobilization Legal Counseling

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**Updated by Lt Col Monte Boettger, October 2010**

**AUTHORITY:** Applicable state law; command discretion; the Related Topics listed below.

## INTRODUCTION

Establishing and maintaining a regular program for pre-mobilization legal counseling will better ensure your unit members and their families will be **READY** in the event of mobilization. Your unit Judge Advocates and paralegals are knowledgeable regarding the personal legal issues that arise in the event of mobilization or deployment and can provide briefings at Commander's calls and Newcomers' Briefings on these issues. Additionally, your legal staff can prepare handouts on these topics or compile a handbook pertaining to pre-mobilization legal issues for distribution to your members. The attachment to this article is a handout informing members of the actions they should take, at a minimum, to ensure readiness in terms of their personal affairs.

## SCOPE OF PRE-MOBILIZATION LEGAL COUNSELING

The scope of pre-mobilization legal counseling should include personal and military matters. Below are some of the subjects that should be part of your unit's pre-mobilization legal counseling program. They are listed by topic titles as they appear in this Deskbook.

### Personal Matters

- Benefits
- TRICARE and DEERS
- Civilian Employment and Guard Membership
- Dependent Care Responsibilities
- Domicile
- Former Spouse Protection Act
- Garnishment
- Health Insurance – Voluntary Conversion Plans
- Living Wills
- Personal Affairs Briefing
- Powers of Attorney
- Servicemembers Civil Relief Act
- Veterans' Benefits
- Wills

### Military Matters

- Claims - International
- Ethics
- Foreign Criminal Jurisdiction
- Law of Armed Conflict
- Military Justice Jurisdiction – ANG Members in Title 10 Status
- Mobilization of the Air National Guard
- Passports and Visas
- Returning to the United States - Customs
- Status of Forces Agreements
- Status of National Guard Members
- Stop-Loss

## CONCLUSION

Pre-mobilization legal preparedness is everyone's responsibility - Commanders and unit members alike. Your legal office can assist you in preparing your members for deployment.

***KWIK-NOTE: ADVANCE planning is the key to being ready for mobilization.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Active State Duty	11-3
AGR Program	11-4
Benefits	4-2
TRICARE And DEERS	4-3
Civilian Employment And Guard Membership	23-8
Dependent Care	1-10
Domicile	23-11
Ethics	7-3
Foreign Criminal Jurisdiction	15-8
Foreign Divorce Decrees	23-13
Former Spouses' Protection Act	23-14
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Judge Advocate Support For ANG Units Deploying Overseas	17-5
Law Of Armed Conflict	15-16
Legal Assistance Program	17-18
Legal Office - Operational Guidance	17-10
Living Wills	23-17
Military Justice Jurisdiction – ANG Members In Title 10 Status	8-15
Mobilization Of The Air National Guard (Federal And State)	20-2
Newcomer's Briefing	1-23
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Servicemembers Civil Relief Act (Federal And State)	20-5
Status Of Forces Agreement (SOFA)	15-14
Status Of National Guard Members	11-7
Stop-Loss	20-6
Veterans Benefits	4-8
Wills	23-21

## **ARE YOU READY FOR MOBILIZATION?**

In the event you are to mobilize, the time available to put your personal and legal affairs in order will be relatively short. Problems arise when people are suddenly and unexpectedly separated and distantly removed from their businesses, jobs, and families. Advance planning will help you avoid many legal problems upon mobilization. In addition, taking care of your personal affairs now, when it is easier for you to do so, will give you and your family peace of mind and allow you to better perform your military duties if you are mobilized. Do not wait until you are mobilized to begin to get your affairs in order. **DO IT NOW**, and update things as time goes by, and as necessary.

## **WHAT YOU SHOULD DO TO GET READY**

The key idea in pre-mobilization legal counseling is “ADVANCE PLANNING.” Some people will need to do more than others to put their personal affairs in order. However at a *minimum*, everyone should do the following seven things:

1. Consider making a WILL, especially if you have minor children or own real estate. If you already have a will, make sure you keep it up to date. Make sure those you have designated as executor, guardian and trustee, and alternates, have agreed to serve. Do your will now and take the time to do it thoroughly. Don't wait until you are mobilized and have to rush to first get it done. Also, consider making a Living Will;
2. Be sure your Record of Emergency Data in your MPF file is current. Check it;
3. Sign a Power of Attorney. This power of attorney may, if you wish, take effect only when you are mobilized and your orders are attached to the Power of Attorney. The Power of Attorney should authorize someone you trust to transact business for you in your absence.
4. Maintain your own personal file of military records;
5. Keep a list of your assets, liabilities, income and expenses. (Consider using the form provided on the website of the Retired Officers Association at <http://www.troa.org/Publications/Download/WorkbookWord.doc>).
6. Keep your important papers in a safe place, preferably a bank safety deposit box, personal safe or fireproof container, and tell your spouse, holder of your Power of Attorney or next-of-kin where these papers are located; and
7. Tell your family about government benefits and their entitlements should you die. Be certain you advise your spouse or family that they can receive legal assistance from the nearest active duty military Judge Advocate Office while you are on active duty, regardless of branch of service.

Your unit legal office is available to assist you by counseling you on potential legal problems you may anticipate in the event of mobilization, and ways to prevent or resolve those problems, preparing wills and powers of attorney, and providing you with personal legal assistance regarding personal and financial matters.

*PLEASE DO NOT PUT THIS OFF. It is a big job, but like all big jobs, doing a little bit at a time with the help of those close to you, will get it done a lot sooner.*

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## **Servicemembers' Civil Relief Act (Federal and State)**

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**Updated by Col William E. Enright, Jr., May 2004**

**AUTHORITY:** 50 U.S.C. Appendix 501 *et seq.*; applicable state law.

### **INTRODUCTION**

The following is an overview of rights and benefits available under Servicemembers' Civil Relief Act (SCRA), formerly the Soldiers and Sailors Civil Relief Act. This topic is not to be cited as legal authority for interpretation of the SCRA. For legal interpretation, consult a Judge Advocate.

### **FOCUS**

The SCRA was signed into law on 19 December 2003 by President George W. Bush and supercedes the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA). The SCRA is intended to strengthen the rights and protections afforded to those in military service, and in some case their family members, and provide essential clarification of benefits continued from the SSCRA.

This topic discusses only the Federal statute. No references are made to any state statute intended to apply as a state SCRA or SSCRA or a supplement to the Federal SCRA.

### **THE SERVICEMEMBERS' CIVIL RELIEF ACT AND WHAT IT DOES**

The Servicemembers' Civil Relief Act (SCRA) provides a wide range of protections for individuals entering or called to active duty in the military service under Title 10. It also applies to individuals in Title 32 state status called to duty for 31 days or more in response to a national emergency declared by the President and supported by Federal Funds. It does not apply to any other military members in Title 32 status. Congress intended the SCRA to TEMPORARILY postpone or suspend certain civilian obligations to enable service members to devote full attention to their military duties when they have been ordered to drop their everyday affairs and answer their country's call. The SCRA does not necessarily eliminate obligations. Instead, if the SCRA applies, certain obligations may be put "on hold" until members return to civilian life when they have the opportunity to take the necessary measures to protect their interests. A member's desire to claim rights under the SCRA will not be cause to delay his mobilization.

The SCRA does not apply to ANG members performing Annual Field Training, inactive duty for training or state active duty service.

The SCRA affords protection in every court, Federal, state and local, in the United States, and applies to the actions of every Federal, state or local governmental agency, and every private business or individual.

### **WHAT THE SCRA DOES NOT PROTECT?**

#### **Criminal Matters**

The SCRA does not provide rights or protections concerning CIVILIAN CRIMINAL prosecutions or matters, including traffic tickets, if the state considers the traffic offense to be criminal. (Many states will stay prosecutions or afford the member some protection when the member is alleged to have committed a non-criminal traffic offense.) Thus, if a member has a criminal matter pending in a civilian court at the time of his order to active duty, the member must address the matter with the court and either resolve it or receive permission to stay proceedings until he is in a position to later resolve the matter. If the member wrongfully attempts to invoke the provisions of SCRA or simply ignores the matters, a warrant will issue for his arrest. Members known to have criminal matters

pending in civilian courts should be referred to a Judge Advocate. (Military attorneys cannot represent military members in civilian criminal prosecutions, but can help resolve this type of problem.)

## **Civil Matters**

The SCRA only covers those civil matters specified in the statute, and only under certain circumstances. Members must be careful to ensure the civil matter for which relief is sought is covered by the SCRA. Otherwise, the member must make arrangements to address the civil matter in his absence.

### Civil Matters Not Covered

Financial obligations incurred by the member or his dependents family members are not by covered by the SCRA. Thus, credit card purchases, and contracts or agreements for installment purchases for cars, furniture, etc., that are signed after the member enters into active duty are not protected by the SCRA.

### Specified Matters Not Covered in All Situations

Certain civil matters may be addressed in the SCRA, but may not be protected because the military-civilian pay differential does not materially affect the member's ability to meet those obligations. The law intends to protect military members who suffer financial hardship as the result of their entry into active military service but does not intend to provide an additional benefit to those who are financial advantaged by entry into active military service or are on a par with their civilian financial situation. If a member applies for benefits under the SCRA that are dependent upon a material reduction in income but that member's income has not been materially affected by his entry into active military service, a civilian court may determine that the member is not entitled to the protections of the act and the member may become liable to his creditor for late payment charges, interest charges and costs, including attorney's fees, associated with the creditor's lawsuit to force the member to pay what he should have been paying. In determining whether military service has materially affected a member's ability to meet his financial obligations, factors such as increased day cares costs, additional living expenses, or other costs incurred as the result of entry into active service may be considered.

## **WHEN DO THE PROTECTIONS APPLY?**

### **Federal Activation – Title 10**

The protections of the SCRA begin on the date the member is ordered to duty. Verbal orders, later confirmed in writing, are sufficient to entitle the member to the protections and benefits of the act. The protections apply whether the active duty is voluntary or involuntary. The protections end from 0 to 90 days after the member is discharged from active duty, depending upon the particular SCRA protection involved.

### **Active State Service Not Covered**

Because of the dual missions of the National Guard, there may be times when the Governor calls the Guard into active service of the state. This is the state equivalent of a Federal mobilization. The authority for the state activation is a state statute or regulation, and the activation occur upon the Governor's order. Such state service, however, is not covered by the SCRA. State activation may, however, create the same problems for Guard members who are called away from their civilian status as does a Federal mobilization. In these situations, the member's protections and benefits are limited to those provided by state law. Many states have statutes or regulations that provide benefits similar to the SCRA. Upon a state activation, a Judge Advocate should be consulted to determine the protections and benefits afforded to military members.

## **GAINING THE PROTECTIONS OF THE SCRA**

### **Inform Those Who Must Adhere to the Act**

The protections of the SCRA are not automatic. The member must inform civilian courts, agencies, businesses or people that he has entered active duty service and is claiming the protections and benefits of the SCRA. Otherwise,

a member may be denied or forfeit the protections and benefits of the act.

### **Notice Letters**

To assist members in informing the proper people, Attachments 1 and 2 to this topic have been provided. Attachment 1 is a sample letter from the member informing the recipient that the member has entered into active duty and is claiming the protections of the SCRA. Attachment 2 is a sample letter to creditors specifically claiming the six (6%) percent interest rate reduction for installment debts that existed prior to the member's entry into active duty service.

### **Who Should Send Notice Letters**

Members, if at all possible, should send notice letters to those who must provide them with the protections and benefits of the act. Ideally, a copy of the member's orders should be attached to the notice letter. In addition, commanders and Judge Advocates may choose to send notice letters and claims of SCRA protections from the unit as a letter from the unit can provide credibility to the member's claim for benefits. However, the unit's letter should not be the only notice letter sent to the party that must provide the protections of the act unless military exigencies prevent the member from sending his own notice.

### **How Should the Letters be Sent?**

The letters should be sent certified mail, return receipt requested, or delivered by any other means that enables the member to easily prove the intended recipient received it. A copy of any notice letter sent should be maintained, at a minimum, until the end of the member's term of active duty service and, maximally, if there is any dispute over the member's claim for protections and benefits, until the dispute is resolved.

### **Know in Advance of Mobilization to Whom the Letters Will be Sent**

All members should maintain an accurate and current list of the names and addresses of all civilian entities and persons to whom the letters will be sent in the event of mobilization or rapid deployments. Members should be encouraged to do this in advance to avoid the last minute rush in tending to these matters.

## **THE PROTECTIONS AND BENEFITS**

The SCRA provides protections for lawsuits and financial matters. All members and/or their dependents are encouraged to consult with a Judge Advocate to assist in identifying the specific protections and benefits available under the SCRA and claiming applicable protections and benefits.

## **THE CIVIL LAWSUIT**

Persons who bring or start the suit are known as "plaintiffs." Persons against whom suit is brought are known as "defendants." The typical lawsuit is begun when the plaintiff, either alone or through an attorney, files in a court a document called a "complaint." In the complaint, the plaintiff states why he is suing the defendant. After the complaint is filed, the plaintiff must give the defendant notice that the suit has been started. This is accomplished by means of serving (delivering) a "summons" and a copy of the complaint on the defendant. A summons is a formal written notice to the defendant to the effect that a suit has been filed against the defendant, and that unless the defendant contests the suit, "judgment" may be entered against the defendant. A judgment, unless successfully appealed, concludes a lawsuit. If the defendant desires to contest the plaintiff's claims, the defendant will normally file a written document called an "answer". In his answer, the defendant states why the plaintiff is not entitled to the relief he seeks. If the parties cannot resolve the matter, a trial is held and court enters a judgment in favor of one of the parties.

If the defendant does not file an answer within the time specified in the summons, the defendant is said to have "defaulted." When a defendant has defaulted, the court may enter a "judgment by default" in favor of the plaintiff.

## **General Relief Protections Applicable to All Lawsuits**

The SCRA protects against default judgments, entitles the military member to a stay or delay of a lawsuit and gives the member additional time in which to file lawsuits.

### Protections Against Default

Under the SCRA, a court will require a plaintiff to file a statement under oath (called an affidavit) that a defendant is not in the military service. This affidavit must be filed before a court can enter a default judgment against the defendant. If the plaintiff is unable to make such a statement, then the plaintiff must file a sworn statement that:

1. the defendant is in the military service; or
2. the plaintiff is unable to determine whether the defendant is in the military service.

### *Rights of the Defendant in the Service*

If the plaintiff's affidavit states the defendant is not in the military service, a default judgment may then be entered against the defendant.

If the plaintiff's affidavit states the defendant is in the military service, a default judgment may be entered against the defendant only after the court, assuming an attorney is not presently representing the defendant, has appointed an attorney to represent him and the attorney has had an opportunity to be heard in the defendant's behalf. An attorney appointed by the court to represent a military defendant has no power to waive any of the defendant's rights or bind the defendant to any agreement without the defendant's consent.

If a plaintiff cannot determine whether a defendant is in the military service, a court may require a plaintiff to post a bond to protect a defendant in the event a default judgment is later set aside in whole or in part because the defendant was in the active military service.

If the court determines a defendant is in the military service or cannot determine whether a defendant is in the military, the court may stay (delay) the proceedings until the defendant returns from military service or until it can determine the defendant's status, as the case may be. "Stays" will be discussed later in this section.

### *False Affidavit*

If a plaintiff swears in an affidavit that a defendant is not in the military service when the plaintiff knows the defendant is performing active duty military service, the SCRA makes such false swearing a crime and the guilty party can be sent to jail for up to one year, fined or both fined and sent to jail IAW Title 18, United States Code.

### *Setting Aside a Default Judgment*

If a default judgment is entered against a military member during a period of active duty service or within sixty (60) days after discharge, the member may still have some protection. A court can be asked to reopen the case and set aside the default judgment. The court will do so if the military member can show that:

1. his application to reopen the case is being made within ninety (90) days after his release from active duty; and
2. the military member has a meritorious defense to the suit.

Even assuming a plaintiff may have obtained a default judgment as the result of false swearing as previously discussed herein, the military member defendant must still meet all three of these requirements before the case may be reopened. Any punishment for the plaintiff's false swearing will be meted out in a separate proceeding.

**CAUTION:** If a member learns, either indirectly or directly through receipt of a summons and a copy of the complaint, that a lawsuit has been filed against him, the member should refrain from contacting the court or counsel for the plaintiff. Instead, the military member should contact his civilian attorney, if he has one, or a Judge Advocate for advice before taking any action, including sending a letter to the court. By acting on his own, the

military member may waive or lose the protections of the SCRA. The protection against default judgments applies only when a military members fails to make an “appearance” in the lawsuit. The word “appearance” in a legal context takes many forms too numerous to mention and varies from state to state and from court to court within a state. Sending a letter to a court, even if only to inform the court that the military member is in active service, may constitute an appearance causing the member to lose the protections of the act that apply to default judgments. (There may, however, be some other protections of the act available.) Thus, if at all possible, the military member must be careful not to do anything that may be construed to be an appearance.

### **Stays (Delays)**

A “stay” is an order of a court that delays a court proceeding or the execution of a court order, such as a judgment to collect money, until a later date.

#### Availability of Stays for Military Members

At any stage of a lawsuit or legal proceeding, an active duty military member, regardless of whether he is the plaintiff or the defendant, may ask a court to stay the proceedings. In addition, the court may order an action against an active duty military defendant stayed without being asked if it determines (1) there may be a defense to the action and the defense cannot be presented without the defendant’s presence or (2) after due diligence, court appointed counsel cannot locate the defendant or otherwise determine whether a meritorious defense exists. When a service member requests a stay, the SCRA requires the court to grant it for a minimum period of 90 days. When asking for a stay, the military member needs to inform the court that he has been activated pursuant to Title 10 of the United States Code or that he has been activated pursuant to Title 32 of the United States Code for a period of more than 31 days for the purposes of responding to a national emergency declared by the President. The format in Attachment 1 to this topic can be used in providing such notice to a court. Details of how the member’s ability to defend or prosecute a lawsuit should be included. For example, service overseas prevents rapid communications with the member’s counsel or the court as there may be no or limited access to computers or telephones for long periods of time, etc. If the other party to the lawsuit does not want it delayed, that party must prove to the court that the military member’s service does not materially affect his ability to prosecute or defend the lawsuit. The automatic right to a stay under the SCRA is limited to 90 days. A stay longer than 90 days is up to the court. So, providing detail as to how the member’s military status affects his ability to prosecute or defend lawsuit, is important. If a judge determines that a stay longer than 90 days is appropriate, the court may order a stay for as long as the length of the member’s military service plus three months beyond the release from active duty. If the member has an attorney representing him in a lawsuit, all communications with the court should be made through and with assistance of the attorney.

#### How Stays Affect Judgments

Stays can also be granted for the execution of judgments entered against military members before they were activated. If, for example, the member’s military and/or civilian pay was being garnished before entry into active military service for the payment of arrearages in spousal or child support, the court may stay the collection of that judgment during the member’s active duty military service. (The member would have to show that military service has materially affected his ability to pay the garnished amount.) The SCRA, however, does not give the member the right to question the validity of any judgment that was previously entered. [For more guidance in this area, see the topics in this Deskbook entitled “FORMER SPOUSES’ PROTECTION ACT” and “GARNISHMENT”.]

#### What If There Are Other Potential Defendants Who Are Not Performing Active Duty Service

If there are other defendants who are not performing active duty military service, a court may stay the action against them so that all defendants can be tried together or order the case against the other defendants to presently proceed and stay the case only as to the active duty military member. The non-active duty defendants have no automatic stay rights under the SCRA, except that the military member’s dependents may have stay rights depending on the nature of the action.

#### Contract Claims That Involve Penalties For Breach of the Contract

If the lawsuit involves a claim that the servicemember is in breach of a contract and the contract calls for fines or

penalties for noncompliance, no fines or penalties may be imposed for any period of stay imposed by the court.

### Practical Tips

The military member must affirmatively request a stay. Although the statute places the burden of proof upon the other party, the military member should still attempt to demonstrate that his ability to proceed with the lawsuit is materially affected by his military service.

### **Statutes of Limitations**

#### Definition and How They Work

The third kind of general relief protection under the SCRA, applicable to all lawsuits, has to do with the statute of limitations.

In most instances, a person who has a right to bring a lawsuit or a proceeding before a governmental administrative board or agency must start the lawsuit or proceeding within a certain time limit. The laws and regulations setting this time limit are known as "Statutes of Limitations." These vary depending on the type of lawsuit or proceeding and the state in which the lawsuit or proceeding must be commenced. The statute of limitations starts "running" from the instant the suit or proceeding first could have been filed and it is deemed to have "run" when the time limit for filing the suit or proceeding has passed. Generally, once the statute of limitations for a particular lawsuit or proceeding has run, the lawsuit or proceeding is forever barred.

#### The Relief – The Statute of Limitations Stops Running

Under the "general relief provisions" of the SCRA, the statute of limitations stops running while the member is performing active duty service, provided the military member's ability to sue or be sued is materially affected because of his active service. (See, Practice Tips, below.) Essentially, the SCRA stops the clock on the statute of limitations at the moment the military member is activated and it does not start to run again until the member is released from duty.

#### *Examples*

For example, someone negligently damages the member's car in state X on 2 January 2002. The member does not bring a lawsuit for damages when, on 1 February 2003, he enters active duty service. He remains on active duty service until he is discharged on 31 January 2004. Suppose State X's statute of limitations requires suit for negligent damage to cars to be filed within three years from the date of the accident. Had the member not entered active service, he would have had until 2 January 2005 to bring suit. Under the SSCRA, the one-year the member was in active service is not counted in the three years you have to file suit. Thus, the member would have until 2 January 2006 to file suit.

Using the same dates in the above example, suppose that the military member had damaged someone else's car. In that circumstance the other party would also have until 2 January 2006 to bring suit against the military member.

In both of the above examples, the accident occurred before the member entered active service. Nevertheless, the same results would be reached if the accident had occurred after the member entered active service.

#### Exception – Internal Revenue Code (IRS)

The automatic "tolling" or stopping of the statute of limitations does not apply to matters involving the IRS. The IRS may provide relief in its own right and may require a member on active duty to file some papers in order to claim those rights. Members with IRS concerns should consult with a Judge Advocate.

### Practice Tips

The SCRA's relief in stopping (sometimes also called "tolling") the statute of limitations from running applies upon

the member's entry into active duty military service. Whether or not the member receives this relief may depend on whether his ability to timely sue or be sued is "materially affected" by military service. For instance, a court may determine that a military member activated for a home station mobilization has not been materially affected by his entry onto active duty and, therefore, is not entitled to a tolling (stopping) of the running of the statute of limitations. Thus, anytime a military member seeks to proceed with an action after the applicable statute of limitations has apparently run, the military member must be able to prove to the court that he was on active duty and his military service materially affected his ability to timely commence the action. Copies of orders indicating when you began and ended any relevant period(s) of active duty service and where the member served will prove helpful.

### **Specific Financial Relief Provisions Applicable to Particular Lawsuits and Situations**

The provisions discussed in this part of the topic involve financial obligations of one kind or another. No attempt is made to list every financial benefit provided by the SCRA or to discuss all the requirements necessary to claim those benefits. The financial benefits discussed herein are those most commonly encountered by Guard members. If a member has a question concerning a matter not addressed in this section, he should consult with a Judge Advocate. The following SCRA financial-type protections will be discussed:

1. Interest in Excess of Six Percent Per Year;
2. Leases - Evictions and Cancellations;
3. Installment Contracts and Repossession of Property;
4. Mortgage Foreclosure;
5. Storage Liens;
6. Insurance - Life, Health and Professional Liability;
7. Powers of Attorney;
8. Taxes - Income and Property;
9. No adverse credit actions; and
10. Motor Vehicle Leases

#### Six Percent Interest Rate

##### *The Cap*

Upon a member's entry onto active duty, and for as long as it lasts, all debts incurred BEFORE being entering the active duty military service that bear interest at a rate in excess of six percent per year may be capped at six percent, providing the member's ability to service that debt has been materially affected by his entry into the active duty military. This includes all kinds of interest-bearing debts, such as mortgages, car loans, credit cards or individual business loans. During active duty military service, the member only has to pay interest on these debts at the rate of six percent simple interest per year. If the interest rate on the installment payment would ordinarily be in excess of six per cent simple interest per year, the SCRA makes it very clear that the excess interest is totally forgiven. When the member's active service ends, the interest rate will revert to the pre-active duty rate.

##### *To What Does the Cap Apply?*

"Interest" includes service charges, renewal charges, fees, or any charges (except bona fide insurance) in respect of the obligation or liability.

The cap only applies to debts incurred or credit card purchases made before entry onto active duty. In determining when a debt was incurred, the date that controls is the actual date of purchase not the date when the charge was posted to an account by a credit card company. If the member makes purchases after entry onto active duty, those

purchases are subject to the normal interest rate applied to the credit card account and the interest on that credit card debt is not capped at six percent. The interest cap on pre-mobilization debts is not lost because a member incurs new debts on an account after entry on active. The member simply pays six percent interest on the old debt and the normal interest rate on the new debt.

### *Claim the Cap*

To obtain the interest rate benefit, the creditor must be notified of the member's entry onto active duty. Attachment 2 to this topic is a sample letter for this notice. Upon the member's notification to the creditor, the creditor must re-compute the interest on the debt to the six percent rate as of the date on the member's orders. To facilitate this process, the member should attach a copy of his orders to the letter.

### *Creditor's Remedy*

As previously stated, military members are only entitled to this benefit if their ability to service their debt is materially affected by their military service. Creditors can object to a military member's claim for a reduction to the six percent interest rate cap. To legally object to a military member's claim for an interest rate reduction, the creditor must file a lawsuit. Otherwise, the creditor must reduce the interest rate to six percent. In the lawsuit, the creditor has the burden of proving that the member's ability to pay more interest than the six percent cap is "not materially affected by your military service." Many creditors now send form letters in response to a member's letter requesting the reduction in interest rate asking for information about the member's income before and after activation. If member's or their dependents receive such inquiries, they should seek the assistance of a Judge Advocate. Whether a member's ability to service a loan is "materially affected" by entry into active duty military service is not limited to a simple comparison of income before and after entry onto active duty. For instance, a military member's family may incur additional day care costs as the result of the member being deployed and not being available during the periods of time that he/she would ordinarily watch the kids. Or, additional expenses for living or utilities, such as rent and telephone, may be incurred. Whether a member's ability to service debt has been materially affected by entry onto active duty is a matter for a court, not the creditor, to decide. But, to avoid the anxiety that a lawsuit can bring, members should consult with a Judge Advocate about their situations as a well-crafted letter to a creditor may convince the creditor that, although the income levels are comparable, the attendant additional expenses entitle the member to the benefit of the act.

When computing income for the purpose of comparing pre-entry onto active duty income with active duty income, the military member must include all military benefits received while on active duty such as BAH, BAS, special duty pay, imminent danger or hostile fire pay and foreign duty pay.

### AGR's

AGR's are not entitled to the rights and benefits of the SCRA unless they have been activated into service under Title 10 of the United States Code. Upon entry onto active duty, an AGR's base pay will remain the same and the AGR may receive slightly increased benefits. Nonetheless, the AGR may be entitled to claim the interest rate cap if the AGR can show that his entry onto active duty caused him additional expense above and beyond any increase he may have received in benefits.

### *Pitfalls to Avoid*

As stated above, if the creditor can prove in court that a military member's entry into active duty military service does not materially affect his ability to pay interest above six percent, he is not entitled to the six percent interest rate cap for the debt(s) owed to that creditor. Should the creditor sue and win, the military member will be liable to pay his own legal fees and court costs and may be held liable to pay any penalties the installment agreement imposes for making late payments or requiring the creditor to initiate a collection action.

### *Special Problems for Joint Debtors*

If the member and spouse jointly incur debt prior to the member's entry onto active duty, the interest rate as to both the member and the spouse shall be capped at six percent. For other joint debts, the six percent cap does not apply to the joint debtor. For instance, if a member and his sister owe money on a loan that bears an interest rate of ten

percent, the sister is not entitled to interest rate relief. Thus, for all intents and purposes, the loan rate of interest remains at ten percent on that loan.

## **Leases and Evictions**

### Evictions

The SCRA prohibits eviction, without a court order, of service members and their dependents from rented housing where the rent is \$2,465.00 or less per month. (The statute requires this amount to be adjusted annually for inflation.) Nor may the landlord subject the premises to distress, which is the seizure of the tenant's property, to satisfy an arrearage in the payment of rent. If the protection applies, it applies whether the member and/or his dependents began living in the rental housing before or after the military member's entry onto active duty.

The court may issue a stay of proceedings to evict the tenant or distress the premises, but the military member does not have right to as long of a stay as he might in some other situations. A court can, on its own motion, issue a stay for a period of 90 days, with discretion to order a longer or shorter period as justice and equity may require. Or, it can issue a stay upon the member's request if the military member or one acting on his behalf requests a stay and demonstrates that the military member's ability to pay rent under the lease is materially affected by his military service. Again, the set standard is 90 days, but the court may order a longer or shorter stay as the circumstances and justice and equity warrant. When a stay is ordered, the court may also grant the landlord equitable relief.

Under SCRA, a court is empowered, under Section 531(b)(1)(B) to "adjust the obligation" between the landlord and the service member. While the term is not further explained, this provision apparently allows a court to change the terms of the agreement between the landlord and tenant. Thus, a court could order the member to pay a reduced amount of rent while performing active duty military service. In ordering a reduction in rent, the court can, IAW Section 531(d), order the rent paid by allotment.

If the protections do apply, the eviction can occur, but only after a court gives permission. This means that, even if the state law or the lease does not require a court order to evict a tenant, the SCRA, a Federal law that supercedes state law or an agreement within a lease, imposes that requirement. If the landlord evicts a person entitled to the protections of the SCRA without first obtaining a court order, the SCRA provides for criminal penalties in the form of fines, jail, or both. Similarly, a landlord is also prohibited by the SCRA from holding a military member's household goods as security for unpaid rent, unless a court permits it. If the rent is more than \$2,465.00 per month in 2004 or the adjusted amount in future years, a tenant is not entitled to the benefits and protections of the SCRA. Thus, if the rent exceeds the maximum allowed by the SCRA, the landlord may proceed under applicable state law to evict the military member and his dependents.

### Cancellation

The SCRA permits an activated member to cancel a lease under two circumstances. First, the member may cancel any lease executed by or on behalf of a person who subsequently, during the term of the lease, enters the active duty military service. Or, second, a person on active duty may cancel a lease entered into after entry onto active duty if the member receives PCS orders or orders to deploy for 90 days or more.

To terminate the lease, the military must give the landlord written notice. The notice may be delivered in-person, by private business carrier such as commercial mail or package delivery service or by U.S. mail, return receipt requested, delivered to the landlord or his agent at the address designated by the landlord. For leases in which rent is paid on a month-to-month basis, the tenant must give the landlord a minimum of 30 days advance notice before the next rent payment is due. For instance, if rent is due on the first day of the month, a notice given on May 15<sup>th</sup> can cancel the lease no earlier than July 1<sup>st</sup>. For any other type of lease, the termination takes place on the last day following the month in which proper notice is given. Thus, for example, a notice given on September 15<sup>th</sup> can terminate the lease no earlier than October 31<sup>st</sup>.

A member's right to cancel a lease does not depend on whether his service has "materially affected" his ability to maintain the lease. The member's entry onto active duty or his receipt while already on active duty of orders deploying him for more than 90 days or sending him PCS plus the proper written notice and lead time are all that are required to allow the member to cancel his lease.

### Security Deposits and Advance Payment of Rent.

If the landlord is holding a security deposit, it must be returned upon termination of the lease, less any outstanding costs such as late charges, damages to the rental premises or unpaid rent, just as if the member had remained in the premises until the expiration of the lease. If rent was paid in advance, the landlord must refund the unearned portion of the rent.

### Business Leases

The right to cancel the lease or seek to adjust the obligation in rent applies equally to business as well as residential leases.

### Practical Tip

This right to cancel a lease is important because it gives the member and his dependents the flexibility to seek less expensive housing and avoid the potential for eviction if his entry into active duty military service will cause him hardship in paying his rent or will cause him needless expense. The right to cancel a business lease allows the member to stop incurring debt for a premise that he cannot use due to his military service. The right to seek to adjust the obligation provides the member with a tool to try to keep any rent obligation manageable, but the member needs to understand that a court does not have to adjust the obligation simply because the member has entered active service and he could wind up with a hefty bill for unpaid rent if the court denies his application to adjust the rent and he has not otherwise cancelled the lease.

### Summary

In summary, the elements of the lease cancellation protection are:

1. Before entry onto active duty, a lease was entered into and premises were actually occupied or were intended to be occupied by the military member or his dependents; or
2. The member was on active duty and occupying the premises when the member received orders to deploy for more than 90 days or to go PCS;
3. Any kind of property - residential or business - is covered;
4. Amount of rent is irrelevant;
5. Whether or not military service "materially affects" the member's ability to continue the lease is irrelevant;
6. Member must give landlord written notice of at least thirty days before the lease may be canceled, and the duty to pay rent stops;
7. The running of the thirty days differs if the rent was due monthly or other than monthly; and
8. The member must enclose a copy of his orders with his notice of lease termination in order to trigger these protections.

### **Installment Contracts and Repossession of Property**

An installment contract is an agreement to buy or to lease in which a person pays so much down and agrees to pay the remainder in monthly installments. Under each contract, the buyer agrees, for all practical purposes, that if he failed to make the payments when due, the seller can repossess the property and sell it to the highest bidder.

Upon the repossession sale, depending upon the terms of the contract, the buyer may still be liable to pay the difference between the sale price and the amount due under the agreement. The SCRA provides military members with some limited protection.

If, before he entered active duty, the military member entered into either an installment contract for the purchase of

real or personal property, or a lease contract with an option to buy real or personal property, and, if he paid a deposit or at least one installment under the contract, then the seller cannot exercise any right or option under the contract to rescind or terminate the contract, to repossess the property for nonpayment of any installment due, or to breach the terms of the contract, without a court order.

This means that, if a military member paid a deposit or made just one payment under an installment contract, the seller must start an action in court if it wants to repossess the property. Similarly, the seller cannot rescind or terminate the agreement for breach of its terms without a court order. (The member should ensure the seller knows that he has entered the active duty military service. Otherwise, the seller may not be on notice that it needs a court order before repossessing the property.)

If the seller seeks a court order to terminate or rescind the agreement or to repossess the property, the court may order the seller to refund all or a portion of all of the installments or deposits paid to date, stay the proceedings on its own motion, stay the proceedings upon application of the military member when the military member demonstrates his ability to fulfill the terms of the agreement is materially affected by his military service or make any other order as is equitable to preserved the interests of the parties.

If the seller violates the SCRA and repossesses the property without a court order, there are criminal penalties, including fines, jail or both.

This protection applies whether the failure to pay occurred before or during active duty service as long as the repossession has not occurred as of the time the member entered active duty service.

If a member enters into an agreement with a seller after entry onto active duty, the SCRA does not protect him. A member who has a problem with a seller pursuant to an agreement that reached before entry onto active duty, should not renegotiate the deal after entry onto active duty without first consulting his attorney or a judge advocate. The renegotiated deal will not be subject to the protections of the SCRA because it is an agreement that was reached after entry onto active duty.

### **Mortgage Foreclosure**

If, before he entered active duty, a military member owned real property secured by a mortgage or trust deed, such as his home, and still owned the property when a secured creditor, such as the bank that gave him a mortgage, files an action alleging that the member breached his obligations under the mortgage agreement, the creditor cannot foreclose on the property without a court order.

Once an action is commenced, a court is empowered to stay the proceedings for a period up to 90 days after the termination of the military member's service obligation. A court may grant a stay on its own motion or upon application of the military member who applies for relief and demonstrates his ability to comply with the terms of a mortgage or trust agreement was materially affected by his entry onto active duty.

A court also has the authority to "adjust the obligation". While this term remains unexplained, it seems apparent the court can order the monthly payment reduced. Contrary to a lease situation where a court can order payment by allotment, no such authority for payment of a mortgage obligation that is adjusted pursuant to the act is found in the SCRA.

Here again, military members should notify their creditors that they have entered active duty military service and include a copy of their orders. Even before the SCRA gave courts the authority to "adjust the obligation", many mortgage holders were willing to work with individuals who, but for the financial hardship imposed by the person's entry onto active duty, were otherwise good credit risks. Now that the SCRA allows a court to "adjust the obligation", creditors may inclined to enter into such agreements on their own knowing that a court could make an order less favorable to them. In military members are experiencing or anticipate experiencing problems servicing mortgage or trust obligations, they should consult with a Judge Advocate early on. The Judge Advocate may be able to assist the member in contacting the creditor and making a financial arrangement that is compatible with the member's military income for the duration of his active duty military service.

A foreclosure may proceed with a court order. The court is required to approve of the sale before it occurs and to

approve the sale after its completion. Also, a foreclosure sale may proceed if the military member waives the protections of the SCRA after entry into the active duty military or completion of his term of service. Such a waiver must be in a writing separate from the contract, lease, mortgage or other document creating the civil obligation.

### **Storage Liens**

A storage company cannot sell a military member's property to cover its charges during his active duty service and for 90 days after the termination of his service without a court order. Once a proceeding is commenced in court, the court may stay the proceedings on its own or application of the military member if the member demonstrates that his ability to pay was materially affected by his military service. The court may enter any order the court determines justice and equity require. The court may also "adjust the obligation" of the parties.

### **Insurance**

#### Life Insurance

The SCRA provides some protection against the lapsing, terminating or forfeiture of life insurance for nonpayment of premiums. To receive these protections:

1. The policy must have been in force before the member entered active duty military service;
2. The policy must not exclude the death benefit if death arises from or is connected with military service, or require the member to pay an additional premium because of military service;
3. The SCRA does not cover SGLI or other group term life insurance. SCRA does cover individual term life insurance policies;
4. If the policy is protectable and the member applies for that protection, the Veterans Administration will guarantee the premiums and interest on the policy for his period of active duty. This guarantee will prevent the policy from lapsing, or being terminated or forfeited during this period. However, the VA guarantee applies only to a maximum of \$250,000.00 of insurance or the maximum benefit available through SGLI, whichever is greater. If a member has policies providing coverage in excess of \$250,000.00, the VA will work it out with his insurance companies so the premiums for a total of \$250,000.00 of coverage is guaranteed;
5. The VA guarantee does not ultimately relieve a member from paying these premiums. The member must first file a form with the VA requesting premium guarantee. The form is available through either the VA or the member's insurance company. The VA will then determine if the policy is covered under the SCRA. (If the VA determines the policy is not covered, its decision may be appealed to the Board of Veterans' Appeals. Judicial review is also available pursuant to Chapter 71 of Title 38 of the United States Code.) If the policy is covered, the VA will issue its guarantee to the member's insurance company that any premiums and interest on the policy accruing during his active duty service. During this period, the VA does not pay the premiums, it just guarantees they will be paid. The member is eventually required to pay his insurance company those premiums were not paid while he was performing active duty military service. If, at the end of the guarantee period, the member has not paid the premiums, the VA will pay the, but then the VA will come after the member for the money;
6. If at the time the protection afforded under the SCRA ends the cash surrender value of the policy falls under the amount due to pay the premiums and the interest due on the premiums, the United States will pay the insurer the amount it is due and the policy will terminate;
7. While a policy is protected under the SCRA, a member may not collect dividends or receive any monetary benefit from the policy without the approval of the VA; and,
8. The member is entitled to this protection whether or not his entry into active military service materially affects his ability to pay the premiums.

The SCRA also protects Life Insurance policies assigned to third parties to secure an obligation. The assignee may not exercise any right or option regarding the policy for one year after the member is released from active duty without a court order except if :

- a. the assignee is the life insurer and the assignment is made by member in connection with a loan secured by the life insurance policy;
- b. the member consents;
- c. premiums are due and unpaid; or
- d. the insured dies.

Premiums payment guaranteed by the VA are not considered unpaid premiums for the purpose of the exceptions.

### Health Insurance

If health insurance is provided and paid for by the member's employer, the employer is legally not required to pay for the member's health insurance during the member's mobilization. (There is an exception to this rule if the military duty is less than 31 days. See the article in this Deskbook entitled Uniformed Services Employment and Reemployment Rights Act).

Instead, the Uniformed Services Employment and Reemployment Rights Act requires employers to notify members and their dependents of their right to elect to continue to be covered under the employer's health insurance, but at their expense, not to exceed 102% of the premium, during the member's term of active duty military service. The member must be offered this continuation of coverage and the employer may not terminate the coverage should the military member elect to continue it despite the member's coverage under a military health plan or CHAMPUS. However, if the employer does elect to continue paying for a member's and his family's coverage during the member's active duty military service, that payment remains deductible to the employer and is not taxed to the member as income.

Upon the member's release from active duty, the member has 120 days to apply for reinstatement to the insurer's health plan. The insurance company may not impose any exclusions or waiting periods for the member or persons covered by the member's policy if the insurance policy was in effect on the day before the member entered active duty and the health insurance was terminated during the period of active duty. There is one exception to the "waiting period" and "exclusions for pre-existing conditions" rules. If the member became disabled while on active duty, applied to the VA for benefits for that disability, and the Secretary of Veterans Affairs has determined the disability was incurred or aggravated in the line of duty, then coverage for that condition does not have to be provided by the health insurance company because the member is entitled to receive VA benefits for that disability. There are no exceptions for family members.

### War Exclusion Provisions

Many life, accidental death and dismemberment, and long term disability insurance policies contain language excluding or limiting coverage for death, dismemberment and long term disability resulting from war or active duty service. Members should review their policies with their agent to determine whether any such exclusion exists. Such exclusions are legal and the SCRA provides no protection against them.

These "war-type" exclusion provisions are usually not found in regular group term life insurance such as those provided by employers and organizations, including those that have some unofficial military connection, such as NGAUS and the EANGUS.

### Professional Liability Insurance

The SCRA provide relief to medical, legal and "other professionals as determined by the Secretary of Defense" for professional liability or "malpractice" insurance. "Other professionals" includes the word "occupational," and would arguably include accountants, architects and other professionals and persons with occupations for whom such policies are usually written. The relief and protections for these professionals generally include the right to have these policies suspended during active duty service and reinstated after active duty service with no adverse effect to the member concerning coverage during the suspension period. Also, it includes the right to have actions against the member for malpractice that were either pending before mobilization or which could have been brought during mobilization stayed until the mobilization is over.

### *Suspension and Reinstatement of Policies*

A professional seeking the benefit of this provision must request, in writing, suspension of the professional liability policy during his active duty military service. No premiums will accrue or have to be paid during active duty service. Any premiums already paid that apply to the suspension period will be either refunded or applied to premiums due upon the policy's reinstatement at the option of the professional.

Professionals must request reinstatement, in writing, within thirty days of their release from active duty. The right to reinstatement is further conditioned on the professionals' paying the premium due upon reinstatement of the policy within thirty days after receiving the premium due notice from the insurer. The policy must be reinstated for a period not less than the balance of the period for which coverage would have continued under the policy had not the coverage been suspended. During this minimum period of reinstatement of coverage, the premium cannot be increased unless it was increased for all persons with the same coverage during the military member's period of active duty service.

### *Applicable Coverage*

The protections here are based upon the member's immunity from suit while mobilized because he is rendering professional services to military patients or clients. Because the military member has requested that his policy be suspended during his period of active duty service, he is not covered under his civilian insurance for any professional conduct during the suspension period that gives rise to a claim, including any failure to act in a professional capacity. If the member anticipates providing professional civilian services while performing active duty service, he should continue his professional liability coverage as the immunity provided by the military extends only to claims that arose while performing services within the scope of your duties.

### *Stays of Pending and Contemplated Actions*

Civil or administrative actions for professional negligence that were pending before mobilization are subject to being stayed as previously discussed in this section.

Actions begun during the suspension period based upon claims of professional negligence that would have been covered under the policy if it had not been suspended are stayed during the suspension period (active duty) and are deemed to have been filed on the first day the policy is reinstated.

In keeping with the overall scheme of the SCRA - that its protections are a shield and not a sword - the plaintiff's right to make a claim against the professional is protected from the expiration of any statute of limitation during the professional's active duty service. The time the professional performed military service is excluded in computing any applicable statute of limitations for the plaintiff to commence suit.

If a military professional dies during the suspension period, the stay terminates on his date of death, and his estate is covered to the same extent as if he died while coverage was in effect but before a claim was filed.

## **Missing In Action**

### MIA Status After SCRA Requirements and Obligations

Any requirement or obligation under the SCRA that begins or ends with the death of a servicemember does not begin or end until the member is reported to or determined by the service Secretary as dead or until a court of competent jurisdiction determines the matter to be dead.

### Powers of Attorney

A power of attorney executed by a military member who is classified as "missing in action" is automatically extended if it:

1. was executed while the member was in the military service or before entry into the military service but after the military member received a call that he was called to report for military service or could receive a call to report for military service;

2. designates the military member's spouse, parent or other named relative as the attorney-in-fact for certain, specified or all purposes; and,
3. by its terms, expires after the military member entered a "missing in action" status.

## **Taxes**

### Taxes on Property

No property owned by a military member on active duty or owned by a military member on active duty jointly with his dependents can be sold to enforce the collection of a tax that became due before or during the member's entry onto active duty without a court order and a determination that the member's entry onto active duty did not materially affect his ability to pay the tax. In addition, a court may stay a proceeding to collect an unpaid tax for up to 180 days following the member's release from active duty.

Property covered by the SCRA includes motor vehicles, residences or real estate owned for professional, business or agricultural purposes.

Property sold to satisfy tax obligations may be redeemed, that is purchased back, within 180 following termination of the active duty service.

Interest and penalties on unpaid property taxes is limited to 6 percent.

### Income Taxes

If a military member's ability to pay income taxes, Federal, state or local, has been materially affected by his military service, he may obtain a deferral of payment for up to 180 days after his release from active duty. To obtain this deferral, the military member needs to notify the tax authority. While the statute does not prescribe a form of notice, the tax authority should be notified in writing and the member is best advised to outline why his entry into active military service has materially affected his ability to pay his taxes. Interest and penalties may not be assessed during a deferral granted under the SCRA.

### State Income Tax

The payment of state income tax depends upon whether you are a "domiciliary" or "resident" of the state. A military member does not lose a domicile or residence because he is absent from a state performing active duty military service and he does not become a domiciliary or resident of a state simply because he is present in a state pursuant to military orders. Active duty military pay earned in the state of a military member's duty station is not taxable by that state unless it is also the state of the member's domicile or legal residence.

Dependents do not enjoy the same rights as military members do concerning state income taxes. If dependents accompany a military member to a duty station in another state, they must pay state income taxes on income earned in that state.

## **No Adverse Credit Actions**

Under the SCRA, military members are protected from the following creditors undertaking these described adverse actions because they are in the military service or exercised their rights under the SCRA:

1. A creditor cannot determine the military member cannot pay a debt;
2. Credit cannot be denied or revoked;
3. A creditor cannot change the terms of an existing credit arrangement;
4. A creditor cannot refuse to grant the member credit in substantially the same amount or terms requested;

5. No one can notify a credit agency or give an adverse report or rating relating to a member's credit-worthiness for consumer credit; and
6. An insurer cannot refuse to insure the member for any type of insurance.
7. A classic, but not the only example of these prohibitions, is a credit report indicating a military member invoked his right to a six percent interest cap.

### **Motor Vehicle Leases**

Section 535 provides that a person called to active duty for 180 days or more or active duty military members who receive PCS orders outside of the United States or to deploy with a military unit for 180 days or more may terminate the lease of a motor vehicle used by the military member or his dependents. The right applies to members who are called to active duty for less than 180 days but whose orders are extended to 180 days or more. To assert this right, the member must notify the entity that leased the vehicle in writing of the intent to terminate the agreement and return the vehicle to the renter within 15 days of the notice of termination. Upon return of the vehicle the military member should obtain a receipt for its return along with a statement of mileage. This prevents claims that the vehicle was not returned when claimed or monies are due for excessive mileage. Early termination charges are prohibited but charges for excess wear and tear, use and mileage are permissible. All obligations under the lease will be prorated to the date of termination. The form for termination approved by the Association of Consumer Vehicle Lessors is attached hereto as Attachment 3.

***KWIK-NOTE: Servicemembers' Civil Relief Act briefing guides, with applicable state law supplements, should be distributed to unit members as part of the Commander's Pre-Mobilization Legal Counseling, Ancillary Training, Legal Assistance, and Preventive Law Programs.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Active State Duty	11-3
Benefits	4-2
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*Attachment 1*

**MEMBER'S NOTIFICATION OF CLAIMING PROTECTION OF SERVICEMEMBERS' CIVIL RELIEF ACT**

Date: \_\_\_\_\_

\_\_\_\_\_ Member's name

\_\_\_\_\_ Member's address

\_\_\_\_\_

SSN#: \_\_\_\_\_

Acct #: \_\_\_\_\_

To: Name and address of civilian court, agency, business or person

Dear (Judge) (Sir):

Please be advised that I have been called to active duty in the United States Air Force on \_\_\_\_\_, by the President pursuant to 10 U.S.C. 12304.

This is to certify that I am a member of the (unit's name and address) from which verification of such military service may be obtained.

As a military member, I am hereby notifying you that I am requesting any and all protections of (both) the Servicemembers' Civil Relief Act of 2003, (and applicable state statute or regulation).

[In this paragraph, request specific protections (Stays, lease cancellations, etc.)].

Your cooperation will be appreciated.

Thank you.

\_\_\_\_\_

Member's Signature

Attachment 2

**MEMBER'S SIX (6%) PERCENT INTEREST NOTIFICATION LETTER PURSUANT TO  
SERVICEMEMBERS' CIVIL RELIEF ACT**

Date: \_\_\_\_\_

\_\_\_\_\_ Member's name

\_\_\_\_\_ Member's address

\_\_\_\_\_

SSN#: \_\_\_\_\_

Acct #: \_\_\_\_\_

To: Name and address of civilian court, agency, business or person

Dear \_\_\_\_\_:

On \_\_\_\_\_ I began a \_\_\_\_\_ period of active duty with the United States Air Force. (As a civilian, my monthly pay was approximately \_\_\_\_\_ Dollars, but my present military pay is only \$\_\_\_\_\_ per month. Because of this sharp reduction in my income, I am not able to make the (monthly) payments we originally agreed upon). [These last two sentences are optional - your SJA may advise this need not be included in the initial letter unless the recipient so requests, because it is the creditor's obligation to prove military service has not materially affected the ability to pay at the interest rate above 6%. Many creditors will not bother, but will just adjust the interest rate down to 6% because it is less expensive to do that than to specifically inquire and sue in court to avoid the reduction to 6% for a particular member].

I have been advised by my military legal assistance officer that during the period of military service, you cannot, in the absence of a court order to the contrary, charge me interest or finance charges in excess of 6% per annum. Please adjust my account to comply with the maximum allowable rate.

Thank you.

\_\_\_\_\_

Member's signature

NOTICE OF CANCELLATION OF MOTOR VEHICLE LEASE  
PURSUANT TO SECTION 305 OF THE  
SERVICEMEMBERS CIVIL RELIEF ACT (50 U.S.C. App. §535)

TO: [Lessor name and mailing address]

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

FROM: [Lessee name and mailing address]

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

I, \_\_\_\_\_, as Lessee ("I"), notify you, Lessor ("You"), pursuant to Section 305 of the Servicemembers Civil Relief Act (SCRA) of my intent to terminate the lease of the following described motor vehicle:

\_\_\_\_\_  
*Year      Make      Model      VIN of leased motor vehicle      Lease or Account Number*

I understand that You may provide more specific instructions related to my lease agreement, your procedures for implementing this lease termination, or may designate someone to act on your behalf (Agent).

[Check applicable status]

\_\_\_\_\_ Since leasing the vehicle described above, I certify that I have entered military service under a call or order specifying a period of not less than 180 days of duty (or have previously entered military service under a call or order specifying a period of 180 days or less of duty, but, without a break in service, I have received orders extending my period of military service to a period of not less than 180 days); OR

\_\_\_\_\_ After leasing the vehicle described above, I certify that I have received military orders for a permanent change of station outside of the continental United States, have been ordered to deploy with a military unit for a period of not less than 180 days, or having been ordered to deploy for a period of less than 180 days, have received orders extending my period of deployment to a period of 180 days or more.

I understand that in order to terminate the lease, I am required to do the following:

1) Deliver this notice and a copy of my military orders to You or your Agent by: (a) hand delivery; (b) recognized courier service; (c) by U.S. mail in an envelope, postage paid and return receipt requested, addressed to You at the above address or your Agent at your Agent's designated address; or (d) by any other means You designate; AND

2) Return the leased motor vehicle to You or your Agent at any reasonable location specified by You or your Agent within 15 days after delivery of this notice.

Termination Date:

The lease is terminated effective on the date that I have complied with items 1) and 2) above.

Federal Odometer Statement:

I understand that Federal law requires me to provide You with a signed statement showing the vehicle's mileage at the termination of the lease. (Attachment A meets this requirement).

Liability by Law:

Although I do not have to pay an early termination charge, I understand that I remain liable for the prorated part of my last monthly payment due before the Termination Date, as well as any past due monthly payments, taxes, summonses and title and registration fees, reasonable charges for excess wear and use and excess mileage, and any other amounts owed under the lease, that have become due and are unpaid at termination in accordance with the terms of my lease.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Servicemember or Designated Agent

\_\_\_\_\_  
Print Name, Rank and Branch of Service

\_\_\_\_\_  
Military Unit & Duty phone number

# ODOMETER DISCLOSURE STATEMENT (Leased Vehicle)

FAX TO \_\_\_\_\_

(Request Fax Number from Lessor)

## ODOMETER DISCLOSURE STATEMENT

Federal law (and State law, if applicable) requires that you, the lessee/customer, disclose the mileage to the lessor in connection with the transfer of ownership. **Failure to complete or making a false statement may result in fines and/or imprisonment.**

Complete disclosure form below and return to lessor.

I, \_\_\_\_\_ state that the odometer now reads \_\_\_\_\_  
(Print name of person making disclosure) (no tenths)

miles and to the best of my knowledge that it reflects the actual mileage of the vehicle described below, unless one of the statements is checked.

(1) I hereby certify that to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.

(2) I hereby certify that the odometer reading is NOT the actual mileage.  
**WARNING - ODOMETER DISCREPANCY**

Make \_\_\_\_\_ Model \_\_\_\_\_ Body Type \_\_\_\_\_ Color \_\_\_\_\_

Vehicle Identification Number \_\_\_\_\_ Year \_\_\_\_\_

Account Number \_\_\_\_\_ Dealer \_\_\_\_\_

### LESSEE / CUSTOMER INFORMATION:

Lessee Name (printed) \_\_\_\_\_ Date \_\_\_\_\_

Lessee Electronic Identification Code (if applicable) \_\_\_\_\_

Lessee Signature \_\_\_\_\_

Lessee Address \_\_\_\_\_  
(Street)

\_\_\_\_\_  
(City) (State) (Zip)

### LESSOR INFORMATION:

Lessor Signature \_\_\_\_\_ Lessee \_\_\_\_\_

Date of Statement \_\_\_\_\_ Date Received by Lessor \_\_\_\_\_

Attachment "A"

This **Odometer Disclosure Statement** has been prepared in conjunction with the Association of Consumer Vehicle Lessors (ACVL) and has been approved by the Army (DAJA-LA), Navy (OJAG Code 16), Air Force (AFLSA/JACA), Marine Corps (CMC (Code JAL)) and Coast Guard (Coast Guard Headquarters Legal Assistance) for use by servicemembers.

# Stop-Loss

**Updated by Lt Col Monte Boettger, October 2010**

**AUTHORITY:** 10 U.S.C. 12305; AFI 10-402 Vol 1, *Mobilization Planning and Personnel Readiness* (09 Aug 07); AFH 10-416, *Personnel Readiness and Mobilization* (22 Dec 94); Sec Def Memorandum: Utilization of the Total Force, January 19, 2007.

## INTRODUCTION

Federal law permits the President to suspend any provision of law relating to promotions, retirements and separations during any period when members of any reserve component are on active duty under involuntary call-up or mobilization authorities. The exercise of this option is known as Stop-Loss. The Air Force has routinely sought this authority when members of Air Reserve Components have been or will be involuntarily called to active duty. The exercise of this option forestalls separations based upon the anticipation of mobilization.

## Suspension of Program

The Army and its reserve components has been the only service to use Stop Loss since 2003. In January, 2007 Secretary of Defense Gates directed all services to minimize the use of Stop Loss and thereafter directed a phased suspension of the program. Active use of Stop Loss by the Army ended as of January 1, 2010. While the services still retain the legal authority to suspend the separation of servicemembers, any renewed use of Stop Loss will require an emergency situation requiring critically short skills, will be limited in duration and will require approval of the Services Secretary.

## Retroactive Pay for Those Affected by Stop Loss

The FY2009 Defense Supplemental provided retroactive Stop Loss special pay for servicemembers who were in Stop Loss status during the period September 11, 2001 through September 30, 2009. The amount of pay retroactive pay is \$500 per month and is tax free for any month that the servicemember was in a combat zone. Servicemembers must submit a claim for this pay no later than October 21, 2010.

## AIR FORCE ACTION

HQ USAF/CAT-MPRC directs the actions required to implement the stop-loss, and:

1. Temporarily suspends all voluntary separations, discharges, resignations and retirements of regular and ARC members whose military status would expire during the specified period. The HQ may grant hardship leave and will prevent the reassignment of individuals in the ready or standby Reserve to a resource pool of lesser availability.
2. Issues guidance within thirty days designed to minimize personnel losses of experienced personnel and to maximize the capability to sustain operations. Guidance may address the following subjects:
  - a. disability separations or retirements;
  - b. mandatory retirements;
  - c. voluntary and involuntary separations and discharges including extreme personal hardship;
  - d. discharge in lieu of courts martial;
  - e. discharge by reason of conscientious objection;

- f. ARC and active duty retired members on active duty;
  - g. disposition of ready reserve and Standby Reserve members not on active duty;
  - h. effective period; and
  - i. disposition of active duty members on terminal leave;
3. Separates active duty or reserve retirees and reserve general officers at the end of their involuntary tour; and
  4. Suspends separations based upon Air Force specialty and skill level deficiencies.

## **THE MESSAGE**

### **Certain Actions Restricted**

Following implementation of the stop-loss, message traffic will contain guidance on the above issues. Message traffic may also address the involuntary separation of personnel based upon misconduct.

### **Certain Actions Not Restricted**

Individuals charged with misconduct and other adverse personnel actions may still be notified and boards may still be held but discharge authority may be withheld. Stop-loss does not affect nonjudicial punishment or other UCMJ actions. Consult the Staff Judge Advocate for interpretation of the message.

***KWIK NOTE: In call-ups or a mobilization, watch for Stop-Loss messages.***

### **RELATED TOPICS:**

### **SECTION**

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# Chapter 21, Motor Vehicle Matters

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- 21-3 Driver's Licenses
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- 21-5 Motor Vehicle Accident Reporting
- 21-6 Motor Vehicle Rules – Military Bases
- 21-7 Suspension of Base Driving Privileges

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## Commercial Driver's License Requirement - Waiver

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Updated by Maj John W. Erickson, Jr., June 2009

**AUTHORITY:** 49 U.S.C. §§ 31301 – 31317

### THE STATUTE

In 1986, Congress passed the Commercial Motor Vehicle Safety Act of 1986. This Act was repealed in 1994, and replaced with COMMERCIAL MOTOR VEHICLE OPERATIONS, which is codified at 49 U.S.C. §§ 31301 - 31317. The intent of the statute is to improve driver quality, to remove problem drivers from the highways, and set minimum standards of fitness for those who possess a commercial driver's license. The statute also established a system that would prevent operators of commercial motor vehicles from having more than one driver's license.

The statute requires an individual who operates a commercial motor vehicle to possess an appropriate license to operate such vehicle and prohibits that individual from possessing more than one driver's license. The statute goes on to require states to pass laws and develop programs to implement the Act. Finally, the statute requires the reporting of traffic violations.

### DEFINITIONS

A commercial motor vehicle is defined as any vehicle used in commerce to transport passengers or property that: (a) has a gross vehicle weight rating of at least 26,001 lbs. or more; (b) is designed to transport at least 16 passengers, including the driver; or (c) is used to transport material designated as hazardous under 49 U.S.C. § 5103.

By DOD definition, a motor vehicle includes only those vehicles designed and operated for highway transportation. It does not include vehicles designed or used for military field training exercises, combat, or tactical purposes, such as fire fighting vehicles and/or on-base only vehicles.

### WAIVER OF LICENSE

Section 31315 of the statute, grants the DOD a WAIVER from the licensing requirements of the statute. The waiver applies to any active duty military personnel, as well as members of the reserve and National Guard on active duty, including personnel on full-time National Guard duty, personnel on part-time training and inactive duty training, and National Guard military technicians. Active duty includes state active duty for the National Guard.

Accordingly, Guard members, as well as excepted technicians in the performance of their duties, are not required to meet the licensing requirement of the Act. Competitive technicians are not exempt from the licensing requirement of the Act and must comply.

States may not require commercial driver's licenses for persons subject to the waiver as the federal law preempts state law in this area.

***KWIK-NOTE: National Guard members do not need a special state license to operate military vehicles while on duty.***

### RELATED TOPICS:

### SECTION

Driver's Licenses

21-3

# Drivers' Licenses

Updated by Maj John W. Erickson, Jr., June 2009

**AUTHORITY:** Servicemembers Civil Relief Act, 50 U.S.C. App § 501 et seq., Applicable state law; AFI 24-301, *Vehicle Operations* (01 Nov 2008); AFI 91-207, *The U.S. Air Force Traffic Safety Program* (22 May 2007); *Johnson v. Maryland*, 254 U.S. 51 (1920).

## CIVILIAN LICENSE

The Servicemembers Civil Relief Act (SCRA) allows active duty military members to keep their state of legal residence even though they may be absent for many years. So long as the member is absent because of military orders and does not desire to change their state of legal residency the SCRA preempts state residency laws and allows the military member to “carry” their state residency with them. Some states also, by state law, extend this coverage to dependents, however the state law where the dependent is living may not recognize this privilege and since the SCRA does not protect dependents in this regard state licensing requirements of the state where they are living will apply. Many military members maintain their license in their state of residence to avoid having to obtain a new license each time they receive permanent change of station (PCS) orders and move to a new location.

If a military member decides to change their state of legal residence by registering to vote, registering their car, buying a home, declaring the state as their residence for tax purposes then they must get a driver's license from that new state of residence. Additionally, if the member got a driver's license at their last military assignment but did not change their state of residence then they must either get a license from the current state they are living in or from their state of legal residence.

## MILITARY LICENSE

In the case of *Johnson v. Maryland*, the U.S. Supreme Court held that if a military member or technician possesses a valid civilian driver's license and a valid AF Form 2293, *i.e.*, a U.S. Air Force Motor Vehicle Operator's License for the class of government vehicle the driver is operating, a State cannot further require the member to obtain that State's license for the class of government vehicle being operated over a state road in the performance of the member's official duty. In other words, in such cases, THREE licenses are neither needed nor required.

***KWIK-NOTE: ANG members must always possess a valid state driver's license; and, if applicable, a U.S. Government Motor Vehicle Operator's License before they will be authorized to operate military vehicles.***

## RELATED TOPICS:

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License Plates	21-4
Motor Vehicle Rules – Military Bases	21-6
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Residency	

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## Vehicle Registration

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Updated by Maj John W. Erickson, Jr., June 2009

**AUTHORITY:** Servicemembers Civil Relief Act, 50 U.S.C. §501 et. seq., and applicable state law.

### WHERE TO REGISTER VEHICLE

Section 571(f)(2) of the Servicemembers Civil Relief Act provides that the term “taxation” includes “licenses, fees, or excises imposed with respect to motor vehicles and their use” but only if the servicemember paid the license, fee, or excise required by the servicemember’s home state. As long as the servicemember registers and licenses his vehicle in his home state, and pays the applicable fees, he does not have to comply with the registration requirements of the state of military assignment.

If a servicemember does not register his car in the home state then the host state may require him to register his vehicle in that state. The servicemember does not, however, have to pay the entire amount assessed if a portion of the license, fee or excise exceeds the amount necessary to register and license the vehicle. Fees in excess of the cost of issuance and administration are barred by section 571.

### CHANGE IN UNIT OF ASSIGNMENT

When the military member’s assignment is changed from one state to another and the vehicle is registered in the state of previous assignment, and that state is not the member’s legal residence, then the member must re-register the vehicle either in the state of current assignment, or the state of legal residence. If the member’s vehicle is registered in her state of legal residence, then, even though the state of military assignment changes, nothing other than the required annual registration in the home state is required.

***KWIK-NOTE: All POVs on base must have valid license plates. This topic should be supplemented by applicable state law requirements.***

### RELATED TOPICS:

### SECTION

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Motor Vehicle Rules – Military Bases	21-5
Suspension of Base Driving Privileges	21-7
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# Motor Vehicle Accident Reporting

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Updated by Maj John W. Erickson, Jr., June 2009

**AUTHORITY:** Applicable state law and regulations; AFMAN 23-220, *Reports of Survey for Air Force Property* (1 Jul 96); AFI 24-301, *Vehicle Operations* (1 Nov 01); AFI 31-204, *Air Force Motor Vehicle Traffic Supervision* (14 Jul 00; IC 2000-1, 20 Jul 07)

## INTRODUCTION

In virtually every state, every motor vehicle accident involving a government motor vehicle (GMV) is required to be investigated promptly and reported through appropriate channels to the Adjutant General.

Depending on differences in various state laws and regulations, there should be a variety of forms that are required to be completed by the Guard member for every accident involving a GMV. The methods of reporting and the kinds of forms to be completed may vary depending upon the seriousness of the accident and whether personal injury, death or property damage in a certain amount is involved. Additionally, such reporting and document completion requirements may also depend upon whether more than one vehicle was involved and whether the accident occurred on base, off base, and/or involved civilians.

Usually, these reports are in addition to the base accident reporting procedures that would be required under AFI 31-204, and reports which may be required under AFI 24-301. Furthermore, pursuant to state statutes applicable to all motor vehicle accidents, whether or not GMVs are involved, there are usually requirements to submit a motor vehicle accident report to the state's Department of Motor Vehicles. If a GMV is involved, such report is usually one of the documents to be completed and submitted to the Adjutant General who may then send it to the state's Department of Motor Vehicles.

## DISTINGUISHED FROM REPORT OF SURVEY

The accident-reporting requirement in this topic is separate from a Report of Survey. Each has a different purpose. The accident report is used to provide the facts and circumstances of the accident reported to the Adjutant General and to comply with state motor vehicle laws. Additionally, it is needed because the state (which may also be self-insured) must determine issues of government negligence, coverage, indemnification of military members, and the liability to the government due to the negligence of civilians. Usually any accident involving a National Guard member operating a GMV is reported by the Adjutant General to the state's Department of Motor Vehicles, and the member's insurance company may find out about it. The Adjutant General, many times, must report the accident, because it is a requirement of state law. A Report of Survey is an Air Force procedure to determine if a member should reimburse the government for property lost or damaged through negligence of the member.

## UNIT REQUIREMENTS

Wing or Group Commanders may be required under state or applicable military regulations to develop local policies to clearly outline local accident reporting and routing procedures to allow for prompt investigating and reporting of these accidents to the Adjutant General. Very often these accidents involving National Guard members and civilians may result in lawsuits as stated in other topics in this Deskbook. Individual National Guard members served with a Summons and Complaint must forward them immediately, through the appropriate channels, to the Adjutant General, with a request for representation and/or indemnification under applicable state statutes. To reiterate, there are usually strict requirements that higher headquarters timely receive these documents in order for the individual National Guard member being sued to be eligible for representation and indemnification by the government.

## **IMMUNITY FROM SUIT**

With the advent of the applicability of the Federal Tort Claims Act (FTCA) to National Guard personnel serving in Title 32 or Title 10 status, a civilian claimant's exclusive remedy would be against the federal government, subject to any insurance coverage maintained by the State. A National Guard member will not be personally liable for acting within the scope of employment in motor vehicle accident cases involving GMVs in the vast majority of cases.

## **LEGAL REVIEW**

Before the documents of the accident leave your base to be sent to higher headquarters, they should be reviewed by the Staff Judge Advocate for accuracy, completeness and compliance with the applicable regulations.

***KWIK NOTE: Prompt and complete reporting of motor vehicle accidents involving GMVs is required for National Guard members to be considered eligible for representation and indemnification by the federal or state government in the event of liability. This topic should also be supplemented by applicable state laws and regulations.***

## **RELATED TOPICS:**

## **SECTION**

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## Motor Vehicle Rules – Military Bases

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**Updated by Maj John W. Erickson, Jr., June 2009**

**AUTHORITY:** AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03); AFI 91-207, *The U.S. Air Force Traffic Safety Program* (22 May 07); AFI 31-204, *Air Force Motor Vehicle Traffic Supervision* (14 Jul 00); applicable state law.

### INTRODUCTION

AFI 31-101, defines all Air Force installations, regardless of mission, as closed installations. This means that the general public, as well as base employees, do not have free access to operate private motor vehicles on base. Access is generally controlled by Security Forces through access gates onto the installation..

### NEED FOR RULES

The permission for operation of private motor vehicles on base requires some means of control. If the base is co-located with an active installation, this will be handled by the active installation. However, if the base is not co-located, it will be up to the Air National Guard Base Commander to establish rules consistent with the base's needs, applicable regulations, and state laws.

As a general proposition, if the base is a stand-alone operation, not located on exclusive federal jurisdiction property, state law will provide the basis for any traffic regulations. The enforcement of these regulations may present some problems. If state law does not empower your security police or air base security guards to enforce traffic regulations, it will be up to the commander to establish an administrative procedure to both identify violators and enforce violations militarily; or, to turn violators over to civilian law enforcement authorities. If state law empowers your security police or air base security guards to enforce state traffic regulations, it will still be necessary for the commander to decide whether, and to what extent, to exercise that power; and, whether, and in what situations, violators will be turned over to local authorities for prosecution or will be handled through established base administrative procedures.

The development of any local base traffic regulations and the administrative procedure to enforce them should be coordinated with the Security Police Commander and the Staff Judge Advocate. In addition, there may be labor relations considerations in applying the regulation to technicians. As a result, the Labor Relations Specialist should also be consulted before implementing any new regulations and/or procedures.

***KWIK-NOTE: Establish the motor vehicle rules for your base and the methods for their enforcement. Consider promulgating a base regulation. Consider supplementing this topic in light of your state's motor vehicle rules.***

### RELATED TOPICS:

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# Suspension of Base Driving Privileges

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Updated by Maj John W. Erickson, Jr., June 2009

**AUTHORITY:** AFI 31-204, *Air Force Motor Vehicle Traffic Supervision* (1 Jul 00, IC 2000-1, 20 Jul 2007) and AFI 31-101, *The Air Force Installation Security Program* (The Air Force Instructions listed here are for official use only. As such, they are stocked and issued by the OPR.); Technician Personnel Regulation (TPR) 715, *Voluntary and Nondisciplinary Actions* (13 Jul 2007); applicable state law.

## INTRODUCTION

Any time there are rules covering the operation of privately owned motor vehicles on base, there is a potential for violations of those rules. *See* the topic: “MOTOR VEHICLE RULES - MILITARY BASES,” in this Deskbook.

In accordance with AFI 31-101, procedures are established for installation entry. The general public, as well as base employees - both military and civilian - do not have free access to operate privately owned motor vehicles on base. This is because the operation of a privately owned motor vehicle on base is a PRIVILEGE and not a right granted by the installation commander. If you accept that privilege, you must comply with the laws and instructions governing motor vehicle operation and registration on the installation. The installation commander is responsible for ensuring vehicles entering their installations are controlled. The operation of privately owned motor vehicles on base is subject to the legitimate concerns of the base commander in providing for the safety of base personnel and the protection of the resources under the commander’s care.

## RULES

If the ANG base is co-located with an active duty military installation, the violation of base driving rules will be handled by the active installation. If the ANG base is not co-located, then the base commander needs to establish rules for handling violators.

## ENFORCEMENT

One possible consequence of violating base driving rules is the suspension of base driving privileges. This should only be done based on specific written rules that have been published and briefed to base personnel. Of primary importance is the right to be heard before base driving privileges are actually suspended. AFI 31-204 can be used as a basis for developing a viable program covering the suspension of base driving privileges. Any such program should logically be part of the base commander’s regulation on motor vehicle rules for the base.

The development of any regulation covering the suspension of base driving privileges should be done in coordination with the Staff Judge Advocate and the Security Forces Commander. In addition, there may be some labor relations considerations in applying any such regulation to technicians. As a result, the Labor Relations Specialist should also be consulted before implementing any new regulation.

If one of your unit members, who is on TDY at an active Air Force installation, has base driving privileges suspended at that installation, the circumstances surrounding the suspension may support ANG disciplinary or adverse administrative action against that member. Such action should be coordinated with the Staff Judge Advocate before it is initiated.

Attachment 1 to this topic is a sample format for an Installation Driving Privileges Program based upon AFI 31-204, which may be helpful in setting up a similar program for your base. It should be adapted to state and local requirements.

**KWIK NOTE:** *Establish the rules. Suspend driving privileges if your rules permit; and provide the affected member a hearing promptly thereafter. You may wish to supplement this topic with applicable state law.*

**RELATED TOPICS:**

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*Attachment 1*

## **DRIVING PRIVILEGES**

*Driving a government vehicle or POV on any military installation is a privilege granted by the Installation Commander.*

1. To drive a POV on base, persons must do the following:
  - a. Comply with all laws and regulations governing motor vehicle operations on base;
  - b. Comply with base registration requirements and register their motor vehicle with Security Police;
  - c. Possess while operating a motor vehicle and produce on demand to law enforcement personnel:
    - (1) A valid state driver's license;
    - (2) A certificate of state registration as required by the state in which the vehicle is registered;
    - (3) Proof of compliance with the minimum requirements of the automobile insurance laws or regulations of the state in which the installation is located; and
    - (4) Proof of satisfactory completion of safety and mechanical vehicle inspection by the state in which the vehicle is registered or by the state in which the installation is located if either state requires such an inspection; and
2. Operators of government motor vehicles must have proof of authorization to operate the vehicle.

*Drivers on base give implied consent to a number of things:*

1. Consent to tests for alcohol or other drugs in their blood, breath and/or urine if lawfully stopped, apprehended, or cited for any offense committed while driving, or in physical control of, a motor vehicle on base while under the influence of intoxicants; and
2. Consent for the removal and temporary impoundment of their POV when it is parked illegally, interfering with operations, creating a safety hazard, disabled by accident, left unattended in a restricted or controlled area, or abandoned.

*The Installation Commander may administratively suspend or revoke driving privileges on the installation.*

1. Driving privileges can be suspended for a number of reasons:
  - a. Installation commanders will immediately suspend installation GOV or POV driving privileges pending resolution of an intoxicated driving incident which involves active duty military personnel, their family members, retired members of the military service, and DOD civilian personnel. This applies regardless of the geographic location of an intoxicated driving incident. If arrested off-base for DWI, driving privileges are immediately suspended. If acquitted on the merits, driving privileges are restored;
  - b. Refusal to take or complete a lawfully requested chemical test to determine contents of blood for alcohol or other drugs (suspend pending resolution of the underlying intoxicated driving incident); or
  - c. Operating a motor vehicle with a blood alcohol content (BAC) of 0.10 of one percent by volume or higher, or in violation of state BAC levels.

2. Driving privileges can be revoked for a number of reasons:
  - a. Failure to comply with the laws and regulations governing motor vehicle operations on base;
  - b. Failure to comply with base registration requirements; or
  - c. Failure to possess a valid state driver's license, proof of vehicle ownership or state registration, or a valid record of motor vehicle safety inspection (where required).
3. Driving privileges will be revoked for a mandatory period of one year for:
  - a. Driving while driver's license or installation driving privileges are under suspension or revocation.
  - b. Refusal to submit to or complete a test to measure blood alcohol content or the presence of any drug when apprehended for intoxicated driving on base; or
  - c. A conviction, nonjudicial punishment, or a military or civilian administrative action resulting in the suspension or revocation of a driver's license for intoxicated driving.
  - d. When a serious incident involving a motor vehicle occurs and the installation commander determines immediate revocation of driving privileges is required to preserve public safety or the good order and discipline of military personnel.
4. The traffic point system is mandatory and must be used on base to provide a uniform administrative device to impartially judge driving performance, in which:
  - a. Points are assessed when a person violates a driving regulation;
  - b. Revocation or suspension can occur for serious moving traffic violations resulting in excessive traffic points (for example, 12 points within 12 consecutive months or 18 points within 24 consecutive months); and
  - c. Off-base convictions result in assessment of traffic points.
5. Before a person's base driving privileges are suspended or revoked, certain procedural guidelines must be followed:
  - a. Persons to be denied base driving privileges have the right to a hearing before the designated hearing officer, and:
    - (1) Must be notified of their right to the administrative hearing and then fill out a request for the hearing;
    - (2) Must be notified of their right to request restoration of driving privileges pending investigation or resolution of the incident (direct request letters to the installation commander or designees);
    - (3) The right of military personnel to present evidence and witnesses and be represented by a civilian counsel (at their own expense) or assigned military counsel;
    - (4) The right of DOD civilian employees to have a personnel representative present at the administrative hearing;
    - (5) Amount of time the individual has to respond and request the administrative hearing before the preliminary suspension becomes permanent;

- (6) Suspension or revocation is not stayed pending appeal; and
  - b. Before immediate suspension occurs for intoxicated driving offenses, review of the evidence must be accomplished as soon as possible, but not later than three duty days following assembly of all the evidence.
- 6. Persons convicted of intoxicated driving offenses must complete alcohol rehabilitation as a condition of reinstatement of driving privileges.

# Chapter 22, Services (Morale, Welfare and Recreation) Issues

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## Private Organizations and Unofficial Activities

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Written by Col Barry Maddix  
Updated/Revised by Mr Louis Proper, April 2006

**AUTHORITY:** AFI 34-223, *Private Organization (PO) Program* (11 Aug 03); ANG Sup 1 to AFI 34-223 (28 Mar 05); DoDI 1000.15, *Private Organizations on DoD Installations* (23 Oct 97).

### INTRODUCTION

ANG Services (MWR) monitored activities that generate or receive funds may be organized into entities known as civil associations, which are either unofficial activities or private organizations, or into not-for-profit corporations, which are also known as military corporations. Civil associations are unincorporated and, as a result, the members of a civil association can be subject to personal liability if the association is sued. Military corporations, on the other hand, are incorporated under state law and, thus, the members of these organizations can be insulated from personal liability.

The following material discusses the formation, ongoing maintenance requirements, and permissible activities of these two kinds of organizations. Depending on the type of organization formed, these issues are governed by either state law and/or Air Force and DoD instructions.<sup>1</sup>

### CIVIL ASSOCIATIONS

*Unofficial Activities (UAs):* UAs are small-scale activities and/or operations whose assets do not meet the financial threshold for establishing a private organization. Examples of UAs are flower funds, coffee funds, unit advisory councils, or small scale booster clubs. If an organization's unofficial funds exceed a monthly average of \$1000 over a three-month period, it must either reduce its assets to an acceptable level, become a private organization, or discontinue operations.

*Private Organizations (POs):* POs are self-sustaining special-interest groups set up by people acting outside the scope of any official position they may have in the federal government. POs are not non-appropriated fund instrumentalities (NAFIs) nor are they entitled to the sovereign immunities and privileges given to NAFIs, the ANG, or the Air Force. POs operate on the installation with the written consent of the installation commander, and can be discontinued at the commander's discretion. The Installation Commander may delegate his authority over POs to the Mission Support Group Commander.

AFI 34-223 and ANG Sup 1 specify that the instruction applies to all POs with the exception of the following that are governed by DoD Directives (DoDDs) and Instructions (DoDIs) as referenced:

1. Scouting organizations operating on US military installations located overseas (DODI 1015.9, (e), *Professional United States Scouting Organization Operations at United States Military Installations Located Overseas*).
2. American National Red Cross (DODD 1330.5, *American National Red Cross*).

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<sup>1</sup> See also "ANG Private Organization Handbook, May 2006, located on the NGB/A7V portal website: "Private Organization Guide, Jan 2000" at <https://www-r.afsv.af.mil/Documents/poguide00.pdf> and various templates available at <https://www-r.afsv.af.mil/documents/newpolicyletteraug02.doc>.

3. United Seaman's Service (DoDD 1330.16, *United Seaman's Service (USS)*).
4. United Service Organizations, Inc. (DoDD 1330.12, *United Service Organizations, Inc.*).
5. Credit Unions (DoDD 1000.11, *Financial Institutions on DoD Installations*; DoDI 1000.10, *Procedures Governing Credit Unions on DoD Installations*; AFI 65-702, *Credit Unions on Air Force Installations*).
6. Banks (DoDD 1000.11, *Financial Institutions on DoD Installations*; DoDI 1000.12, *Procedures Governing Banking Institution on DoD Installations*; AFI 65-701, *Banking on Air Force Bases*).

## **MILITARY CORPORATIONS**

A military corporation is a not-for-profit corporation that is organized under the laws of the state and may provide insulation of its members from personal liability. Technically, a UA or a PO could conceivably incorporate under state law; however, because of the costs and/or the cumbersome filing requirements, an organization may choose not to do so.

## **CREATING A PRIVATE ORGANIZATION**

Individuals desiring to set up a PO should submit written by-laws, constitution or other necessary documents through the Base Services Prime RIBS Manager, Services Flight Commander, and Staff Judge Advocate for consideration by the Installation Commander. These documents must address, among other things, the nature, function, objectives, membership eligibility, and sources of income for the PO.

The constitution and by-laws must:

1. Address the nature, function, classification, objectives, membership eligibility, and sources of income of the PO.
2. Notify all members of their personal financial responsibility.
3. Describe the responsibilities of PO officers for asset accountability, liability satisfaction, and sound financial and operational management.
4. Provide specific guidance on how to dispose of residual assets remaining in the PO treasury after satisfaction of outstanding debts.

Each PO controls its own activities and ensures compliance with all governing instructions. The installation commander has the power to withdraw authorization for any PO.

1. POs may use DoD terminology, the name or abbreviation of a DoD component, organization, or installation in its name provided it takes steps to ensure its status as a PO is apparent and unambiguous (in other words, the PO cannot imply any sort of endorsement from the DoD, Air Force, or Air National Guard). This requires prior approval as defined in AFI 34-223, paragraph 10.
2. POs may not use the seal, logo, or insignia of the DoD, any military department or military service, organizational unit, or installation on the PO's letterhead, correspondence, or in its title. See further restrictions in the AFI.
3. POs may not discriminate or restrict membership based on culture, ethnicity, gender, age, religion, or disability.
4. POs may not harass or haze as part of an initiation.

## OPERATING A PRIVATE ORGANIZATION

The Installation Commander provides limited supervision over POs. His or her control lies in the power to authorize and withdraw authorization for POs to operate on the installation. The commander ensures that all POs are in compliance with the requirements of AFI 34-223 and ANG Sup 1. However, commanders should not control or dictate any internal activities or structure of POs.

The Installation Commander annually must require all unit commanders certify compliance with regulatory guidance for all Unofficial Activities or Private Organizations associated with their units and ensures the Commander's Checklist in AFI 34-223, ANG Sup 1, Attachment 8, is accomplished by unit commanders and for non-unit affiliated POs.

The Services Flight, through the Base Prime RIBS Manager, is required to keep a file on all approved POs and UAs on the installation.

There are a number of restrictions in AFI 34-223 and ANG Sup 1 that apply to the formation and operation of a PO. These restrictions are set out in full in paragraphs 10.1 through 10.16.5. Some of the more important restrictions are:

1. POs must be self-sustaining. Generally, income must not accrue to individual members. POs must prepare an annual income-and-expense statement, either on an accrual or cash basis. If annual revenues are less than \$100,000, there is no requirement to conduct an independent audit or financial review, unless there are signs of fraud or impropriety.
2. PO funds cannot be commingled with Federal or State funds.
3. POs and unofficial activities/organizations must not engage in activities that duplicate or compete with the Army and Air Force Exchange Service.
4. POs and unofficial activities/organizations may not engage in frequent or continuous resale activities or operate amusement or slot machines. However, the installation commander may authorize (or the Mission Support Group or Services Flight Commander may authorize, if the authority is delegated) 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. 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 so long as there is no actual resale. Also, the occasional sales limitation does not apply to PO sales of unit souvenirs or memorabilia to members of the unit provided AAFES elects not to provide the service and the PO chartering documentation authorizes resale under these circumstances.
5. POs and unofficial activities may not sell alcoholic beverages. Dining Social Clubs organized and chartered under ANGI 34-121, *Dining Social Club Organizations*, have a waiver to this prohibition.
6. POs must have liability insurance unless the installation commander, with judge advocate review, waives the requirement. However POs may be required to obtain insurance for certain special events which involve a greater risk of injury or damage.
7. The PO should consider bonding for its treasurer.
8. POs must comply with all applicable federal, state, and local laws governing similar civilian activities. Some POs may qualify for tax-exempt status if they are organized for one or more of the purposes specifically outlined in the Internal Revenue Code.
9. POs are limited to off-base solicitation of funds that clearly indicate that they are not for the base or any official part of the Air Force. See Para 10.15 of AFI 34-223.

10. POs are strictly limited in conducting occasional, infrequent fund-raising raffles only when authorized in advance by the installation commander (or as delegated), and subject to a number of restrictions detailed in Para 10.16. in AFI 34-223. See also DoD 5500.7-R, Joint Ethics Regulation (JER), 30 Aug 93 and Changes 1 & 2).

#### **ENDING A PO ACTIVITY OR DISSOLVING A MILITARY CORPORATION**

When a PO decides to disband or shut down, it must use its funds to satisfy any outstanding debts or obligations and dispose of any residual balance as decided by the PO membership. The officers of the PO should notify the Base Prime RIBS Manager, the Services Flight Commander and the Installation Commander of their intent to dissolve the PO and prepare a time-phased action plan to do so.

A military corporation should be dissolved in accordance with the requirements of state law. Typically, this means that the officers of the corporation should notify the Secretary of State of their intention to dissolve the corporation and should follow all other requirements of state law. Officers of the military corporation should consult with their judge advocate concerning any special state law issues.

***KWIK-NOTE:*** *While you should ensure that POs meet regulatory requirements, you should not control or dictate any internal activities or structure of POs. Your control over POs lies in the power to authorize and withdraw authorization for POs to operate on your installation.*

#### **RELATED TOPICS:**

#### **SECTION**

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## Dining Social Club Organizations

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Written by Col Barry Maddix

Updated/Revised by Mr Louis Proper, April 2006

**AUTHORITY:** ANGI 34-121, *Dining Social Club Organizations* (1 Sep 2005) (NGB/A7V has substantially revised previous guidance); AFI 34-219, *Alcoholic Beverage Program* (9 Sep 98); AFI 34-223, *Private Organization (PO) Program*, (11 Aug 2003); ANG SUP 1 to AFI 34-223, *Private Organization (PO) Program* (28 Mar 2005); AFI 34-223, *Private Organization Program*, and ANG Sup 1 to AFI 34-223

*NOTE: ANGI 34-121 replaces ANGR 215-2, Dining Social Club Organizations. According to the Services Division at the National Guard Bureau (NGB/A7V), the new instruction provides guidance and spells out responsibilities and procedures to keep the Installation Commander out of trouble. Responsibilities are assigned for the ANGRC, TAG, Installation Commander, Services Commander, Services Prime RIBS Manager, Club Advisory Committees and the Club Manager. It also includes information and guidance on real estate licensing and leases. Additionally, ANGI 34-121 includes an AF waiver that allows properly chartered ANG Dining Social Clubs to sell alcoholic and malt beverages and operate a continuous resale function. Commanders and Judge Advocates must use ANGI 34-121, but proceed with caution in establishing a new dining social club on an Air National Guard Base. Coordination and communication with local State Headquarters and the NGB/A7V is strongly advised.*

### INTRODUCTION

ANG Dining Social Clubs (DSC's) enhance morale and esprit de corps, provide activities and facilities for fellowship and recreation for ANG members and their families, and offer programs similar to those available to active and reserve forces through the Air Force Club Program. However, they have no federal status. Dining Social Clubs must be operated within ANG policy and in compliance with federal, state, and local laws. Dining Social Clubs on ANG installations are not part of the Air Force Club Program.

The State Adjutant General is the approval authority for the operation of a DSC on an ANG installation and provides oversight for annual DSC reviews forwarded by the Assistant Adjutants General for Air from Installation Commanders.

Only one DSC per ANG installation is allowed. ANG tenant units on an active military installation where the host base operates an Air Force Club activity may not establish a DSC. Under normal circumstances, ANG members are encouraged to participate in their host's Air Force Club program.

There is no official relationship between the activities of DSCs, which are designed as private organizations, and those of the ANG personnel who are members and/or patrons. Dining Social

Clubs are not integral parts of military organizations from which its membership is drawn. Membership in a DSC does not entitle its members to reciprocal privileges in any US Armed Forces Club (open mess). ANG members on an active Air Force installation in an active duty or active duty for training status are eligible for AF Club membership as outlined in AFI 34-272, *Air Force Club Program*.

## **PROCEDURES FOR ESTABLISHMENT OF DINING SOCIAL CLUB ORGANIZATIONS**

A DSC must be established as a not-for-profit membership corporation duly organized in conformity with State law. Its functions and objectives must be in writing and should be reviewed by the senior ANG installation judge advocate and other staff members as deemed necessary. Each DSC must maintain on file (normally the Services Flight has private organization oversight) at the ANG installation the organizational documents required by State law, including an alcohol license or waiver (a Federal Bureau of Alcohol, Tobacco, and Firearms permit is also required), a certificate or articles of incorporation, charter or constitution, by-laws, and such other organizational documents as may be required.

Constructing new facilities on an ANG installation specifically in support of a DSC is not authorized, even if the facility is constructed totally with donated materials and labor. Requests by DSCs for approval to have joint use or exclusive use of a facility must be submitted through the State Assistant Adjutant General for Air in accordance with ANGI 34-121, paragraph 4.3.. Operation or maintenance facilities are considered inappropriate for joint use.

If a DSC requests joint or exclusive use of an available building, a lease/license requiring payment of rent or consideration in cash or in kind is necessary. The proposed lease/license is prepared by the Base Staff Judge Advocate and Real Property Office and sent through the Installation Commander, TAG, USPFO and NGB/A7CP in turn and processed through AFRPA/RE.

The documentation requirements are spelled out in paragraph 4.3.5. of ANGI 34-121, and include: the request letter, letters of compliance, proposed license, approved Facility Board minutes, color coded maps showing floor plan and location on base, appropriate environmental documentation, and any other pertinent data.

As private organizations, DSCs operating on ANG installations must also comply with the guidance set forth in AFI 34-223, Private Organization Program, and ANG Sup 1 to AFI 34-223. Further procedural information concerning the establishment of a DSC is found in Chapter 1 of ANGI 34-121.

## **MEMBERSHIP**

Dining Social Clubs determine their own eligibility rules; however, Installation Commanders should not approve any DSC that doesn't primarily focus on the ANG family. DSCs may not discriminate in membership policies on the basis of age, race, religion, color, national origin,

disability, ethnic group, marital status, lawful political affiliation, labor organization membership, gender, or other classification prohibited by Federal or State laws.

## **ALCOHOL SALES**

Properly chartered and authorized DSCs may sell alcoholic and malt beverages for on-premise consumption, but must operate such sales in strict compliance with the alcoholic beverage laws of the state and municipality in which it is located. (DSCs were granted an exemption from AFI 34-223 for alcoholic and continuous resale activities by AF/A7V (now AF/A1S), see ANGI 34-121, paragraph 1.5.2.). Additionally, DSCs are subject to the ANG installation commander's alcohol deglamorization program established IAW AFI 34-219, *Alcoholic Beverage Program*, and AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*. AFI 34-219 also sets out guidelines as to where drinking may occur on an ANG installation as well as useful procedures to avoid dram shop liability. ANG installation commanders should make use of all available means to deglamorize alcohol and make ANG personnel aware of responsible approaches to drinking. DSCs must also comply with the spirit and intent of the President's and DoD's initiatives to prevent driving under the influence of alcohol and drugs.

## **RESPONSIBILITIES OF THE INSTALLATION COMMANDER AND STATE ADJUTANT GENERAL**

The ANG installation commander is responsible for ensuring that space and facilities necessary for mission requirements are not used to support DSC operations. No federal manpower or funds may be used to support DSCs. ANG commanders also must ensure excess facilities committed to Congress for disposal as a condition of an approved ANG construction project are not used in support of DSC operations. Additionally, installation commanders must require an external audit of the DSC's operations at least every 18 months.

The State Adjutant General is responsible for ensuring that all DSCs operating on ANG installations are properly authorized and in compliance with applicable federal, state, and local laws, and ANG instructions. The Adjutant General provides oversight for the annual review. The Adjutant General has the authority to withdraw the authorization for DSC operations at any time. The DSC members may also terminate the DSC, consistent with the corporate charter, constitution and by-laws.

## **INSURANCE**

Dining Social Clubs must establish and maintain reasonable amounts of commercial insurance to provide protection against personal liability, worker's compensation and property damage claims, or other legal actions that may arise from activities of the organization, its employees, members or guests. Commercial insurance against liability exposure and loss or damage to DSC assets is the sole responsibility of the DSC. Evidence of such insurance coverage and the amount thereof should be provided to the ANG installation commander. The DSC should also consider maintaining an insurance policy to cover the actions of its officers and directors.

DSCs selling alcoholic beverages must be familiar with the dram-shop theory of liability. This theory deals with legal liability created by state law or court decision that imposes on the server of alcoholic or cereal malt beverages (or the owner or operator of an establishment that serves alcoholic or cereal malt beverages) the duty to refuse to serve alcoholic or cereal malt beverages to a patron who has reached or appears to be reaching a point of intoxication that might cause that person to be a danger to himself/herself and/or others.

The amount of insurance required may depend on state law or common practices in the local business community, but must be appropriate to protect the DSC, the DSC members, the US Government, the USAF, and the ANG from liability.

### **OPERATING GUIDELINES AND INSTRUCTIONS:**

Detailed DSC operating guidelines are published in Chapter 3 of ANGI 34-121. These guidelines may need to be supplemented based on the particular requirements in your state.

Generally, activities of DSCs should not in any way reflect prejudice or discredit upon the ANG, USAF, DoD components or other agencies of the federal government.

In order to protect the interests of the DSC as well as ANG members and their guests, the organization must:

1. Publish operating instructions that prohibit serving alcoholic beverages to those who appear either to be intoxicated or not in complete control of their faculties.
2. Ensure that all servers are trained properly on recognizing signs of excessive consumption and the importance of liquor liability laws (Dram-Shop). Servers must be familiar with all operating instructions.
3. Ensure proper safeguards are set up to protect the welfare of an intoxicated or impaired person and to prevent that person from injuring others.
4. Publish DSC Operating Instructions (OIs) as required by Attachment 2 to ANGI 34-121.

***KWIK NOTE: When providing oversight, considering or establishing a Dining Social Club Organization, Commanders should closely consult with their Staff Judge Advocates.***

### **RELATED TOPICS:**

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## MWR Programs, Activities and Facilities

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Updated by Mr Scotty Birchfield, Sep 2007

**AUTHORITY:** AFI 34-266, Air Force Fitness and Sports Program (12 Oct 2001); ANG Sports Policy Message, 5 June 2007; AFI 91-302, Air Force Occupational and Environmental Safety, Fire Protection, and Health (AFOSH) Standards (18 Apr 94); AFI 32-1024, Standard Facility Requirements (31 May 94).

### INTRODUCTION

ANGI 34-107 was rescinded in CY06. Therefore, this topic is an overview of ANG Policy disseminated by message 5 June 2007. This policy will be codified in an ANG Supplement to AFI 34-266. The ANG Policy message provides guidance on implementing the ANG Services (MWR) Program; defines Recreational and Sports Program responsibilities and eligible participants, and gives guidance on management of airlift and motor vehicle resources in support of National Guard Bureau (NGB) sanctioned recreational and sporting events. ANG Policy and the proposed ANG Supplement/ AFI 34-266, define ANG picnic/recreational areas and fitness rooms. It applies to all ANG personnel.

### ANG RECREATIONAL AND SPORTING EVENTS

#### Policy

NGB encourages all active ANG members to participate in ANG-organized and ANG-sponsored recreational and sporting events because they help maintain readiness as well as personal, mental, physical, and social well-being. The events offer commanders another retention tool and develop esprit de corps.

#### Requirements

1. Must be open to all active ANG personnel. All other personnel, retired ANG, personnel from other military services, and ANG Title 5 civilians requested by the host unit and authorized by NGB may participate.
2. When ANG events require the utilization of core MWR facilities, the total serviced community of active DoD personnel and retirees must be provided with equal access and utilization to these facilities.
3. Spouses of ANG members may participate in sporting events; however, all expenses incurred are the responsibility of the members and spouses.
4. MWR recreational and sporting events established for ANG and other authorized personnel within a State, such as unit sponsored camping/fishing trips, family field days, and unit teams participating within the community, do not require NGB sanction. They will, however, be consistent with the guidelines and limitations set forth in published ANG Policy.
5. ANG members are authorized to use Services facilities on active duty Air Force bases as specified in AFI 34-262, Services Programs and Use Eligibility.

#### Prohibitions

Under no circumstances, unless specifically authorized by publication, is military airlift to be used by spouses. Promotional material shall not suggest NGB endorsement of any commercial product or service and shall be designed only as an information medium.

## **Intramural and Extramural Programs**

ANG Intramural and Extramural Programs require NGB sanction. Written requests for NGB sanction for a specific recreational and/or sporting event should be sent through the respective Adjutant General (TAG) for concurrence to NGB/A1S, Conway Hall, 3500 Fetchet Ave., Andrews AFB MD 20762-5157, no later than 4 months before the date proposed for the event. NGB/A1S will coordinate all action necessary for final approval or disapproval.

Requests for NGB sanction must include as a minimum:

1. Nature of recreational or sporting event.
2. Travel dates.
3. Competition dates.
4. Number of anticipated entrants.
5. Type of participants (active Air Force, active ANG, which includes drill status, military technicians, competitive technicians, and military duty personnel, retired military, personnel from other military services, ANG Title 5 civilian employees, and spouses).
6. The number of military duty personnel (AGR) granted permissive TDY to participate or support the event or competition.
7. Other pertinent data (e.g., locations of competition--fields, lanes, city, and state).
8. Sponsoring unit.
9. Unit project managers and telephone numbers.

## **NGB-Sanctioned Recreational and Sporting Events**

Any competitive recreational or sporting event that provides a broad participant appeal will be considered as an NGB-sanctioned recreational or sporting event. Examples include, but are not limited to, bowling tournaments, softball tournaments, fishing tournaments, regionalized golf tournaments and competitive track and field events.

## **Fiscal Limitations**

All ANG members who travel to a sanctioned recreational or sporting event as participants or in any other supporting role are not entitled to TDY per diem or travel allowances. Military technicians and drill status personnel will not be awarded retirement points for participation in or support of a recreational or sporting event. ANG personnel performing active or inactive duty for training will not participate in or support a recreational or sporting event while in a training status for pay. However, members may participate during non-duty hours.

## **Transporting Personnel**

1. Each individual is responsible for arranging the transportation to the participation site and return.
2. Units or individuals requesting travel via military air will comply with ANGI 10-201, paragraph 1.10. Travel in accordance with DODR 4515.13R may be authorized in a space-available status for those military personnel eligible based on their leave or duty status at time of travel.
3. Government-owned or leased motor vehicles may not be provided to participants or support personnel involved in a sanctioned ANG recreational and/or sporting event without approval authority from the installation commander for this type of transportation IAW AFI 24-301, paragraph 9.8. When available, NAF and/or commercial transportation sources will be used. All requests must be coordinated with the installation Transportation and Services offices. Such support cannot be provided for domicile-to-duty transport.

## FITNESS FACILITIES AND RECREATIONAL AREAS

The following are considered ANG MWR facilities:

1. Picnic Area: a covered or uncovered outdoor area encompassing picnic tables and grills for cooking;
2. Recreational Area: one or more sports fields; i.e., running track, football field, softball/baseball diamond, soccer field, racquetball court, volleyball court, and/or basketball courts;
3. ANG fitness room: An indoor area consisting of, but not limited to, the following: Weight Conditioning area, Aerobic Conditioning area, racquetball court, volleyball court, and/or indoor track. The assessment area for fitness tests is separate from the normal conditioning area.

Commanders should ensure that Services (MWR) facilities and programs meet the safety requirements in accordance with AFI 34-266, Air Force Fitness and Sports Programs, and AFI 91-302, Air Force Occupational and Environmental Safety, Fire Protection, and Health (AFOSH) Standards. Facility requirements are also controlled by AFI 32-1024, Standard Facility Requirements.

### Requirements of Fitness Facilities and Recreational Areas

1. They exist on base with the Installation Commander's consent.
2. They provide MWR services to unit members.
3. They are ultimately subject to the Installation Commander's oversight.

Local community facilities must be used to the maximum extent possible. ANG facilities for MWR activities must only be considered on a case-by-case basis by the Deputy Assistant Secretary of the Air Force (Installations) and will qualify only under the following conditions:

Facilities which support physical fitness and outdoor recreation are given priority. Maximum use should be made of existing facilities. Facility size should be limited to the minimum considered essential to support the uniqueness of the installation. Operations and maintenance costs should be held to an absolute minimum. A modest consolidated club/mess facility (normally provided as a Dining Social Club, governed by ANGI 34-121); will be considered if justified to foster esprit de corps.

**KWIK-NOTE:** MWR and Services activities promote personal, mental, physical, and social well-being and develop *esprit de corps*. Be cognizant of fiscal limitations.

### RELATED TOPICS:

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## Morale, Welfare and Recreation (MWR) Funds

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**Lt. Col. Barry Maddix and Capt Jed French, May 2001**

**AUTHORITY:** ANGR 34-3, *ANG Unit Welfare Funds* (26 Aug 77); AFI 34-124, *Air Force Morale, Welfare, and Recreation Advisory Board* (25 Jul 94); applicable state law and regulations.

### INTRODUCTION

This topic provides guidance on the number and kind of funds and accounts a Commander should maintain for money generated by MWR activities.

### FUNDS

This topic discusses funds generated by MWR activities rather than funds used to establish MWR activities. The subsection outlines some PRACTICAL SUGGESTIONS as to how a commander can and should successfully control MWR funds on his/her base.

The generation of money from various MWR activities on an ANG base can either be a tremendous help to the unit and the esprit de corps of its members, or may present problems for the Commander as a result of fraud, waste and abuse. The difference in outcomes is a direct result of how closely the Commander monitors these activities.

Because of the various kinds of MWR fund-generating activities on a base or in a unit, the military not-for-profit corporation should be used as the one vehicle for allocating funds as well as accounting for them. The GOALS are to minimize the number of bank accounts to maintain, audit, and be accountable for, and to provide maximum protection for the Commander in conducting fund generating MWR activities.

Currently, under federal and state law and regulations, and consistent with those goals, only the following separate funds and accounts should exist on any base (The Club accounts may be combined because of consolidated clubs). Each is followed by a brief description.

1. **OFFICERS CLUB** - a separate military not-for-profit corporation with a liquor license, separate taxpayer identification number, federal tax-exempt organization certificate and state sales tax waiver. The "O" Club should have its own separate bank account into and out of which only "O" Club funds flow.
2. **NCO CLUB** - a separate military not-for-profit corporation with a liquor license, separate taxpayer identification number, federal tax-exempt organization certificate and state sales tax waiver. The NCO Club should have its own separate bank account into and out of which only NCO Club funds flow.
3. **UNIT MWR FUND** - a separate federal fund pursuant to ANGR 34-3, made up of the moneys received monthly by the unit from its gaining MAJCOM based on active duty performed by unit members (technicians and traditional Guard members) during the previous month. The amount received varies monthly and is based upon a multiplier (example \$.10) per active duty workday which multiplier may be different from MAJCOM to MAJCOM since the multiplier is determined from available MWR funds generated by that MAJCOM. There is a separate bank account, a separate federal taxpayer identification number, a separate MWR Council to expend funds, and auditing procedures established by the cited regulations. This fund should not be administered through a military corporation or civil association.
4. **UNIT AGR MWR FUND** - a separate federal fund pursuant to ANGR 34-3, made up of the moneys received monthly by the unit from its gaining MAJCOM based on the number of AGRs employed during the previous

month. The amount received varies monthly and is based upon a multiplier (example \$ .10) per active duty workday, which multiplier may be different from MAJCOM to MAJCOM since the multiplier is determined from available MWR funds generated by that MAJCOM. There is a separate bank account, a separate federal taxpayer identification number, a separate MWR Council to expend funds, and auditing procedures established by the cited regulations. This fund should not be administered through a military corporation or civil association.

5. CENTRAL FUND OR CONDUIT FUND - a separate local fund created and operated at the Commander's discretion, as a conduit for receipt and expenditure of NGAUS, state militia association and "O" Club yearly dues. Excess funds from any non-alcoholic MWR activity operated by a military corporation or civil association may be received into this central or conduit fund pursuant to that corporation's or association's determination for use by the Commander when VIPs come to the base. This fund has a separate bank account, separate taxpayer identification number and must be separately audited. No military corporation or civil association should be set up to administer this fund.
6. CORPORATE (UNIT) FUND - This is the separate fund generated locally for ALL non-alcoholic MWR activities required to be conducted through a military corporation or civil association. There is a separate bank account, separate taxpayer identification number, federal tax-exempt organization certificate, state sales tax waiver, and separate auditing procedures pursuant to state law and regulations. This fund is administered by a separate Board of Directors or Council which decides how the money will be spent.

The Wing or Group Commander may permit subordinate unit Commanders to maintain their own separate unit checking accounts for use by those Commanders for members of their units, for such things as squadron retirement affairs, purchase of flowers for suitable occasions, etc. The funds constituting such accounts should be received either from the Unit fund at the determination of the Board of Directors, or by separate collection from within the subordinate unit. However, each separate subordinate Commander's account must use the taxpayer identification number (different checking account number, of course) of the Unit fund to enjoy the tax exempt status of the Unit fund, and to avoid the need of creating still another military corporation or civil association. The subordinate unit Commander's fund is spent at the discretion of that Commander, but must be audited pursuant to the state law and regulations governing the Unit fund.

These are the only funds and accounts the Commander should permit on the base on a Wing or Group-wide basis.

***KWIK-NOTE: The generation of money from various MWR activities on an ANG base can either be a tremendous help to the unit or may present problems as a result of fraud, waste and abuse. You should closely monitor accounts established to hold these funds.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Morale, Welfare and Recreation (MWR) Programs, Activities and Facilities	22-4
Dining Social Club Organizations	22-3
Civil Associations and Military Corporations	22-2

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# Using Base-Sanctioned Private Organizations to Support Open Houses

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**Lt Col Barry Maddix and Capt Jed French, May 2001**

**AUTHORITY:** AFI 35-101, *Public Affairs Policies and Procedures* (1 Dec 99); AFI 34-262, *Services Programs and Use Eligibility* (27 Apr 00); AFI 65-601, Volume 1, *Budget Guidance and Procedures* (17 Nov 00); 5 C.F.R. 2635; DoD 5500.7-R, *Joint Ethics Regulation (JER)*, Section 3-300 (30 Aug 93, C4, 6 Aug 98); AFI 34-223, *Private Organization Program* (3 Dec 99); AFI 36-3101, *Fundraising Within the Air Force* (8 Jul 94); 31 U.S.C. 1342, 1353, 3302; 10 U.S.C. 1588, 2601.

## INTRODUCTION

An increasingly common practice in managing base open houses is for event organizers to stand up a private organization (PO) to support the effort since a base-sanctioned PO offers flexibility in some areas that open house organizers do not have. A truly independent PO may complement or enhance an official activity by performing services or roles not permitted under official guidelines. For example, a PO could provide food or refreshments at an official function because fiscal restrictions bar using appropriated funds for the same. In the context of an open house, a PO could fund costs not ordinarily borne by appropriated or nonappropriated funds, provide indirect support of the event, and manage a bank account for the foregoing purposes. A PO could also donate funds or property to the Air Force for use at an open house. However, a PO's freedom of action in support of the event is not unlimited. There are clear limitations in fiscal law and regulatory restrictions under the PO Program as well as liability concerns which limit what such an organization can or should do.

## FISCAL RULES

### Expenditures

Open houses enhance community relations and are an authorized function of the Air Force (AFI 35-101, paragraph 8.42); therefore, expenditure of appropriated funds (APF) to support open houses is authorized. Various support functions performed by civil engineering, transportation, security forces, communications, and medical personnel are properly funded with appropriated dollars. Generally speaking, MWR activities are located on the ground behind the viewing stands at an open house. The MWR elements of the event are enumerated in AFI 34-262, paragraph 2.9.1, and in the *Air Force Services Guide to Open Houses and Air Shows*, paragraph 3b. The expenses associated with MWR activities are ordinarily borne by nonappropriated funds (NAF), and any proceeds must be separately accounted for. NAFs may not be used to subsidize mission-related elements or provide support to elements unrelated to the Services MWR Program (AFI 34-262, paragraph 2.9.3; *Air Force Services Guide to Open Houses and Air Shows*, paragraph 3a).

In addition to these APF and NAF expenditures, there are other costs for which official funds are not available. If these costs are to be funded, only unofficial funds may be used. The largest expenses in this category are typically those associated with civil aerial acts other than warbirds (27 July 1994 AF/CV memorandum, "Civil Aircraft Performances and Charging Admission at Base Open Houses/On-Base Events"). Additionally, any expenditures specifically prohibited by regulations governing APF and NAF expenditures fall into this category (*see generally* AFI 65-601, Volume 1; *see also* AFI 34-262, paragraph 2.9.3, and *Air Force Services Guide to Open Houses and Air Shows*, paragraph 4). Furthermore, any indirect support of the open house, such as lodging or local transportation for civil aerial act team members, would be included in this category, as well.

## **Augmentation**

The augmentation rule restricts POs from funding any mission-related element of an open house. If a PO pays expenses that would otherwise be paid for by appropriated funds, an illegal augmentation may occur. As a result, POs are limited to paying expenses that would not otherwise be paid for with appropriated funds.

An improper augmentation can be avoided either by depositing funds into the miscellaneous receipts of the Treasury (31 U.S.C. § 3302(b)) or by making a gift of funds or property to the Air Force under authority of the gift acceptance statute (10 U.S.C. § 2601) or similar authority, such as 31 U.S.C. § 1353. Funds or property received by a PO may be given to the Air Force pursuant to these authorities, and such funds may be designated for a particular purpose. (Note that these authorities do not allow for gifts of services. Acceptance of services falls under the voluntary services rules explained below.) Although the prohibition against augmentation applies only to APFs, NAF regulations establish a corresponding procedure for making donations to the NAF account (AFI 34-201, Section 5B).

## **Voluntary Services**

Pertinent to a PO's involvement in an open house is the authority for acceptance of voluntary services by MWR programs.

To the extent a PO performs a function that would normally be performed by government employees paid through appropriated funds (such as management of the mission-related elements of an open house), it potentially violates the voluntary services prohibition. The Comptroller has distinguished between receipts of money and receipts of services, dealing with the former under the augmentation rule and the latter under the voluntary services prohibition.

As a practical matter, the distinction between augmentation and voluntary services makes little difference when examining open house management or administration by POs. POs must refrain from doing work that government employees would otherwise do—whether it is considered an augmentation or an illegal voluntary service.

A base-sanctioned PO composed primarily of government employees may not hold a contract to manage an open house. Furthermore, ANG employees should not enter into individual agreements with the ANG to provide gratuitous services. It would be extremely difficult, if not impossible, for employees to separate duties performed in their official capacity from duties official in nature which are performed in an unofficial capacity. Employees may not waive compensation when they are otherwise entitled by statute to such compensation. Any attempt to do so would be ineffective and would constitute prohibited voluntary services.

## **Indemnification**

Absent express statutory authority the government may not enter into an arrangement to indemnify, where the amount of the government's liability is indefinite, indeterminate, or potentially unlimited, whereby the government would cover the expenses of an open house beyond those assumed by a PO. On the other hand, an indemnification agreement that limits liability to a specific amount or to available appropriations may be proper if sufficient funds have been certified as available to meet the contingency.

## **SOLICITATION OF DONATIONS**

A PO may accept gifts or donations consistent with its purpose. However, a PO's ability to solicit for gifts or donations, or otherwise engage in fundraising, is heavily regulated. A PO may not solicit gifts or donations on-base. Additionally, any off-base solicitation must be for the PO itself and not for the base or any official part of the Air Force, thus, a PO organized to support an open house may solicit off-base for its own purposes—i.e., to support the open house—so long as the PO solicitors clearly indicate that any donations are to the PO, as a PO, and not to the Air Force. The PO should also make clear to donors that recognition for donations may not be made publicly, except for a limited acknowledgement at the open house.

Military members and DoD civilian employee members of a PO are also governed by ethical strictures when soliciting on behalf of the PO. A DoD employee may not solicit from a subordinate (5 C.F.R. 2635.808(c)(1)) or a prohibited source (5 C.F.R. 2635.808(c)(1)(i)). The term “prohibited source” is defined at 5 C.F.R. 2635.203(d) and would include any Air Force contractor or commercial offeror, and any nonfederal organization seeking official action by the Air Force. When soliciting funds for a PO, an employee must be acting exclusively outside the scope of his or her official position (J.E.R., Section 3-300.a). It must be clear that the employee is not soliciting or accepting a donation because of the employee’s official position (5 C.F.R. 2635.202(a)(2)). To that end, a solicitation may not reference an employee’s position, title, or authority (J.E.R., Section 3-300.a(1)). For further discussion of these rules, see OpJAGAF 1998/71, 6 July 1998, Solicitations.

For fundraising in general, POs must comply with the requirements of AFI 34-223, AFI 36-3101, local restrictions imposed by the installation commander, and the PO’s own charter.

## CONCLUSION

In sum, private organizations **may** be used to hold seed money, raise funds and accept donations from outside sources in accordance with applicable AFIs, donate funds and in-kind gifts to the government, fund expenses not ordinarily borne by APF or NAF funds, and provide voluntary services to support the MWR elements of an open house. They **should not** be used to contract for aerial events or other activities that could subject the PO membership to personal liability, or to act as a conduit for in-kind donations that raise similar liability concerns. Moreover, government personnel who are supporting an open house in their official capacity should not actively participate in a PO, the purpose of which is also to support the open house. Under current statutory and regulatory restrictions, POs **may not** be used to manage APF-funded activities of an open house, fund activities that are ordinarily borne by APF funds, contract with the Air Force, or offer sponsorship benefits in exchange for donations. PO members who work for the government may not officially solicit gifts or donations for the open house; they may do so only in a personal capacity in accordance with governing AFIs and ethical guidelines. Furthermore, the government may not indemnify a PO for liability or expenses that are indefinite, indeterminate, or potentially unlimited, and for which money has not already been allocated. Restrictions arising from statute cannot be waived; regulatory restrictions may be waived only by the OPR.

***KWIK-NOTE: There are a number of fiscal and ethics rules implicated in implicated in funding various aspects of open houses and air shows. Be aware of those rules and consult your Staff Judge Advocate when organizing such an event.***

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## Chapter 23 - People Problems

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## Adoption Expense Reimbursement

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Updated by Lt Col. A. Jerome Dees, May 2009

**AUTHORITY:** 10 U.S.C. 1052; DoDI 1341.9, *DoD Adoption Reimbursement Policy* (3 Nov 07,C1, 23 Apr 09), DODFMR, Chapter 7, Appendix A (May 2009).

### THE ADOPTION REIMBURSEMENT PROGRAM

This program authorizes reimbursement for certain adoption expenses up to \$2,000.00 per adoption with a maximum reimbursement of \$5,000.00 in any calendar year. To be eligible the member must be on active duty and have served at least 180 days of continuous active duty; the adoption must be finalized while the member is on active duty and the expense must be documented and allowable as defined by the DODFMR. AGR status is considered to be active duty for this program. Non-AGR members who served on Title 10 orders for more than 179 days may also be considered “active duty” for this program.

This program reimburses for adoption of a child under the age of 18, an adoption by a single person, an infant adoption, an inter-country adoption, and an adoption of a child with special needs (as defined in section 473(c) of the Social Security Act 42 U.S.C. 673(c)) and, for adoptions finalized after November 2, 2007, stepchildren adopted by the military member. Adoptions qualify for reimbursement only if the adoption is arranged by a qualified adoption agency, or for adoptions finalized after November 2, 2007, those arranged by either a qualified adoption agency or other source authorized to place children for adoption under state or local law. The application for reimbursement must be filed no later than one year after finalization of the adoption. Reimbursement is for “reasonable and necessary” adoption expenses, which include placement fees, legal fees and court costs, certain medical expenses, and temporary foster care fees (when required by the adoption process). Travel costs are not reimbursable.

Once a child has been placed in the military members home by the adoption agency members may use a TRICARE Military Treatment Facility for medical care for the child. Interested personnel should contact their local military personnel flight, customer service section, for guidance and copies of the application forms. Further information is available from *AFMPC/DPMASC*, DSN 487-2432.

### ADOPTION TAX CREDIT

Members may be able to receive a tax credit of up to \$5000 for qualifying expenses paid while adopting an eligible child. The credit may be as much as \$6,000 if the expenses are for the adoption of a child with special needs. Qualified adoption expenses are reasonable and necessary adoption fees, court costs, attorney fees, traveling expenses (including amounts spent for meals and lodging) while away from home, and other expenses directly related to, and whose principal purpose is for, the legal adoption of an eligible child.

The credit is not available for stepparent adoptions or for expenses that are reimbursed under an employer’s program or expenses paid using funds received from any federal, state, or local program. An eligible child is a child with special needs if he or she is a citizen or resident of the United States and a state determines that the child cannot or should not be returned to his or her parents’ home and probably will not be adopted unless adoption assistance is provided to the adoptive parents. A foreign child cannot be treated as a child with special needs.

The full tax credit is available for a taxpayer whose modified adjusted gross income (AGI) does not exceed \$75,000, but the credit is reduced for taxpayers with a modified AGI over \$75,000 but less than \$110,000, and eliminated for those with a modified AGI over \$110,000. The credit can be taken in a tax year even if the adoption is not final, except in the case of a foreign adoption in which case expenses can only be claimed if the adoption is final in that year.

***KWIK-NOTE: Adoptions by military members are encouraged. Only AGRs and those serving on active duty for more than 180 days are likely to qualify for adoption expense reimbursement.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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## Bad Checks

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**Updated by Lt Col A. Jerome Dees, May 2009**

**AUTHORITY:** DoDD 1344.9, *Indebtedness of Military Personnel*, (8 Dec 08); DoD Instruction (DoDI)1344.12, *Indebtedness Processing Procedures for Military Personnel*, (18 Nov 94, C2 11 Jul 96), AFI 36-2906, *Personal Financial Responsibility* (1 Jan 98); applicable state law.

### **POLICY**

The issuance of a check is an express representation by its maker that there will be sufficient funds in the account when the check is presented to the maker's bank for payment.

Air Force policy regarding bad checks is as follows:

1. Air Force members are expected to pay their just financial obligations in a proper and timely manner. AFI 36-2906, para. 3.4.1;
2. Mistakes happen. No action will be initiated against a member if the individual has a check dishonored because of honest error or a bank error, but;
3. If it is dishonored because of criminal misconduct, intent to deceive, or negligence, then prompt corrective action is necessary.

Note that while this policy does not apply directly to the Air National Guard commanders should be aware of it for a number of reasons. First financial difficulties and failure to properly address them can affect the security clearance of the individual involved. Second, mobilization or deployment of the member will make them subject to these requirements and could subject them to an involuntary allotment and or non-judicial punishment. Finally, where the members conduct constitutes criminal misconduct the commander may want to consider discharging the member. Issuing bad checks may be a crime under state civilian law and may bring discredit on the Air National Guard. Such conduct may also be prohibited under some state Codes of Military Justice. Consequently, issuing a "bad" check is a serious, possibly criminal matter.

The action an ANG Commander can take will depend on where, when and to whom the check was given. If it was passed in an on base facility, given to another unit or military member or constituted a federal or state civilian law violation, then the Commander may be able to take appropriate disciplinary action under the state Code of Military Justice. The Commander should consult the local SJA to determine appropriate action in each case.

### **HOW WILL YOU FIND OUT ABOUT IT?**

Air National Guard Commanders will normally learn one of their members has been involved with a bad check in many ways; the three most common ways are notification from the base facility where the check was written, a telephone call or letter from the individual that the check was written to or other notification that the member has been arrested by civilian authorities for passing a bad check.

## **AFTER NOTICE OF DISHONOR, FIND OUT WHY**

In order to decide on appropriate action the Commander needs to determine the facts, including why the check was dishonored; was it a bank or government error, or was it the member's inadvertence, negligence, or criminal conduct. That factual determination will provide the basis for the official action on the case. The member is usually to most accessible source of the information. Since issuing a bad check may be an offense under your state Code of Military Justice and/or under your state civilian criminal laws, you should consult your SJA prior to any discussion of this matter with the member. The SJA may recommend that you provide an appropriate rights advisement under your state Code of Military Justice, the Miranda case, the Fifth Amendment, and/or Article 31, UCMJ, as applicable. Questioning should not be limited to ascertaining fault only, but should include any extenuating or mitigating factors since they can have a significant influence on the action taken. See the topic in this Deskbook entitled "ADVISING SUSPECTS OF THEIR RIGHTS" for further guidance in this area.

## **WHAT NEXT**

After you have learned why the check was dishonored, you should take appropriate action. Depending on your state Code of Military Justice, the administrative and disciplinary actions that may be available include:

1. Counseling;
2. Restitution (which should be urged in every case);
3. Administrative letter of counsel or reprimand;
4. Nonjudicial punishment;
5. Administrative separation; and/or
6. Court-martial.

If a check bounced at an on-base facility, the installation Commander can suspend on-base check-cashing privileges. If the bad check was passed on base in a federal facility, it may be a crime under federal law, and after speaking with the Staff Judge Advocate, you may wish to notify the local U.S. Attorney for consideration of prosecution under federal civilian criminal law. If the bad check was passed on base in a state or privately owned facility, it may be a crime under your state's law, and after speaking with the Staff Judge Advocate you may wish to notify the local state, county or municipal prosecutor for action under state civilian criminal law.

If, as a result of one of your members passing a bad check, the member has already been arrested by civilian authorities, follow the guidance in the topic in this Deskbook entitled "ARREST BY CIVILIAN AUTHORITIES", which discusses when and how to take appropriate military action.

## **SUMMARY - RULES FOR COMMANDERS**

General rules for a Commander to follow are:

1. If a check is dishonored through inadvertence, such as bank or governmental error, illegibility of amount or signature, or a failure to date it, then you should:
  - a. Apprise the member of this fact and allow the member to redeem the check within 5 days. If the member does so, no further action is required;
2. If a check is dishonored through suspected criminal conduct, i.e., intentionally writing one and knowing that funds are not sufficient or nonexistent, the Commander should:

- a. Review the member's personnel record, if one exists, to get the "overall picture" of the individual;
  - b. Consult with the Staff Judge Advocate;
  - c. Counsel the member concerning Air National Guard policy in general that bad checks bring discredit on the Guard.
  - d. Consider punitive action under your state Code of Military Justice if it applies;
  - e. If flagrant and repeated, consider adverse administrative or discharge action, if a ground exists (e.g. Misconduct);
  - f. Contact the Military Personnel Flight (MPF) for assistance; and
  - g. Coordinate a written reply with your SJA advising the complainant that the Air National Guard has no authority to resolve disputed claims or to require members to pay a private debt without a civil judgment, and provide a copy of your response to the MPF and the Staff Judge Advocate; and
3. If a check is returned for other reasons, such as a negligent failure to maintain sufficient funds or to keep checking account records accurate, then the Commander should:
- a. Review the member's personnel record, if one exists, to get the "overall picture" of the individual;
  - b. Consult with the Staff Judge Advocate;
  - c. Determine if any security reporting is necessary by consulting your unit security monitor and Chapter 8 of AFI 31-501.
  - d. Counsel the member concerning Air National Guard policy in general that bad checks bring discredit on the Guard;
  - e. If recurring, consider adverse administrative or discharge action, if a ground exists (e.g. Misconduct);
  - f. Contact the Military Personnel Flight (MPF) for assistance; and
  - g. Coordinate a written reply to the complainant with your SJA, advising the complainant that the Air National Guard has no authority to resolve disputed claims or to require members to pay a private debt without a civil judgment, and provide a copy of your response to the MPF and the Staff Judge Advocate.

## CONCLUSION

A Commander will generally receive notice of a member's dishonored check by oral or written notification. The ANG does not have a specific instruction regarding disciplinary procedures to follow when members issue bad checks. Any discussion of the matter with the member should be preceded by advice from the servicing SJA. Remedies may range from counseling up to court-martial if your state Code of Military Justice is applicable. This subject should be included in your Preventive Law Program.

**KWIK-NOTE: When you learn that one of your members has passed a bad check, consult your Staff Judge Advocate before doing anything else.**

## RELATED TOPICS:

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## Bankruptcy Notice

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Updated by Lt Col A. Jerome Dees, May 2009

**AUTHORITY:** 11 U.S.C. 362(a), 525.

### INTRODUCTION

All Air National Guard members are expected to pay their financial obligations in a timely manner; however the Air National Guard maintains a strict policy of neutrality where bankruptcy is concerned. The mere fact that a member has filed a bankruptcy petition or has been discharged from bankruptcy does not provide grounds for initiating an adverse action against the member.

In order to determine whether disciplinary or administrative action is warranted, the commander should examine the facts to determine whether there was mismanagement of personal affairs or a dishonorable failure to pay just debts. If there was a dishonorable failure to pay just debts which is characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations, even though bankruptcy was filed, adverse action may be taken. If there was not, then the bankruptcy, or what led to it, cannot be grounds for the adverse action.

The Staff Judge Advocate should be contacted before considering any adverse action associated with a member's bankruptcy. When providing financial counseling for members contemplating bankruptcy, also contact the Staff Judge Advocate for information on how to handle the problem through the Legal Assistance Program.

### EFFECT OF BANKRUPTCY PETITION ON MILITARY PAY

Personnel within your command who process pay documents should be alert for bankruptcy petitions concerning individuals whose pay they process. The filing of a bankruptcy petition AUTOMATICALLY STAYS or suspends any collection action against the subject individual's pay, whether the debt arose before the filing of the petition or after the filing of the petition (11 U.S.C. 362).

When a Commander receives notice of the filing of a petition in bankruptcy by a service member, the appropriate Finance Office should immediately be contacted so that an expedited action can be taken to honor the automatic stay. Such an action is not discretionary, but mandatory under the law.

If you are uncertain whether a document you receive is a petition in bankruptcy or of the action to be taken, you should contact your servicing Judge Advocate for assistance.

### DOES BANKRUPTCY PROTECT AGAINST ADMINISTRATIVE SEPARATION?

When a service member files a bankruptcy petition, the military's response typically requires a balancing act. While each service member has a right to file a bankruptcy petition and seek the protection of the bankruptcy laws, established policy provides that an ANG member may be administratively discharged for "dishonorable failure to pay just debts." See AFI 36-3209. Additionally, a dishonorable failure to pay just debts may be charged as a criminal offense under Article 134 of the Uniform Code of Military Justice if the ANG member is on extended active duty under Title 10 United States Code, or under an appropriate provision of your state's Code of Military Justice for all other ANG members, including AGRs. The circumstances surrounding the Bankruptcy may also require a security determination under AFI 31-501.

At the same time, the Bankruptcy Code provides that no governmental unit (including the military departments) may discriminate in employment matters, or terminate an employee solely because of bankruptcy (11 U.S.C. 101(27) and 525(a)).

On occasion, a Commander will encounter an off-base creditor whose debt the ANG member has listed in the filed bankruptcy petition and who tries to collect the debt despite the pending Bankruptcy and writes a letter to the ANG member's Commanding Officer. By sending a letter, the off-base creditor may have violated the automatic stay provisions of the Bankruptcy Code by trying to collect the debt after a petition has been filed. See 11 U.S.C. 362(a). Before responding to any such letter the Commander should consult the servicing SJA to ensure that any responsive action does not violate the automatic stay provisions. Violation of the stay provisions could result in damages, costs, attorney's fees and punitive damages against the creditor, and the Commander, who very well may be personally liable to pay them. See 11 U.S.C. 362(h).

Members cannot be separated SOLELY for bankruptcy. Members may be administratively discharged for failure to pay just debts that are not dischargeable in bankruptcy, whether or not bankruptcy is filed. Consult your Judge Advocate to ascertain which debts fall into the dischargeable debt category. Examples of debts not dischargeable are spousal support, child support and debts incurred but not paid after the bankruptcy petition was filed.

Thus the answer to the Commander's dilemma about whether to answer the off-base creditor, whether to counsel the member to pay the debt or whether to take adverse action against the member for a dishonorable failure to pay just debts lies in the determination of whether the debts are or are not dischargeable in bankruptcy. To summarize:

1. No separation can be based solely on bankruptcy;
2. If there is a dishonorable failure to pay just debts, and the debt is dischargeable in bankruptcy, you can separate the member if no bankruptcy was filed, but you cannot separate the member if bankruptcy was filed since the automatic stay of the bankruptcy filing prohibits separation as well as collection action;
3. If there is a dishonorable failure to pay just debts, and the debt is not dischargeable in bankruptcy, you can separate the member if no bankruptcy was filed, and you can probably separate the member even if bankruptcy was filed; and

#### **“EMPLOYER DEDUCTION” ORDERS DISTINGUISHED FROM “GARNISHMENT” ORDERS**

When a service member files a voluntary petition under Chapter 13 of the Bankruptcy Code, the Bankruptcy Court may ultimately issue a Chapter 13 “employer deduction order” under the authority of 11 U.S.C. 105(a). An employer deduction order (or earnings deduction order) commonly called an EDO, is the typical way in which a Chapter 13 debtor funds a bankruptcy plan. The EDO is a court order recognizable by its filing stamp, and requires a specified amount to be deducted from each paycheck of the debtor and sent to the court-appointed trustee who pays the allowable claims of the military member's creditors.

An EDO is not a garnishment order. The Accounting and Finance Office must honor an EDO. If an EDO is not honored, it can result in a contempt sanction being applied by the Bankruptcy Court against the offending military officials, including a Commander. Contempt sanctions include jail and/or fines, which must be paid personally. The government will not pay these for you.

#### **CONCLUSION**

When a Commander or Accounting and Finance Office receives a bankruptcy document they should immediately consult with the Judge Advocate to discuss the appropriate action to be taken.

***KWIK-NOTE: Failure to properly honor a bankruptcy petition or a bankruptcy court order could lead to a Commander's personal liability for money damages and contempt of court.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Administrative Discharge of Enlisted Personnel	24-3
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Dependent Support	23-10
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Quality Force Management Actions	24-12

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## Child and Spouse Abuse, Maltreatment and Neglect

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Updated by Lt Col A. Jerome Dees, May 2009

**AUTHORITY:** Applicable state law and regulation; AFI 40-301, *Family Advocacy* (19 Jan 2005; Change 1 7 Aug 2006)(for reference only).

### THE PROBLEM

Child and spouse abuse, maltreatment, and neglect (collectively called “abuse” here) has become prevalent in today’s society, and is a matter of increasing concern to federal, state and local officials.

The Air Force has a fully integrated program (AFPD 40-3) for the prevention of abuse, for the identification, treatment, and rehabilitation of the abuser, and can institute administrative and disciplinary actions against the abuser. Air National Guard units, as military organizations; do not have a similar program although ANG members may be entitled to assistance from Military One Source (<http://www.militaryonesource.com>). The Air Force program applies to all military and civilian personnel and their dependents entitled to receive care in a military facility (see AFI 41-115, Authorized Health Care and Health Care Benefits in the Military Health Services System).

All states have civil and criminal statutes and regulations, and abuse protection agencies to assist affected individuals. All personnel should be vigilant and address indications of or evidence of abuse by, to, or among their members and families. Suspicions of abuse are usually required by state law to promptly be reported to appropriate civilian law enforcement officials and protective social service type agencies in your jurisdiction.

### COMMANDER’S DUTIES

ANG Commanders have a duty to report known or obvious instances of abuse, or abusers to appropriate officials, failure to do so could expose the Air National Guard or the State to liability for a negligent omission because a person in a supervisory capacity or position of authority with knowledge of the abuse may later be deemed to have had a duty to act (*i.e.*, to report the abuse), and may be required by state law to promptly report suspected abuse. You should immediately consult your SJA to ensure compliance with applicable laws.

If one of your members has been adjudicated an abuser of a child or a spouse, or has been convicted of a criminal offense, by civilian authorities, after consulting with your Staff Judge Advocate, consider appropriate quality force management or disciplinary action. Conviction for a criminal offense involving a child or spouse may also be a Lautenberg conviction which could result in potential criminal liabilities for both the member and the organization. Consult your SJA and see Chapter 1-42.

**KWIK-NOTE:** Closely consult with your Staff Judge Advocate before reporting suspected child or spouse abuse to civilian agencies and before questioning one of your members about suspected abuse.

### RELATED TOPICS:

### SECTION

Personal Liability of Federal and State Officials  
Quality Force Management Actions  
Lautenberg Amendment

18-9  
24-12  
1-42

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## Child Custody - Unlawful

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Updated by Lt Col A. Jerome Dees, May 2009

**AUTHORITY:** Parental Kidnapping Prevention Act of 1980, 28 U.S.C. 1738A; Uniform Child Custody Jurisdiction Act (most, if not all states have adopted it as part of their statutes); 18 U.S.C. 1073.

### INTRODUCTION

“Child snatching” has become prevalent in today’s society. It usually, but not always, arises when a parent or relative does not return the child to the lawful custodial parent after a visitation period, or when a parent takes the child away from the lawful custodial parent. Public Law 96-611 (Section 10), includes cases involving interstate or international flight to avoid prosecution under state felony statutes for parental kidnapping as a federal crime within the prohibitions of 18 U.S.C. 1073. One case has held that the Parental Kidnapping Prevention Act, requires the authorities of every state to enforce custody and visitation determinations made by the courts of other states, imposes no affirmative duty of compliance on military commanders. (Dare v. Secretary of the Air Force, 608 F.Supp. 1077 (D. Del. 1985), aff’d per curiam, 787 F.2d 581 (3rd Cir. 1986)), cert. denied, 479 U.S. 846 (1986).

### ANG CONCERNS

What does this mean for Air National Guard Commanders? Even though the courts may not require a military commander to enforce custody and visitation orders, each Commander still has a responsibility for enforcing good order and discipline when members of their unit are in violation of federal or state law.

Once a state court with jurisdiction issues a decree, judgment or other order providing for child custody (including visitation rights), that order is valid and enforceable anywhere in the United States. If a child is taken by one parent in violation of that court decree, judgment or order, the lawful custodial parent, or someone on the parent’s behalf may contact you in an attempt to locate the other parent (and the child). The non-custodial parent may be one of your unit members and you could be contacted by others in an attempt to locate the child. You should contact your Public Affairs Officer and SJA for assistance in responding to outside requests for information about specific unit members.

If you learn that one of your unit members may have violated a child custody decree, judgment or order, and the Parental Kidnapping Prevention Act of 1980, you have an obligation to counsel the member and may, under state law, be required to notify the appropriate civilian authorities. Interference with custody is a criminal offense in most states so you should seek the advice of your Staff Judge Advocate before speaking to or questioning the member. Military members are expected to comply with the law and the ANG is not a “safe haven” for those who have violated the law. There is also a potential for personal liability if the child is injured or mistreated by the parent in unlawful custody, and the unit or members withheld information that could have prevented the injury or harm.

You should also consult your state code of military justice to determine what, if any, disciplinary action may be taken against the member under the code. Your SJA can assist you with this determination.

***KWIK-NOTE: Air National Guard bases should not be “safe havens” for violators of the law.***

### RELATED TOPICS:

### SECTION

Access to Military Installations

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Privacy Act	14-12

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# Citizenship

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Updated by Lt Col A. Jerome Dees, May 2009

**AUTHORITY:** 8 U.S.C. 1401, *et seq.*

## INTRODUCTION

As part of your pre-mobilization legal counseling, encourage all of your members who have documentary evidence of becoming a U.S. citizen, to safeguard those documents for later use in claims by themselves or their dependents for military entitlements.

This topic has been included in the Deskbook for informational purposes should a question of citizenship arise concerning one of your members, their dependents, or that of a prospective ANG member. Matters involving citizenship should be referred to the Judge Advocate.

Pursuant to 8 U.S.C. 1440(a), an individual's attaining citizenship may be accelerated for active military wartime service. Normal National Guard service does not qualify an individual for accelerated citizenship.

## GUIDELINES

In general, anyone born in the United States, Puerto Rico, U.S. Virgin Islands, Guam or other U.S. possessions is a U.S. citizen (USC). However, some persons born overseas may be citizens at birth through derivation or descent (as opposed to naturalized citizens) if one or both of their parents are USCs (subject to physical presence or residence requirements discussed below), or they may later become USCs through derivation. **PERSONS BORN ON U.S. MILITARY INSTALLATIONS OVERSEAS ARE NOT USC'S BY VIRTUE OF THEIR PLACE OF BIRTH, BUT MAY BE CITIZENS DERIVATIVELY THROUGH THEIR PARENTS(S).** The following guidelines outline the status of children born overseas to USCs:

### I. BIRTH TO TWO USC PARENTS (BOTH LEGITIMATE PARENTS WERE USC'S AT TIME OF CHILD'S BIRTH)

A. CHILD BORN OVERSEAS TO TWO USC PARENTS BEFORE 24 MAY 1934: Varying conditions. Check for advice.

B. CHILD BORN OVERSEAS TO TWO USC PARENTS BETWEEN 24 MAY 1934 AND 12 JAN 1941: Child is a U.S. citizen if at least one of the USC parents had some time in the U.S. prior to the birth. The child does not need any subsequent residence or presence to preserve citizenship.

C. CHILD BORN OVERSEAS TO TWO USC PARENTS AFTER 12 JAN 1941: Child is a U.S. citizen at birth **ONLY** if at least one of the USC parents had **RESIDED** at some time in the U.S. or its possessions (i.e., general place of abode - actual dwelling, not merely legal domicile, except military service overseas counts as U.S. residence) prior to the child's birth. The child does **NOT** need any subsequent residence or presence to preserve citizenship. **IF NEITHER U.S. CITIZEN PARENT EVER RESIDED IN THE U.S. OR ITS POSSESSIONS PRIOR TO THE CHILD'S BIRTH, CITIZENSHIP CANNOT BE PASSED ON. ONE PARENT MUST PETITION TO MAKE THE CHILD A LAWFUL PERMANENT RESIDENT (LPR).**

## II. BIRTH OVERSEAS TO ONE CITIZEN PARENT

A. **BIRTH OVERSEAS TO ONE CITIZEN PARENT PRIOR TO 24 DEC 1952:** There are varying conditions. By this time the U.S. State Department (overseas) or the Immigration and Naturalization Service (INS) of the U.S. Department of Justice (in the U.S.) should have adjudicated most cases and issued either a (consular) Report of Birth Abroad of a Citizen of the U.S. or a Certificate of Citizenship in those cases wherein they recognized U.S. citizenship. For individual questionable cases, check with the International Law Division of TJAG, USAF or with INS.

### B. BIRTH OVERSEAS TO ONE U.S. CITIZEN PARENT AFTER 24 DEC 1952:

1. **ONE U.S. CITIZEN PARENT AND ONE U.S. NATIONAL (A U.S. NATIONAL IS NOW GENERALLY ONLY A PERSON BORN IN AMERICAN SAMOA OR SWAINS ISLAND, AND SOME NON-U.S. CITIZENS BORN IN THE OLD CANAL ZONE) PARENT:** If the USC parent has at least one year continuous physical presence in the U.S. or its possessions prior to the child's birth, the child is a USC at birth.

2. **ONE USC PARENT AND ONE ALIEN (EITHER LAWFUL PERMANENT RESIDENT (LPR) OR ANY FOREIGN NATIONAL (FN)) PARENT:** The USC parent must have been physically present in the U.S. or one of its possessions for at least ten years before the child's birth, and at least five of the ten years must have been after reaching the age of 14, in order for the child to be a citizen at birth. Thus, if the USC parent is less than 19 or has spent less than ten years in the U.S. or its possessions prior to the birth, the child is NOT a U.S. citizen at birth. However, honorable service overseas as a U.S. military or civilian U.S. government employee or as a dependent of such military or civilian counts as time in the U.S. for the purpose of passing on citizenship this way. **ALSO CHILDREN BORN PRIOR TO OCT 10, 1978 AND GAINING U.S. CITIZENSHIP THROUGH THE USC PARENT 10 YEAR/5 YEAR RULE MUST SPEND AT LEAST 2 TO 5 YEARS IN THE U.S. BETWEEN THE AGES OF 14 AND 28 TO RETAIN THE CITIZENSHIP!**

3. **CHILD BORN OVERSEAS TO USC MOTHER OUT OF WEDLOCK** is a U.S. citizen regardless of mother's age if the USC mother had been physically present in the U.S. continuously for at least one year any time prior to the birth of the child. Thus, an 18-year old USC woman who spent most of her life in the U.S. prior to going overseas can pass on citizenship at birth to her child whose father is an alien, only if she does NOT marry the alien!

4. **CHILD BORN OVERSEAS OUT OF WEDLOCK TO USC FATHER** gets retroactive citizenship back to date of birth ONLY IF the child is legitimized by the USC father before the child turns 21.

## III. GENERAL COMMENTS ON BIRTH OVERSEAS

A. **IN OTHER CASES**, including certain births in Panama, seek advice from International Law Division of TJAG, USAF or INS.

B. **CHILDREN BORN OVERSEAS TO ONE OR TWO USC PARENTS** MAY also be considered by their country of birth as citizens of that country or of the country of their mother's birth, but there is no general rule. Notwithstanding, if they are U.S. citizens, they should have a U.S. State Department (consular) Report of Birth Abroad of a Citizen of the U.S. (FS-240) or an INS Certificate of Citizenship (AA-Series) to prove it. With either document, they can get a U.S. Passport, which itself is also good proof of U.S. citizenship. There is some legal question as to whether such a child is considered a natural-born citizen for purposes of qualifying for the Presidency, since such citizenship is statutory and not constitutional as it is for citizens born in the U.S. (14th Amendment to the Constitution).

C. **OTHER CHILDREN BORN OVERSEAS:** If the child is not a U.S. citizen by birth, the child may be eligible for some other status or may later become eligible for some status.

1. CHILD BORN OVERSEAS TO A U.S. LPR: A child born overseas to a mother who is an LPR of the U.S., and who is temporarily visiting abroad, can be registered and admitted as an LPR without an immigrant visa pursuant to 8 CFR 211.4 and 211.1. Thus, if a child does not qualify as a USC but the mother is a U.S. LPR, the child can be registered as an LPR. The mother and child must return to U.S., Puerto Rico, or Virgin Islands for the registration as soon as possible, and in any event within two years after the birth. The mother should not return to the U.S. after the birth without the child.

2. CHILDREN BORN OVERSEAS TO USCs and/or LPRs who are not otherwise eligible for automatic USC or LPR status should have their USC or LPR parent immediately petition for them to give them LPR status, either at a U.S. consular office overseas or at an INS office in the U.S.

D. REMEMBER, people born in Puerto Rico, U.S. Virgin Islands, or Guam are USCs at birth, regardless of parentage and should have a birth certificate to prove this. Check for other possessions or associated territories on a case-by case basis.

E. PEOPLE BORN ON U.S. BASES OVERSEAS DO NOT ACQUIRE CITIZENSHIP BY BEING BORN ON BASE, UNLESS THE BASE IS IN PUERTO RICO, GUAM OR U.S. VIRGIN ISLANDS!

#### IV. CHILDREN GETTING CITIZENSHIP AFTER BIRTH, THROUGH LATER DERIVATION OR NATURALIZATION

If the child is not a USC at birth, the following applies:

A. CHILD WHO IS NOT A CITIZEN (BORN TO TWO USC PARENTS): A USC parent must petition to give child LPR status, then can petition for the child's naturalization as long as the child is under 18.

B. CHILD WHO IS NOT A CITIZEN (BORN TO ONE USC PARENT): The USC parent should petition to give child LPR status. The USC parent can then petition for the child's naturalization while the child is under 18. The child will receive a Certificate of Naturalization. Or the child can become a citizen by derivation if: the child has become an LPR, the second parent becomes a USC by naturalization before the child turns 18, and the child has begun residing in the United States prior to the age of 18.

C. CHILD (BORN TO TWO NON-U.S. CITIZENS) WHO IS, OF COURSE, NOT A CITIZEN can become a USC if before the child turns 18 the child becomes an LPR and is residing in, or starts to reside in, the United States, and any of the following occur:

1. Both the parents become USCs by naturalization;
2. One parent dies and the surviving parent becomes a USC by naturalization;
3. The parent with legal custody of the child becomes a USC by naturalization (and the parents are legally separated or divorced); or
4. The mother of a child born out of wedlock (and the child has not been legitimated by the putative father) becomes a USC by naturalization.

D. In other cases, the USC parent or parents of an LPR child under the age of 18 can petition for the naturalization of the child.

E. Except for veterans of wartime service, all persons must first become LPRs in order to be naturalized as USCs. Anyone acquiring citizenship by derivation after birth must be an LPR first.

F. Adopted children are generally considered the same as natural children for citizenship purposes as long as they are residing in the United States with their adoptive parent(s) pursuant to a lawful admission for permanent residence, and they were adopted before the age of 16. Adopted children of members serving overseas may also be eligible.

G. For purposes of immigration, however, stepchildren are not accorded "child" status for naturalization purposes.

H. For immigration and naturalization purposes, "child" means an unmarried minor. Married children under 18 cannot gain naturalization benefits through their parents and must wait until reaching 18 to file for naturalization.

I. Parents cannot derive citizenship from their USC children, but USC children, 21 and over, can petition to get LPR status for their parents.

***KWIK-NOTE: For questions of citizenship, always check the latest guidelines, which may be obtained from your local office of the INS.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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## Civilian Re-employment Rights for Guard Members

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Updated by Lt Col A. Jerome Dees, May 2009

**AUTHORITY:** 38 U.S.C. 4301 through 4333; Applicable State Law

### INTRODUCTION

The rules relating to rights of Guard members concerning their civilian employment are now found in the Uniform Services Employment and Re-Employment Act of 1994 (USERRA). The 1994 law made improvements and clarified issues that had arisen under prior law. Most of the 1994 USERRA applies to employment on or after December 12, 1994. However, provisions dealing with disability were retroactive to August, 1990; the health insurance provisions became effective 13 October 1994; and some of the pension rules did not become fully effective until 13 October 1996. Therefore, care must be taken when dealing with these issues to initially determine which law would apply. Commanders should also consult their Staff Judge Advocate to determine if there are State Law protections similar to USERRA.

The basic intent of USERRA is to preclude discrimination in employment matters because of military membership or duty requirements, and to provide a remedial procedure to correct violations.

### BACKGROUND AND DISCUSSION

The protections of USERRA extend not only to veterans completing tours of active duty, but also to National Guard and Reserve personnel attending unit training assemblies, undergoing annual training, attending military schools, serving pursuant to mobilization orders, or performing other types of duty. By protecting the civilian employment rights of National Guard and Reserve personnel, USERRA helps implement the Total Force policy. If National Guard and Reserve personnel are to be able to train properly and to perform “real world” missions, they must be able to leave their civilian jobs without suffering any penalty or detriment. It is thus most important to the national defense effort that civilian employers grant their employees who serve in the National Guard or Reserve administrative leave for military training.

### PRACTICAL TIP

USERRA is administered by the United States Department of Labor, through the Veterans' Employment and Training Service (VETS). VETS provides assistance to those persons experiencing service connected problems with their civilian employment and provides information about the Act to employers. VETS also assists veterans who have questions regarding Veterans' Preference. Your Staff Judge Advocate should establish contact with the nearest office of the Employer Support of the Guard and Reserve and VETS. Commanders should work closely with their Staff Judge Advocates in handling all civilian employment matters.

### HIGHLIGHTS OF 1994 USERRA

**Basic Premise:** (1) An employee or applicant for employment cannot be denied employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of having served in the military. (2) A person who is absent from his or her civilian employment because of military service is generally entitled to be reemployed by his or her employer.

**Employers Subject to USERRA:** Every employer in the United States, including, Federal, state, local government, and private firms.

**Persons Protected:** Any person who “is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service.”

**Duty Covered:** Voluntary or Involuntary Service, active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, absence from work for a fitness examination. Includes special schools.

**Maximum Cumulative Absence Rules/School and Long Tour Rules:** Cumulative length of absence for duty and of all previous absences from job with any one employer may not exceed 5 years (change in employers starts new 5 year clock).

Exceptions:

- \* If required to complete an initial tour of duty
- \* If unable to obtain orders releasing from duty
- \* If performed per 10 U.S.C. 270; 32 U.S.C. 502(a) or 503, or due to additional training requirements determined and certified in writing by Secretary of military department to be necessary for professional development or skill training or retraining completion.
- \* If ordered to or retained on active duty per 10 U.S.C. 672(a), 672(g), 673, 673b, 673c, 688 or 14 U.S.C. 331, 332, 359, 360, 367 or 712.
- \* If ordered to or retained in active duty (other than for training) per law during war or during a national emergency declared by the President or Congress.
- \* If ordered to active duty (other than for training) in support of an operational mission for which order to duty is per 10 U.S.C. 673(b).
- \* If ordered to active duty in support of a critical mission or requirement.
- \* If called into Federal service as a member of National Guard per 10 U.S.C. Chapter 15 or 10 U.S.C. 3500 or 8500.

Time, frequency, and duration of training or service absence or the nature of service (including voluntary) shall not be the basis of denial of protection.

**Civilian Job Return Rights**

a. If duty was less than 91 days, the person is entitled to --

1) The position the person would have held had the person remained continuously employed without service interruption (escalator principle), so long as qualified for the job or can become qualified after reasonable efforts by employer or

2) The position the person held on commencement of military service absence, only if not qualified after reasonable efforts by employer to hold position discussed in paragraph a.1), above.

Unlike prior law -- no option of offering other jobs of equivalent seniority, status, and pay.

b. If duty was 91 days or more, the person is entitled to --

1) The position the person would have held had the person remained continuously employed without

service interruption (escalator principle) or

2) A position of like seniority, status, and pay as to paragraph b.1), above, so long as qualified for the job or can become qualified after reasonable efforts by employer or  
(Unlike a., above, under b. the employer can offer equivalent job instead of the job would have attained.)

3) If not qualifiable for position in paragraphs b.1) or b.2), above, then:

a. In the employee's position held on commencement of military service absence or

b. In a position of like seniority, status, and pay to that job

c. If not qualified or qualifiable for a. or b. option positions, then in any other position of lesser status and pay with full seniority, if qualified.

d. Reasonable efforts include training but do not include undue hardship on employer. Undue hardship means significant difficulty or expense, considering:

1) Nature and cost

2) Overall financial resources, number of employees, effect or impact at the location

3) Overall financial resources of employer, number of employees of employer, number, type, and location of facilities

4) Type of operation, work force, geographic separateness, administration, or fiscal relationship of facility to employer

e. If two or more entitled to same position, first to have left a position has prior right of re-employment.

f. What if disability incurred in or aggravated during military service? Employer must reasonably accommodate so as to allow return to position would have held had the person remained continuously employed without service interruption (escalator principle). If not qualified/qualifiable after reasonable efforts:

1) Position of equivalent seniority, status, and pay, so long as qualified for the job or can become qualified after reasonable effort by employer or

2) If not qualified/qualifiable, then in a position which is the nearest approximation to the equivalent position in a.1), above, consistent with circumstances of that person

g. Disability provisions -- retroactive to re-employment on or after 1 Aug 90

h. Right after military obligation (draft or volunteer/active duty or reserve) to "be restored to such position or to a position of like seniority, status, or pay" as though never absent or, if disabled, alternative nearest approximation unless impossible or unreasonable.

Member shall "be permitted to return to job with seniority, status, pay, and vacation as if not absent" and "shall not be denied retention in employment or any promotion or other incident or advantage of employment" because of reserve obligation or disablement.

### **Return to Work Procedure**

a. If duty is of 1 to 30 days -- Report at the beginning of the first regular work period on the first full calendar day,

following completion of service and “safe” transportation home and 8 hours (Q: Could this mean if duty over at 1630 hours Sunday, 2 hours travel time = 1830 hours, plus 8 hours = 0230 hours Monday, then first full calendar day is not until Tuesday?), or as soon as possible if impossible or unreasonable through no fault of person.

b. If duty is of 31 to 180 days -- Submit an application no later than 14 days after completion of service, or on the next full calendar day if impossible or unreasonable through no fault of person.

c. If duty is of 181 or more days -- Submit application no later than 90 days after completion of service.

d. Time extensions (if hospitalized for or convalescing from an illness or injury incurred in or aggravated during the performance of military service) for up to two years. Plus, extension of the two years for minimum time required to accommodate for circumstances that make time to report back impossible or unreasonable.

Failure to report on time does not forfeit job automatically. Military member employee is subject to employer's conduct rules/policies/practices for discipline.

**Q: What kind of notice is required before departing for service?** Written or verbal at any time prior to departure except: if precluded by military necessity or if impossible or unreasonable (per regulations of Secretary of Defense).

**Q: What kind of return documentation?**

If absent over 30 days, give employer documentation upon request that shows:

- 1) Application to return is timely if gone over 30 days and
- 2) Accumulated service does not exceed 5 years absence from that employer if gone over 30 days and
- 3) No disqualifying service discharge, dismissal, etc.

Employer may not deny re-employment if documentation does not exist or is not readily available.

**Q: Discharge Type Affects?**

Member loses USERRA rights if Dishonorable or Bad Conduct Discharge; Under Other Than Honorable Conditions; Dropped from the Rolls; or Dismissed.

**Q: Multiple covered persons/occupied position?**

If 2 or more returning military members -- first to have left for military duty has prior right to former position.

\* Returning employee not receiving former position because of multiple eligible returnees is eligible for other positions providing similar status and pay with full seniority.

\* If returning employee is disabled, employee is eligible to a position per the priority as set forth in para. 4f), above.

Displace replacement employee -- inferred.

No bumping of person with a superior claim for veterans under 5 USC.

**Special Protections for Returning Servicemember**

No discharge from civilian job without cause:

- 1) Within 1 year if military service was more than 180 days.

- 2) Within 180 days if military service was more than 30 but less than 181 days.
- 3) If 30 days or less duty, no discharge because of duty.

**Exceptions:**

If Employer's circumstances have so changed so as to be impossible or unreasonable to re-employ

If re-employment would impose undue hardship on employer to re-employ

- 1) Disabled
- 2) Not qualified or qualifiable with reasonable effort

**Seniority**

Entitled to seniority and other rights and benefits determined by seniority existing when left for military duty plus additional would have attained if remained continuously employed.

While absent the employee shall be deemed on furlough or leave of absence and entitled to such other rights and benefits not determined by seniority as are generally provided to other employees on furlough or leave of absence under policies in effect at the time military absence begins or established while on military service. May be required to pay for continuation as other employees.

**Vacation/Salary Continuation**

- a. Upon request employee is entitled to use during military duty absence any vacation, annual, or similar leave accrued prior to duty absence.
- b. Employer not required to continue salary. ("Benefit" is other than wages or salary for work performed.) May use of leave absence without pay.

Except: Federal Civil Service, state statutes, or employer policy

8. Miscellaneous Benefits -- Accrual or Participation Required?

**Escalator Principle:**

Entitled to seniority and other rights and benefits determined by seniority existing when left for military duty plus additional would have attained if remained continuously employed.

While absent the employee shall be deemed on furlough or leave of absence and entitled to such other rights and benefits not determined by seniority as are generally provided to other employees on furlough or leave of absence under policies in effect at the time military absence begins or established while on military service. May be required to pay for continuation as other employees.

a. Pension Benefit Plans:

ERISA covered plans (Sec. 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or any federal or state law provided pension plan for government employees are treated as follows:

- 1) No break in service for military duty absence
- 2) Military service will constitute service with the employer for purpose of determining non-forfeatability of accrued benefits and accrual of benefits.

3) Employer must fund and allocate the amount of any employer contribution for the absent military member in the same manner and extent as other employees.

4) If plan requires employee contributions or provides for employee deferrals (IRS Code, Section 402(g)(3)), employee is entitled to employer funded accrued benefit contribution allocations only to the extent the employee makes employee payments. Payments by employer due within a period of 3 times the period of military service absence, not to exceed 5 years.

5) To calculate the salary basis for the contributions:

a) Use salary/rate of compensation would have received during military absence or

b) If not reasonably certain, use employee's average salary/rate of compensation during 12 months immediately preceding the military duty (or, if less than 12 months duty, the prior period of employment equal to military duty time)

Thrift covered plans are treated per 5 U.S.C. 8432(b) as follows:

1) Employee may make upon return contributions in the amount that would have been made for the period of military duty absence, reduced by any actually made during absence.

2) Contributions can be made over period of time elected by employer and in addition to resume or elected regular contributions upon return to employment.

3) Executive Director of plan shall prescribe time, form, and manner in which employee may specify the total amount and time period for payments, including a maximum time limit which cannot be less than 2 times or more than 4 times the period of military duty absence.

4) If employee makes contributions, employer must make its contributions.

5) Employer contribution shall be 1% of employee's basic pay (rate would have been paid during military absence), reduced by any the employer actually made.

6) Employer may be required to pay lost earnings on contributions made up for the absent period under procedures set forth for calculating/crediting prescribed by the Executive Director of the plan.

7) No break in service for military duty absence at employee's option.

8) If reemployed during 2 Aug 90 - 13 Oct 94 (before the effective date of USERRA (13 Oct 94), employee is deemed (for purposes of Thrift provisions) to have not been re-employed until 13 Oct 94, or first day following actual re-employment, whichever occurred first.

9) Retroactive to a release from military duty, triggering return to civilian employment, which occurred after 2 Aug 90, 5 U.S.C. 8432(e), Section 4 of P.L. 103-353, 108 STAT. 3172.

10) If absent more than 90 days, employee may be required to provide documentation of eligibility (timely application for re-employment, proof of no absences exceeding 5 years, and no adverse discharge) before pension entitlements extended

b. Health Insurance

Military member employee may elect to continue group health insurance for self and/or dependents during period of military duty absence. Period of coverage is the lesser of:

- 1) 18 months from date employee leaves from civilian job, or
- 2) Day after employee failed to return to civilian job on time.

Employee must pay premiums as would other COBRA covered employees, but not more than 102% of the full premium (employer and employee portions). EXCEPT: If military duty is less than 31 days, employee need only pay the employee share of premium for coverage of self and/or dependents.

No exclusion or waiting period may be imposed on employee or dependents upon return to employment unless it relates to an illness or injury determined by Secretary of Veterans Affairs to have been incurred in or aggravated during performance of military duty. In that case an LOD or Physical Board and VA rules extend case coverage.

### **Remedies**

Employee files written complaint on form prescribed with Secretary of Labor through Regional Department of Labor office. Technical assistance to be provided by Department of Labor.

Department of Labor to investigate and resolve complaint through reasonable efforts. Subpoena power for witnesses and documents. (Except: legislative branch and judicial branch exempt.) If unsuccessful, Department of Labor is to notify the complainant of the results of the investigation and rights to proceed under 38 U.S.C. 4323 if state/local government or private employer or 38 U.S.C. 4324 for Federal Executive agency.

No authority for Department of Labor for Thrift plan disputes. (Pursue those through Thrift plan administrative appeals and litigation.)

#### State/local government or private employer

Upon receipt of Department of Labor notification of unsuccessful resolution, complainant may request that Department of Labor refer complaint to U.S. Attorney General. Attorney General, if reasonably satisfied that the complainant is entitled to rights or benefits under the Act, may bring enforcement action in U.S. District Court.

Complainant may initiate own legal action IF

- 1) Chose not to apply to Department of Labor; or
- 2) Chose not to request referral to U.S. Attorney General; or
- 3) Has been refused representation by Attorney General.

#### Damages/remedies court may order:

- 1) Comply with Act
- 2) Compensate lost wages or benefits
- 3) Payment of liquidated damages equal to the amount in 2), above, if court determines there was an employer willful failure
- 4) Prejudgment interest

No fees or court costs to claimant

If private attorney retained, court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

Court may use temporary or permanent injunctions, temporary restraining orders, and contempt orders to enforce the Act.

No suits may be brought by the employer or pension plans.

No state statute or limitations applies.

### Federal Executive Agencies

Federal Executive Agency includes U.S. Postal Service, Postal Rate Commission, NAFs, 5 U.S.C. 105 agencies (other than 5 U.S.C. 2302(a)(2)(C)(ii) types covered by 38 U.S.C. 4325), and any military department in 5 U.S.C. 102 with respect to civilian employees. 38 U.S.C. 4303(5).

Complainant, after filing complaint with Department of Labor, who receives a notification of an unsuccessful effort to resolve the matter, may request the Labor Department to refer the matter for litigation before the Merit Systems Protection Board (MSPB) and to Office of Special Counsel pursuant to 5 U.S.C. 1211.

If Office of Special Counsel is reasonably satisfied of complainant rights entitlement, the Special Counsel may appear as attorney for the employee before the MSPB.

If Special Counsel declines, complainant shall be notified.

Complainant can pursue own complaint with/without own attorney IF:

- 1) Chose not to apply to Department of Labor; or
- 2) Received an unsuccessful effort notice from Department of Labor; or
- 3) Chose not to be represented by the Special Counsel; or
- 4) Received notice from Special Counsel of intent not to represent.

MSPB can order requiring the Federal agency to compensate loss of wages/benefits, in addition to other remedies of the Act.

MSPB may award reasonable attorney fees, expert witness fees, and other litigation expenses.

Adverse finding before MSPB may be appealed by employee to U.S. Court of Appeals for the Federal Circuit.

If Special Counsel appeared at MSPB hearing, Special Counsel may represent during appeal.

### 5 U.S.C. 2302(a)(2)(C)(ii) agencies (FBI, CIA, DIA, CIO, NSA, and other intelligence agencies)

Each agency to prescribe procedures providing for 38 U.S.C. 4313 re-employment rights.

Designate agency official to determine if re-employment is impossible or unreasonable.

If determined impossible or unreasonable, agency official shall notify employee and Office of Personnel Management (OPM).

Determination is not subject to judicial review.

Employee can still seek information assistance from Department of Labor.

Director of OPM shall ensure an offer of employment if impossible or unreasonable to return to former position and employee submits an application.

### State Agency Employers:

There may not be a judicial remedy against state agencies under USERRA as a result of state sovereign immunity (See Alden v. Maine, 119 S.Ct. 2240). However, state law may provide a remedy for employees of state agencies.

### **State Statutory Protections:**

The legislatures of many states have enacted state statutes to protect the civilian employment rights of National Guard members and Reservists from those states. Such state legislation is permitted under federal law.

A Commander attempting to assist an Air National Guard member with a civilian employment rights problem should consult the Staff Judge Advocate for information regarding state civilian employment rights statutes which may be helpful.

## **PROBLEM AREAS**

### **Scheduling – Shift Work**

Commanders may well find that they have more civilian employment rights problems with local, state, and federal governmental entities than they do with nongovernmental employers. Such governmental entities employ firemen, policemen, and nurses, who work on shifts. Unit training assemblies for such employees who are members of Reserve components interfere with weekend shift assignments to the dismay of supervisors.

It is not uncommon for civilian employment rights problems to arise with the United States Postal Service, where employees serving in the National Guard or Reserve may also be needed for week-end shifts.

The local police department or fire department of a small town will often include a number of persons who are serving in the National Guard or Reserve. Their supervisors become distressed when a number of these personnel have military duty on the same weekend. Commanders and Staff Judge Advocates may find it helpful to deal with mayors and city attorneys rather than with low level supervisors in resolving civilian employment rights problems involving policemen and firemen.

Another problem area involves civilian employers who assign work time on rotating shifts. Civilian employers must grant employees who work on rotating shifts leaves of absence to perform military training with the National Guard and Reserve just as they must grant leaves of absence to non-rotating shift employees. Many employers encourage and permit their National Guard and Reserve employees who work on rotating shifts to swap work assignments with others to accommodate military duty needs and to make up work time lost. However, the United States Supreme Court has ruled that employers are not required to provide work rescheduling assistance to shift employees who are National Guard members and Reservists unless such rescheduling assistance is provided to other shift employees who do not serve in the National Guard or Reserve.

### **Practical Considerations**

#### ESGR

A source of possible assistance is the National Committee for Employers Support of the Guard and Reserve, an activity of the Department of Defense. This National Committee may be reached at a tollfree number, 1-800-336-4590.

In addition, most states have a comparable State Committee for Employers Support of the National Guard and Reserve. Air National Guard members and their Commanders may contact the State Committee for Employers Support of the National Guard and Reserve through the Adjutant General's office in their respective states.

#### Local Unit Action

In many cases, civilian employment rights problems can be resolved without having to invoke the assistance of the United States Attorney, the Office of Veterans Reemployment Rights in the Department of Labor, or the National and State Committees for Employers Support of the Guard and Reserve.

Often a polite but firm letter to a civilian employer from the Commander or the Staff Judge Advocate will have the desired result. Such a letter should explain, in straightforward language the Total Force concept, the civilian employment rights protections given by federal (and often state) law, make discreet mention of the United States Attorney and the Department of Labor, and appeal to the employer's patriotism. Such a letter should explain how important it is to the national defense that National Guard and Reserve personnel be given leave from their civilian jobs to undergo required military training without loss of any benefits. Such a letter sent in advance of any additional training besides the regular UTA or AT periods should also be used to prevent civilian employment rights problems.

Such a letter is often most effective when it is sent to an executive of the employer rather than to a low level supervisor. In today's environment, there are many civilian employers who are simply unaware of the civilian employment rights protections given by law to National Guard and Reserve personnel. A firm but courteous letter to such persons may often resolve a civilian employment rights problem. A Commander should write a civilian employer only if the Staff Judge Advocate has reviewed and approved the letter.

#### Requesting Leave of Absence - Goodwill

While the law indicates that a member of the National Guard or Reserve must request a leave of absence from the civilian employer for the purpose of performing military training, there is no requirement that the request be in writing. However, some employers may prefer a written request. A written request for a leave of absence for military training may prevent misunderstandings.

While the law does not specify when a request for a leave of absence should be made, common sense indicates that a National Guard member or Reservist should make the request at the earliest possible date.

Many National Guard and Reserve personnel find it helpful to provide civilian employers with copies of military duty orders or unit training assembly schedules as soon as these documents are printed. Again, there is no legal requirement that these documents be presented.

***KWIK-NOTE: Although the laws in this area heavily favor the military member, since traditional Guard members work full-time for their civilian employers, TACT, PERSUASION, AND RESTRAINT should first be tried to resolve any problems before bringing in the U.S. Department of Labor or equivalent state authority.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Preventive Law Program	17-15
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Premobilization Legal Counseling	20-4

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# Debt Collections

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**Updated by LtCol A. Jerome Dees, May 2009**

**AUTHORITY:** DoD 7000.14-R, *DoD Financial Management Regulation*, Vols. 4 (May 09) and Vol. 5 (May 09); AFMAN 65-116V2, Chapter 6 (16 Mar 07) and AFMAN 65-116V1 (1 Apr 07).

## INTRODUCTION

This topic deals with ANG collection of debts owed to the United States by ANG members. It does not apply to private debts of ANG members to other creditors, including dependent support.

## PROCEDURES AND REQUIREMENTS

Generally, debts owed by ANG members to the United States, its agencies and instrumentalities, may be collected voluntarily or involuntarily through the various procedures prescribed in DoD 7000.14-R, Vol. 4 and 5. The unit's servicing Comptroller is the appropriate person to commence such actions. In cases of doubt as to the appropriateness of beginning such collection, the servicing Judge Advocate's advice should be sought. As a general principle, Comptrollers are required to take timely and aggressive collection action with respect to any debts owed to the United States. Due process requirements in such actions require written demands for debt payment and an opportunity for the debtor to respond with agreement or objection.

The government prefers to collect its debts in a lump sum; however agreements may be made for installment payments, in most cases. Interest, penalties, and administrative charges may accrue from the time when the first demand for payment is made.

Debts owed to the United States may be recouped involuntarily by salary offset under federal law. These procedures are prescribed in DoD 7000.14-R, Vol. 4 and 5, and AFMAN 65-116V1 Chapter 52.

The government may choose to compromise, suspend or terminate a collection activity under specified circumstances. These circumstances are listed and described in DoD Instruction 7000.14, Vol. 4 and 5.

## RELIEF FROM COLLECTION

Frequently, a service member facing debt collection by the United States seeks waiver or remission of the debt. The key elements for the government to grant such waiver or remission are:

1. That the debt or erroneous overpayment was not caused by the act of the service member; and
2. That the recoupment of the money by the government will work a serious financial hardship on the member.

Requesting waiver or remission may or may not temporarily suspend involuntary collection of the debt while the matter is under adjudication. If relief is granted, it may result in either termination of additional collections forward, or possibly in the restoration of the recouped overpayments back to the service member.

For a more detailed discussion of this area, see the topic in this Deskbook entitled “REMISSION AND WAIVER OF INDEBTEDNESS.”

***KWIK-NOTE: The U.S. government aggressively seeks to collect its debts.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Bad Checks	23-3
Bankruptcy Notice	23-4
Garnishment	23-15
Legal Assistance Program	17-8
Officership	1-24
Remission and Waiver of Indebtedness	1-33
Reports of Survey	25-19
Travel Advances	27-10
Travel Vouchers	27-12

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## Dependent Support

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Updated by LtCol A. Jerome Dees, May 2009

**AUTHORITY:** AFI 36-2906, Personal Financial Responsibility (1 Jan 98)

### INTRODUCTION

This topic deals with debts ANG members owe their dependents. Air Force Instruction 36-2906 specifies and outlines the obligation of Air Force personnel to pay all just financial obligations in a proper and timely manner.

### RESPONDING TO DEPENDENTS' COMPLAINTS

Issues of dependent support most frequently arrive at the Commander's office by way of a telephone call or a letter from a complaining spouse, former spouse, or other dependent of an ANG member. The Commander should respond to the dependent in an appropriate and courteous manner without promising a specific outcome. You may advise the caller or writer that you will discuss the matter with the member and advise the member to adhere to lawful obligations. You **MAY NOT**:

1. Admit or imply liability of a member for the claimed dependent support;
2. Divulge that administrative or disciplinary action will be taken;
3. Act as an intermediary for any party; or
4. Provide legal advice to the dependent of available remedies within the military to collect the dependent support.

You should consult you servicing Judge Advocate to discuss and appropriate response and to review any written response.

### SYMPATHY OR ANGER PLAYS NO PART

Some of the complaints you receive may "tug at your heartstrings." The complaint may paint a picture of the member as a deadbeat who is living well at expense of the dependent spouse and children. Typically the complaint alleges that the spouse and/or children are going without enough food, clothing or shelter because the member has either refused to honor court-ordered support obligations or has just stopped providing support for the spouse and/or children. As a Commander must should remember that there are at least two sides to every story and remain neutral until you have an opportunity to determine the facts. Consult your SJA before talking to the member about the complaint as what is said by the member may form the basis of some form of adverse action against the member.

### POLICY

The Air Force's policy is that dependent support is an aspect of meeting one's just financial obligations. The standard is that adequate support must be provided, but the Air Force does not attempt to arbitrate what is adequate. Commanders have no authority to unilaterally deduct money from a member's pay for support of dependents, even if a civilian court has ordered the member to pay such support. Adequacy of support is highly subjective, and making specific judgments should only be done in extreme cases.

## **BAQ**

One objective standard by the Air Force is that a member may only draw Basic Allowance for Quarters (BAQ) at the “with dependent” rate if in fact the BAQ is being used entirely for the benefit of one or more of the member’s dependents. Payment to or for the benefit of any (not necessarily all) dependents fulfills this minimal requirement. Failure to support in this manner may result in BAQ recoupment for the periods of non-support. Members should be advised that they may not receive BAQ at the with-dependent rate if they do not provide financial support to their spouse or children, and that refusal to support family members will result in termination of BAQ entitlement at the with-dependent rate.

## **GARNISHMENT**

Occasionally a civilian court Garnishment Order or Summons for spousal maintenance (alimony) and/or child support arrearages (not for current obligations) may be received by the command. These should properly be referred to the Finance Officer for appropriate transmittal to the Defense Finance and Accounting Service (DFAS-DE). The servicing Judge Advocate should be consulted on the legal sufficiency of the garnishment action and its underlying judgment, and should monitor that an appropriate response is made to the court within the prescribed time. Since military pay may be garnished for spousal maintenance and child support arrearages, upon receipt of a Garnishment Order or Summons, the Commander should also refer the member to the Judge Advocate for legal assistance and an explanation of the member’s rights and obligations. Attachment 2 of AFI 36-2906 provides detailed facts regarding garnishment of military pay for child support and alimony obligations.

## **COURT ORDER**

Court ordered support is considered a just debt and should be paid by the service member. Failure to pay court ordered support can affect the member’s security clearance, ability to reenlist, deployability and could land the member in jail.

## **CONCLUSION**

Although AFI 36-2906 does not appear to specifically apply to ANG members other than AGRs; it does apply to mobilized members of the ANG. Commanders should freely consult with their servicing Judge Advocate on any support of dependents situations which become aggravated and which may possibly cause the Commander to take adverse military action against the member.

**KWIK-NOTE: Commanders may terminate entitlements being improperly used, but cannot compel members to support their dependents.**

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Bad Checks	23-3
Bankruptcy Notice	23-4
Child and Spouse Abuse, Maltreatment and Neglect	23-5
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Paternity Claims	23-18

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# Domicile

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Updated by LtCol A. Jerome Dees, May 2009

**AUTHORITY:** 50 U.S.C. Appendix 571; Black's Law Dictionary; applicable state law.

## INTRODUCTION

The Servicemember's Civil Relief Act provides that military members do not lose or change their state of residence or domicile simply because they move pursuant to military orders. The general rule of thumb is that a military member remains a resident of the state from which they joined the military, unless they have taken steps to become a resident of another state. This rule does not apply to non-military spouses nor does it apply to members of the ANG who usually become a resident of the state in which they live by operation of state law.

The general rule is that legal residency is established when an individual is physically present in a state AND has the intent to permanently reside in the state. The "intent to permanently reside" does not mean the individual plans to stay forever and you can still be a resident even if you plan, at some point in the future, to move to another state. "Intention to permanently reside" can be shown through several factors: ownership of real property; voter registration; vehicle registration; driver's license; and declaration of legal residence on legal documents (including DD 2058, used by the military). One of these factors by itself would probably not be enough to change residency, but if a service member moved to a state and registered to vote, bought a house, registered her car, got a new driver's license, and registered her children in the local schools, she would most likely be considered to be a resident of the new state. Additionally, if all these factors are present the intent to move at some unknown time will not prevent the individual from being considered a resident by the state.

## DEFINITION

The word "domicile" is derived from the Latin "domus", meaning home or dwelling house, and domicile is the legal concept of "home," *i.e.* that place where people have their true, fixed and permanent home and principal establishment, and to which whenever they are absent they have the intention of returning. "Domicile" is also the established, fixed, permanent, or ordinary dwelling place or place of residence of a person, as distinguished from the person's temporary and transient, though actual, place of residence. It is the legal residence, as distinguished from the temporary place of abode.

"Citizenship," "habitation," and "residence" are words which in the particular case may mean precisely the same as domicile. "Domicile" and "residence," however, are frequently distinguished, in that domicile is the home, the fixed place of habitation; while residence is a transient place of dwelling. People can have many residences, but usually only ONE DOMICILE. When we speak of domicile, we mean a state in the United States, or a specific place outside the U.S.

## RULE

An existing domicile continues until a new domicile is acquired, and a one who changes domiciles may have to document proof of the change. The general rule is that a domicile is neither lost nor gained solely by being absent from the old domicile or present in the new location.

## THE EFFECT OF DOMICILE

The issue of domicile or residence may affect questions of a person's personal property, income, gross income, the validity of Wills, Powers of Attorney, Living Wills, taxes, motor vehicle registration and licensing, voting, the ability to sue or be sued in the courts of a given state, and other civilian matters indigenous to a particular state. Militarily, "domicile" or "residence" may also affect a person's the proper completion of travel vouchers, and the sending or receiving of notices or other military documents.

## HOW TO CHANGE DOMICILE

In order to change domiciles, you must initially satisfy the following criteria: (1) you must be physically located and have an actual address in the new state; (2) you must intend to remain in the new state indefinitely or treat the new location as your permanent home; (3) you must intend to abandon your old domicile.

Practically speaking, however, you will not be able to change your domicile simply by insisting that you have had the intention to remain in your new domicile and abandon your old one. You must produce evidence of your intentions. To do so, you should consider the following actions in your new state: (1) register to vote; (2) obtain a driver's license; (3) register your vehicle and transfer title; (4) purchase real estate and apply for the homestead exemption; (5) change your W-4 form; (6) execute a will; (7) open a checking account and other bank accounts; (8) obtain professional licenses, if appropriate.

You may also manifest your intent through actions in your old domicile, such as selling real estate, closing bank accounts, and terminating other business relations.

This topic may be included in your Legal Assistance and Preventive Law Programs. All questions on domicile and residency should be referred to the Judge Advocate. Some of the Related Topics below are impacted by a person's domicile.

***KWIK-NOTE: Absent acts demonstrating an intent to change domicile, the place of military service does not affect domicile. The unit must know every member's "home of record."***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Citizenship	23-7
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Driver's Licenses	21-3
Foreign Divorce Decrees	23-13
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## Financial Responsibility

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Updated by Lt. Col. A. Jerome Dees, May 2009

**AUTHORITY:** AFI 36-2906, *Personal Financial Responsibility* (1 Jan 98)(for reference only)

### INTRODUCTION

Air Force Instruction 36-2906 specifies and outlines the obligation of Air Force personnel to pay all just financial obligations in a proper and timely manner. This topic generally focuses on debts owed by ANG members to private creditors. See the topic in this Deskbook entitled "DEPENDENT SUPPORT" for a discussion of financial obligations of ANG members owed to dependents. Commanders should be careful to counsel members preparing to deploy to take care of any financial issues prior to deployment since the active component commander will have more authority to address financial issues.

### RESPONDING TO OUTSIDE COMPLAINTS

In the ANG, a problem of personal financial responsibility will normally come to the Commander's attention by way of a phone call or letter from the creditor of an ANG member. The member may be an AGR, a Technician, or a traditional Guard member. While the caller or writer should be treated with respect and courtesy, it should be made clear that the ANG cannot intervene directly between the parties and, that the matter will have to be handled in the civilian courts. The ANG is not a collection agency. Usually, the most effective response is for you, the Commander, to inform the complainant that that the matter will be discussed the matter with the member. It may also be helpful to say that you will remind the member about the member's legal responsibility to pay all just financial obligations.

ANG Commanders have no authority to compel their members to comply with their legal financial responsibilities. In responding to creditors, Commanders **MUST NOT**:

1. Admit or imply liability of a member;
2. Divulge that administrative or disciplinary action will be taken;
3. Act as an intermediary for any party; or
4. Provide legal advice to the creditor of available remedies within the military to collect the debt.

The discussion with the member should be informative to the member about the contact from the creditor, but it should not be judgmental or disciplinary. If a follow-up response to the caller or writer was promised, the Commander and the member should agree who will do it. Commanders should refer complaint letters to their Judge Advocate for assistance in drafting an appropriate response.

Be careful when you talk to the member as what is said by the member may eventually form the basis of adverse military action against the member.

### ACTION AGAINST MEMBER

In the event that calls or letters from different creditors regarding the same member become frequent, the Commander should determine an appropriate course of action in conjunction with the servicing Judge

Advocate. The issue of service-connection, impact on duty performance and mission accomplishment must be carefully considered before any administrative or disciplinary action is begun.

## **GARNISHMENT**

Occasionally the Commander is served with a Garnishment Order or Summons from a civilian court, indicating that a judgment has been entered against an Air National Guard member, and involuntary collection action is being sought by the creditor through the court from the ANG pay of the debtor. This is discussed in detail in the "GARNISHMENT" topic of this Deskbook. Attachment 3 of AFI 36-2906 is a detailed fact sheet regarding personal indebtedness and involuntary allotments for civil debts.

## **DEBTS TO THE GOVERNMENT**

Debts of ANG members to the government or its non-appropriated fund instrumentalities (NAFIs) created, for example, by bouncing checks on base (for example, the BX or the commissary) or running up charges at the clubs are amenable to Air Force debt collection procedures addressed in a separate topic in this Deskbook entitled "DEBT COLLECTIONS."

## **BANKRUPTCY**

Relief in bankruptcy is available to ANG members as it is to any other person. The filing of a bankruptcy petition cannot be deemed the direct or sole cause for adverse action against an ANG member. The effect of bankruptcy on any situation being analyzed by the Commander or the Accounting and Finance Officer (AFO) should be discussed with the servicing Judge Advocate.

## **ACTION BY MEMBERS FOR WRONGFUL CONTACT BY CREDITOR**

Under the laws of many states, the employer (ANG) of the debtor (member) cannot be contacted about a consumer debt of the member without the written consent of the debtor unless there is a court judgment by the creditor against the debtor or unless the debt arose from a bad check. If a creditor violates such an applicable law in the state where your base is located, refer the member to your Judge Advocate for legal assistance and advice.

***KWIK-NOTE: ANG Commanders cannot compel their members to pay their private debts.***

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## Foreign Divorce Decrees

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Updated by Lt. Col. A. Jerome Dees, May 2009

**AUTHORITY:** AFI 36-3026, *Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel* (20 Dec 2002); OpJAGAF 1987/9, *Foreign Divorces, Determination of Validity for Entitlement* (16 Jan 87); applicable state law.

### JUDGE ADVOCATE REVIEW REQUIRED

If an ANG member submits a foreign divorce decree (sometimes also known as the "quickie" divorce) as supporting documentation for termination of ID card and other military entitlements of the former non-military spouse, the servicing base Staff Judge Advocate (SJA) office must review the decree and render a legal opinion on its validity under U.S. law. The standard for review is whether the court order would be valid under U.S. law. The local SJA should send the opinion to State Headquarters/JA for further processing to NGB/JA. A foreign divorce decree is not accepted as documentation for ID card and other military entitlements purposes until the legal staffs make their final determination on the decree's validity.

### STANDARD FOR REVIEW

Foreign divorces must be valid under U.S. law. Foreign divorces of doubtful validity may not be used to establish or terminate an Air Force administered entitlement unless a court of competent jurisdiction in the U.S. has declared the divorce valid. Foreign divorces are of doubtful validity when the foreign court lacked subject matter jurisdiction because neither party established a bona fide domicile, even though the laws of the foreign country do not require residence or domicile as a condition to jurisdiction. Temporary presence to establish domicile solely to obtain a divorce does not establish bona fide domicile under U.S. law, even if the residence requirements of the foreign jurisdiction in question are met. Comptroller General decisions at 61 Comp. Gen 104 (1981) and 55 Comp. Gen. 533 (1975) illustrate these principles.

### COURT OF "COMPETENT JURISDICTION"

Under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, divisions of military retired pay and garnishments of active duty pay may only be made through a court order issued by a "court of competent jurisdiction," which is defined by the statute as a court of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. The definition also includes any court of a foreign country with which the United States has an agreement requiring the United States to honor the country's court order. It does not include a court order issued by any other foreign sovereign.

### EFFECT OF INVALID DIVORCE DECREE

This means that if the ANG member remarries, and the foreign divorce decree is of doubtful validity for purposes of ID cards and other military entitlements to non-military spouses, the former spouse will retain them, and the new spouse will not be entitled to them. Also the former spouse may continue to be able to file for survivor benefits and the new spouse may not be able to. All affected ANG members should be made aware of these potential results.

**KWIK-NOTE:** Alert your MPF and Military Pay section to submit all foreign divorce decrees presented by your members, to your Judge Advocate for a legal review.

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## Former Spouses' Protection Act

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Updated by Lt. Col. A. Jerome Dees, May 2009

**AUTHORITY:** 10 U.S.C. 1072, 1076, 1086, 1408, 1447, 1448, 1450 and 1451 (Uniformed Services Former Spouses' Protection Act).

### INTRODUCTION

Federal legislation has rarely created a greater concern or emotional reaction among members and retirees than that associated with the Uniform Services Former Spouses' Protection Act (USFSPA). USFSPA applies to all active duty personnel, and members of the Reserve Forces, including AGRs, technicians (for military pay), and traditional Guard members. Many service members and retirees do not understand how this legislation works. They want to know why the state court has a right to take a portion of their retirement and award it to their former spouse. An understanding of USFSPA is important to all Commanders because the marital discord of members can negatively impact your effort to maintain good order and discipline.

### BACKGROUND

Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA) in 1982 to allow state courts to divide military retired pay upon divorce and to allow former spouses, in some circumstances, to receive a portion of the member's retired pay directly from the government. The legislation allows former spouses to be beneficiaries under the Survivor Benefit Plan (SBP), and allows qualifying former spouses to receive the same benefits as surviving spouses of military retirees (such as care at military medical facilities and access to military exchanges and commissaries). An amendment to the USFSPA also extended some of these benefits to some victims of spousal or child abuse.

### RETIRED PAY (PENSION)

USFSPA does not set any limits on the amount of disposable military retirement pay that can be awarded to a former spouse. Courts are required only to make an equitable division. The definition of "equitable" will depend on the facts of the case and, may range from zero to more than fifty percent. The court will consider the length of the marriage and the number of married years coinciding with retirement creditable military service, but there is no magic number. Essentially, states are allowed to treat military retired pay as a portion of marital property, similar to civilian pensions. Division of retired pay does not affect an award of alimony.

USFSPA does not create a right in the former spouse to the military member's retired pay. Only state law can do that. What USFSPA does is to allow the state court to treat a military pension as it does any other pension, under certain circumstances, and if certain conditions are met. In essence, while USFSPA does not create a right in the former spouse to the military member's pension, it does not prohibit the exercise of that right if the state court so orders.

A state court cannot order a member with 20 or more years of creditable service to retire. However, if a member gets divorced before obtaining 20 "good" years for retirement, a state court is not prohibited under USFSPA from providing for distribution of the military pension if and when it "vests" (20 "good" years), and the member retires in the future.

### Division of Retired Pay as Distribution of Marital Assets

Under 10 U.S.C. 1408(c)(1), a state court may treat disposable retired pay as property belonging only to the military member or to both the member and the spouse, according to that state's law. Thus, the pension can be divided if state law permits. Most states do permit this division. The few that do not, usually award higher spousal support or divide other property in favor of the spouse to make up for it.

Federal, state and territorial courts of competent jurisdiction can divide retired pay; and foreign courts can divide it if a treaty exists, requiring mutual compliance with that country's law and U.S. law.

### **When Can the Court Divide the Pension?**

The court can only treat disposable retired pay as property for distribution under state law as part of the marital assets, if it has jurisdiction over the member. Jurisdiction must be based on either:

1. The member's residence, other than because of military assignment;
2. The member's domicile; or
3. The member's consent to the court's jurisdiction.

In short, the member's due process rights of notice of the proceedings and an opportunity to be heard must be complied with. The Soldiers' and Sailors' Civil Relief Act must also be also complied with when it applies. See the topic in this Deskbook entitled "SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (FEDERAL AND STATE)" for a discussion of when that statute applies.

### **How Long Must the Marriage Have Lasted Before the Pension May be Divided?**

There is no set minimum time for the duration of the marriage in order for a division of retired pay to take place. This is completely in the court's discretion and pursuant to state law. This "no minimum length of the marriage" rule for division of the pension must not be confused with the minimum length of marriage rules for direct payment to the former spouse discussed later in this topic.

### **Only "Disposable" Retired Pay May be Divided**

If the court apportions retired pay between the member and the spouse, only "disposable retired pay" (DRP) may be divided. DRP is defined at 10 U.S.C. 1408(a)(4) as the member's monthly retired pay minus certain deductions, such as:

1. Income tax withholdings;
2. SBP premiums;
3. Overpayments and recoupments by the U.S. government;
4. Forfeitures ordered by a court-martial;
5. Waivers of retired pay required by law in order to receive compensation under 5 U.S.C. (federal civil servants) and 38 U.S.C. (veterans benefits); and
6. If the member is entitled to disability pay, the product of the member's monthly retired pay and the percentage of the disability. This is because disability pay under Chapter 61 of Title 10 is not part of disposable retired pay and belongs solely to the member. For example, if monthly retired pay is \$500.00, and the member is 40% disabled, \$200.00 is deducted from the monthly retired pay which is subject to the division.

## **How Much of DRP Can Be Awarded to the Former Spouse?**

USFSPA sets no limits on the amounts of the DRP, which can be awarded, to former spouses. This is completely within the discretion of the court and state law. The former spouse conceivably could get it all. Again, do not be confused between the “no limits” rule for amounts awardable, and the maximum award subject to direct payment discussed later in this topic.

## **What a Court Order Awarding DRP Must Say to be Valid**

10 U.S.C. 1408(a)(2)(c) requires court orders dividing retired pay for the purpose of property settlement to express such awards to former spouses “in dollars or as a percentage of disposable retired pay.”

## **Direct Payment**

### What is it?

Direct payment of an award of the military member’s pension is a valuable right to the former spouse because the payment comes directly from the Air Force to the former spouse. If there is no direct payment pursuant to USFSPA, the Air Force pays the military member the full pension amount without regard to the court ordered award to the former spouse, and it is up to the military member to pay the former spouse the amount due as ordered by the court. While failure to obey the court order requiring payment by the military member to the former spouse is punishable as contempt of court, it is not hard to imagine some disgruntled military members delaying payments due their former spouses long enough to be inconvenient and annoying yet just short of being in contempt of court. Unfortunately, there are also other members who neglect altogether to pay their former spouses. As a result, direct payment is better because the Air Force does not take sides - it complies with the court order and makes the direct payments to the former spouse to the extent permitted by USFSPA. Thus the key for the former spouse is to qualify for direct payment by the Air Force.

### How much of DRP can be directly paid?

The total amount of the member’s retired pay directly payable to a former spouse cannot exceed 50% of the member’s DRP. Again, do not confuse the right to receive the DRP with the right to receive direct payment of it. Amounts of the DRP awarded in the court order in excess of 50% of the DRP must still be paid to the former spouse by the member.

The “50% maximum” means that if a member has multiple spouses who have court orders awarding them payments from the member’s retired pay, the court orders are treated on a first-come, first-served basis, and the total of a member’s DRP that will collectively be directly paid to all former spouses with the required court orders cannot exceed 50% of the DRP.

There is one exception to the 50% cap. If the member’s retired pay is also garnished pursuant to 42 U.S.C. 659, for arrearages of child support or child and spousal support, the cap for direct payment can rise to 65% of the member’s DRP.

### What are the substantive requirements to obtain direct payments?

There are two substantive requirements which must be met before direct payment will be made:

1. The court order must be a final decree of divorce, marriage dissolution, annulment or legal separation, or a court approved property settlement agreed to by the military member and the former spouse; and
2. The final decree must provide for either:
  - a. Child support; or

b. Spousal support (alimony); or

c. If the division of retired pay is paid as part of the property settlement:

(1) The marriage must have overlapped with at least 10 years of the member's service that is creditable for retirement; and

(2) The court order must express payment in dollars or a percentage of the member's DRP.

This means that assuming the decree is final, the pension award can be used to satisfy either current child or spousal support, if either type of support is provided in the court order (Note, the difference here with garnishments, discussed in the topic in this Deskbook entitled "GARNISHMENT," which deals with arrears of child or spousal support). The pension can also be (and probably more commonly is) directly paid to the former spouse as part of the property settlement if the court order correctly recites that at least 10 years of the marriage between the member and former spouse coincided with 10 "good years" of the member's service for retirement, and the court order expresses the award in dollars or a percentage of the pension.

Let's distinguish some things.

1. The "10 year marriage/service overlap" rule only is required for direct payment from the Air Force if the pension is awarded as part of a property settlement. This "10 year" overlap rule does not apply to (and without regard to the length of the marriage, direct payment of the pension can still be made for) child or spousal support.

2. Also, if the military member and former spouse were not married as long as 10 years, although there can be no direct payment of the pension as part of the property settlement, the failure to meet the "10 year" overlap requirement does not in any way invalidate the court order awarding part of the pension to the former spouse. All that the failure to meet the "10 year" overlap requirement means is that the former spouse will (hopefully with minimal hassle) receive the pension award from the military member and not directly from the Air Force. As discussed above, the length of the marriage is not a requirement under the USFSPA before the former spouse is entitled to the member's retired pay.

#### What are the procedural requirements to obtain direct payment?

Before the agency (for ANG members it is the Air Force) will begin direct payments, the former spouse must comply with certain procedural requirements. While the first six items below can be separately provided, DD Form 2293 signed by the former spouse includes them. Items 7-10 must be provided in addition to DD Form 2293 or items 1-6 separately provided:

1. Written application requesting the direct payment;

2. The member's name and social security number;

3. Written statement that the court order has not been modified by the court or appealed by the former spouse;

4. Agreement by the former spouse that future overpayments are recoverable and subject to involuntary collection from the former spouse or the estate of the former spouse;

5. Agreement by the former spouse to notify the agency if the court order is vacated, modified or set aside. This includes notice of the former spouse's remarriage if part of the payment is for spousal support, or changes in eligibility for child support if part of the payment is for child support;

6. Name and address of the former spouse;

7. Certified copy of the court order and divorce decree, certified within 90 days of its service on the agency;
8. If the order was issued while the member was in Title 10 status, proof that the member's rights under the Soldiers' and Sailors' Civil Relief Act were honored;
9. Proof of the date of marriage if not stated in the court order; and
10. Service of the above personally, or by registered or certified mail, return receipt requested on the:  
Defense Finance and Accounting Service; Cleveland Center, Code L; PO Box 998002; Cleveland, Ohio  
44199-8002  
(216) 522-5301 (Customer Service)

#### How will direct payments be made?

Once the substantive and procedural requirements are met, payment of the designated amount will be made directly to the former spouse by the Defense Finance and Accounting Service (DFAS), and not more frequently than monthly. Payments will begin 90 days after the effective service of the court order on the DFAS or on the date the member first becomes eligible for retired pay, whichever is later.

#### When will direct payments stop?

Direct payments terminate upon the earliest of the following three events:

1. The terms of the court order are satisfied;
2. The death of the retired member; or
3. The death of the former spouse.

This means that the former spouse cannot transfer while alive, or through a Will, the right to receive direct payments.

### **Summary of Division and Direct Payment Rules**

#### Division

Federal law now permits military pensions to be divided between members and their former spouses. There is no federal limit on the amount of the pension that can be awarded to each party. Only the part of the pension constituting "disposable retired pay" may be divided. The division must be set forth in a valid court order.

#### Direct Payment

For direct payment to former spouses of the divided pension, the court order must be final and provide for child or spousal support or a property settlement. If the pension is part of a property settlement, for direct payment, the marriage and the member's creditable retirement service must have coincided for at least 10 years. Direct payment is capped at 50% of disposable retired pay, which can be extended to 65% to accommodate valid garnishments. Direct payments stop when either party dies or the court order has been satisfied.

#### **Practical Tips**

If you cannot find the military member, or do not know to which agency the member belongs to correctly serve the court order to collect the pension, see the topic in this Deskbook entitled "WORLDWIDE LOCATOR SERVICE FOR MILITARY PERSONNEL" for assistance in locating the member.

The DFAS-DE/GL has prepared two Fact Sheets "Uniformed Services Former Spouses' Protection Act Bulletin" and Uniformed Services Former Spouses' Protection Act – Frequently Asked Questions and Answers which contain excellent discussions of the substantive and procedural requirements of this area of military pensions. You should obtain, maintain and incorporate both of these Fact Sheets in your unit's Legal Assistance, Preventive Law and Pre-Mobilization Legal Counseling Programs.

## **MILITARY MEDICAL CARE**

Former spouses are entitled to military medical care if they were married for at least 20 years to a military member who performed at least 20 years of service creditable for retired pay; and there was either a 20 year or a 15 year overlap of the marriage and the military service. The first group is called "20/20/20" former spouses; the second, "20/20/15" former spouses. The extent of military medical benefits depends on which group the former spouse is in. If the former spouse is in neither group, there is no right to military medical care.

If the former spouse is in either group, there are two additional requirements for military medical benefits entitlement:

1. The former spouse must be unremarried; and
2. The former spouse must not be covered by an employer-sponsored health plan.

Let's address the latter two requirements before talking about 20/20/20 and 20/20/15 spouses.

### **Unremarried – No Reinstatement**

The former spouse who qualifies for military medical care, and then remarries, and then becomes unmarried because of divorce, annulment or death of the former spouse's new spouse, cannot have the military medical care entitlement reinstated.

### **Employers-Sponsored Health Plan – Limited Reinstatement**

For a former spouse who otherwise qualified for military medical care except for having employer-sponsored health coverage, and who becomes no longer covered by employer-sponsored health coverage, military medical care benefits can only be reinstated for a period not to exceed one year from the date of dissolution of the marriage between the former spouse and the military member. As a practical matter, often the termination of employer-sponsored health coverage comes after this one year date.

### **20/20/20 Former Spouses**

20/20/20 former spouses who do not unremarry and do not have an employer-sponsored health plan are entitled to full military medical benefits. They will be put on the DEERS system automatically, and have the choice of using either TRICARE or military facilities if they are available. If they need to be hospitalized and live within the prescribed limits of a military hospital, they must seek admission there. If they are issued a statement of non-availability, only then may they use a civilian hospital and civilian doctors.

The same rules that apply to retirees apply to former spouses. TRICARE has a deductible. The former spouse pays 25% and TRICARE pays 75%. TRICARE coverage ends when the former spouse reaches age 65 and goes on Medicare. These former spouses will always be eligible for care at military hospitals if there is room.

### **20/20/15 Former Spouses**

20/20/15 former spouses who divorce, remaining unremarried, and not covered by an employer-sponsored health plan are entitled to military medical care for one year and are eligible to participate in a group

insurance plan for one year with limited coverage for one additional year. There is no coverage after two years.

### **COMMISSARY AND EXCHANGE PRIVILEGES**

Only 20/20/20 former spouses who do not remarry are eligible for commissary and exchange privileges. For the Air Force, the regulatory authority for these benefits prescribed by the Secretary of Defense, is AFI 36-3026.

A 20/20/20 former spouse who remarries, can requalify for commissary and exchange benefits when the disqualifying remarriage ends due to divorce, annulment, or death of the former spouse's new spouse.

For information about the latest changes in medical benefits and commissary and exchange privileges, contact HQ AFMPC/DPMDOP, N.E. Office Plaza, 9504 IH 35 North, San Antonio, Texas 78233-6636.

### **SURVIVOR BENEFIT PLAN (SBP)**

Former spouses are eligible to be covered under a member's SBP if certain rules are followed and requirements are met. The statute is 10 U.S.C. 1447, *et seq.* Basically, the rules cover two situations of elections for former spouse coverage: by retiring members and by retired members. Because of the greater relevance for ANG units of the elections of retiring members, only those rules will be discussed here.

#### **Rules**

Election for coverage for a former spouse precludes payment of the SBP to a present spouse. Only one spouse may be covered at a time. Children of the member and a former spouse may also be covered.

Members must designate which former spouse is to be covered.

If the member is currently married at the time of election to cover the former spouse, the present spouse must be notified of the election.

Former spouse elections can only be made pursuant to a court order, or a written agreement between the member and the former spouse, which has been approved by a court order. Evidence of this must be signed by the member and former spouse and submitted at the time of the election.

Former spouse elections may be revoked by the member, but only if the court order or written agreement approved by the court order has been modified to permit the revocation.

Spouses who were married at the time they were elected for coverage, and subsequently divorced the member, so that upon or after the member's retirement, they are a former spouse and, are not automatically covered for the SBP. The now former spouse must notify the agency and apply for a change in class of beneficiary.

### **CONCLUSION**

The various aspects of USFSPA discussed in this topic have previously undergone statutory and regulatory changes. Because of the nature of the subject matter, future changes are likely.

***KWIK-NOTE: This subject is of interest to your personnel from their perspectives both as military members and former spouses.***

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# Garnishment

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**Updated by Lt. Col. A. Jerome Dees, May 2009**

**AUTHORITY:** 42 U.S.C. 659, implemented by 5 C.F.R. Part 581; 15 U.S.C. 1673(b) (Consumer Credit Act); 50 U.S.C. Appendix 520, 521 and 523; AFI 36-2906, *Personal Financial Responsibility* (1 Jan 98); applicable state law.

## INTRODUCTION

The Hatch Act Reform Amendments of 1993 authorized involuntary allotments against military and federal civilian pay to satisfy civil debts established by court order. Prior to these amendments the pay of members of the active and reserve forces, including the National Guard, and of federal civilian employees was only subject to garnishment to satisfy certain domestic support obligations as directed by a court order. Pay from private civilian employment has always been subject to garnishment for this purpose, and also to satisfy any other debts of the person whose pay is being garnished.

## WHAT IS GARNISHMENT?

Generally stated, garnishment is the involuntary taking of a person's (the debtor) income from a third party (the garnishee) to satisfy past-due obligations to another person (a creditor) as directed by the order of a court. There are two essential elements applicable to all garnishments against either public or private income: (1) the involuntary taking of income and (2) by court order.

AFI 36-2906 sets forth the procedures for both garnishment and involuntary allotments processed through the Defense Finance Accounting Service, including statutory allotments for child and spousal support, or involuntary allotments for civil debts for active duty, Reserve, and Air National Guard. Attachments 2 and 3 of the regulation are detailed fact sheets regarding garnishment for child support and alimony and involuntary allotments for civil debts. The DFAS website contains detailed information on the civilian and military garnishment process and limitations.

***KWIK-NOTE: Commanders should ensure that their unit members are familiar with what Garnishment is and how it can affect them.***

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# Jury Duty

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**Updated by Lt. Col. A. Jerome Dees, May 2009**

**AUTHORITY:** Applicable state law; 5 U.S.C. 6322; 10 U.S.C. 982 (active duty); DoDI 5525.08, *Service by Members of the Armed Forces on State and Local Juries* (3 Jan 2007)(active duty); AFI 51-301, *Civil Litigation* (1 Jul 2002)(active duty); Decision of the Comptroller General, B-217845 (18 Sep 85).

## INTRODUCTION

Air Force and Air National Guard policy on jury duty is to allow members to fulfill their civic duty. Commanders should encourage and facilitate their members' jury service. While Air Force and Title 10 ANG members' obligations to serve on a state or local jury are also governed by federal law and regulation (10 U.S.C. 982 and AFI 51-301, paragraphs 9.21 - 9.24), the jury service obligations of non-Title 10 ANG personnel are governed by state law. This topic discusses the disqualifications and exemptions from jury service of ANG members depending on their status. The rules for regular Air Force and Title 10 ANG members will also be set forth as a contrast to the rules for non-Title 10 ANG members, *i.e.*, ANG members in State active duty status or Title 32 status.

## ANG MEMBERS - GENERALLY

### Disqualification vs. Exemption

Jury duty as it involves ANG members concerns two questions which are also asked by most members of society: "Can I serve if I want to?" and "Can I get out of it?" The first question concerns "disqualification" from jury service, and the second concerns "exemption" from jury service.

Many state's laws concerning jury duty define and distinguish between the terms "disqualification" and "exemption." Disqualification is usually automatic, while an exemption usually must be claimed by the prospective juror. In other words, if you are disqualified, you cannot serve as a juror even if you want to; if you are exempt, the choice of serving or not serving as a juror is yours since you must claim the exemption from service.

Many state's laws disqualify "members in the active service in the armed forces of the United States" from jury service.

However, many states' military laws usually define "active military service of the United States" or "active service in the armed forces of the United States" or similar terms, as full-time duty in the Army, Navy (including Marine Corps.), Air Force or Coast Guard of the United States. That does not include the Air National Guard unless the member has been mobilized or is otherwise serving under Title 10.

### Temporary Excuses

Even though ANG members as such may not be disqualified or exempt from jury service, what if that service will conflict with upcoming training duties, deployments or school dates? Common sense, in light of ANG policy encouraging jury service, should guide you, the Commander. If jury service will conflict with a regularly scheduled UTA, you probably should let the member serve and make up the drill (SUTA, RUTA, EQT, etc.). If it will conflict with a period of annual training away from your home station, a deployment or a school tour, you may be able to assist the member in being temporarily excused from jury service based upon a reason similar to that supporting an active duty member's request for an exemption

highlighted below. Commanders may write letters requesting a temporary excuse from jury service for affected Guard members, but as a matter of policy, should do so only in instances where there is no reasonable alternative to re-scheduling the training. Be sure to consult with your Judge Advocate before sending such a letter to a court.

The way this situation will present itself is one of your members will tell a supervisor of the conflict between the jury service and the training date. For control purposes and uniformity, you should instruct your subordinate Commanders that any request by a member for a military exemption from jury service must be in writing and come through channels to you, the Wing or Group Commander with an endorsement by the subordinate Commander recommending approval or disapproval of the request with supporting reasons why there are or are not reasonable alternatives to the scheduled training with which the jury service is in conflict. If you decide to write a letter to the court, explain why you are making the request, emphasize to the court and the member that the request is only for a temporary excuse, and tell the member that your letter may not result in the court granting the temporary excuse. If your request for the excuse is denied by the court and there is no basis for the member's disqualification or exemption from jury service under your state law, your member will have to perform jury service and make up the training at a later date. However, your request on behalf of the member will be granted in most, if not all cases, if it is appropriately worded and supported.

### **AGRs**

Under most state's laws, AGRs are usually not disqualified or exempt from serving as a juror simply because of their AGR status. When serving in Title 32 or State active duty status, AGRs are not in the Air Force of the United States. They are under state control.

AGRs having no military basis to be temporarily excused from jury service, as discussed above, must be given leave to perform jury service with no reduction in pay or benefits. Pursuant to the above cited DoD Directive, any pay the AGR receives from the jury authority for jury service is payable to the U.S. Treasury through your base Military Pay section and the active duty base that processes your unit's travel vouchers; but AGRs may keep any reimbursement from the jury authority for expenses incurred in the performance of jury duty such as for transportation costs or parking fees.

The jury authority may not separately reimburse for expenses, or may include pay and expenses in one jury service pay check and may or may not itemize those expenses on the check voucher or stub. Here's an example: The member receives a \$50.00 check for jury service and no reimbursement for expenses which total \$20.00. What does the member do? Turn in the \$50.00 check and all receipts for transportation and parking expenses with it to base military pay together with a letter to the active duty base Military Pay Section that processes your unit's travel vouchers, requesting reimbursement for the \$20.00. The member will probably get reimbursed the \$20.00, and the request should be processed as a local travel request a travel voucher.

### **Traditional Guard Members**

While you should check your state law, most states neither disqualify nor exempt traditional Guard members simply by virtue of their membership status. Traditional Guard members called to serve on juries and without a military basis to be temporarily excused, as discussed above, must be given leave from scheduled training which conflicts with the jury service with no reduction in Guard pay or benefits.

### **Technicians**

In a majority of states, technicians are not disqualified or exempt from jury duty whether in federal civilian employee or military status. Under the Comptroller General Decision cited above, pursuant to 5 U.S.C. 6322, federal employees are entitled to "court leave" - that is, leave without reduction in pay or benefits - for the period of absence during which they serve as jurors. Pursuant to another Decision of the Comptroller General cited at 27 Comp. Gen. 83, 89 (1947), they are entitled to "court leave" even if they could have requested and received an excuse or exemption from jury service. This is because 5 U.S.C. 6322

is intended to encourage participation in the judicial process, including jury service. However, pursuant to the above cited DoD Instruction, any pay the technician receives from the jury authority for jury service is payable to the U.S. Treasury through your base Military Pay Section and active duty base that processes your unit's travel vouchers; but technicians, like AGRs are entitled to any reimbursement from the jury authority for expenses incurred in the performance of jury duty, such as for transportation costs or parking fees.

The jury authority may not separately reimburse for expenses or may include pay and expenses in one jury service pay check and may or may not itemize those expenses on the check voucher or stub. The member should turn in the jury pay check and all receipts for unreimbursed transportation and parking expenses with it to base military pay together with a letter requesting reimbursement for the expenses. The member will probably get reimbursed and the request should be processed like (but not on) a travel voucher.

## **TITLE 10 MEMBERS**

### **Rules Regarding Exemption from Jury Duty**

Under 10 U.S.C. 982, Air Force members are exempt from jury duty when such duty unreasonably interferes with their military duties or adversely affects the readiness of a unit, command, or activity. The Secretary of the Air Force has delegated the authority to determine such exemptions to commanders.

A. All general officers, Commanders, people assigned to the operating forces, members in training status, and people stationed outside the United States are exempt from jury duty.

B. Other Title 10 members on active duty may be exempted from the performance of state and local jury duty if the Commander exercising special court-martial jurisdiction (usually the Mission Support Commander) decides such jury duty would:

1. Interfere unreasonably with the performance of the member's military duties; or
2. Adversely affect the readiness of the unit, command, or activity to which the member is assigned. The decision of the special court-martial convening authority acting as the designee of the Secretary of the Air Force is final.

### **Procedures Regarding Jury Duty**

If you are a Title 10 member on active duty and are summoned to perform state or local jury duty, immediately inform your immediate Commander. If you are exempt under A. above, your immediate Commander or a designee will give written notice of the exemption to the state or local official who issued the summons for jury service.

If you are not exempt under A., your immediate Commander initially determines whether you are exempt under the rules of B. above.

If your immediate Commander believes you are not exempt, you must comply with the jury duty summons. If your Commander thinks you meet the requirements of B., then that Commander will obtain a final decision on exemption from the special court-martial convening authority (SPCM).

If the SPCM decides that exemption is not appropriate, you must comply with the jury duty summons. If the SPCM finds exemption is appropriate, your immediate Commander or a designee will give written notice of the exemption to the state or local official who issued the summons.

The written notice of exemption will include: "(Grade and Name), a member of the United States Air Force on active duty, has been summoned to perform jury duty (when, where, and on what jury). Under 10 U.S.C. 982, DoDI 5525.08, and Air Force Instruction 51 -301, this member has been determined by the Secretary of the Air Force or an authorized designee as exempt from duty on the jury in question because such jury

service would unreasonably interfere with the performance of the member's military duties or would adversely affect the readiness of the unit, command, or activity to which the member is assigned. Under 10 U.S.C. 982(b), this determination is conclusive."

If you serve on a state or local jury you cannot be charged leave or lose any pay or entitlements during the period of service.

All fees accrued to members for jury service are payable to the U.S. Treasury.

You are entitled to any reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty, such as transportation costs or parking fees.

***KWIK-NOTE: Before communicating with a civilian court official, Commanders should consult with their Judge Advocate. Include this subject as part of your Preventive Law Program and brief your Commanders on your policy.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Active Duty - Air National Guard Members	11-2
AGR Program	11-4
Domicile	23-11
Preventive Law Program	17-15

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# Living Wills

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**Updated by Lt. Col. A. Jerome Dees, May 2009**

**AUTHORITY:** 10 U.S.C. 1044; DoDD 1350.4, *Legal Assistance Matters* (28 April 01)(incorporating Change 1, 13 Jun 01) (Certified Current 1 Dec 03); AFPD 51-5, *Military Legal Affairs* (27 Sep 93); AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 Oct 03) (Interim Change-1, 21 Oct 08); applicable state law

## INTRODUCTION

The rising costs of medical care, increasing emphasis on quality of life, and notoriety of Terri Schiavo's persistent vegetative condition have heightened public awareness of the terminally ill. As a result of this awareness, many states, after consultation with lawyers, doctors and clergymen, have either passed laws or have had court decisions concerning the legal, medical and moral validity of such wishes. These laws and court decisions have spawned a document, which expresses these medical treatment decisions and which, while taking different forms in the various states, has come to be known as a Living Will.

While a Living Will may sometimes be confused with a Last Will and Testamentary (Will), a Living Will is distinctly different from a Testamentary Will. A Testamentary Will is executed before death and takes effect after death. A Living Will is executed before death and is effective while a person is alive - although in reality it may be designed to hasten death.

## DEFINITION

A Living Will is a legal document signed by an individual who is lucid and has the capacity to communicate. The document provides for a course of action to be followed regarding medical treatment in a situation where, as a result of a physical or mental disability or terminal illness, there is no reasonable chance of recovery. Commonly it states that in the event of a terminal illness or persistent vegetative state, life sustaining assistance or extraordinary measures should not be used to prolong life. A Living Will gives people some ability to control what medical treatment they will receive at a time when they are no longer able to speak for themselves (*e.g.*, use of feeding tubes). The Living Will informs an individual's physicians, family, clergymen, lawyer, medical facility or other persons who may be responsible for their health, welfare or affairs whether or not they wish to be kept alive by artificial means or just be kept as pain-free and comfortable as possible in such a "terminal illness" situation.

## WHO PREPARES THE LIVING WILL?

Your Judge Advocate is authorized to prepare a Living Will for any person eligible for legal assistance. Members may have their Living Wills prepared by the unit Judge Advocate without charge. Additionally, a member may obtain a will prepared by a civilian attorney, who ordinarily will charge a fee for the will preparation and advice.

## DL WILLS

Unit Judge Advocates have access to the Air Force software program DL WILLS which can create advance medical directives, including a Living Will and a health care power of attorney (discussed as a separate topic in this Deskbook). This software has been updated and is tailored to the requirements of each state. Further, the program also provides Living Wills with the required 1044c U.S.C. preamble language (see AFI 51-504, para. 1.4.2.1 and DoDD 1350.4).

## PART OF MILITARY MEDICAL FILE?

There is no legal prohibition against placing a Living Will in an Air Force or ANG health record. Because of mobilization, deployments and other training away from home station during which members could become terminally ill, Commanders should set a policy after consulting with their Clinic Commander and Judge Advocate either encouraging or merely permitting the placing of a Living Will in the member's military health record.

**Practical Tip:** While there is no legal or military requirement that military personnel execute a Living Will, if a member prepares one, they may wish to make and sign two originals: one for the member's personal use away from the military and the other for inclusion in the member's military health record. However, if the member wishes to revoke the Living Will, the member must remember to revoke both documents. A photocopy of a Living Will not bearing original signatures may not be valid under state law. The Living Will placed in a member's military medical file need not have been prepared by a military attorney.

## LEGAL EFFECT

A Living Will may be called a Health Care Proxy, Healthcare Declaration, Durable Power of Attorney for Healthcare, Advance Directive, Directive to Physicians, Living Will or whatever form or title may be designated by each state's laws. The legal effect of Living Wills varies with the specific form of and language in the document that is signed, and applicable state laws.

Depending on the legal effect given to a Living Will in a given state, military physicians may consider and be guided by the express wishes of a particular patient, as well as the best interest of medical practice, applicable laws and the rights and desires of next of kin. Consideration to the desires of the patient should be given whenever possible when consistent with good medical practice and the law. A physician's failure to comply with the Living Will in some states may constitute unprofessional conduct.

**KWIK-NOTE:** *Because the laws governing Living Wills vary from state to state, be sure that individuals visit the legal office to obtain a form valid under the laws of the state of their domicile and/or where they reside. This topic should be supplemented by state law.*

## RELATED TOPICS:

## SECTION

Domicile	23-11
Legal Assistance Program	17-8
Newcomer's Briefing	1-22
Personal Affairs Checklist	20-3
Powers of Attorney	23-19
Preventive Law Program	17-15
Premobilization Legal Counseling	20-4
Wills and Trusts	23-20

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## Paternity Claims

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**Updated by Lt. Col. A. Jerome Dees, May 2009**

**AUTHORITY:** Applicable state law, AFI 36-2908, *Family Care Plans* (1 Oct 00); AFI36-2906, *Personal Financial Responsibility* (1 Jan 98); DoDD 1344.3, *Paternity Claims and Adoption Proceedings Involving Members and Former Members of the Armed Forces* (1 Feb. 78) (*incorporating Change 1, 16 Nov 94*) (*Certified Current as of 1 Dec 03*).

### COMMANDER'S ACTION UPON LEARNING OF CLAIM

#### No Authority to Decide It

Should a member of your unit or a third party voice a complaint to you concerning paternity involving a member of your unit, you must remember that you have no authority to decide such a claim. This is a matter for the civilian courts. You should refer any member of your unit with paternity issues to the unit's Judge Advocates for legal assistance. While the JAG will not be able to prepare any documents or represent the member in a civilian court they can advise on the law and process involved.

#### Advise Affected Member of Support Duties and Benefits

If a member of your unit admits paternity to you, or if you learn that a civilian court has adjudicated your member as the father, you should advise him of his obligations to provide adequate support to his dependent (if the member has been found by a civilian court to not only be the father, but also to be liable for child support), and of the benefits which may be available to the dependent based on his military service. The member should be directed to the unit MPF for further information in this regard, and to the legal office for advice on the member's legal rights and obligations to the child. Members should further be advised of their responsibilities under AFI 36-2908 for dependent care when appropriate.

#### Refer Matter to Civilian Authorities or Take Military Action?

You may have learned from the complainant or another person that the complainant is under the appropriate state's lawful age of consent or that the member is married. Discuss with your SJA whether referral of this information to civilian law enforcement officials or child protective agencies is appropriate, and whether what you have learned and the circumstances under which you learned it (for example, has the information been verified?) may support adverse administrative action or disciplinary action under your state Code of Military Justice. Because of the potential uses of this information adverse to the member - civilian and military - consult with your SJA before you speak to the member, and even then, be careful what you say to him.

***KWIK-NOTE: Commanders should respond to paternity complaints only after consulting with their SJA.***

#### RELATED TOPICS:

#### SECTION

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Commander's One-On-One Meeting With Member - Precautions	16-5

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Fraternization and Professional Relationships	7-4
Investigation by Commander of Suspected Minor Offenses	16-10
Lawsuits Against National Guard Personnel	18-6
Quality Force Management Actions	24-12

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# Powers of Attorney

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Updated by Lt. Col. A. Jerome Dees, May 2009

**AUTHORITY:** 10 U.S.C. 1044; DoDD 1350.4, *Legal Assistance Matters* (28 Apr 01)(incorporating Change , 13 Jun 01) (Certified Current as of 1 Dec 03); AFPD 51-5, *Military Legal Affairs* (27 Sep 93); AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 Oct 03)(Interim Change-1, 21 Oct 08); applicable state law

## INTRODUCTION

Due to the potential for deployment, military members should consider preparation of a power of attorney to provide for the care and protection of their property during their absence. Further, to avoid the cost and stress of a legal guardianship proceeding in the event of incapacity, members should consider preparing a power of attorney to provide for the maintenance of their property and/or to express their health care decisions and instructions.

## DEFINITION

A power of attorney is a legal document by which a person, who is called the principal, donor or grantor, gives someone else, who is called the attorney-in-fact or agent, the authority to act as the first person's agent or attorney. The attorney-in-fact can then conduct business on behalf of the grantor in the grantor's absence and/or incapacity. The transactions of the attorney-in-fact are binding upon the grantor as though the grantor had personally conducted the transaction. While state laws may vary the following information is generally applicable. Legal documents should be prepared by a Judge Advocate to ensure that the documents comply with required law.

## REQUIREMENTS AND USES

In order to be effective, Powers of attorney are must be in writing, signed by the grantor, and notarized or witnessed. The original power of attorney document must physically be given to the attorney-in-fact to use as necessary. Powers of attorney are revocable, by a writing signed by the grantor and notarized, which states the power of attorney is revoked, by physically destroying the original power of attorney, or automatically upon the death of the grantor. Powers of attorney have no effect after the death of the grantor.

A **general power of attorney** gives the attorney-in-fact the right to conduct any type of transaction the grantor could do personally, including selling property or obtaining and using credit. Unit legal offices often use the AF Form 165 (General Power of Attorney) for this purpose. However, when using this form, Air Force practice is to limit the effective period of this document to one year.

A **special or limited power of attorney** gives the attorney-in-fact the right to act on the grantor's behalf for a specific transaction, such as selling a car, filing income tax return or leasing a house. Unit legal offices often use the AF Form 831 (Special Power of Attorney) for this purpose. The effectiveness of this document may also be limited to a specific time frame, generally not more than one year.

**Durable powers of attorney for property and finances** have gained popularity in recent years and many states have passed legislation authorizing this specific type of power of attorney. The basic concept is that an individual can appoint someone to act as power of attorney over his or her property and finances that will be effective through the disability or incapacity of the principal. A springing durable power of attorney "springs" into effect upon the disability or incapacity of the maker. Durable powers of attorney may also, depending on state law, become effective immediately and remain in effect even if the grantor of the power of attorney subsequently becomes disabled or incapacitated. State laws should be reviewed to see if this type of power of attorney has been authorized in your state.

**Health care powers of attorney** have also become popular and most states have statutes concerning this type of power of attorney. The importance of this document is that an individual can appoint an agent or surrogate to make health care decisions for the principal (the member) in the event of incapacity. Consult your SJA to see if this type of power of attorney has been authorized in your state. Health care powers of attorney and Living Wills (discussed as a separate topic in this Deskbook) are often referred to as Advance Medical Directives.

Personnel should be informed about powers of attorney and the uses and consequences of granting one to someone through the base Preventive Law Program and Legal Assistance Program. No power of attorney forms should be distributed in blank. All powers of attorney should be executed (signed) under the supervision of a Judge Advocate or attorney.

There is no legal or military requirement that military personnel execute a power of attorney. A power of attorney should not be signed until the member has discussed the need for one and consequences of signing one with a legal assistance officer or a civilian attorney. However, if one is needed, signing it will help relieve the deployed or mobilized member from any emotional burden attached to the inability to tend to affairs at home which could impede the performance of military duties.

### **SIGN NOW, USE LATER**

Rather than wait to sign a power of attorney after the member is mobilized or on the eve of a deployment, many Commanders, in consultation with their Judge Advocate, encourage their members to sign powers of attorney now, but with language in them stating the power of attorney is to take effect only upon the member's mobilization or deployment, is to expire at the conclusion of the mobilization or deployment, and that mobilization or deployment orders must be attached to the power of attorney for it to be effective. An alternative would be for members to have a completed power of attorney, except for signature and notarization, in a mobility folder, which could be executed upon mobilization.

Members on mobility should be given a form to be put in their mobility folder that states whether they have or have not, signed or waived a power of attorney and a Will. An unsigned entry should be either a "signed" or "waived" entry this way you will know that the member has been counseled on the purpose of these documents.

### **WHICH FORMS SHOULD BE USED**

Many units have found that the Air Force General and Special Power of Attorney forms, while containing good samples of clauses to consider, are not accepted by local banks or other individuals in their State. This is because civilian institutions are not familiar with the military forms, and prefer forms they are familiar with. Air Force forms may not contain language required by your state so your Judge Advocate may opt to use a statutory power of attorney, crafted to comply with state requirements, and revised to include clauses from the Air Force DL Wills software program. DL Wills also provides health care and durable (financial) powers of attorney consistent with AFI 51-504 and which includes the required 1044 U.S.C. preambles.

### **CONCLUSION**

This topic has been written in a briefing format and may need to be supplemented by applicable state law. It should be part of the unit's programs listed in the Related Topics below.

***KWIK-NOTE: Powers of attorney are available through the base Legal Assistance Program to eligible personnel. Powers of attorney that state that they take effect upon mobilization and/or incapacity and should only be signed after consultation with in the presence of a Judge Advocate or civilian attorney.***

### **RELATED TOPICS:**

### **SECTION**

Legal Assistance Program  
Living Wills  
Newcomer's Briefing

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Premobilization Legal Counseling	24-7
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## Wills & Trusts

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Updated by Lt. Col. A. Jerome Dees, May 2009

**AUTHORITY:** 10 U.S.C. 1044; DoDD 1350.4, *Legal Assistance Matters* (28 Apr 01) (C 1, 13 Jun 01) ( Current 1 Dec 03); AFPD 51-5, *Military Legal Affairs* (27 Sep 93); AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 Oct 03)(IC1, 21 Oct 08); applicable state law

### INTRODUCTION

Estate planning is the process of addressing important matters in advance of a major life contingency (*i.e.*, incapacity or death). It is especially important that military members properly prepared for these events. Planning involves discussion with an attorney about documents including wills, revocable living trusts, powers of attorney and living wills. Powers of attorney and living wills are discussed in separate Deskbook articles, see related topics below.

### WHAT IS A WILL?

A Last Will and Testament, commonly known as a Will, is an official, written declaration that takes effect at death and appoints the person who will administer your estate. It names the person(s) or organization(s) who are to inherit your property. A Will can designate a guardian for adopted or biological minor children of the decedent (assuming no one else has legal custody of the children). The Will maker is often called the “Testator” if male or “Testatrix” if female.

### WHAT PROPERTY DOES A WILL GOVERN?

A Will governs disposition of property (*e.g.*, real, personal, cash, intangible) or the portion of property owned solely by the individual. Certain types of property do not pass through a will. Property held in “joint tenancy with right of survivorship” or other related forms of joint ownership will usually pass outside the will to the surviving joint tenant(s). Likewise, distribution of property may be controlled by contract language, as in the case of insurance policies and retirement accounts. Insurance proceeds and retirement accounts are normally paid based on the beneficiary named by the insured person. If the beneficiary named is a spouse or family member, the proceeds are paid directly to the beneficiary.

If insurance proceeds or retirement accounts are payable to the estate of the decedent, a probate process would normally be necessary to distribute the proceeds. In many husband/wife situations, property is held in joint tenancy and insurance/retirement proceeds are payable to a surviving spouse; upon the death of the husband or wife, all property would pass to the surviving spouse and no probate is usually necessary. Upon the death of the surviving spouse, however, a probate may be necessary depending on how the assets are held. Guard members need to understand that provisions of a Will do not override a joint tenancy or contractual distribution of assets. The manner in which property is held affects how it is distributed, and Guard personnel need to understand the differences. The service members desire with respect to distribution of his or her assets upon death should be discussed with a Judge Advocate and appropriate documents drafted and executed to effect the member’s intent.

### WHY YOU SHOULD HAVE A WILL?

If you do not have a will the distribution of your property at death will be determined by state law. In most states if you are not married your possessions will be split between your parents, if your parents are not alive then your possessions are split between your living brothers and sisters. With very few exceptions, every person should have a current Will that includes provisions for the support and maintenance of any minor children, the disposition of the

decedent's property, and the appointment of an administrator to carry out the requirements of the will . Failure to maintain a current Will can result in the local probate court making these decisions, based on state law and not the desires of the member.

### **GUARDIAN FOR MINOR CHILDREN**

Without a Will, the court would have little guidance upon which to make a decision regarding placement of minor children. If you have sole care, custody, and control of a minor child, you owe it to yourself and the child to make proper provisions for the child's continued care. If you are married, you and your spouse should also name a custodian in your wills in the event both of you were to die. You know best who would be the appropriate guardian of the child's person and property. The court will normally follow the desire of the parent/s by appointing the designated guardian and or custodian.

### **ADMINISTRATION OF THE PROBATE ESTATE**

The person named as the executor in the Will or appointed by the probate court when there is no will may be known as an "Executor" (male), "Executrix" (female), "Personal Representative" or "Administrator" (gender neutral). These are the individuals who must ensure that all debts are paid and that your property is properly distributed to those people you want to receive it or who are to receive it under state law. Generally you should name someone who can be trusted to honor your wishes and who has good business judgment.

### **COMMANDER'S RESPONSIBILITIES**

Commanders should encourage every member of their unit to consult with a Judge Advocate and have a Will prepared if they need one. Every member should be informed of reasons for executing a Will either through the base Preventive Law Program or through the Legal Assistance Program.

### **WHO PREPARES THE WILL?**

Your Judge Advocate is authorized to prepare a Will for any person eligible for legal assistance. Unless qualified to do so JAGs will not prepare complicated wills or trusts or wills in cases of very large estates. See the topic in this Deskbook entitled "LIABILITY OF NATIONAL GUARD LEGAL OFFICE PERSONNEL" for the basis of this authority. AGRs can have Wills prepared at any active duty base legal assistance office, regardless of service component.

Members may have their simple Wills prepared by the unit Judge Advocate without charge. Additionally, a member may obtain a Will prepared by a civilian attorney, who ordinarily will charge a fee depending upon the complexity of the member's estate planning needs. Commercially available "do-it-yourself" Will kits may create unnecessary legal issues and should not be used if legal assistance allows a will to be done by a JAG.**DL WILLS**

The standard Air Force software program utilized by unit JAGs for creating a Will is DL WILLS. This software has been updated and is tailored to the requirements of each state.

AFI 51-504, para. 1.4.1.2 also mandates that every Will shall be prepared and executed as a military testamentary instrument. DL WILLS provides language that meets the military testamentary instrument criteria. In accord with 10 U.S.C. 1044d and DoDD 1350.4, a military testamentary instrument shall: 1) be executed by the testator/testatrix; 2) be executed in the presence of a military legal assistance counsel as presiding attorney; 3) be executed in the presence of at least two disinterested witnesses; 4) include a military testamentary instrument "preamble" pursuant to 1044d; and 5) include a self-proving affidavit. As a matter of good practice, an Air Guard Judge Advocates should use this program in the preparation of a will.

## CHANGES TO A WILL

Wills can be changed by a written document called a “Codicil” or can be revoked at any time before death. A Will signed after an earlier Will revokes the earlier Will as a matter of law. A Will should be reviewed periodically and upon the birth or death of any person affected by the Will or upon a substantial change in the decedent’s estate.

## WILLS AND MOBILIZATION, MOBILITY AND DEPLOYMENT

Ensuring that all units members have a current Will is a step towards assuring the members and their families are prepared for a deployment or mobilization, and ensuring members are able to perform their duties without unnecessary distraction.

**Practical Tip for Inspections:** Members on mobility should be given a form to be put in their mobility folder which states that they have either signed (with a civilian or military attorney or waived the signing of a Will and power of attorney. Thus, there is a record that the member has been advised of the need for these documents.

## DEFINITION: WHAT IS A TRUST?

A trust is an arrangement reflected in a legal document whereby a “Trustee” is appointed to manage assets (“corpus”) for the benefit of one or more “beneficiaries.” The person who creates the trust is known as a “grantor” or “settlor.” There are many different types of trusts that serve many different purposes.

An “inter vivos” or “living trust” is a trust established by an agreement to be effective during the creator’s lifetime. If the trust can be amended or terminated by the creator, it is known as a “revocable living trust.” The primary purpose for such trust is to avoid the probate process upon the creator’s death and sometimes upon the death of the creator’s spouse or other family members.

An “irrevocable living trust” cannot be changed or revoked by the creator. It is often used to remove assets from the creator’s estate for purposes of reducing federal estate tax or for the divestment of assets to enable the creator to qualify for long-term health care public assistance.

A “testamentary trust” is a trust created by a Will. A “minor’s trust” is commonly used to ensure beneficiaries or their legal guardians do not misuse or waste trust assets. The trustee manages the assets until the beneficiary reaches an age specified by the decedent. A “credit shelter trust” may be used to provide tax planning for married couples.

## SHOULD YOU CREATE A TRUST?

A trust should only be used after consultation with an attorney who has the requisite knowledge and expertise. . Generally, judge advocates should discuss the importance of a testamentary trust when passing assets to a minor beneficiary (see, AFI 51-504, para. 1.4.1.1). Judge advocates should not prepare complex tax planning or inter vivos trusts unless the SJA determines that the attorney preparing the trust possesses the necessary expertise to draft, review and execute these documents.

**KWIK-NOTE:** *Start a program now to provide Wills to all unit members who need and want them in order to avoid the necessity of last-minute will preparation in the event of deployment.*

## RELATED TOPICS:

## SECTION

Counseling	24-7
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Powers of Attorney  
Preventive Law Program

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17-15

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## Worldwide Locator Service for Military Personnel

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Updated by Lt. Col. A. Jerome Dees, May 2009

**AUTHORITY:** As listed below.

### INFORMATION REQUIRED

Each of the armed services has a worldwide locator service. Requests should be in writing and should provide, to the extent known, the service member's:

1. Full name;
2. Social security number;
3. Date of birth;
4. Rank;
5. Location (last known); and
6. Time frame of last known duty assignment.

### BRANCH OF SERVICE ADDRESSES AND TELEPHONE NUMBERS

Addresses and telephone numbers of the locator service are as follows:

1. United States Army

Department of the Army Worldwide Locator, EREC  
8899 E. 56<sup>th</sup> Street, Indianapolis, Indiana 46249-5301; (1-866-771-6357)

2. United States Air Force

AFPC/DPDXIDL (Air Force Worldwide Locator), 550 C Street West, Suite 50 San Antonio, Texas  
78150-4752; (210) 565-2660

3. United States Navy

Navy Personnel Command PERS-312F 5720 Integrity Drive, Millington, TN 38055-3120 ; 1-866-827-5672(901)874-3388

4. United States Marine Corps

Headquarters, U.S.M.C.(Code MMSB-10) 2008 Elliot Rd., Rm. 201 Quantico VA 22134-5030; (703) 784-3942

5. United States Coast Guard

Primary address: ARL-PF-CGPC [CGLocator@uscg.mil](mailto:CGLocator@uscg.mil). Verification address: Commander, Personnel Service Center PSC (adm) - MS 7200 4200 Wilson Boulevard, Suite 1100 Arlington, VA 20598-7200; (202) 267-1340

### PRACTICAL TIPS

Prior to mailing in a location request you should call the appropriate military branch to learn whether any specific procedures or fees are required. You can also check for this information on the DOD website at <http://www.defenselink.mil/faq/pis/PC04MLTR.html>. The telephone lines at the various locator services

stay busy and it is rare to get through on the first call. It can take from three to six months for a recently PCS'ed service member's new unit of assignment to be available through the locator service.

If the service member has moved from an address within the last eighteen months of your inquiry of the member's whereabouts, you can also try the member's local Post Office. You can either use a Freedom of Information Act form as provided by PSM 262.73, or write a letter to the Postmaster of that local Post Office (Postmaster, City, State, Zip Code) requesting a forwarding address for the member. In both cases, you must provide a \$1.00 fee.

NOTE: If you have a copy of the service member's Leave and Earning Statement (LES), the military unit ID code of the individual and the state the service member claims as legal residence are located on the LES.

***KWIK-NOTE: Assist your members in attempting to find other military members through proper channels. Include this in your Legal Assistance Program.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Access to Military Records	14-2
Freedom of Information Act	14-10
Privacy Act	14-12

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# Sexual Assault Response and Prevention (SAPR) Program

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Updated by Lt. Col. A. Jerome Dees, May 2009

**AUTHORITY:** Under Secretary of Defense (Personnel and Readiness) Memorandum “*Response Capability for Sexual Assault*” 17 December 2004; Deputy Secretary of Defense Memorandum “*Confidentiality Policy for Victims of Sexual Assault (JTF-SAPR-009)*” 16 March 2005; DoDD 6495.01, *Sexual Assault Prevention and Response (SAPR) Program* (October 6, 2005) (incorporating Change 1, November 7, 2008; *Department of the Air Force Policies and Procedures for the Prevention and Response to Sexual Assault* (26 July 2005); DoD Instruction 6495.02, *Sexual Assault Prevention and Response Program*, (June 23, 2006); NGB/CF Memorandum “*Appointment of Wing Executive Support Officers (Community Manager) as the Sexual Assault Response Coordinator*” dated 28 Feb 06.

## **OVERVIEW OF THE SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM:**

The military does not tolerate sexual assault, and has implemented a comprehensive policy of prevention, response, and accountability to ensure the safety, dignity, and well-being of all members of the Armed Forces. Three key components of the new policy involve: 1) the creation of a Sexual Assault Response Coordinator (SARC) position responsible for managing the SAPR program; 2) the establishment of a volunteer Victim Advocate (VA) position to provide one-on-one support to a victim; and, 3) three sexual assault reporting types (restricted, unrestricted, and independent), of which the “restricted” report which permits a military member to limit command to receiving only non-identifying information.

## **SEXUAL ASSAULT POLICY DEFINITIONS:**

The 26 July 2005 Air Force policy provides:

Sexual assault is a crime. Sexual assault is defined as intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. Sexual assault includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender, spousal relationship or age of victim.

“Consent” shall not be deemed or construed to mean the failure by the victim to offer physical resistance. Consent is not given when a person uses force, threat of force, coercion or when the victim is asleep, incapacitated, or unconscious.

*Other Sex Related Offenses.* Other sex-related offenses are defined as all other sexual acts or acts in violation of the Uniform Code of Military Justice that do not meet the above definition of sexual assault or the definition of sexual harassment as promulgated by DoD Directive 1350.2, *Department of Defense Equal Opportunity*, para E2.2.15. Examples of other sex-related offenses could include indecent acts with another and adultery.

*Victim.* A victim is a person who alleges direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault or other crime of interpersonal violence and who has a connection with the installation. Victims will be eligible for and provided services by the Air Force consistent with their legal status. The services contemplated range from referral to the

appropriate civilian or foreign agency to the provision of all services available for an active duty member.

*Healthcare Provider.* Under this policy healthcare providers includes those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide health care services, at a medical or dental treatment facility or who are providing such care elsewhere at a deployed location or otherwise in an official capacity.

*Personal Identifying Information(PII).* Under this policy PII is that information which would disclose or have a tendency to disclose the identity of a victim or alleged assailant of a sexual assault. PII includes the person's name or particularly identifying information (e.g., physical characteristics or identity by position, rank, or organization), or other information about the person or the facts and circumstances involved that could reasonably be understood to identify the person (e.g., a female in a particular squadron or dormitory where there is only one female assigned). In contrast, non-identifying personal information includes those facts and circumstances surrounding the sexual assault incident or individuals that generally describe the incident and individuals without tending to disclose an individual's identity.

### **SEXUAL ASSAULT RESPONSE COORDINATOR (SARC):**

The SARC serves as *the* point of contact for integrating and coordinating sexual assault care from an initial report of sexual assault, through disposition and resolution of issues related to the victim. The SARC ensures the victim support system provides a sexual assault response capability for victims. The SARC promotes sexual assault prevention measures. The SARC recruits, interviews, trains and supervises a unit's Victim Advocates.

### **VICTIM ADVOCATE (VA):**

A VA is a mature volunteer (generally an E-4 or above and/or officer) who provides essential support, liaison services and care to the victim, as well as crisis intervention, referral and on-going, non-clinical support, including data on options and resources to keep the victim informed about case decisions.

### **THREE TYPES OF REPORTING:**

The three types of recognized reporting are restricted, unrestricted, and independent.

#### **Restricted Reporting:**

*Restricted* reporting allows a sexual assault victim, on a confidential basis, to disclose details of the assault to specifically-identified individuals and to receive medical treatment and counseling, without triggering an official investigation. Since the SAPR program creates no new benefits, the ANG member must have independent benefits, such as medical insurance, to have access to medical or other resources. If the assault occurred while in a military status a Line of Duty will establish entitlement to medical care associated with the assault. The victim also may report the assault to a chaplain; restricted reporting policy is in addition to the current privilege afforded communications with a chaplain. Health care providers will initiate the appropriate care and treatment and report the sexual assault to the SARC in lieu of reporting the assault to law enforcement or command. The victim will acknowledge in writing his or her understanding that restricted reporting may limit the ability of the government to prosecute the assailant and an understanding of the reasons DoD policy favors unrestricted reporting. Restricted reporting is intended to give a victim additional time and increased control over the release and management of his/her personal information, and to empower him or her to seek relevant information and support to make more informed decisions about participating in the criminal investigation.

#### **Unrestricted Reporting:**

*Unrestricted* reporting is a non-confidential report which requires notice to the chain-of-command, Security Forces, etc. A service member who is sexually assaulted and desires medical treatment and an official investigation of his or her allegation should use current reporting channels, e.g. chain-of-command, law enforcement, as well as the SARC. Upon notification, the SARC assigns a VA.

Regardless of whether the member elected restricted or unrestricted reporting, confidentiality of medical information will be maintained in accordance with DoD 6025.18-R, "DoD Health Information Privacy Regulation," January 2003. Where a victim elects restricted reporting, the SARC, VA, and military health care providers may not disclose covered communications to law enforcement or command, except as provided in the exceptions to confidentiality below. Covered communications are oral, written, or electronic communications of personally identifiable information made by the victim to the SARC, VA, or healthcare provider related to their sexual assault. However, for purposes of public safety and command responsibility, the SARC must report to the command, within 24 hours of an incident, information concerning a sexual assault, without any personally identifying information of the victim.

### **Independent Reporting:**

An *independent report* is a non-confidential report discovered by a source other than the victim. Command can act on an independent report even if a restricted report was made. If information about a sexual assault is disclosed to command from a source independent of the restricted reporting avenues or to law enforcement from other sources, command may report the matter to law enforcement, and law enforcement remains authorized to initiate its own independent investigation. Additionally, a victim's disclosure of his or her sexual assault to persons outside the protective sphere of persons covered by DoD policy may result in an investigation of the allegations. Even if disclosed to others a restricted report continues to be so characterized by the SARC.

### **EXCEPTIONS TO CONFIDENTIALITY:**

In cases in which members elect restricted reporting, the prohibition on disclosing covered communications is not applicable as to the:

- Command or law enforcement, when disclosure is authorized by the victim in writing.
- Command or law enforcement, when disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another.
- Disability Retirement Boards and officials, when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations, limited to only that information which is necessary to process disability retirement determination.
- SARC, VA, or healthcare provider, when disclosure is required for the supervision of direct victim services.
- Military or civilian courts of competent jurisdiction, when disclosure is ordered by or is required by federal or state statute. SARC, VA, and healthcare providers will consult with the servicing legal office in the same manner as other recipients of privileged information to determine if the criteria apply.

Healthcare providers may also convey to command any possible adverse duty impact related to the victim's medical condition and prognosis in accord with DoD 6025.17R, Health Insurance Portability and Accountability Act.

Improper disclosure of covered communications, improper release of medical information, and other violations of the DoD policy are prohibited and may result in discipline, loss of credentials or other adverse personnel or administrative actions.

### **NO NEW SERVICES ARE CREATED UNDER THE SAPR PROGRAM:**

No new specific services, such as medical care or counseling, are created under the new authority; however if a sexual assault occurs while in a duty status, completion of a Line of Duty Determination will establish an entitlement to medical care required by the assault.

The case of a sexual assault upon an ANG member with no military nexus (e.g., the event occurred off-base and the ANG member/s were in a non-duty status at the time) presents command the opportunity to determine the level of support provided, if any. Regardless of the victim's status as active duty Air Force or ANG, certain services are available under the Air Force One Source program on a 24/7 basis by calling 1-800-707-5784 or visiting [www.airforceonesource.com](http://www.airforceonesource.com).

The DoD policy does not create any actionable rights for the alleged offender or the victim, it does not constitute a grant of immunity for any actionable conduct by the offender or the victim. Covered communications that have been disclosed may be used in disciplinary proceedings against the offender or the victim, even if such communications were improperly disclosed. Collateral misconduct of the victim (e.g., underage drinking, drug use) is not excused by the DoD policy but should be considered after ensuring the sexual assault victim receives proper support.

### **DISTINGUISHING THE SAPR PROGRAM FROM THE VICTIM WITNESS ASSISTANCE PROGRAM (VWAP):**

There may be confusion between the SAPR program and the longer-standing VWAP. VWAP is a JA responsibility. See AFI 51-201, *Administration of Military Justice* (26 November 2003) at Chapter 7. VWAP provides support to sexual assault victims involved in criminal matters, as does the SAPR program. The existence of the SARC as a dedicated office to attend to the sexual assault victim may indicate the SARC is better resourced to support the sexual assault victim. VWAP under JA's legal expertise offers significant support to the sexual assault victim on matters such as keeping the victim informed of pre-trial custody, adjudication, the ability to secure financial support of active duty wrongdoers where a marital relationship exists, etc. One distinction of VWAP from the SAPR program is that the former has jurisdiction to support *all* victims *and* witnesses involved in a criminal matter, while the SAPR program's focus is on the military member who suffers a sexual assault.

### **THE ROLE OF THE JAG IN THE SAPR PROGRAM**

Issues such as prosecution, evidence, criminal and civil matters, privacy and disclosure requirements are areas where attorneys are subject matter experts. JA can offer tremendous support to a SARC, answering legal questions, coordinating on MOUs, interpreting regulations and statutes, and discovering and ascertaining state specific issues.

### **AIR NATIONAL GUARD APPROACH THE SAPR PROGRAM:**

Current National Guard policy requires that every state designate a SARC as an additional duty at the Joint Force Headquarters level. A 28 Feb 06 NGB/CF memorandum makes the Wing Executive Officer the wing SARC. The VA staff for both the Air Force and Air National Guard comes from a pool of military volunteers who serve under an additional duty.

### **CREATING A QUALITY SAPR PROGRAM:**

1. Designate a SARC and have the person trained. Provide support such as days to attend training, develop community relationships, the SARC's need to recruit and train the VA staff, and physical requirements of office space and a locking storage cabinet.

2. The SARC recruits, appoints, and trains those willing to serve as a VA.
3. The SARC builds a team of select ANG offices to serve on a board or council for support and prevention. While the rightful board chair appears to the vice commander, the SARC clearly can be a moving force. Council members might include the vice commander, Chaplain, Public Affairs, Security Forces, Family Support, medical personnel, MEO, JA, EEO, and First Sergeant's representative.
4. The SARC promotes the program through informational e-mails, briefing command and unit members at large, creating a web site, publication of articles in the unit paper, etc. The unit commander and/or vice commander should voice a commitment to the program and demand that all personnel attend required training.
5. Create strong links with community resources. The SARC should establish relationships with the local sexual assault response center, law enforcement, medical facilities, and the prosecutor's office. MOUs should be considered to strengthen bonds, force both parties to give the situation well-deserved attention and increase visibility.
6. The SARC produces and distributes information materials. These might include a handbook, a tri-fold on the unit's SAPR program, a PowerPoint presentation highlighting ANG aspects, a wallet-sized handout bearing relevant information, and a handbook for victims, commanders, and the VA. For samples, check the FLITE DocuShare (or its successor) website for ANG under the name SAPR Program or similar name.
7. Have the SARC focus on pragmatic items as to sexual assault prevention and response. Lofty, unrealistic plans and approaches should be avoided.
8. Have the SARC attend local and state conferences. Multiple victim services at a state and local level can be readily discovered, networking contacts fostered and current developments learned by attendance.
9. Associate with a local Air Force base, if possible. The Air Force's robust SARC offices, which include a dedicated SARC and assistants, generally at a GS-7 level, can offer tremendous support.

#### **FEDERAL VICTIM RIGHTS MAY DIFFER FROM STATE RIGHTS**

A standard set of federal rights exist for victims, but state statute-created victim rights can vary from state to state, with many of the rights overlapping. Individual states establish their own reporting requirements such as whether a report of a sexual assault must be made to local law enforcement. JA can assist command and the SARC in ascertaining unique state rights and reporting requirements. When a local reporting form is unavailable, consider use of DD Form 2701, *Initial Information for Victims and Witnesses of Crime* (Dec 94), with the disclaimer that it is based on federal law and that state law provisions may differ.

*Remember:* the victim's privacy rights must be valued and respected. Gossip, rumor and innuendo will ill-serve the victim and may undermine the credibility of a SAPR program.

**KWIK-NOTE:** *The 28 Feb 06 NGB/CF memorandum mandates the Wing Executive Support Officer be appointed the wing level SARC, unless an exception is applied for and granted. An enthusiastic SAPR program operated by the wing level SARC offers many benefits complying with the letter and spirit of DoD, AF and NGB policies, and furthering a unit's good, order and discipline, morale, trust in command and respect of others.*

#### **RELATED TOPICS:**

##### **Line of Duty**

# Chapter 24, Quality Force Management

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# Administrative Demotion of Airmen

Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** ANGI 36-2503, *Administrative Demotion of Airmen* (1 March 2004); AFPD 36-25 *Military Promotion and Demotion* (21 June 1993); AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005); ANGI 36-101, *The Active Guard/Reserve Program* (3 May 2002); ANGI 10-248, *The Air National Guard (ANG) Fitness Program* (9 April 2004); applicable state military codes.

## DEMOTIONS AND DEMOTION AUTHORITY

### DEMOTIONS

Administrative demotions apply to airmen in grades E-1 to E-9. This disciplinary tool can result in demotions of one grade or three or more grades. Since the demotion process may become very involved, the Commander should consult with the Staff Judge Advocate. Also, a thorough investigation of the charge and the member's military record should be made to determine what appropriate quality force management tool should be used (administrative demotion, nonjudicial punishment, reprimand, administrative discharge or court-martial). Once the administrative demotion process is complete, the Staff Judge Advocate should review it for legal sufficiency. *Do not demote a member when action under Article 15 or other sections of the UCMJ is more appropriate.* Do not forgo demotion because discharge is contemplated.

### DEMOTION AUTHORITY

RANK	DEMOTION AUTHORITY
Traditional Guardsmen E-1 to E-6	State Adjutant General, but may be delegated to wing, group or base commander
Traditional Guardsmen E-7 to E-9	State Adjutant General, but may be delegated to Assistant Adjutant for Air
Full -time AGRs	State Adjutant General*
Members on active duty with NGB or ANG Readiness Center	Director, Air National Guard, with concurrence of the State Adjutant General

\* ANGI 36-2503 and ANGI 36-101 do not specify a separate demotion authority for AGRs. However, the State Adjutant General holds the authority to terminate AGR status for cause.

### REASONS FOR DEMOTION

Although there are separate paragraphs in the regulation for the various ways in which members may be subject to demotion, each of them should be properly cited, and all of these reasons are conceptually similar. They are:

1. Failure to complete training;
2. Failure to attain grade/skill relationship;
3. Failure to attain and maintain fitness standards;
4. Unsatisfactory participation;
5. Failure to fulfill NCO responsibilities;
6. Voluntary change of assignment; or
7. AGR priority placement program position declination.

Documentation is absolutely critical to establish the basis for administrative demotion.

### FAILURE TO COMPLETE TRAINING

1. Airmen promoted to attend officer training school, the flight screening program, or the ANG Academy of Military Science who fail to complete such training, will be demoted to the former grade.

2. Airmen promoted under ANGI 36-2502, paragraphs 2.5 to 2.5.3, who fail to qualify for the new AFSC will be demoted to the last grade satisfactorily held.

4. Airmen promoted to E-3 without a 3 level AFSC, who fail to qualify for the AFSC, will be demoted to the former grade.

#### **FAILURE TO MAINTAIN GRADE/SKILL RELATIONSHIP**

Airmen who fail to attain the AFSC or PAFSC skill level necessary to support their grade within the time limits specified by the commander will be demoted to a grade commensurate with their skill level.

#### **FAILURE TO MAINTAIN FITNESS STANDARDS**

Commanders may demote a member after a 4<sup>th</sup> (or greater) fitness test failure (score <70).

#### **UNSATISFACTORY PARTICIPATION**

1. Six unexcused absences in a continuous twelve month period will support the first administrative demotion. An absence is one four hour UTA. Commanders may pursue multiple sequential demotions for unsatisfactory performance.

2. After nine unexcused absences, action may begin under AFI 36-3209. Per AFRC guidance, do not transfer unsatisfactory participants to the Inactive Ready Reserve, absent a strong justification as to the member's potential for future service. AFRC/CC policy strongly supports discharge over assignment to the IRR.

#### **FAILURE IN NCO DUTIES**

As a practical matter, most demotions in the Guard are for failure in NCO duties. While any failure in the duties of NCOs under AFI 36-2618, *The Enlisted Force Structure* suffices, typically commander reduce NCOs in rank for disciplinary incidents occurring when the member is not on duty. Typical examples include drunk driving, civilian convictions, inappropriate use of or failure to pay on the Government Travel Card, and drunk and disorderly conduct.

#### **VOLUNTARY CHANGE OF ASSIGNMENT WITH REDUCED GRADE**

The procedures for demotion do not apply when an airman voluntarily reduces rank either for a change of assignment or acceptance of a military duty tour. Before being demoted for a voluntary change of assignment, the member must make a written statement indicating the acceptance of the demotion and the understanding that this demotion will not preclude a subsequent military promotion.

#### **PROCEDURES FOR DEMOTION**

##### **BURDEN OF PROOF REQUIRED TO ADMINISTRATIVELY DEMOTE**

The demotion authority must be convinced by a preponderance of the evidence that the action is warranted. This means that the evidence warranting demotion must outweigh, even slightly, the evidence that the demotion is not warranted. The demotion authority may consider all matters in the file that are relevant even though some of these matters may not be admissible in a judicial proceeding such as a court-martial.

##### **NOTIFICATION OF UNEXCUSED ABSENCES**

After each unattended scheduled training period, unit Commanders must notify unit members of their unexcused absence and the adverse effects of that absence by letter sent either by regular mail or certified mail, depending on the number of absences in a twelve-month period. However, this does not preclude demotion or other disciplinary action if the member otherwise had notice of drill periods and failed to attend.

##### **NOTIFICATION OF DEMOTION ACTION**

The unit Commander of the airman will inform the airman in writing by certified mail return receipt requested, of the Commander's intention to recommend demotion. This notification will contain all of the elements in ANGI 36-2503, para. 4.1, including, but not limited to:

1. The specific reasons and paragraphs in ANGI 36-2503 for the proposed action;
2. A complete summary of the facts;

3. Instructions to the airman to acknowledge receipt of the notification within 5 calendar days, and, if the airman does not concur with the demotion action, the right to submit matters within 20 days of giving notice of the non-concurrence;
4. Instructions to the airman to concur, or not concur no later than the end-of-day roll call following the second UTA after acknowledgment of the action;
5. A statement that the airman may consult with military counsel; and
6. If applicable, a statement that the airman may retire or resign, in lieu of the administrative demotion.

A sample letter is contained in the instruction and should be used as a model. JAG review at this stage is very important because it is much easier to correct any problems before the first letter recommending demotion goes out than to salvage the effort after it has been improperly commenced. JAGs should know whom the Commander has tasked with the administrative details for demotions and work closely with that person.

### **MILITARY COUNSEL**

The member has the right to counsel, but watch out for conflicts! Often a member is in to see the JAG before the Commander is. It is easy for the JAG to start a counseling session with the member, which might later deprive the Commander of that JAG's services. See also, 24 Apr 2006 TJAG Policy Memorandum on Delivery of Defense Services. Commanders and SJAs should make every reasonable effort to select a defense counsel from outside the unit.

### **PERSONAL INTERVIEW**

The airman is entitled to present any documents he or she chooses in response to an administrative demotion action. The airman is also entitled to a personal interview with his or her immediate commander before the commander takes any action.

### **THE DEMOTION PROCESS**

After considering all the matters presented, the immediate commander who is also the demotion authority will either terminate the demotion action or request the SJA review for legal sufficiency prior to effecting the demotion. If the SJA determines there is legal sufficiency to support a finding for demotion, the immediate commander may proceed with the demotion action. If the case lacks legal sufficiency, it may be terminated or re-opened for further development of the facts. The airman should be advised in writing by certified mail or by personal delivery of the decision.

An immediate commander who is not the demotion authority will consider each and all of the matters presented and then:

Terminate the demotion action, or

Prepare a written summary of that personal interview (if any), include that summary in the case file, and forward the case file to the demotion authority with an appropriate recommendation. The immediate commander will immediately notify the airman in writing by certified mail or by personal delivery of the decision to continue processing the demotion action or to terminate it.

The demotion authority who is not the airman's immediate commander will then obtain a legal review from the servicing SJA before rendering a final decision on the immediate commander's demotion recommendation.

The demotion authority will notify the airman's servicing Military Personnel Flight (MPF) in writing of the decision to concur or nonconcur with the immediate commander's demotion recommendation. The MPF will then notify the airman of the decision by indorsement through the airman's immediate commander.

### **CONCLUSION**

Commanders have usually already decided to take some action by the time they consult with the JAG. Commanders should expect their JAG to be prepared to lay out their options (demotion, discharge, state action) and make a recommendation. A little time spent by the JAG with the administrative personnel and a fast turnaround will pay big dividends..

As with any adverse action Commanders confront, there are many procedural requirements to ensure that the regulations are followed, and that the affected member receives notice of the intended action, an opportunity to be heard and the right to consult with counsel. ANGI 36-2503 procedures are more efficiently handled through use of

form letters which can be made easily adaptable to most factual situations. These forms should make processing these actions more efficient and less of a drain on the Commander's time and should be prepared and used in coordination with the Staff Judge Advocate.

***KWIK-NOTE: States should supplement this topic by developing their own administrative demotion processing procedures and by adapting the sample letters and forms to their own use.***

**RELATED TOPICS:**

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# Administrative Discharge of Enlisted Personnel

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Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005); AFI 31-501, *Personnel Security Program Management* (27 January 2005); *The Air National Guard (ANG) Fitness Program* (9 April 2004); TJAG ANG/JA Memorandum on Delivery of Defense Services (24 Apr 2006); applicable state law.

## INTRODUCTION

Airmen have the privilege to serve in the Air National Guard, not the irrevocable right to do so. A Commander has many options for removing or discharging unfit enlisted members from the Guard program. An administrative discharge is a discharge from both the state ANG and as a Reserve of the Air Force. As for active duty airmen, an ANG member's service will be characterized as either Honorable, General (Under Honorable Conditions), or Under Other Than Honorable Conditions (UOTHC). Several alternatives exist to separation, for use in appropriate cases.

AFI 36-3209 states the permissible grounds for discharging an airman. They fall into two broad categories: voluntary and involuntary. The AFI requires discharge in certain limited cases, and permits discharge in others. Particular attention must be paid to the characterization of discharge, whatever the category. For example, it is probably not appropriate to assign an honorable characterization of discharge to a member who engaged in serious misconduct. Ultimately this will lead to problem members being reassigned to another unit or service..

## GROUND - VOLUNTARY

AFI 36-3209 specifies the following voluntary grounds for discharge:

1. Expiration of Enlistment – an enlisted member whose enlistment expires is automatically discharged.
2. Immediate Re-enlistment – members re-enlisting receive a discharge from their previous term.
3. Incompatible Service Affiliation – members who earn a commission, enlist in an active duty component, receive an ROTC scholarship or join the ROTC advanced program, etc.
4. Removal from Unit – members who move beyond a reasonable commuting distance may request separation.
5. Incompatible Occupation – a member with an incompatible occupation may *request* separation.
6. Retirement – members approved for retirement separate and enter into the Retired Reserve.
7. Religious Vows – members who join a religious order or take incompatible religious vows may request separation.
8. Own Convenience – members not in their first term of service may request separation.
9. Early Release to Further Education or Training – members may request separation to attend a formal school or training program incompatible with their service.
10. Public Office – ANG members (only) may request separation if they are elected or appointed to public office.
11. Dependency or Hardship – members may request separation if they have serious and documented family obligations.
12. Pregnancy or childbirth – female members (only) may request separation for pregnancy or childbirth.
13. Conscientious Objection – a member with a bona fide belief rejecting all forms of violence may request separation.
14. Sole Surviving Son or Daughter (AKA the Private Ryan Rule) – a member may request separation if they have a sibling or parent who dies in the line of duty, leaving them the sole surviving son or daughter.
15. Insufficient Retainability for Mobilization or Deployment – members requesting exemption from activation or deployment due to insufficient retainability must also apply for separation.
16. Discharge for the Good of the Service – members whose conduct would render them triable by court-martial may request separation for the good of the service.

17. Miscellaneous Reasons – members may request separation for other reasons, but the good of the service is the paramount consideration. In the past, this has facilitated separations for the victims of well-known cases of fraternization or other non-criminal conduct bringing discredit upon the service.

## **GROUNDINGS – INVOLUNTARY**

1. Selective Retention/Non-selection for Re-enlistment – members non-selected for retention will be separated.
2. Unsatisfactory Participation – members with 9 unexcused absences in 12 months can and should be separated, absent substantial evidence of the potential for future deployment or mobilization. PALACE CHASE obligors must return to active duty.
3. Parenthood – after counseling and remedial measures, commanders should separate members who cannot satisfactorily perform their duties or cannot deploy because of parental responsibilities.
4. Conditions That Interfere with Military Service – commanders may separate members who have medical conditions that do not disqualify them under AFI 48-123, but interfere with military service (such as personality disorders) or who do not qualify for continued military service for non-service-connected medical conditions developed not in the line of duty.
5. Failure to Respond to Official Correspondence/Inability to Locate – two “we can’t find him” reasons. Commanders use unsatisfactory participation more often.
6. Entrance or Service in the Armed Forces of a Foreign Country/Accepting Civil Employment with a Foreign Country/Loss of Nationality – self-explanatory; most often for non-citizens returning to their home countries
7. Deactivation of Unit – if the unit deactivates and no appropriate vacancies exist in the local area, the member may be separated.
8. Provisions of state law – some states have additional reasons for separation.
9. Failure to Comply with Requirement for a Medical Examination – for members who fail to complete medical readiness requirements within 90 days of the due date.
10. Physical Disqualification – members who fail to meet medical retention criteria under AFI 48-123 or cannot otherwise perform their duties and who cannot be retrained or reassigned.
11. Minority, Erroneous, Defective and Fraudulent Entry – separation for members who have defects in their initial accession into the service. Some defects may be waived.
12. Entry Level Performance and Conduct – usually for members who cannot adjust to military service.
13. Excess or Overgrade Members – members who exceed the time limits and do not find another position.
14. Substandard (Unsatisfactory) Performance – generally repeated CDC failures, but also fitness or other failures.
15. Drug or Alcohol Rehabilitation Failure – generally used for self-identified members who fail rehab.
16. Homosexual (or Bisexual) Conduct – consult with your SJA before taking any action not immediately required
17. Misconduct - .serious or recurring minor misconduct, including drug abuse, failure to support dependents, GTC misconduct, civilian conviction, and other misconduct. Consult as soon as possible with your SJA. A waiver is required for retention of members with a positive urinalysis result.
18. Discharge in the Interests of National Security – usually used for members who cannot obtain or retain a security clearance required for their position.
19. Secretarial Plenary Authority – SECAF may discharge any member in the best interests of the Air Force.

## **CHARACTERIZATIONS**

Different grounds for discharge have different permissible characterizations. The following definitions serve as general guidance for evaluating cases where AFI 36-3209 allows different levels of characterization.

**HONORABLE** – the member’s conduct has generally met USAF standards for performance of duty.

**GENERAL (UNDER HONORABLE CONDITIONS)** – the negative aspects of the member’s performance outweighed the positive aspects of the member’s service.

**UNDER OTHER THAN HONORABLE CONDITIONS** – the member’s conduct includes acts or omissions that constitute a significant departure from the conduct expected and has some relation to the member’s performance of his duties.

Early identification and documentation of an unfit or unsuitable member helps to expedite the discharge process. An isolated incident is not a sufficient basis for discharge, unless the incident involves serious misconduct or a civilian conviction. However, the civilian conviction must be for an offense which warrants discharge and for which a punitive discharge would be authorized for the same or a closely related offense under the UCMJ or a state military code. Evaluation should be made on a case-by-case basis.

When a member commits a serious offense (remember, even in civilian status most state military laws provide that the member is at all times a member of the organized militia of that state), look in the UCMJ or your state military code to see if the offense carries a punitive discharge. If it does, you may begin administrative discharge action based upon the misconduct, even if the member has not yet been convicted of that offense. The administrative discharge process requires proof by a preponderance of the credible evidence. This is much less than the beyond a reasonable doubt standard used by criminal courts. Before beginning a discharge action based on a civilian conviction, you should closely consult with your Staff Judge Advocate. While a criminal conviction for a serious offense can be the basis for an involuntary discharge, it may, under some circumstances, be better and quicker to proceed with an administrative discharge on the basis of the underlying misconduct.

The majority of cases are based on a more prolonged pattern or course of conduct, which would establish reasons for involuntary separation as outlined in AFI 36-3209. In these cases, there must be sufficient documentation of the grounds for discharge before the action is initiated. In many instances, an individual should be counseled, reprimanded, and demoted (for example, through administrative demotion or nonjudicial punishment) before a discharge action is initiated.

#### **ALTERNATIVES TO FORMAL DISCHARGE ACTION**

When other administrative or disciplinary actions have met with resistance or resulted in minimal improvement, the Commander should consult with the member's First Sergeant, MPF and the Staff Judge Advocate. At this point, the member's whole record should be reviewed, including the Expiration of Term of Service. If an individual's re-enlistment date is approaching, the Commander should consider giving written notice to the individual that reenlistment will not be extended. Transfer to the Inactive Ready Reserve (IRR) should also be considered.

#### **PROCEDURES AND REQUIREMENTS**

If denial of re-enlistment is not an appropriate method of separation, the Staff Judge Advocate should help the Commander determine if reasons for involuntary discharge exist. The Commander will prepare a Commander's Report and send a Letter of Notification to the member containing the detailed reasons for the proposed discharge and the type of discharge to be recommended to the discharge authority. General forms are provided in AFI 36-3209. The documents are drafted with the advice of the Staff Judge Advocate. The discharge process begins when the Letter of Notification is sent to the member.

Note, that under AFI 31-501, there may be certain requirements for proceeding in administrative discharge actions if the case involves a national security issue. See the topic entitled "PERSONNEL SECURITY ACCESS PROGRAM" in this Deskbook.

If you are unable to or choose not to present the discharge paperwork to the member in person, you must establish proof of delivery of the Letter of Notification to the member or agent by sending it certified mail, return receipt requested. Once the discharge process has begun, depending upon the nature of the action, the individual has certain rights, including the right to confer with military or civilian counsel (the latter at the individual's own expense), and in some instances, to present the case before an administrative discharge board. It is important to know when the individual has the right to a board.

#### **CONDITIONAL WAIVERS**

In practice, the "conditional waiver" approach may be used to resolve these "right to a board" cases. This approach is by no means required, but in many cases it may be appropriate. The conditional waiver is simply the member waiving a board and consenting to the administrative discharge on condition that the discharge will be a certain type

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# Administrative Discharge of Officers

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Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005); TJAG ANG/JA Memorandum on Delivery of Defense Services (24 Apr 2006); applicable state law.

## INTRODUCTION

AFI 36-3209, Chapter 2, establishes two general categories for officer separations: 1) unfitness, unacceptable conduct, or substandard performance of duty (AFI 36-3209, Chapter 2, Section 2D) and 2) reasons that do not involve misconduct on the part of the officer (AFI 36-3209, Chapter 2, Section 2C). Here, we address only the most common reasons for discharge.

## REASONS FOR DISCHARGE – UNFITNESS, UNACCEPTABLE CONDUCT, OR SUBSTANDARD PERFORMANCE OF DUTY

Conduct that evidences unfit or unacceptable conduct by ANG officers includes:

1. Conduct incompatible with exemplary standards of personal conduct, character, and integrity such as:
  - a. Failure to meet financial obligations
  - b. Mismanagement of government affairs
  - c. Drug abuse
  - d. Serious or recurrent misconduct
2. Misrepresentation or omission of material fact(s) in official statements or records
3. Failure (when reasonably traced to factors within the officer's control) at any school attended at Government expense
4. Sexual perversion (as defined by your state law)
5. Fear of flying - This applies to a rated officer who is suspended from flying status because the officer states in written or oral testimony a fear of flying, and medical personnel determine the officer is physically qualified to fly.
6. Refusal or unexplained failure to participate in required training activities
7. Refusal or unexplained failure to comply with, or acknowledge official communications
8. Retention is not clearly consistent with the interest of national security
9. Homosexual or bisexual conduct

## REASONS FOR DISCHARGE – SUBSTANDARD PERFORMANCE

Conduct that evidences substandard performance of duty by ANG officers includes:

1. Failure to demonstrate acceptable qualities of leadership required of the officer's grade
2. Failure to achieve acceptable standards of professional proficiency required of the officer's grade
3. Failure to properly discharge assignments commensurate with the officer's grade and experience
4. Progressive downward trend in the officer's duty performance resulting in an unacceptable level of effectiveness
5. Record of marginal service over an extended period of time
6. Apathy or bad attitude
7. Certain personality disorders which interfere with the officer's duty performance
8. Failure to conform to the prescribed standards of dress, weight, bearing and behavior
9. Inability to perform duties or unavailability to perform worldwide duties due to dependent care responsibilities
10. Lack of response to training impairing the officer's satisfactory performance of duties in the officer's assigned specialty

## REASONS FOR DISCHARGE – OTHER REASONS WITHIN THE MEMBER'S CONTROL

1. Drug or alcohol abuse rehabilitation failure
2. Conviction by civilian authorities
3. Unsatisfactory participation – 9 UTA absences within 12 months

## **REASONS FOR DISCHARGE – REASONS OTHER THAN MISCONDUCT**

AFI 36-3209 also provides for separation of officers who are not qualified or are unable to meet the obligations of service. Generally, discharge pursuant to these grounds is not based on misconduct of the individual officer. They include: not being qualified for promotion, lengthy service, inability to locate, physical disqualification, failing to get a military physical, loss of nationality, and physical disqualification.

## **EVALUATION AND ACTION**

As a Commander you should examine and evaluate any information you receive which indicates an officer under your command may be subject to separation pursuant to AFI 36-3209. You should ensure that the case is thoroughly investigated and the facts are fully developed and documented.

Consult with your unit SJA regarding any officer you believe may be subject to discharge under AFI 36-3209. Once you have determined you have an individual who qualifies for separation, you should recommend initiation of discharge proceedings to the State Adjutant General (AG), through your chain of command, using the format in AFI 36-3209, Attachment 3. You must concisely state the basis for your recommendation and attach all investigative reports and/or documents that substantiate it.

If the AG believes action under AFI 36-3209 is appropriate, the AG will send a letter of notification specifying the proposed discharge, the grounds and reasons therefor, and the rights of the officer respondent. In all AFI 36-3209 cases, Officers have the right to a board hearing. This right may be waived.

Eligible officers may tender a resignation or apply for transfer to the Retired Reserve at any time. An officer may not submit a conditional resignation. If the submission is made prior to the convening of a board, further action is suspended. If the resignation or transfer is disapproved, the board may be convened.

Upon the officer's response or lack of response to the letter, the AG determines if continued discharge action is warranted. If it is not, the case is closed. If so, the AG refers the case to a discharge board. The discharge board holds a hearing and makes recommendations regarding discharge and characterization. The board's recommendation goes back to the AG, who may approve it for cases not requiring SAF approval. For cases requiring SAF approval, the board report goes up to SAF through the Personnel Council.

In summary, the ANG commander initiates the discharge process with a recommendation to the AG. If the AG agrees, the officer receives a Letter of Notification and may opt for a discharge board. The board makes findings and recommendations regarding discharge and characterization, which it reports back to the AG. A board's discharge recommendation may require approval by SAF, depending on the nature of the discharge.

## **ALTERNATIVES TO BOARD PROCEEDINGS**

**Dropping From the Rolls** – AFI 36-3209 also provides for dropping ANG officers from the rolls of the Air Force instead of their administrative discharge if they have been convicted by civilian authorities and are sentenced to confinement in a state or federal penitentiary. Subject to due process considerations, ANG officers may also be discharged if they are convicted by a foreign court.

**Resignation** –As a general rule, resignations will be accepted; however, whenever an officer submits a resignation, you should consult with the unit SJA to ensure appropriate documentation of the basis of the request and ensure the officer's request is not subject to disapproval. Resignations are not automatic; they must be approved to be valid. Local Commanders are not the approval authority for resignations.

## **CONCLUSION**

An officer discharge may be a long road. However, it will go quickest if the initiating commander provides good documentation of the facts supporting discharge. Early consultation with your unit SJA will also speed the process.

***KWIK-NOTE: Early coordination will help speed the process.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Federal Commission Status Withdrawal	1-16
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## Letters of Counseling, Admonition and Reprimand

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**Updated by Major Marshall L. Wilde, October 2006**

**AUTHORITY:** AFI 36-2907, *Unfavorable Information File (UIF) Program*, Chapter 3 (17 June 2005). This Instruction does not apply to the ANG and is provided for information only.

### INTRODUCTION

While many state Codes of Military Justice authorize letters of admonition or reprimand as forms of nonjudicial punishment, for less severe infractions, "administrative" letters of admonition or reprimand may also be used by Commanders. Admonitions and reprimands may also be given orally, if a Commander feels the conduct does not warrant a written record. We discourage verbal discipline, as it does not provide an adequate record to assist in later disciplinary incidents.

### ADMONITION

An "Admonition" is a warning, reminder, or reproof given to deter repetition by the offender of the type of misconduct which resulted in the admonition and to advise the offender of the consequences that may flow from a recurrence of the misconduct. It is a formalized version of a written counseling. Attachment 1 to this topic is a sample Letter of Admonition with a form acknowledgment of receipt and a chance to respond. For active duty and activated officers, admonitions are usually given to avoid the requirement of filing a Letter of Reprimand in an Unfavorable Information File (UIF). This requirement does not apply to the ANG, giving admonitions limited utility.

### REPRIMAND

A "Reprimand" is an act of censure which reproves or rebukes the offender for misconduct. An admonition may be included in a "reprimand." Attachment 2 to this topic is a sample Letter of Reprimand with a form acknowledgement of receipt and a chance to respond. A commander may include a reprimand as part of an Article 15.

### GUIDANCE AND COMMAND DISCRETION

While there is currently no specific ANGI or applicable AFI governing administrative admonitions and reprimands, Commanders and supervisors have inherent authority to issue them. As such, there is no specific guidance on questions of where to file them, what use of them can be made, how long they may remain "on file," or what, if any, appeal lies from their issuance. As a policy matter, they should not be filed in the recipient's official personnel file, but rather in a Commander's or supervisor's own file on the member. The Commander may use them in determinations on promotion, assignment, OPRs, etc. based upon the Commander's discretion. The length of time the Commander wishes them kept "on file" is also a matter of discretion. The only avenue of appeal from an administrative admonition or reprimand would appear to be through a "complaint of wrongs" procedure pursuant to any applicable law or regulation.

In response to an ANG member's poor performance or a breach of proper conduct, if informal counseling fails to achieve the desired result, or if an infraction is of a more serious nature, a Commander or supervisor should consider an administrative letter of admonition or reprimand. The question of how serious an infraction has to be for the Commander to deal with it administratively rather than nonjudicially, and if administratively, orally or in writing, is the Commander's "call." This should be made with the advice of the Staff Judge Advocate, since these actions may form the building blocks for more serious adverse action against the member in the future. While these actions usually follow unsuccessful counseling attempts, counseling is not necessarily a prerequisite to the issuance of an admonition or reprimand. Each Commander must use judgment in deciding which rehabilitative tool to use.

Sometimes a reprimand will get the offender's attention and effect the desired change without resort to protracted counseling. On the other hand, some offenders may only become more recalcitrant if they perceive the early reprimand as unjust or premature.

## FORMAT

Reprimands, admonitions, and counselings share a common recommended format. The following serves as a “blank” that may be tailored to your specific purposes.

(Date)

MEMORANDUM FOR (GRADE AND NAME)

FROM: (Office Symbol)

SUBJECT: Letter of (Reprimand/Admonishment/Counseling)

1. It has come to my attention that you ...*(Describe misconduct or substandard performance. Use additional paragraphs if necessary.)*
2. You are hereby (reprimanded/admonished/counseled). *(Tailor language to match specific allegation.. Explain why actions were unacceptable. Also state future expectations, especially in cases of substandard performance. Explain that any further instances of misconduct or substandard performance could result in more severe action. Although not strictly required, reprimands usually cite a specific section of the UCMJ.)*

*(Following two paragraphs are mandatory)*

3. AUTHORITY: 10 USC 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 or documents you submit become a part of the action. DISCLOSURE: Your written acknowledgment of receipt and signature are mandatory. Any other comment or document you provide is voluntary.
4. You will acknowledge receipt and return this letter to me within 30 calendar days of your receipt. Any comments or documents you wish to be considered concerning this letter of (reprimand/admonition/counseling) will be included with your response.

Commander's/Supervisor's

Signature Block

1<sup>st</sup> Endorsement, (Member's Name)

I acknowledge receipt and understanding of this letter on \_\_\_\_\_ at \_\_\_\_\_ hours. I understand that if I intend to submit a statement or other documents in response to this letter, I must do so within 30 calendar days of my receipt of this letter.

Member's Signature Block

2<sup>nd</sup> Endorsement, (Commander's name) (DATE)

(member's name) (submitted matters/elected not to submit matters/did not respond within 30 days.) (Include the following if the member submitted matters but you continue to wish to impose discipline: I have considered the matters submitted by the member and find that they do not merit rescinding this letter. I have attached these matters as part of this letter as Attachment 1.)

Commander's/Supervisor's

Signature Block

## PROCESS

Commanders may administer discipline in person or via certified mail, return receipt requested. While issuing discipline in person is preferred, it is not possible in some circumstances, such as when the member has refused to

attend drill. The certified mail and return receipt serve to show that the member had notice of the disciplinary action. The second endorsement serves to “close the loop” and show that the member had the opportunity to respond. While the above format is not strictly required, it mirrors the active duty format and consistency will help later commanders or supervisors feel more comfortable with the disciplinary action.

***KWIK-NOTE: LOCs, LOAs, and LORs serve as the backbone of squadron level discipline. In addition to their remedial effect, they help establish a pattern if the member engages in additional misconduct in the future.***

**RELATED TOPICS:**

**SECTION**

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Sources of Commanders' Authority	2-7	

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## Barring Reenlistment

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Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** AFI 36-2606, *Reenlistment in the United States Air Force* (21 November 2001); ANGI 36-2002, *Enlistment and Reenlistment in the Air National Guard and as a Reserve of the Air Force* (1 March 2004).

### CRITERIA

Most ANG members discharged for misconduct have some history of poor performance. Often, we discover that the chain of command knew of these problems, yet still allowed the member to reenlist. The reenlistment policy of the Air National Guard is set forth in ANGI 36-2002, paragraph 4.3, as follows: "Continued retention in the ANG is a command prerogative and not an inherent right of any individual." Chapter 4, paragraph 4.1, further bolsters the commander's authority with the following language: "No individual will be extended without the concurrence of his/her commander."

Certain factors preclude reenlistment. Ineligibility factors (14) are identified in Table 4. Some of the situations that deny reenlistment or extension and that do not permit waivers are (See ANGI 36-2002, Table 4.1 for full listing) the following:

1. Morally unacceptable persons convicted by a civilian court of an offense punishable by death or convicted of one or more felonies, persons under restraint, persons having frequent difficulties with law enforcement;
2. Persons under parole, probation, or suspended sentence from a civil court (This is subject to certain exceptions listed in the regulation);
3. Persons under the influence of alcohol or drugs;
4. Persons with a documented history of mental illness or insanity;
5. Students enrolled in the advanced course of AFROTC, Army ROTC, or Naval ROTC, or scholarship students within these programs;
6. Drug abusers, unless cleared of drug abuse charges;
7. Immigrant aliens enlisting enlisted in the ANG on or after 1 Jun 83 who have not acquired U.S. citizenship status during their initial enlistment;
8. When expiration of term of service (ETS) is imminent, and members are under investigation, they may voluntarily extend for six-month periods until the case is decided. However, if they elect not to extend, they will be separated on their ETS, and reenlistment is barred;
9. A person who presents a national security risk;
10. Individuals not selected for retention under state selective retention programs;
11. Conscientious objectors; and
12. Individuals convicted of misdemeanor crimes of domestic violence.

Even when policy does not prohibit a member from reenlisting, the commander should carefully consider whether the member meets that commander's "quality cut". A commander may deny reenlistment for virtually any reason, but the most common non-mandatory reason is simply that the member has not performed up to the commander's expectations.

## **POLICY**

The policy of the ANG allows commanders the authority to make the decision on whether or not an airman is to be reenlisted, extended, or retained. A commander is not required to reenlist, extend, or retain any airman, and commanders do not have to set out any reasons for their decision. The reenlistment decision is, in essence, a “freebie” for the commander and is often the best opportunity to remove members of the ANG who do not meet expectations or who are simply more trouble than they are worth.

## **EXERCISE YOUR DISCRETION WISELY**

The commander's ability to control the reenlistment or extension of enlistment of unit personnel is a valuable quality force management tool. While no reasons need be given for the decision to not reenlist or extend the reenlistment of a member, commanders should have a valid justification for their decision. Being able to articulate a justification could be important if, for example, the member was able to later allege that the denial of reenlistment was based upon reprisal or unlawful discrimination based upon, for example, race, sex, etc.

Before deciding upon a bar to reenlistment, commanders should involve their MPF and Staff Judge Advocates in the process.

## **WAIVERS**

Members with disqualifying factors often request that their commanders support a waiver for reenlistment. Commanders should weigh the effect of a waiver extremely carefully. To illustrate, a member who has twice failed the fitness test will probably not improve his or her fitness. A member who has a misdemeanor domestic violence conviction or a protective order issued will not be able to bear arms. When you sign a waiver, you put your credibility on the line.

***KWIK-NOTE: Membership in the Air National Guard is a privilege, not a right.***

## **RELATED TOPICS:**

## **SECTION**

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Judicial Review Of Military Administrative Actions	18-5
Quality Force Management Actions	24-12
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# Counseling

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**Updated By Major Marshall L. Wilde, October 2006**

**AUTHORITY:** AFI 36-2907, *Unfavorable Information File (UIF) Program*, (17 June 2005). This AFI does not apply to the ANG and is cited for information only.

## INTRODUCTION

Counseling should serve as the commander's first tool for corrective action. This does not mean that all airmen who require counseling are in trouble or that all airmen who are in trouble should be counseled. Airmen should be encouraged to affirmatively seek the assistance of their supervisor or commander. The wisdom and maturity of the supervisor or commander frequently provides the guidance necessary to improve job performance before a major problem requiring more serious action develops. Sometimes the commander or supervisor should initiate counseling, usually to correct habits or shortcomings which are not criminal or illegal, but which can ultimately negatively affect job performance.

## COUNSELING VERSUS LETTERS OF COUNSELING

Our Army brethren use the word "counseling" in a more general sense, meaning mentorship or leadership on a one-to-one basis. In the Air Force, we usually use "counseling" to mean corrective action to address substandard performance, while we use mentoring or feedback to describe a less formal process. While this subchapter addresses formal counseling, the Air Force encourages the frequent use of informal counseling, mentorship, and feedback in the workplace. These tools often prevent the need for formal counseling.

## WHEN TO FORMALLY COUNSEL

Airmen should be formally counseled as soon as possible after displaying substandard duty performance or behavior. This counseling session should be documented by use of a letter of counseling (LOC). Generally speaking, an LOC will be destroyed one year after the last recorded counseling session or upon the member's reassignment or separation. In limited circumstances, a commander or supervisor may wish to verbally counsel a subordinate, usually because they believe that under the circumstances the formality of an LOC would cause more harm than good. When this is the case, we advise some documentation of the session through an MFR or some written record to provide documentation to serve as a record or evidence that the session occurred.

Counseling records may become very important if, at a later time, more serious adverse actions, including administrative discharge proceedings under AFI 36-3209, become necessary. Counseling records may also provide a valuable history for new commanders or supervisors and help them to better understand existing problems and those curative steps already taken.

## CONTENTS OF A FORMAL COUNSELING RECORD

Whether or not an LOC is used, the commander should ensure that supervisors who counsel airmen include in their documentation at least the following:

1. A statement of the circumstances which brought about the counseling session;
2. A brief description of what was said by both the member and the supervisor conducting the session. This is made simpler if the report is written immediately after the session;
3. The causes of the problem; and
4. The solution which was developed and the action taken or recommended.

## ADVICE OF RIGHTS

Normally, counseling sessions do not require advising members, whether military or civilian, of their constitutional rights. However, remember that it is an offense for you to ask a member questions that may lead to an incriminating answer if you suspect them of an offense under the UCMJ. Civilians are normally not entitled to union representation during counseling sessions. However, the Judge Advocate should consult with the Civilian Personnel Office on this issue and check the relevant collective bargaining agreement, since union representation during counseling may have been negotiated in that contract. Failure to advise members of their rights may prevent admissions or statements made by the airman or civilian member from being used against them in subsequent actions.

If a counseling session has been convened by a commander concerning a situation for which disciplinary action could be taken, the questions of advice of rights must be considered. Commanders often wish to simply talk to their subordinates about incidents of misconduct. However, when you suspect a member of an offense under the UCMJ, you must advise the member of his or her Article 31 rights before asking any questions about the misconduct. As a practical matter, we advise against questioning the member directly by the commander. Instead, take the future view – “How are we going to get beyond this?”

In cases involving possible criminal misconduct, civilian members may need to be advised of similar rights under the *Miranda* case and, if the member so requests, a union representative may be present. Any questions about the text of these rights can be answered by your Judge Advocate.

## DUE PROCESS AND ACKNOWLEDGMENT OF RECEIPT

Records of counseling must reflect the fact that the member received the document and had an opportunity to respond. As such, each such counseling should be annotated with "You may respond to this allegation" or with the more formal language allowing 30 days to respond for a formal LOC. Consider carefully how you want to deal with the member's right to respond. In informal mentoring situations, a discussion may be appropriate. However, in more formal counseling, it may need to be a “one way conversation” with only the right to submit matters in writing.

A common problem arises in a written counseling when airmen or employees refuse to acknowledge the counseling by their signature. When this occurs, simply annotate that fact on the bottom of the form, date the form, and sign it. Failure to acknowledge receipt of a document is rarely an independent basis for separate adverse action. Another solution is to have a witness present who prepares a memo for the record (MFR) regarding the member's refusal to acknowledge receipt of the written counseling.

***KWIK-NOTE: Document all counseling sessions.***

### RELATED TOPICS:

### SECTION

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Confessions	8-10
Employee Interrogation	5-3
Investigation by Commander of Suspected Minor Offenses	16-10
Quality Force Management Actions	24-12

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# Dropping ANG Officers From The Rolls Instead of Administrative Discharge

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Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** 10 U.S.C. 12684; AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005).

## WHEN IT CAN BE DONE

AFI 36-3209, para. 2.36.6, permits dropping an officer from the rolls (DFR) instead of administratively discharging the officer in certain cases of a civilian or foreign court conviction.. An officer who has been found guilty by civilian authorities of any offense and sentenced to confinement in a federal or state confinement facility may be dropped from the rolls of the Air Force. Limited by certain due process safeguards, an officer may be dropped from the rolls if convicted and confined by a foreign court. Dropping an officer from the rolls terminates the officer's military status as of 2400 hours on the date specified in the orders.

## PROCEDURE

To initiate a DFR, the Adjutant General forwards a report to the Chief, National Guard Bureau, with a recommendation on whether the officer should be dropped from the rolls, or, alternatively, processed for administrative discharge, stating the reasons for such recommendation. Such factors as the quality of the officer's service, length of service, type of offenses involved, and the notoriety and protracted nature of an administrative board proceeding are common reasons for deciding to proceed with a dropping from the rolls action instead of a discharge proceeding. The Chief, National Guard Bureau, also makes a recommendation and forwards the case to the Air Force Personnel Board, which renders a final decision on behalf of the Secretary of the Air Force.

## DUE PROCESS REQUIREMENTS

10 U.S.C. 12684 and AFI 36-3209 do not expressly provide for any form of procedural due process in dropping a member from the rolls. Procedural due process requires that the member be notified of the proposed action and an opportunity to be heard. The administrative discharge process provides a measure of due process, but the question remains whether or not the U.S. Constitution requires a degree of procedural due process in dropping an officer from the rolls. Recommending a retirement-eligible member for DFR may require some procedural due process. Such an officer may have a constitutionally-protected property interest in retirement benefits, which would mandate procedural due process under the Fifth Amendment. However, non-retirement-eligible officers have no such constitutionally-protected property interest and thus no right to procedural due process under the Fifth Amendment. (See OpJAGAF 1989/86).

## DOCUMENT THE RECORD

Because of the procedures required by AFI 36-3209 to drop an officer from the rolls and the potential due process issues, a commander should immediately consult with the Staff Judge Advocate in any case involving a possible dropping from the rolls action so as to ensure that the record to be submitted is properly documented and legally sufficient to support an appropriate recommendation by the Adjutant General and to support the final decision in the action.

## BENEFITS/ENTITLEMENTS

ARPC advises that the TAG make a recommendation on the benefits/entitlements that the officer should retain when dropped from the rolls. The Secretary of the Air Force makes the final decision regarding benefits.

## CONCLUSION

Some of the Related Topics below may lead to an ANG officers being dropped from the rolls. Some states laws have similar procedures. Consult yours.

***KWIK-NOTE: Officers may be dropped from the rolls instead of administratively discharged in cases of criminal confinement.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Administrative Discharge Of Officers	24-4
Arrest By Civilian Authorities	8-6
Federal Commission Status Withdrawal	1-17
Judicial Review Of Military Administrative Actions	18-5
Officer Evaluation System	1-23
Quality Force Management Actions	24-12

## ID Card Retrieval

Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** 18 U.S.C. 499 and 701; AFI 36-3026, *Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel* (20 December 2002).

### REASONS TO RETRIEVE

ID cards are government property. The willful altering, damaging, lending, counterfeiting or using of any ID card in any unauthorized manner is a federal crime, prosecutable by federal civilian authorities and punishable by a fine or imprisonment or both. Such actions may also result in a military member being court-martialed or processed for administrative discharge. Any commissioned or noncommissioned officer or Security Forces member, in the performance of duty, may confiscate any ID card that has expired, is being fraudulently used, or is being presented by a person not entitled to its use.

When a unit commander starts administrative or judicial action against a member that may result in a discharge, the commander or a designee should retrieve ID cards from the member and the member's dependents. The commander sends the retrieved ID cards by letter to the servicing MPF. The letter requests destruction of the cards. It also requests that the member and dependents be issued ID cards to expire within 90 days after the administrative or judicial action began.

The MPF must attempt to retrieve ID cards from persons no longer entitled to a dependent ID card. Such cases include instances of divorce, marriage of a child, or college disenrollment of an eligible child. If the card cannot be retrieved voluntarily from the holder by letters from the sponsor, commander, or MPF, the case may be referred to Security Forces for investigation. Such an investigation, however, should be closely coordinated with the Staff Judge Advocate.

Certain categories of former dependents may be entitled to ID cards. These include victims of domestic violence perpetrated by the member and certain un-remarried spouses. Former spouses and unmarried parents of children of military members may also request a base entry letter to exercise the military benefits of their children. Should any problem arise in this area, coordinate with the Staff Judge Advocate.

***KWIK-NOTE: An ID card is federal government property and its possession and use are a PRIVILEGE. The ID card may be confiscated and the user prosecuted for its improper use.***

### RELATED TOPICS:

### SECTION

Administrative Discharge of Enlisted Personnel	24-3	
Administrative Discharge of Officers	24-4	
Criminal Investigations, Prosecutions And Reporting – DOD And DOJ		8-12
Fraud, Waste And Abuse	16-7	
Preventive Law Program	17-15	

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## Mailing or Delivery – Affidavits and Certificates of Service

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Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** Applicable federal and state statutes and regulations. AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), 28 USC §1746.

### INTRODUCTION

Whenever a military-related document is mailed or personally delivered to a unit member and, by the nature of the document, it is contemplated that at some future time it will be necessary to prove that the document was mailed or delivered, commanders should ensure that appropriate evidence of that mailing or delivery is completed and retained in the case file. The vast majority of instances where such proof of mailing or delivery will need to be prepared and retained is in ADVERSE ACTIONS. These include nonjudicial punishment actions, administrative demotion and other quality force management actions, notices of unexcused absences from scheduled training, recall to active duty recommendations for unsatisfactory Palace Chase participants, and administrative discharge actions. Attachment 10 to AFI 36-3209 provides a format for a sworn affidavit of mailing that may be used in discharge cases. The availability of return receipt mailing allows commanders to take discipline in cases where the member refuses to attend drill.

If the document itself provides a space for acknowledgment of its receipt and is personally delivered so that both the unit and the member receive a signed and dated copy of the acknowledgment of receipt, then the affidavits or certificates of mailing or delivery described in this topic need not be prepared. Simply make certain that the member signs. If the member refuses to sign, have a witness sign and annotate the document to indicate that the member refused to sign. However, in all other cases where proof of mailing or delivery may be needed later, these affidavits or certificates should be prepared contemporaneously with the mailing or delivery and retained in the case file.

### AFFIDAVIT OR CERTIFICATE - MAILING OR DELIVERY

Particular state or federal statutes or regulations may prescribe whether you should use an affidavit, which is a signed and sworn (notarized) written statement, instead of merely a certificate, which is a signed certification that the act described in the statement was done. In the absence of a particular statute or regulation prescribing an affidavit (which is always permissible), commanders, in their discretion and after consultation with their Staff Judge Advocate, may require only a certificate. Lack of a notary public conveniently located on base between scheduled training periods is a main reason for only requiring a certificate when an affidavit is not required by statute or regulation. Generally speaking, the modest investment required to have a full-time AGR or technician certified as a state notary pays off many times over.

Note also that specific federal or state statutes or regulations may require that mailing be by certified mail rather than regular mail. If you are required to, or do, send a document by certified mail, always send it return receipt requested and retain the (white with the green printing) certified mailing receipt. If the member has been picking up or claiming certified mail, send it RESTRICTED DELIVERY to the member only (you should also do this the first time you send the member certified mail). If the member has not been picking up or claiming certified mail (where it has been returned by the U.S. Post Office UNCLAIMED), DO NOT send the certified mail RESTRICTED DELIVERY. RESTRICTED DELIVERY requires additional postage.

If you are not required to mail certified, usually you should not do so, as it is much more expensive and the return receipt requested green card may not be returned to you by the U.S. Post Office by the due date specified in the correspondence. *The action to be taken by the due date described in the correspondence must await your receipt of the green card before it may begin.* Note also that if you are permitted to send a document by regular mail, you may

obtain a Proof of Mailing from the U.S. Post Office, but this requires personal delivery to the Post Office and is usually not necessary.

The attachments to this topic are sample forms to assist you.  
Attachment 1 is an Affidavit of Service by Mail;  
Attachment 2 is an Affidavit of Service by Personal Delivery;  
Attachment 3 is a Certificate of Service by Mail; and  
Attachment 4 is a Certificate of Service by Personal Delivery.

They may be prepared on plain (not unit letterhead) paper. It is a good idea to attach the Affidavit or Certificate to the file copies of the correspondence to which it refers. Never send the Affidavit or Certificate to the recipient. You may wish to use these forms and have them distributed to your subordinate commanders, first sergeants, and MPF for their use as necessary. Your Staff Judge Advocate can explain under what circumstances they are to be used and completed.

Also, in administrative matters under FEDERAL law or regulation (such as AFI 36-3209) one can use an “Unsworn Declaration Under Penalty of Perjury,” as provided for at 28 USC §1746. This is very useful but should only be used when a notary public is not available. Sworn affidavits with a notary’s signature are preferred.

***KWIK-NOTE: Supplement this topic with applicable state law.***

Attachment 1

**AFFIDAVIT OF SERVICE BY MAIL**

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

(Name, Grade, SSAN), being duly sworn, states:

1. That (he or she) is a member of (Unit, Base, State, Zip Code).
2. That on the \_\_\_\_\_ day of \_\_\_\_\_(month, \_\_\_\_\_(year) in the performance of (his or her) official duties, (he or she) mailed an original (letter, action, etc.) dated \_\_\_\_\_, Subject: \_\_\_\_\_, to (Name, Grade, SSAN, Address), by (regular mail), (certified mail, return receipt requested), (restricted delivery, if applicable): that being the last known address given by the member as the one at which mail would be received or forwarded to (him or her). The letter was sent (with a postage and fees prepaid return addressed envelope, if applicable) inside a properly addressed, postage paid, sealed envelope by placing it in an official depository of the United States Postal Service.

\_\_\_\_\_(Signature)\_\_\_\_\_ Typed Name and Grade

Sworn and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_(month)\_\_\_\_\_, \_\_\_\_\_(year)\_\_\_\_\_

\_\_\_\_\_  
Notary Public (or person authorized to give oaths)

Attachment 2

**AFFIDAVIT OF SERVICE BY PERSONAL DELIVERY**

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

(Name, Grade, SSAN), being duly sworn, states:

1. That (he or she) is a member of (Unit, Base, State, Zip Code).
2. That on the \_\_\_\_\_ day of \_\_\_(month)\_\_\_, \_\_\_(year)\_\_\_ in the performance of (his or her) official duties, (he or she) personally delivered an original (letter, action, etc.) dated \_\_\_\_\_, Subject: \_\_\_\_\_, to (Name, Grade, SSAN, Address), by handing it to (him or her) at (time of delivery), at (place of delivery).

\_\_\_\_\_(Signature)\_\_\_\_\_  
Typed Name and Grade

Sworn and subscribed before me this \_\_\_\_\_ day of \_\_\_(month)\_\_\_, \_\_\_(year)\_\_\_

\_\_\_\_\_  
Notary Public (or person authorized to give oaths)

Attachment 3

**CERTIFICATE OF SERVICE BY MAIL**

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

(Name, Grade, SSAN), hereby certifies as true and accurate:

1. That (he or she) is a member of (Unit, Base, State, Zip Code).
2. That on the \_\_\_\_\_ day of \_\_\_(month)\_\_\_, \_\_\_(year)\_\_\_ in the performance of (his or her) official duties, (he or she) mailed an original (letter, action, etc.) dated \_\_\_\_\_, Subject: \_\_\_\_\_, to (Name, Grade, SSAN, Address), by (regular mail), (certified mail, return receipt requested), (restricted delivery, if applicable): that being the last known address given by the member as the one at which mail would be received or forwarded to (him or her). The letter was sent (with a postage and fees prepaid return addressed envelope, if applicable) inside a properly addressed, postage paid, sealed envelope by placing it in an official depository of the United States Postal Service.

\_\_\_\_\_(Signature)\_\_\_\_\_  
Typed Name and Grade

Attachment 4

**CERTIFICATE OF SERVICE BY PERSONAL DELIVERY**

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

(Name, Grade, SSAN), hereby certifies as true and accurate:

1. That (he or she) is a member of (Unit, Base, State, Zip Code).
2. That on the \_\_\_\_\_ day of \_\_\_\_ (month)\_\_\_\_, \_\_\_\_ (year)\_\_\_\_ in the performance of (his or her) official duties, (he or she) personally delivered an original (letter, action, etc.) dated \_\_\_\_\_, Subject: \_\_\_\_\_ to (Name, Grade, SSAN, Address), by handing it to (him or her) at (time of delivery), at (place of delivery).

\_\_\_\_\_(Signature)\_\_\_\_\_  
Typed Name and Grade

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# Nonjudicial Punishment

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**Updated by Major Marshall L. Wilde, October 2006**

**AUTHORITY:** Applicable state law or regulation; UCMJ and AFI 51-202, *Nonjudicial Punishment* (7 November 2003); TJAG ANG/JA Memorandum on Delivery of Defense Services (24 Apr 2006) (applicable only when a member is in federal status).

## INTRODUCTION

Nonjudicial punishment under Article 15 fills the gap between purely administrative measures, such as a letter of reprimand, and the formal judicial processes of a court-martial. AFI 51-202 only applies to Guardsmen in federal service, while similar, but not identical, provisions of state law apply to Guardsmen in drill status. Your Staff Judge Advocate will help you determine whether the facts of a case merit an Article 15 and will help you navigate any unusual provisions of state law. States may vary as to the applicability and provisions of nonjudicial punishment in unexpected ways. As a practical matter, remember that, by nonjudicial punishment, you offer a choice of forum, not a plea bargain. If the member accepts nonjudicial punishment, the member still has the right to contest the charges informally and to have punishment decided only after the member presents their side of the matter.

## GENERALLY

Nonjudicial punishment is one of the commander's most valuable management tools for maintaining morale, discipline, and efficiency within the command or unit. The primary goal of a nonjudicial punishment action is to address the commission of a minor offense, and, if appropriate, rehabilitate the offender. As in all disciplinary cases, we recommend that you take the earliest action possible after the offense, consistent with the need to obtain complete and accurate information.

Commanders have nonjudicial punishment jurisdiction over all ANG personnel within their command, including AGR's. Thus, an AGR member who commits an offense during the regular work week is subject to nonjudicial punishment under the same procedures applicable to other Guard personnel during periods of AT or while in UTA status. Also, state law may allow nonjudicial punishment of Title 32 military technicians or drill status (traditional) Guardsmen. While the federal UCMJ only applies in Title 10 status, many states have UCMJ-like provisions that apply at all times.

Any person may recommend the imposition of nonjudicial punishment to a commander authorized to impose punishment. Usually, the person making the recommendation may not recommend the type of punishment to be imposed. All nonjudicial punishment actions should be in writing and should utilize approved formats pursuant to state regulation. For example, there is usually a standard form letter of notification and requirement for certifying the mailing, delivery and receipt of nonjudicial punishment documents.

## THE NONJUDICIAL PUNISHMENT ACTION FROM COMMENCEMENT TO APPEAL

First, nonjudicial punishment is a process and not a conclusion. Nonjudicial punishment exists to determine whether an offense occurred and to impose remedial measures if the commander finds the member responsible. We do not generally recommend nonjudicial punishment for very minor first offenses. However, even very minor incidents, such as failing to show up for work on time, may merit nonjudicial punishment, if repeated.

Commanders do not have to address all known or suspected incidents of misconduct through nonjudicial punishment. For instance, if a commander knows that a member went AWOL from annual tour and suspects that he drove drunk downtown but does not have sufficient facts to prove the DWI charge, the commander could offer

nonjudicial punishment on the AWOL charge and leave the DWI charge to civilian authorities. As a general matter, however, the commander should consider all known incidents of misconduct and attempt to address them in a global solution.

A commander should offer nonjudicial punishment only for “minor offenses”. Commanders have broad discretion to define what constitutes a minor offense. However, in most cases, you should not offer nonjudicial punishment if the UCMJ authorizes more than one year of confinement for the offense(s). To use an inexact, but useful, analogy, you should not offer an Article 15 for what civilian authorities would consider a felony.

Commanders should make every effort to process Article 15’s in an expeditious matter. Delay can undermine the effectiveness of the nonjudicial punishment. State codes may require a certain format. If they do not, we generally recommend using AF Form 3070, Record of Nonjudicial Punishment Proceedings, to initiate and process the action. While designed for active duty use, this form will help you avoid mistakenly skipping some stage of the proceedings. The form should include the charge(s).

The nonjudicial punishment process offers the accused member the opportunity to meet with a military lawyer, to submit matters in mitigation, extenuation, or defense before a decision is made on punishment (and subject to certain time limits), to have a personal appearance before the commander, and to have a public hearing on the Article 15. Consult with your SJA to determine who serves as defense counsel for your unit. If the member submits matters to contest the Article 15, you should consider these and attach them to the record. You have the authority to decide whether or not you believe any matters submitted and whether they make a difference in your decision. While an Article 15 does not have the same formality as a court proceeding, we recommend that you apply the “beyond a reasonable doubt” standard of evidence to the proceeding. You should usually state that you have considered any matters submitted and the effect, if any, they made on your decision. This serves an important role in letting the member know that you did not dismiss the matters out of hand and helps the appellate authority understand your reasoning.

Members often request a personal appearance before their commander. While you do not have to grant this request if you find it impractical, you should generally allow the member to appear before you, as this maximizes the effectiveness of the process. Guardsmen may also request a public hearing, although they do not often do so. Whether or not the member requests it, you may open the proceedings to the public, if you think it would have a greater impact on your unit or the member.

Do not delay the action if the accused member does not timely acknowledge receipt of the charges (notification of charges form or a letter of notification); timely submit matters in mitigation, extenuation or defense in response to the charges; or timely appeal from the imposition of punishment. Failing to respond within the time limits acts as a waiver by the member, and the action may proceed without the member’s response.

## **PUNISHMENT ACTION**

Types of punishments which may be imposed nonjudicially include admonition, reprimand, reduction in grade, forfeiture of pay, extra duties, restriction to certain specified limits, withholding of privileges, and, in limited circumstances, correctional confinement. Again, state law or regulation will govern. Check your state law or regulation to determine whether the punishments of confinement, extra duties, or reduction in grade can be imposed nonjudicially upon officers or warrant officers. Also, fines not exceeding certain amounts for certain members may be authorized for nonjudicial punishment under state law or regulation. Fine proceeds may sometimes be deposited in the unit’s military fund, according to state law or regulation. Check whether only one type of punishment may be imposed for any one nonjudicial punishment action and whether an authorized punishment may also include an admonition or reprimand. Your SJA can help you with this.

Commanders often impose reductions in rank because of the difficulty in collecting fines or administering other types of punishment. Commanders may, in appropriate cases, suspend a reduction in rank, either for the first rank or for a lower rank. For instance, in most cases, a commander could reduce a Senior Airman to Airman First Class outright, suspend the reduction, or reduce the airman to A1C and further reduce the member to Airman, suspending only the second reduction. This type of punishment enables you to distinguish among the various factors and circumstances surrounding the member and the offense for which you imposed the nonjudicial punishment. It also

allows you to keep the member on a type of "probation" for a period of time (usually six months). However, it will also require you to maintain a higher degree of supervision over the member and, given the realities of part-time service, may not provide you enough time to effectively evaluate the member. You should not suspend reductions as a matter of course, but rather use them only when the specifics of the case make a suspended reduction particularly appropriate.

"Confinement" under Article 15 usually consists of up to 30 days of "correctional custody" or participation in the "re-motivational program." These programs provide a forum for "re-bluing" troubled airmen, but very few bases have them. Before attempting to impose this type of punishment, you will need to resolve numerous logistical issues, and we usually do not recommend it for that reason.

## **RESTRICTIONS ON IMPOSITION OF PUNISHMENT**

Any commander in the organized militia usually may impose nonjudicial punishment. In most cases, state law or regulation will limit certain punishments to certain levels of command. For example, reductions in grades E-7 through E-9 may be limited to senior commanders, and some wing or group commanders with nonjudicial punishment authority may choose not to delegate this authority to subordinate commanders. Also, state law usually limits certain punishments to field grade commanders. This becomes a particular issue for the Guard, with its more frequent assignment of captains as squadron commanders.

If a subordinate commander lacks the authority to punish the member effectively because of these limitations, the subordinate commander may recommend to the superior commander that the superior commander offer nonjudicial punishment. The fact that the action is being sent to that commander for consideration also implicitly indicates that the subordinate commander seeks a punishment beyond his or her authority to impose, without violating the rule that a person cannot recommend a type of punishment. The superior commander may offer nonjudicial punishment, prefer charges, or otherwise dispose of the charges as the superior commander deems fit.

## **APPEALS**

Once punishment has been imposed, the member is given an opportunity to appeal. The appeal is usually taken to the next higher authority, which may approve or reverse both the finding of responsibility and the punishment or may mitigate the punishment. The higher authority should impose no greater punishment than initially imposed. Usually, state law or regulation will provide that the punishment comes into effect upon being imposed, whether or not the member appeals.

## **POST-PUNISHMENT OPTIONS**

Once punishment is imposed, the commander or higher authority usually has the authority to suspend, mitigate, remit, or set aside all or part of the punishment and to restore to the member all rights, privileges, and property affected, within certain time limits. Action to suspend, mitigate, or remit a punishment is usually taken when the commander or higher authority believes that the member is deserving of a second chance, following a probationary period during which the member's conduct toward rehabilitation is observed.

## **SPECIAL PROBLEMS**

**Demands for Trial.** Your state laws or regulations probably give the member a right to demand a trial by court-martial at some point in the nonjudicial punishment process. If members have a right to demand a trial by court-martial in your state, consult with your SJA and follow the applicable procedures if a member exercises that right. While additional facts may merit reducing the charges to an administrative disposition, we should never be in a position where a member can effectively "call our bluff" by declining nonjudicial punishment. The credibility of the military justice system rests on our willingness and ability to proceed to court-martial proceedings for members who refuse nonjudicial punishment.

A common problem is the LACK OF UNIFORMITY among commanders in either imposing or recommending nonjudicial punishment. This problem arises in several ways.

1. Commanders have broad discretion in nonjudicial punishment, as it should be. However, justice demands that commanders within a given unit show some uniformity in the types of punishments imposed for the same offense. The facts and circumstances of the offense and the record of the member may account for the differences in type of punishment imposed, but if all members of one squadron who are AWOL from a weekend UTA routinely receive only a reprimand, while all members of another squadron who commit the same offense routinely receive nonjudicial punishment with reduction in grade, this disparity can reduce unit morale.

2. If uniformity becomes a issue, superior commanders may wish to withhold authority from subordinate commanders to dispose of certain offenses or situations. For instance, if one squadron demotes and discharges airmen who repeatedly fail their fitness test, while another squadron takes no action, the group commander should consider withholding authority to address fitness failures from his subordinates. Superior commanders may also exercise this option selectively by withholding disciplinary authority from a particular commander or commanders. Withholding authority puts a higher burden on the superior commander to monitor misconduct by subordinates. For instance, in the above situation, if the group commander withholds authority to take action from the squadron commanders, he or she should also require the subordinates to report monthly on their members who fail the test.

3. Discharge versus Nonjudicial Punishment. Sometimes we describe an Article 15 in the Guard or Reserve as a backhanded compliment, because it generally means that we have decided not to discharge the individual. Nevertheless, nonjudicial punishment and discharge are not mutually exclusive. However, we should seek to maintain uniformity within the same unit. If members who get a DWI receive an Article 15 in one unit, but receive a discharge with no Article 15 in another, the commanders may wish to meet with the SJA or each other to discuss their reasoning and reduce the disparity.

4. Deployed Actions. Guard commanders have an unfortunate reputation among active duty commanders for reversing Article 15 actions taken in the deployed environment. You should NEVER reverse the actions of a deployed commander without discussing the matter directly with that commander and considering all the evidence available to that commander. Members who receive an Article 15 in the deployed environment have very little incentive to portray all the facts accurately to a commander who was not present for the misconduct.

You should always consult your Staff Judge Advocate before initiating nonjudicial punishment action to ensure the charges are supported by the evidence. Usually, the SJA also must review the completed action for legal sufficiency to ensure that both the commander and the accused member are protected.

***KWIK-NOTE: Timely and uniformly administer nonjudicial punishment pursuant to your state's regulations and develop forms to do this.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Absent Military Members	1-2
Letters of Counseling, Admonition and Reprimand	24-5
Advising Suspects of Their Rights	8-9
Arrest By Civilian Authorities	8-6
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Polygraphs (Lie Detectors) - Use in The Military	8-11

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# Quality Force Management Actions

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Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** Too numerous to cite here, but see authorities cited in the "AUTHORITY" sections of the topics listed under "RELATED TOPICS" below.

## INTRODUCTION

We define "Quality Force Management" as the whole toolkit that commanders may use to deal with administrative, personnel, and disciplinary problems presented by the action or inaction of their members. The other sections of this chapter contain specific procedures for each action, which are listed in the Related Topics section of this topic. First, we will discuss general guidelines to use when taking these actions, and then we will list some of the quality force management actions commanders can take.

## GUIDELINES FOR USE

### All Actions

Commanders should tailor their actions to both the member and the problem presented. Some actions work best in conjunction with other tools, while others work best alone. To help you determine which actions are appropriately taken alone or in combination and the personnel consequences of any action, consult your MPF Chief, Staff Judge Advocate, and other appropriate staff officers.

### Considerations in Deciding How to Dispose of a Case

In every case, when considering appropriate disciplinary action, the commander should consider the nature of the offense, the service record of the offender, the need for good order and discipline in the command, and the impact of the member's conduct on society and upon any victims.

### Documentation

Other commanders will probably have reason to review your actions. You can most effectively defend your decision by providing your reasoning and adequate documentation. First, document the administrative and disciplinary measures taken, either directly, where the action creates a paper trail itself, or through a memorandum for record. Second, document your reasoning in deciding to take action. Generally speaking, the disciplinary process benefits from open discussion of the reasoning behind an action. In the rare instances it does not, at least keeps some record of the incident to remind yourself of your reasoning. Remember, no action happens in a vacuum. If you do not properly document your actions, you may preclude later, more serious actions, should they become necessary.

### Remain Objective

Get all the facts and circumstances reasonably available before initiating action. Sometimes a completed investigation will be enough (OSI, Security Forces, etc.), or the commander may appoint an Investigating or Inquiry Officer to check out the facts. Carefully consider any information presented by the offender, whether or not it changes your mind in the end. If you find yourself losing your objectivity, consult with another commander. In an extreme case, such as where you yourself were the victim of the misconduct, consider recommending action to a higher commander, rather than taking it yourself, so as to avoid any taint of bias.

### Use Progressive Discipline

In disciplinary actions, Air Force policy recommends a graduated response to a member's conduct. For example, when initial efforts, such as counseling, fail to get the member's attention for being late for work, you may want to use a stronger measure, such as a letter of reprimand. However, do not take inappropriately light action when the facts merit a serious response or a more thorough exploration of the facts. For instance, we would never recommend an Article 15 for a sexual assault. First, if the member in fact committed the offense, the punishment would be too light. Second, the member should have the formality of a court-martial to preserve his right to full defense.

### **Consistency**

Maintain consistency in disciplinary actions among unit members with similar offenses and similar records. If you and another commander at the same level treat similar offenses differently, consider meeting with the commander to discuss his or her rationale. If you have subordinate commanders with differing disciplinary philosophies, encourage them to share them and discuss how you view these offenses, without requiring them to agree with you. If the problem continues, consider withholding authority from subordinate commanders in order to preserve consistent discipline.

### **Withholding Privileges**

Any time you take an action withholding some kind of privilege, do it in writing and specify the reasons for your action, the specific privilege being withheld, and the specific dates or duration the privilege will be withheld. Have the writing personally delivered or mailed to the member concerned and obtain the member's signed acknowledgment of receipt of the writing. The writing should make clear that your action is an order and that failure to obey it will result in more serious action being taken. Commit yourself in advance to taking the steps necessary to back up your orders, or you will risk losing your credibility and authority.

Remember, if you ask the member to acknowledge receipt of any writing and the member fails or refuses to do so, do not argue the point. Simply prepare a memo for the record (MFR) of the failure or refusal and let it go at that. The MFR will be proof enough, together with any affidavit or certificate of service by mail or personal delivery, that the member received the writing. As long as you have this other evidence of mailing or delivery of the writing to the member, the lack of a signed acknowledgment of receipt does not prevent the action from proceeding in the absence of any timely response by the member, nor does it prevent the effectiveness or enforceability of the action if the member later violates your direction contained in the writing. Failure or refusal to acknowledge receipt of a writing, standing alone, should not normally form the basis of separate disciplinary action.

### **APPEAL - COMPLAINT OF WRONGS**

Since many of these actions will themselves have no specific procedure for the member to appeal your action, the member's only recourse to properly challenge the propriety of your action will be through a complaint of wrongs procedure, if any, under applicable state law. You need not (and probably should not) advise the member of this complaint of wrongs procedure in your writing advising the member of the action.

Since most of these actions are exercised within your discretion as a commander, so long as you have a good reason for taking the action and it is documented, only rarely will higher headquarters overturn your action, regardless of the procedure permitting that review. Realize that you would not have been appointed as a commander unless you were trusted to exercise good judgment. Your obligation to higher headquarters is to provide it with documentation of the facts supporting your decision and your reasoning.

### **KINDS OF ACTIONS**

#### **Administrative**

Counseling (oral or written)  
Admonitions (oral or written)  
Reprimands (oral or written)  
Demotions  
Flying Evaluations Board (rated officers only)  
Medical Evaluation Board (medical reasons only)  
Discharge  
Dropping Officers from the Rolls instead of Discharge

#### **Personnel**

AFSC Reclassification  
Assignments

Barring Reenlistment  
Base Driving Privileges (suspension)  
BX Privileges Revocation - for instances of abuse  
Check Cashing Privileges (revocation- for instances of abuse)  
Commissary Privileges - for instances of abuse  
ID Card overstamping or retrieval  
Medical Profile Change (for medical reasons only)  
OPR Comment (Officers)  
Palace Chase - Involuntary Call to Active Duty  
Personnel Reliability Program (PRP) (action)  
Personnel Security Access Program  
Promotion Denial - Airmen and Officers  
Reporting Identifiers  
Security Clearance Revocation  
Selective Retention action  
Transfer to the Individual Ready Reserve (IRR) (failure to satisfactorily participate)  
Urinalysis testing  
Weight Program entry  
Withdrawal of Authority to Bear Firearms  
Withdrawal of Credit for Attendance at Training (for being late or out of uniform)  
Withdrawal of Federal Commissioned Status (Officers)

### **Disciplinary**

Nonjudicial Punishment (all permissible types)  
Court Martial

### **CONCLUSION**

As you see, some of the types of quality force management actions available to you can be used generally, while others can be used only in specific situations. Use them wisely.

***KWIK-NOTE: Know the quality force management actions available to you, and use them appropriately.***

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# Revocation of Security Clearance

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Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** AFI 31-501, *Personnel Security Program Management* (27 January 2005); DOD 5200.2-R, *Personnel Security Program* (January 1987); DoDD 5200.2, *DoD Personnel Security Program*, (9 April 1999).

## INTRODUCTION

When a commander receives information that a member of the unit has committed a serious offense or a breach of security, or has behaved in a manner that indicates the member is a security risk, that commander must determine whether to recommend removing that member's security clearance.

## STARTING THE REMOVAL PROCESS

The establishment of a Security Information File (SIF) serves as a starting point for removing a security clearance. An SIF documents the information showing that granting the security clearance eligibility to an individual or continuing an individual's existing security clearance eligibility may not be in the best interests of national security.

The commander establishes an SIF when an individual's activity, conduct, or behavior raises concerns about the appropriateness of continued access to classified information. The security criteria specified in DOD 5200.2-R, para C2.2 and Appendix 8, and AFI 51-301 8.2.1.3, list different types of information that raise such concerns, including:

- refusal to sign a required Standard Form 312 or other nondisclosure agreement;
- refusal or intentional failure to provide the personnel security questionnaire information required for an investigation or periodic reinvestigation or failure to sign the required release statements for review of medical, financial, or employment records;
- refusal to be interviewed in connection with a personnel security investigation;
- incidents of theft, embezzlement, domestic abuse, unauthorized sale or use of firearms, explosives or dangerous weapons, or misuse or improper disposition of government property, or other unlawful activities;
- permanent decertification from the PRP for other than physical reasons; and
- any other information that gives rise to a concern that the member may have an increased risk of disclosing classified information.

Upon establishment of an SIF, the commander determines whether or not to initiate suspension action for the individual's access to classified information and/or suspension of unescorted entry to restricted areas. If criminal activity is involved, the matter should be investigated by Security Forces or AFOSI. If the commander decides to initiate an SIF and to suspend a member's access to classified information and restricted areas, the commander notifies the individual and provides an information copy to 497 Intelligence Group/INS, Bolling AFB, D.C. In the completed SIF, the commander includes a recommendation on whether to grant, reinstate, deny, or revoke the member's security clearance and the rationale for the recommendation. Final determinations related to security clearances are made by the Air Force Central Adjudication Facility (AFCAF).

## DECIDE IF OTHER ADVERSE ACTION IS APPROPRIATE

Frequently, the same misconduct that gives rise to establishment of an SIF can be the basis for separate administrative or punitive action. For example, falsifying a travel voucher would justify an SSF, because it involves fraud. However, it may also justify court-martial or administrative discharge. In such cases, the AFCAF will ordinarily await the outcome of such other action before rendering a decision on the member's security clearance, since a discharge (for example)

would render any decision related to the security clearance irrelevant. Accordingly, other punitive or administrative action should not be delayed pending a resolution on the security clearance issue. However, if the member has had special access information, actions should not proceed without the approval of the affected special access granting authority. Remember that revocation of a security clearance is not a disciplinary action and is not a substitute for appropriate disciplinary action by the commander.

If other adverse action leading to discharge is not warranted, and the AFCAF recommends discharge in the interests of national security, the member may be processed for administrative discharge under the provisions of AFI 36-3209, paragraph 3.22 (14 April 2005 edition).

### **OBTAINING CLEARANCE TO PROCEED WITH DISCIPLINARY ACTION IN CERTAIN CASES**

Individuals with certain special security clearances have a greater potential to harm the national security of the United States and, thus, commanders must request clearance before proceeding with certain actions. Before proceeding to court-martial, administrative discharge, or civilian removal of an individual with access to Single Integrated Operational Plan-Extremely Sensitive Information (SIOP-ESI), SCI, research and development (R&D) special access program, AFOSI special access program, or other special access program information, the commander must request approval to proceed from the appropriate program office. This does not preclude the commander from immediately suspending access and generally does not preclude the disposition requested by the commander. Planning ahead will minimize the time delay associated with this request for clearance.

### **PRACTICAL TIP**

As always, documentation and proper planning will help immeasurably. Consulting with the SJA can speed the process along by coordinating the various actions necessary to bring the action to completion.

***KWIK-NOTE: Properly document your decisions - either way - in revocation of security clearance cases.***

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# Selective Enforcement

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Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** AFI-201, *Administration of Military Justice* (26 November 2003) (applicable to ANG only when in federal status); applicable state law.

## INTRODUCTION

Commanders must impartially and uniformly administer military justice actions and adverse administrative actions, and ensure compliance with and enforcement of all regulations governing the members of their unit. The prohibition against selective enforcement is not meant to inhibit the exercise of your command discretion under the regulations or as a matter of policy, but often there exists a fine line between command discretion and selective enforcement of law and regulations.

## HOW THE PROBLEM ARISES

Commanders are responsible for enforcing the requirements of all regulations upon unit members evenhandedly, regardless of rank, sex, race, religious belief, national origin, full-time or part-time status, or friendship or lack thereof. The perception that the commander is not impartial, favoring some and imposing harsher measures on others without a legitimate reason, undermines command authority.

The problem of selective enforcement arises most often when regulatory requirements are imposed on some members and not on others. A common example is enforcement of fitness program under ANGI 10-248 (9 April 2004). For a variety of reasons, commanders sometimes strictly enforce the program against some unit members and not at all against others. Given the nature of the program, the whole unit sees the lack of consistency. The consequences include reversal of administrative actions on appeal to a superior authority and dissension within the ranks, which may adversely impact morale.

## HOW TO PREVENT THE PROBLEM

Sunlight is the best “disinfectant.” To the extent permissible by privacy concerns, the commander should make the facts supporting his or her decisions clear, along with his or her reasoning. For instance, if a Guardsman receives an Article 15 for AWOL and the unit knows that he has been absent, the commander may want to open the Article 15 hearing to the unit to show such conduct is taken seriously. To give another example, while the Air National Guard does not consider the Fitness Program punitive, Guardsmen should witness the consequences of failure. This may include announcing remedial fitness session during drill or gathering other unit members at the end of the run course to cheer on the people re-testing. As a general rule, the more public the commander’s reasoning, the better.

***KWIK-NOTE: Enforce all statutes and regulations fairly and uniformly among all members of your unit.***

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RELATED TOPICS:	SECTION
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# Air National Guard Fitness Program

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Updated by Major Marshall L. Wilde, October 2006

**AUTHORITY:** ANGI 10-248, *The Air National Guard (ANG) Fitness Program* (9 April 2004).

## **PURPOSE**

The goal of this program is to promote good health and physical fitness. Enhanced readiness is a direct corollary of health and fitness. The Fitness Program annually evaluates the fitness level of ANG members to ensure they are physically prepared to support all military operations, exercises, or other contingencies.

## **THE AIR FORCE FITNESS PROGRAM**

Air Force members are assessed at least once every 12 months to ensure compliance with physical fitness standards. The Air Force and ANG replaced the old ergo cycle program with a combination of push ups, sit ups, 1.5 mile run, and waist measurement. These measurements correlate better with performance and long term health than the earlier measurements. The program includes testing, improvement measures, and provisions for discipline for repeated failures.

## **AIR NATIONAL GUARD FITNESS PROGRAM (ANGFP)**

### **TESTING**

The Air National Guard Fitness Program requires testing of ANG members at least every 12 months. Members may score in four ranges – “poor” (<70); “marginal” (70-75); “good” (75-90); and “excellent” (90-100). Members who score a poor or marginal rating must be tested again in six months, effectively requiring units to offer testing at least every 6 months. Fitness test scores are entered into an Internet database ([angfitness.com](http://angfitness.com)), accessible by commanders at various levels to ensure compliance. Members who have physical limitations that prevent them from performing parts of the test may receive alternative testing for the run or exemptions from the push up and sit-up measurements. Scores are scaled to compensate for the exempt station.

### **FITNESS IMPROVEMENT**

Commanders must enter members who receive a “poor” rating into a Fitness Improvement Program (FIP) the following drill weekend. The FIP combines education with an improvement plan to promote better fitness. The program explicitly allows earlier fitness testing, although the only mandatory testing occurs six months after the initial test. If the member fails to improve after six months in the FIP, the medical element should examine the member to determine if a health limitation exists. If a member follows the FIP, but cannot improve, the commander may exempt the member from meeting fitness standards for up to one year. Commanders should only use this option if the member has followed the fitness program.

### **COMMANDER ISSUES**

Two years into the new program, the first wave of members who have failed 4 or more times has hit. As with the Weight Management Program, compliance with the standards has been uneven. ANGI 10-248, Attachment 15 provides recommendations regarding discipline for repeated failures. Members do not generally receive discipline for the initial failure. A subsequent failure after 6 months in the FIP can result in administrative action up to and including discharge. A fourth failure virtually mandates demotion and discharge, although a commander may, in exceptional circumstances, retain the member and issue lesser discipline. The ANGI does not limit a commander’s authority to take disciplinary action for a member’s failure to perform any duty mandated in the FIP, such as a failure to attend a mandatory class, fitness event, or test.

Consistency of discipline has arisen as a major challenge to the program. Superior commanders may withhold subordinate commanders' authority to issue discipline for fitness failures in favor of taking direct action themselves. Failing to enforce fitness standards provides the Air Force with substandard personnel assets for deployment, endangers the member's health, and cheats members who take the effort to maintain their fitness.

***KWIK-NOTE: ANG members must ensure they are physically prepared to support all military operations, exercises, or other contingencies. Commanders bear a special responsibility to enforce these standards.***

**RELATED TOPICS:**

**SECTION**

Quality Force Management

24-12

# Chapter 25 – Resources

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## Airport Joint Use Agreements

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** ANGPAM 32-1001, *Airport Joint Use Agreements For Military Use Of Civilian Airfields* (8 Apr 03); 49 U.S.C. 47101-47129; ANGI 32-1003, *Civil Engineering Facilities Board (FB)* (1 Jan 05); applicable state law and regulations.

### INTRODUCTION

Many ANG units operate on civilian public airports. In many cases, a fee is paid to the airport's controlling authority for the ANG's use of airport joint use facilities (taxiways, runways, etc.). An Airport Joint Use Agreement (AJUA) is the legal instrument that establishes the payment of such fees and other terms and conditions relative to the ANG's use of the airport facilities.

AJUAs reduce the tension and confusion that often arise resulting from ANG operations at a civilian airport by clearly setting forth the terms and conditions of the ANG units use of the facilities. The more specific these terms, conditions, and responsibilities are, the better the relationship between the unit and the airport will be.

### LEGAL RELATIONSHIPS

Civil airports receiving funds from the Federal Aviation Administration under the Airport Development Grant Program (Title 49 U.S.C. 47101, *et seq.*) incur obligations to the United States Government. Among these is a requirement that each of the airport's facilities developed with financial assistance from the United States Government and each of the airport's facilities usable for the landing and taking off of aircraft, must be available without charge for use by government aircraft, unless the use is substantial. When the use of civil airport facilities by United States aircraft is substantial, the government may be charged a fee, proportionate to its use, of the costs of operating and maintaining the facility used. The costs of operating terminals, parking, etc. may not be included in that charge. In some cases, if the civil airport was not constructed through an FAA grant, the amount of the use charge is arrived at by negotiation and is not limited by the provisions of Title 49.

ANGPAM 32-1001 governs AJUAs and provides a standard form agreement (Attachment 2). Paragraph 3 of ANGPAM 32-1001 references Attachment 2 stating that in order to ensure consistency among agreements, all AJUAs will follow a standard process for calculation of fees and a standard format agreement.

The AJUA is not a contract or Federal award but is a payment document. The AJUA does not require a contracting warrant for execution and is not subject to the cost accounting principles of Office and Management Budget (OMB) Circular A-87, *Cost Principles for State, Local and Indian Tribal Governments*.

### INPUT

ANGPAM 32-1001, paragraph 2.3, states that the Air National Guard Civil Engineer (ANG/CE), is responsible for negotiation of agreements where a based ANG unit is host, negotiations will be coordinated with all other military units assigned at or operating from the location, and the authority to negotiate agreements and renewals will not be delegated to the field unit. Paragraph 3.1 further provides that ANG/CEP will initiate renewal negotiations with airport owner/operators one year prior to the expiration of the existing AJUA. It is imperative for the local commander to begin working with ANG/CE as early as possible in the renewal process. Additionally, the local commander and State Adjutant General should keep informed of negotiations and provide input as to their needs. Such communication cannot be expected to occur automatically. Every effort must be put forward by each player in order to arrive at a successful agreement. The commander must be proactive in the negotiation of an agreement.

In this respect, the Commanders of units which are going through a re- negotiation process should consult with their

own civil engineers and staff to insure that nagging difficulties can be addressed in negotiations. Commanders should also have their Judge Advocates review all drafts of the AJUA. Ultimately, the AJUA must be submitted in writing to the Deputy Assistant Secretary of the Air Force Installations (SAF/IEI) for approval prior to signature by the parties.

One of the most important aspects of AJUAs is the number of dollars to be paid by the Government for the Guard's use of the property. Attachment 3 to the ANGPAM is a guide to calculating the allowable costs. The ANGPAM cautions that Attachment 3 is just a guide and is not necessarily all inclusive and that additional categories may be included. See Paragraph 4.3.

One consideration is the amount of the proportionate use of the common use areas of the airport. Proportionate use will be established through a tower count of military and civilian aircraft flying operations for an entire fiscal year or calendar year. Additionally, proportionate use by the ANG will be offset by any significant contributions in kind, to include services, major equipment and construction, provided toward joint use operations by the ANG. Therefore, if Air National Guard units are equipped and capable of providing services to the airport which otherwise would be expensive or difficult to procure, these services may become the subject of negotiation in reducing net costs to the Government. Examples are the capacity to lift or tow aircraft, to assist in fire protection and suppression, and to provide other services for emergency matters.

Commanders should be aware that in heavily-populated urban areas, airport authorities may be hungrily eyeing every available square foot of airport land as potentially revenue producing. Likewise, if the Government needs additional facilities to improve its readiness, the joint use of those facilities (such as an extended runway, or hush house) may make the Guard unit a more attractive joint user to the airport authority. Negotiations with the airport manager or commission will be reflective of the day-to-day relationship of the parties.

Commanders who become aware of: (a) proposals for the sharing of services and activities by the unit and the airport; (b) the need to construct additional facilities for readiness; or (c) plans for construction or expansion that may impact unit operations, should inform the USP&FO and ANG/CE and continually coordinate on questions relating to airport operations with those offices.

The Staff Judge Advocate should be familiar with the terms and conditions of the AJUA and any related cooperative agreements and should be informed of any issues with regard to relations with the airport and any proposals that would impact on that relationship.

## UPDATES

Although it can be expected that the ANG/CE will keep track of approaching termination dates of Airport Joint Use Agreements, Installation Commanders should be aware of these dates. An acute understanding of the nature and extent of the Agreement will pay dividends to the Guard and the Air Force.

Day-to-day questions regarding Guard - Airport Authority relations typically extend well beyond the subject matter contained in the Airport Joint Use Agreement. The Agreement cannot possibly address all the problems that arise between such entities. Careful attention to a "good neighbor policy" in these situations can make an enormous amount of difference in the style and atmosphere that finally exists when the Agreement comes up for re-negotiation.

***KWIK-NOTE: Every Base Commander should have a copy of the applicable Airport Joint Use Agreement for the base, suspense it at least one year before its termination date, and provide input for modifications (with reasons), to ANG/CE through the state Adjutant General for the upcoming re- negotiation process. ANG/CE has many AJUAs to track - the commander only one. Many Air National Guard units operate on public airports. The terms and conditions of every agreement are directly affected by current climate - don't expect an automatic renewal of the terms of the existing AJUA. Some units enjoy free land and support services. Others find themselves occupying land that the airport authority would now like to control, and the pressure on the unit becomes great.***

## RELATED TOPICS:

Aid to Civilian Authorities

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## Alert Pay and Resource Management

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Col Douglas R. Jacobson, May 2007

**AUTHORITY:** ANGI 10-203, *ANG Alert Resource Management* (30 Mar 2005)

### INTRODUCTION

Certain ANG units perform non-contingency alert taskings in support of air sovereignty, aerial refueling, search and rescue, and airlift missions. ANG forces also perform alert missions for contingency operations such as Operation NOBLE EAGLE.

When performing non-contingency alert, ANG aircrews may accomplish non-contingency alert duty in a Title 32 status. However, they will automatically convert to Title 10 status when airborne and accomplishing an operational federal mission. Units will ensure self-executing Title 10 orders are no file for all alert personnel who may need to convert to Title 10. Title 32 ANG members performing alert duty are under the command and control of their respective state's chain of command until ordered to Title 10 status. ANG members may volunteer, and be subsequently ordered to active duty, under the authority of 10 U.S.C. 12301(d). Members are subject to the UCMJ while in a Title 10 status.

### WORKDAY GUIDANCE

ANG Deployment Division (ANG/XOX) manages special training workday resources to support fighter, airlift, and aerial refueling alert missions. ANG Personnel Recovery/Special Missions Division (ANG/XOP) manages special training workday resources to support search and rescue alert missions. Some units may perform the Air Sovereignty Alert (ASA) mission on a short-term, non-steady state basis and will be resourced with MPA days from the active duty MAJCOM.

For "hard alert" periods, an individual will be compensated one alert workday (one 8 hour period) for each calendar day and will accrue one standby workday for each 8 hour period not covered by the compensated alert workday. For example, each 24 hour period results in 3 pay days.

For "soft alert" periods, an individual will be compensated one calendar alert workday (one 12 hour period) for each calendar day and will accrue one standby alert workday for each 12 hour period not covered by the compensated calendar alert workday. For example, each 24 hour period results in 2 pay days.

Attachment 1 to ANGI 10-203 defines the following terms.

A "Stand-By Alert Workday" is an alert workday earned during alert duty. The individual is not required to be on duty but must be available for recall at any duty location within 12 hours.

"Hard Alert" is an alert mission which requires an immediate response and the aircrew must reside at the alert duty location to meet mission timing. Actual timing is based upon specific mission requirements.

"Soft Alert" is an alert mission which does not require an immediate response or the alert crew is not required to remain at the alert duty location (pager/telephone alert). Also known as modified alert.

Attachment 2 to ANGI 10-203 sets forth the NGB Air Sovereignty Alert Resource Policy. Alert units receive a finite amount of annual funding and workdays. Commanders will have the responsibility to manage these assets in order to complete the fiscal year without additional funds.

**KWIK-NOTE:** *ANG members on Title 10 alert status are subject to the UCMJ.*

**RELATED TOPIC:**

Status of National Guard Members

**SECTION**

11-7

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## Anti-Terrorist/Force Protection Matters

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** AFI 10-245, *Air Force Antiterrorism (AT) Standards* (21 Jun 02, incorporating change 1, 17 Mar 07); see also, AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03) (FOUO Instruction); DODD 2000.12, *Antiterrorism/Force Protection (AT/FP) Program* (18 Aug 03); DoDI 2000.16, *DOD Antiterrorism Standards* (2 Oct 06); DoDI 2000.14, *Combating Terrorism Procedures* (15 Jun 94); DoD O-2000.12H, *DOD Antiterrorism Handbook* (9 Feb 04); and, Joint Pub 3-07.2, *Joint Tactics, Techniques and Procedures for Antiterrorism* (17 Mar 98).

### INTRODUCTION

AFI 10-245 indicates that the purpose of the Antiterrorism (AT) program is to deter or blunt terrorist acts against the US Air Force. AFI 10-245 provides guidance on the collection and dissemination of timely threat information and training to all Air Force members, discusses the development of comprehensive plans to deter, and counter, terrorist incidents, and addresses the allocation of funds and personnel and implementation of AT measures.

### COMMAND RESPONSIBILITY

AT is a command responsibility and must be thoroughly integrated into every unit's mission. Commanders must develop a full working knowledge of AT postures stay abreast of changing postures and threat levels. Risk management, based on the threat, is key in determining vulnerability and prioritization of resources. Any hazard with a level of risk that cannot be controlled to an acceptable level must be forwarded to the next level in the chain of command for resolution.

#### AT Working Groups

The Installation Commander must implement an AT program to combat the local terrorist threat and support the US Air Force AT program. This program shall identify tasked agencies, required actions and means of exercising and evaluating the program through annual operational and command post AT exercises. This includes establishing a Threat Working Group ("TWG") to address the threat, which must consist of AFOSI, SF, IN, SG, CE, SV, and other agencies. The TWG shall assess the threat for the commander and recommend courses of action to mitigate or counter the threat. The TWG shall meet, at a minimum, quarterly, to review the current threat and advise the installation commander accordingly.

#### Standards and Plans

Installation Commanders are required to designate in writing an AT officer ("ATO"). ATOs shall meet with installation AFOSI, Security Forces, Intelligence, Medical, Fire, Public Health and other agencies often enough to manage a comprehensive AT Program. The plan should implement DoD and Air Force AT and Force Protection (FP) initiatives, threat assessment procedures, and response measures to terrorist incidents as well as procedures to collect and analyze terrorist threat information, capabilities and vulnerabilities to attacks, procedures for enhanced AT/FP protection, and integrated procedures for security, fire, medical, command and control and other emergency services to respond to terrorism incidents. At the Flight and Squadron level, AT Advisors (ATA) then must be identified, in writing, and trained to insure AT program is thoroughly integrated into every unit mission.

#### Threat Level and Force Protection

The DoD Terrorism Threat Level classification system is a set of standardized terms used to quantify the level of terrorism threat on a country-by country basis. The terrorism threat level terms are Low, Moderate, Significant, and High, and are defined in Attachment 4 to AFI 10-245. The system evaluates the threat using a variety of analytical

factors. Terrorism Threat Levels are estimates with no direct relationship to specific Force Protection Conditions (“FPCONS”). A FPCON is a security posture promulgated by a commander in consideration of a variety of factors (i.e. a terrorist threat analysis, threat level etc.) Terrorism Threat Levels should not be confused with FPCONS.

#### Other Responsibilities

AFI 10-245 sets forth Installation Commander responsibilities for implementation of many of the 31 DoD AT/FP Standards. Installation Commanders must familiarize themselves with DoD and Air Force AT/FP requirements.

#### **CONCLUSION**

Installation Commanders must implement an AT program to combat the local threat and support the Air Force AT program. Additionally, AT requires every individual to maintain a level of awareness, to practice personal security measures, and to report suspicious activity. Commanders at all levels should ensure that all personnel complete the Level I AT Awareness Training. Furthermore, the Flight or Squadron level ATA, and alternate, must complete the Level II AT training resident course.

***KWIK-NOTE: As the Installation Commander, you are responsible for implementation of the DoD and Air Force Antiterrorism/Force Protection program.***

#### **RELATED TOPIC:**

#### **SECTION**

Classified Material

14-2

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## Architect and Engineering Services

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** Federal Acquisition Regulation (FAR) (48 C.F.R. Subpart 36) and supplements (Department of Defense (DFARS), Army (AFARS), National Guard (NGFARS)); ANGI 32-1023, *Criteria and Standards for ANG Construction* (2 Oct 98)

### INTRODUCTION

Authority for the use of Architect and Engineering (A & E) services is provided on an individual project basis. Authority to use A & E services on most large ANG projects is provided by the Design Instruction, a formal document issued by NGB/A7CC.

### TYPES OF A & E SERVICES

Typically there are three types of A & E services, referred to as Types A, B, and C.

Type A services include advanced planning studies, field surveys and investigations which precede the more formal design preparation work. These surveys and investigations include topographical surveys; soil borings; soil analyses; chemical and mechanical surveys and investigations; determination of utility locations and capacities; technical studies; code and criteria reviews; and/or concept development studies.

Type B services are those which include production of complete designs, including preliminary and final plans, outline and final specifications, design analyses, and preliminary and final cost estimates.

Type C services include construction inspection, testing, shop drawing review and management services.

### OBTAINING A & E SERVICES

#### Contracting Officer Responsibilities

The Contracting Officer and the Base Civil Engineer (BCE) play primary roles in obtaining A & E services, and should be the Commander's main focal points when A & E services are needed.

The Contracting Officer is responsible for:

1. Publicizing pre-selection and selection actions in the Commerce Business Daily;
2. Preparing and submitting the synopsis for the Commerce Business Daily;
3. Serving on pre-selection and final selection boards;
4. Obtaining cost estimates from prospective A & E firms;
5. Negotiating contracts with selected A & E firms;
6. Determining that negotiated fees are fair and reasonable and, as applicable, within the statutory six percent of maximum construction cost fee limitation for Type B services;
7. Preparing and administering A & E contracts;
8. Executing modifications; and

9. Furnishing copies of contracts to the BCE and NGB as necessary.

### **Base Civil Engineer Responsibilities**

The BCE is responsible for:

1. Establishing and justifying the need for A & E services;
2. Obtaining NGB approvals and authority for the use of A & E services;
3. Maintaining current data indicating A & E qualifications;
4. Serving on pre-selection and final selection boards;
5. Preparing government cost estimates;
6. Providing documentation to the Contracting Officer;
7. Providing technical assistance to the Contracting Officer during negotiations; and
8. Monitoring work and services furnished by the A & E.

### **PROCEDURES**

Acquisition of A & E services is governed by Federal Acquisition Regulation ("FAR") Part 36 and applicable agency supplements. Consultation with contracting and civil engineering personnel early in the process is essential to the successful acquisition of A & E services. Generally, acquisition of such services involves convening a board consisting of members with sufficient education and experience to evaluate competing architect and engineering firms. Specific procedures are outlined in the governing regulations.

### **SUMMARY**

Obtaining A & E services is an administratively detailed and complicated process and one in which the Commander should rely heavily upon the Judge Advocate, Contracting Officer, and Base Civil Engineer for guidance and advice.

***KWIK-NOTE: Commanders should always coordinate with the Contracting Officer and BCE BEFORE seeking A & E services.***

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## Computer Acquisition and Security

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Col Douglas R. Jacobson, May 2007

**AUTHORITY:** Federal Acquisition Regulation (FAR) (48 C.F.R. Part 39, Acquisition of Information Technology) and supplements; AFI 33-202, Vol 1, *Network and Computer Security* (3 Feb 06, incorporating change 4, 10 Jan 07); AFI 33-207, *Computer Security Assistance Program* (1 Sep 97); ANGI 33-104, *Air National Guard Systems Telecommunications Engineering Manager - Base Level (ANG Stem-B) Procedural Guidance* (10 May 05).

### ACQUISITION

FAR Part 39 applies to the acquisition of information technology (IT) by or for the use of agencies, except for acquisitions of information technology for national security systems. In acquiring information technology, agencies shall identify their requirements pursuant to OMB Circular A-130 including consideration of security of resources, protection of privacy, national security and emergency preparedness, accommodations for individuals with disabilities, and energy efficiency. When developing an acquisition strategy, contracting officers should consider the rapidly changing nature of information technology through market research and the application of technology refreshment techniques.

Prior to entering into a contract for information technology, an organization should analyze risks, benefits, and costs. Reasonable risk-taking is appropriate as long as risks are controlled and mitigated. Contracting and program office officials are jointly responsible for assessing, monitoring and controlling risk when selecting projects for investment and during program implementation. Types of risk may include schedule risk, risk of technical obsolescence, cost risk, risk implicit in a particular contract type, technical feasibility, dependencies between a new project and other projects or systems, the number of simultaneous high risk projects to be monitored, funding availability, and program management risk.

Effective 12 Aug 03, Air Force policy required that AFWay would be used for all purchases of desktop and notebook computers. AFWay was developed by the Air Force to provide a purchasing process for acquiring and managing IT. AFWay is online at <https://afway.af.mil>

On 13 Jul 04 the Air Force Information Technology Commodity Council (AF ITCC) announced its commodity strategy for desktop and laptop computers. Key tenants of the strategy are to leverage Air Force wide purchase volume, standardize hardware and core software, reduce costs, and improve life cycle management practices. The strategy involves the use of a Quarterly Enterprise Buy (QEB) process to establish and update standard desktop and laptop computers and consolidate requirements. Effective 13 Jul 04, planned purchases for desktop and laptop computers are to be made through AFWay either from small businesses or through the QEB process.

### SECURITY MEASURES

The potential for abuse of computers and information technology includes, but is not limited to: violation of copyright laws, processing of classified material, and accessing bulletin boards. This is a continual problem in today's environment. The following measures taken by Commanders will help ensure computer security:

1. Be aware of the provisions of the above references and notify all personnel on a semi-annual or annual basis of the sanctions available regarding willful violation of Air Force policy, ANG policy, and federal and state law related to computer security and abuses;
2. Develop and implement a program of inspections by qualified personnel who can determine whether any laws have been or are being violated. The unauthorized copying of "pirated" software violates both federal copyright laws

and federal trademark laws;

3. When software packages are ordered and received, require the individual who is responsible for the particular equipment which is ordered, to acknowledge receipt of the software and issue a memorandum of understanding indicating that the software is either public domain or copyrighted;

4. Designate in writing certain computers, primarily those with removable disks and similar media, to process classified material;

5. Caution individual computer operators about the potential for criminal action if they knowingly violate laws governing the processing of classified material on an unauthorized piece of equipment.

## CONCLUSION

Commanders are encouraged to contact their contracting officers for advice on computer acquisition, and to take the above preventive measures concerning computer security.

***KWIK-NOTE: Commanders must follow established procedures to acquire computers, and take all reasonable precautions to ensure computer security.***

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## Air National Guard Construction

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Col Douglas R. Jacobson, May 2007

**AUTHORITY:** 10 U.S.C. Chapter 1803; Federal Acquisition Regulation (FAR) (48 C.F.R. Chapter 1) and supplements (Department of Defense (DFARS), Army (AFARS), National Guard (NGFARS)); ANGI 32-1023, *Criteria and Standards for ANG Construction* (2 Oct 98); applicable state law.

### GENERAL PRINCIPLES

Construction of ANG Facilities is authorized and funded in annual DoD Authorization and Appropriation Acts. When such construction is authorized and funds are appropriated, the construction is accomplished under the authority and procedures of 10 U.S.C. Chapter 1803 and the applicable regulations. Construction on federally owned or controlled land is generally accomplished via a federal contract awarded and administered by the USP&FO contracting office. Construction on state owned or controlled land must be accomplished by a State contracting officer in accordance with State law. In the case of State construction, funds are provided to the State by a military construction cooperative agreement between the State and NGB. When an "armory" is constructed on State land, the Federal share of the construction is limited by law to 75% of the construction cost.

### ANG SPECIFIC

ANG facilities have historically been constructed under federal contracts on federally owned and controlled land and the facilities subsequently licensed to the State. Where facilities are constructed at civilian airports for an ANG unit located there (*e.g.*, runway extensions, barriers, etc.) such construction must be by the State (*i.e.*, airport authority, municipality, etc.).

Programming, authorization, and funding for construction is normally done through the five year PPBS cycle, with an individual project taking several years from start to finish. However, authorizations and appropriations from congressional add-ons and reprogramming may result in projects being undertaken outside this normal cycle.

Major construction may be funded only with funds appropriated in an ANG military construction line item in a DoD Military Construction appropriation act. However, a minor construction project estimated to cost less than \$500,000 may be funded with Operation and Maintenance Appropriations (10 U.S.C. 2805(c)). Maintenance and repair is generally not considered construction unless the cost of repair is more than 50% of the value of the facility; maintenance and repair is funded with Operation and Maintenance appropriations.

Successful construction projects require coordination and teamwork among the contracting officer (USP&FO), unit civil engineering personnel, the Staff Judge Advocate, and the National Guard Bureau to insure that the construction project is properly approved, that it meets ANG design criteria, and that the proper party (USP&FO or State) executes the contract. The project file should be documented to show that: the work in the project has been properly defined; proper funds are available and utilized; the project specifications and requirements meet ANG standards; and that the work is prosecuted in a manner that it meets the contract requirements and is within the available funding.

A Judge Advocate must review all federal contracts and Construction Cooperative Agreements for conformance with the FAR and its supplements. This Judge Advocate review will include review of project approvals, project funding, design contract solicitation and award, the construction contract solicitation prior to issuance, the construction contract prior to award, and any contract or agreement modifications prior to execution. The entire working file is reviewed to assure compliance with law and regulations at each stage. The Staff Judge Advocate

should be consulted on any legal problems under the contract at the earliest possible time so that the government's interests are fully protected.

***KWIK-NOTE: All ANG construction must be initiated by the appropriate federal or state officials.***

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## Contracting Pitfalls

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** Federal Acquisition Regulation (FAR) (48 C.F.R. Chapter 1, 1.602-3) and supplements (Department of Defense (DFARS), Army (AFARS), National Guard (NGFARS)); DoDD 5500.7-R, *Joint Ethics Regulation* (30 Aug 93, C4, 6 Aug 98).

### **AUTHORITY TO CONTRACT AN UNAUTHORIZED PROCUREMENT**

The most basic premise of acquisition law, procurement law, or Government contract law (the terms are used interchangeably), and its application is that only a Contracting Officer has the authority to contractually bind or otherwise obligate the Government, and then only within the limits of the Contracting Officer's warrant. This authority to bind the Government must exist before contact is made with potential vendors or contractors. In the absence of authority provided pursuant to the Contracting Officer's warrant, no representative of the Government can obligate the Government to perform pursuant to the terms of any contract. Should an individual without the requisite authority attempt to obligate the Government, that individual may be personally liable for the performance of the contract. In other words, just because someone without authority has attempted to bind the Government in a procurement matter, does not mean that the Government is thereafter going to assume those obligations made on its behalf by someone without proper authority.

The Government is not required to ratify your actions and assume the obligations you have created. However, the contractor is generally entitled to enforce its contract and therein lies the basis of potential personal liability.

While the Government is not required to ratify unauthorized procurements, it may, nonetheless, do so in limited situations. The Federal Acquisition Regulations and supplements provide procedures for ratification of unauthorized procurements, but they are narrow in application and the process can prove to be embarrassing for the person involved. The local commander of the individual making the unauthorized commitment, or procurement, is responsible for assuring the regulatory requirements of the applicable FAR Supplement are satisfied.

As a Commander, be aware of the very strict limitations upon your direct dealing with private business for government purchases. Authority to procure supplies or services on behalf of the Government comes from either the U.S. Constitution or federal statute. **THIS AUTHORITY IS NOT INHERENT IN ANY POSITION OR COMMAND.** If you do not have procurement authority and have needs which cannot be filled through military supply channels, **ASK YOUR CONTRACTING OFFICER FOR GUIDANCE.**

As a Commander, if you are unsure of your authority as it relates to the acquisition of supplies or services, or if someone serving under you may have been involved in an unauthorized acquisition, see your Staff Judge Advocate immediately.

### **COMPETITION**

Expenditures of public money require special care. It is important that the ANG acquire the greatest value from its expenditures for goods and services. Additionally, it is important that the public perceives the ANG as a careful manager of public funds. Competition is generally the key to effective procurement. Well-designed competitions ensure that the ANG gets the best value for its expenditures and allows our country's free market system to work for our benefit. Moreover, competition, in most cases, is mandated by law.

Procurements of \$3,000 and below can be made without competition. However, the Contracting Officer must still be able to determine that the price is fair and reasonable. All purchases over that amount generally require some level of competition unless a specific exemption applies. Consult with your Contracting Officer for more details.

## CONTACT WITH CONTRACTORS

Federal law limits information that can be divulged by federal employees concerning procurements or potential procurements. As a general rule, Commanders should not communicate directly with prospective contractors either before or during the procurement process without first seeking the advice of a JAG or Contracting Officer. Similarly, after a contract has been executed (signed), it is the responsibility of Contracting Officers and their technical representatives to deal with the questions of contract administration or performance.

The terms of the contract govern contract performance. **COMMANDERS SHOULD NOT UNDER ANY CIRCUMSTANCES PROVIDE DIRECTION TO THE CONTRACTOR DURING ANY PART OF THE CONTRACTORS PERFORMANCE OF THE CONTRACT. INSTEAD, DEAL WITH THE CONTRACTING OFFICER.** Instructions, requests, complaints, or similar communications made by the Commander directly to the contractor can result in the submission of claim for extra work. The Contracting Officer is not required -- and indeed may not be able -- to ratify unauthorized directives provided to a contractor by a Commander.

Similarly, contact of a non-business nature with contractors or prospective contractors should be kept to a minimum. Irregularities and improprieties, as well as the appearance of irregularities and improprieties, are areas that are closely monitored by the general public as well as various "watch dog" agencies, such as the General Accounting Office, OSI, Inspector General, and federal and State auditors of the USP & FO. A powerful, confidential disclosure tool is the Fraud, Waste and Abuse Hotline which can be used to communicate "real" or "perceived" violations. Therefore, seemingly harmless contacts with contractors or prospective contractors can be distorted and blown completely out of proportion, generally to the detriment of the Commander who has made the contact with the contractor or prospective contractor. Those same agencies also conduct audits and inspections of various contracting functions to assure ongoing compliance with the various acquisition regulations.

On occasion, you may be contacted by a prospective contractor for the purpose of providing a demonstration, loan, testing, or evaluation of a product. Contacts with prospective contractors for these purposes should be coordinated with a Contracting Officer or JAG.

## RESPONSIBILITY TO THE CONTRACTING PROCESS

Ensuring that the command complies with all applicable laws and regulations governing the purchases of goods and services is a responsibility that ultimately rests with the Commander. The Commander must recognize that Contracting Officers may only act within the parameters of the existing laws. Actions that violate the law can result in serious consequences for the command as well as the individuals involved. Therefore, it is in the best interest of the commander to insure the integrity of the contracting process and protect the system from improper intra-organizational pressure.

## LEGAL REVIEW OF CONTRACTS

Contracts must be reviewed for legal sufficiency by the Staff Judge Advocate and/or NGB - JA, depending on the dollar amount and type of contract involved. A Commander's best source of information and advice regarding potential acquisition law problems is the Staff Judge Advocate.

***KWIK-NOTE: Commanders themselves should NEVER spend, authorize, or obligate government funds because that authority has been vested solely in a warranted Contracting Officer.***

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## ANG Facilities

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Col Douglas R. Jacobson, May 2007

**AUTHORITY:** DoDD 1225.7, *Reserve Component Facilities Programs and Unit Stationing* (6 Jun 01); AFI 32-1012, *Reserve Component Facilities Programs* (22 Jul 94); ANGI 32-1003, *Civil Engineering Facilities Board (FB)*, (1 Jan 05); ANGI 32-1001, *Civil Engineering Operations Management*, (22 Sep 00)

### RESPONSIBILITY OF CHIEF, NGB

The Chief, National Guard Bureau, is responsible for developing the program for facilities to be solely used by the ANG. These programs are developed in accordance with AFI 32-1012.

AFI 32-1012 states that the Chief, NGB must: establish plans, programs, budgets, and accounting procedures to support facilities construction and maintenance programs and submit reports; develop and maintain management information systems to control the use of funds; and execute a cooperative agreement that establishes the equities and obligations between the United States Government and each state for a military construction project on state-owned land.

Attachment A to AFI 32-1012 provides criteria for cooperative agreements covering contributions of federal funds to the states for National Guard facilities.

The categories for facilities in the ANG are construction, maintenance, and minor construction. The authority for expending funds in these categories is vested with the Chief, NGB and may be delegated to the base civil engineering office.

### OPERATION AND MAINTENANCE RESPONSIBILITIES

The ANG is responsible for all O&M costs of its exclusive use (licensed) facilities including ANG units which are tenants on military installations. The host is responsible for all O&M costs of jointly used areas which are not licensed to the ANG. O&M costs for unlicensed facilities used by ANG personnel performing an active duty mission shall be provided by the MAJCOM responsible for the mission.

### POLICY

The general guidance for facilities policy is:

1. Construct facilities to make the greatest contribution to readiness;
2. Utilize facilities for joint use, if possible;
3. Use existing facilities when possible;
4. Use drawings to show major components;
5. Design facilities for alternative uses in the future;
6. Facilities should not have redundant space; and
7. The design of facilities should be austere.

## ACQUISITION

The general guidance for acquiring facilities is:

1. Use existing facilities before new facilities are sought;
2. Use excess real property held by other military departments or federal agencies before new land is sought;
3. Use leases or donations if the leased or donated land meets the mission needs;
4. Construct additions on existing facilities;
5. Purchase existing facilities if they meet the mission needs;
6. Construct new facilities jointly with other reserve components; and
7. If these methods do not meet the mission needs, then construct new facilities.

## CONCLUSION

ANG facility issues raise many regulatory and legal questions. Therefore before any decision is made concerning ANG facilities, the Staff Judge Advocate should be consulted.

***KWIK-NOTE: There is an established pecking order for the use and acquisition of ANG facilities.***

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## Federal Government Property Furnished to the ANG

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Updated by Col Douglas R. Jacobson, May 2007

**AUTHORITY:** 10 U.S.C. 101(c)(4)(C); 32 U.S.C. 702; AFMAN 23-110, *USAF Supply Manual* (1 Apr 07); AFI 23-201, *Fuels Management* (7 Jul 04)/ANG Supplement 1 (1 Mar 05); OpJAGAF 1980/70, *Federal Government Property Furnished to Guard Remains Federal Property* (17 Jul 80); OpJAGAF 1980/73, *AFOSI May Investigate ANG Activities To Safeguard Federal Property* (22 Jul 80).

### OWNERSHIP

Federal government property furnished to the ANG remains federal property.

The ANG is a part of the organized militia of the United States that is organized and equipped primarily at federal expense. Most ANG operations and supplies are funded directly under Title 10, U.S.C. In addition, the Secretary of the Air Force supports the ANG by providing arms, equipment, uniforms, and other supplies to the states pursuant to 32 U.S.C. 702.

### PROTECTIONS

Property issued to the ANG is afforded the same protections under laws that apply to any property of the United States. Accordingly, theft of ANG property is punishable under federal law. Theft by an ANG member in Title 10 status may be punishable by court-martial under the provisions of the UCMJ. A member of the ANG that commits such a crime while in Title 32 or civilian status may face prosecution by the Department of Justice in federal district court.

Theft of ANG property is a federal crime and may be investigated by federal investigative agencies such as the Federal Bureau of Investigation, and the Air Force Office of Special Investigation.

***KWIK-NOTE:*** Consult the above referenced ANGIs for specific guidance on use of federal property.

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## Fire Protection Jurisdiction

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** AFI 32-2001, *The Fire Protection Operations and Fire Prevention Program* (1 Apr 99); ANG Supplement 1 to AFI 32-2001 (8 Oct 99); applicable state law and regulations.

### INTRODUCTION

ANG Installation Commanders have overall responsibility for the installation's fire protection program. They must assure that all resources under their command are adequately and effectively protected from fire, implement all governing directives, and also preserve all evidence resulting from a fire until investigations are completed.

In order to accomplish this, Commanders need to know the jurisdiction or areas, both on and off base, for which they are responsible. A Commander's fire protection jurisdiction will often be set forth in the leases, licenses, Airport Joint Use Agreements, Memoranda of Understanding (MOUs) and other agreements that govern the operations of the base and define the ANG's relationship with other military components and civilian agencies on the base. Commanders should consult with the Base Fire Chief to ensure that fire protection responsibilities are clearly defined and understood.

### JURISDICTIONAL CONFLICTS WITH CIVILIAN FIRE DEPARTMENTS

ANG units may have fire protection responsibility for buildings or areas off the base proper which are situated in a municipality. In other cases, the United States may have leased land for a base and licensed it back to the State for use as an ANG base. Such scenarios can present problems regarding fire protection responsibilities because local civilian fire departments may assert that the property falls within their jurisdiction.

### FEDERAL SUPREMACY DOCTRINE

The leases, licenses, and other agreements concerning the property in question should address the responsibilities of the various parties. However, even if the documents are silent, as a general rule, federal regulations supersede conflicting state and local laws. Accordingly, property under the control of the ANG is subject to ANG jurisdiction and fire protection procedures. Because this doctrine is applicable to a variety of situations, we have set forth a fairly lengthy analysis below that applies the principle of federal supremacy to fire protection responsibilities.

### AVOIDING CONFLICTS

The best method for avoiding conflicts is advance planning. Commanders should ensure that the Base Fire Chief identifies all areas of potential conflict and initiates contact with the local authorities. Fire protection is a serious matter in terms of protecting property and lives and in maintaining good community relations. An emergency situation is not the time to argue over jurisdiction. Identify potential problem areas and address potential conflicts before a problem arises. Get your Judge Advocate involved to help coordinate the matter.

### FEDERAL SUPREMACY ANALYSIS

The federal government has the supreme right to perform the functions delegated to it by the Constitution free from interference from any source, and jurisdiction of the State which would impair the federal government's effective use of the premises for the purposes leased (*i.e.*, performance of the federal military mission by the ANG). See Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525 (1885). The State has consented to that federal supremacy by virtue of its lease to the United States for use and occupancy of the premises by a federally recognized reserve component of the armed forces. The federal government has exercised that jurisdiction by virtue of its licensing of

the premises to the state ANG for its use subject to federal regulation, supervision, and approval.

The federal government's authority to regulate, supervise, and approve this usage of the premises by the state ANG derives from the U.S. Constitution, Article I, Section 8, Clauses 14 (regulation of the military) and 16 (training of the militia). The federal government has the right to administer, operate, maintain and equip those facilities designated for the proper development, training, operation and maintenance of reserve components of the armed forces (10 U.S.C. 18231, *et seq.*). The President also may prescribe regulations for the organization, discipline, and governing of the National Guard, and this power may be delegated (32 U.S.C. 110).

The state ANG is a part of the organized militia of the several states that is organized, armed, and equipped wholly or partly at federal expense (10 U.S.C. 101(c)(4)(C)). The state ANG is funded almost entirely by the federal government. Supplies necessary to uniform, arm, and equip the state ANG are issued to your State by the Secretary of the Air Force under the authority of 32 U.S.C. 702. Property so issued or consigned remains the property of the United States (32 U.S.C. 710(a)). The general authority for the Secretary of the Air Force to periodically require inspections of the Air National Guard to inquire into the condition of property, proper organization, qualification of ANG personnel, equipment and training, and compliance with federal regulations is provided in 32 U.S.C. 105.

The USAF has assigned your unit a specific mission in support of the national defense. The unit has been issued a certain number and kind of aircraft and the necessary supporting materials to perform that mission. The cost of the facilities, equipment, and materials comprising your mission at your base is in the tens of millions of dollars.

The Air National Guard of the United States (ANGUS) is a reserve component of the Air Force, all of whose members are members of the ANG (10 U.S.C. 101(c)(5)). All federally recognized ANG units and organizations, including your unit, are also units and organizations of the ANGUS. Conceptually, however, they are distinct; the ANG is a state militia organization while the ANGUS is a reserve component of a federal armed force. Members of the ANG thus are members of the ANG of the State, receive federal recognition of that membership and occupy Reserve of the Air Force status as ANGUS members and as such are subject to federal regulation. The above applies to the Air National Guard of the State.

From the foregoing, it should be clear that Congress has exercised its constitutionally derived power (Art. I, Section 8, Clauses 14 and 16) by enacting laws and regulations governing the organized militia (*i.e.*, state ANG). Such federal legislation and regulations displace conflicting state law under the Supremacy Clause (U.S. Constitution, Article VI, Section 2).

The two federal military regulations governing fire protection for the Air Force and the Air National Guard are AFI 32-2001 and ANG Supplement 1 to AFI 32-2001.

These federal regulations clearly supersede state law to the extent that they conflict.

Moreover, because of the pervasiveness of the federal government's regulation of the operations and conduct of the Air National Guard, and the dependence and reliance upon the ANG as an essential component of this nation's defense - visibly demonstrated by the federal government's commitment to your unit of military resources vital to the nation's defense - the federal interest in the Air National Guard is so dominant, that the federal government has pre-empted this area: *i.e.*, federal law precludes enforcement of state law concerning the operations, training or mission of the Air National Guard to the extent that enforcement of the state law would produce a result inconsistent with the object of the federal law.

State law may even complement, rather than conflict with, federal law and regulations governing the state Air National Guard. Your unit is part of your state's military department which includes all the state's property, structures, facilities, functions, and personnel. The Adjutant General (AG) usually has the authority:

\* To lease, furnish, maintain and operate bases, buildings, structures, and other facilities for the state ANG, with appropriated federal or state funds, and

\* To determine all services necessary to be performed there.

State law may require all property of the state and United States to be safeguarded and maintained, with

responsibility and accountability for liability for loss, damage, or destruction fixed by the AG as provided in applicable laws and regulations of the federal and state government.

In recognition of the federal interest in the ANG, state law or regulation usually gives the AG general charge and control of, and regulatory power over all bases and facilities owned, leased, or maintained by the State or United States for use by the state ANG and of all activities conducted thereon. The Installation Commander designated by the AG is in direct charge and control of that installation and must observe all laws, orders, and regulations applicable to the base or other facilities, all activities conducted therein and all persons employed therein.

State law or regulation may uphold the paramount use of installations for military operations without outside interference. To emphasize the ultimate authority of the Installation Commander, state law may even give the Installation Commander the power to detain any person, who in any way or manner interrupts, molests, or prevents the discharge of military duties of state ANG members on the base.

At your base, your unit has a fire department with many members who serve full-time. The federal government has authorized and supplied your unit (at a substantial cost) special fire fighting vehicles, trucks and equipment to enable the base fire department to protect all the assets assigned to and used by the unit, including aircraft, structures, equipment and personnel, in performance of the unit's mission. The federal government also appropriates hundreds of thousands of dollars each year to specially train these firefighters to be better able to perform their assigned duties. In light of this, and the federal government's reliance on your unit for a vital role in this nation's defense, it is somewhat difficult to understand how any civilian fire department -- city, town or village; full-time, part-time, or volunteer -- would seek to assert its authority or assume responsibility over military assets which the federal government has furnished, especially where the federal government has expressly provided that the military authorities have ultimate responsibility and control of fire protection for those assets.

Your supreme authority over your own area, whether or not it is geographically within a local fire district, is provided by federal law which is paramount; and which may even be complemented by state law. Thus, the source of the local fire department's authority will either be superseded or pre-empted by federal law.

## CONCLUSION

The above has been set forth as source material for your information and use if you ever have a problem in this area. Again, please consult with your Judge Advocate and consider the particular nuances of your state's law before acting on such a problem. Sometimes a polite but firm explanatory letter to an appropriate civilian official will resolve the matter. You may even consider entering into a Reciprocal Fire Protection Agreement or an MOU, if you deem it appropriate. If the problem is not resolved locally, inform your state Headquarters.

***KWIK-NOTE: This is an area where you sometimes have to assert your authority with local officials firmly, while at the same time maintain good community relations.***

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## Installations Jointly or Solely Occupied by the ANG

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** AFI 32-1061, *Providing Utilities to US Air Force Installations* (15 Mar 02); AFI 32-1012, *Reserve Components Facilities Program* (22 Jul 94); AFI 32-9001, *Acquisition of Real Property* (27 Jul 94); applicable state law and regulations.

### INTRODUCTION

A few Air National Guard units are co-located on active duty Air Force bases or on a site owned or leased by the Air Force, or other active duty component. Common situations also include ANG units occupying land:

1. Owned by the federal government and either used solely by the ANG, or jointly with an active duty or Reserve unit;
2. Owned by the State and used solely by the ANG; or
3. Owned by a political subdivision of the State (County, City, etc.), leased to the Air Force, and then licensed by the Air Force to the State for use by the ANG, either solely, or jointly as a host or a tenant to another National Guard or Reserve unit.

This topic discusses some of the legal concepts connected with such relationships.

Common questions that arise in these situations relate to who has authority to do what, who has responsibility for ownership of property, etc. This topic briefly looks at several combinations of relationships and suggests starting points for clarifying them. Whether the land is exclusively or concurrently owned by the federal or state government determines many of the questions that arise. First determine who owns the land, then determine whether it is jointly or solely used.

### AIR NATIONAL GUARD AS SOLE OCCUPANT OF A SITE

In these relatively simple situations, the State Adjutant General is responsible for operation and maintenance of installations and related activities. State law and regulations usually govern a Installation Commander's authority and responsibilities.

### AIR NATIONAL GUARD AS HOST

If the ANG is the Host of an installation, the ANG Installation Commander is the authority for all activities of all tenants on the base. For example, the ANG Installation Commander may ban smoking from all base buildings, and those buildings include those occupied by another reserve component tenant on the base. There should be in place an agreement between the host and all tenants which governs the rights and responsibilities of each occupant and the conditions of occupancy. These agreements are usually handled by the National Guard Bureau in conjunction with the State Adjutant General, but all host and tenant Commanders should attempt maximum input in conjunction with their civil engineers, Judge Advocate and other key personnel. At a minimum, all occupants should have a copy of this agreement for reference.

### AIR NATIONAL GUARD AS TENANTS ON ACTIVE DUTY INSTALLATIONS

All land and buildings (real property) on Air Force installations, including the land and buildings of an Air National Guard unit, are under the command jurisdiction of the Chief of Staff, USAF. This includes buildings constructed and

maintained by the National Guard unit. In this situation, the USP&FO does not have control.

In the ANG section of the Air Force Base, the Air National Guard has exclusive use of all real property, but must obtain the Air Force Base Commander's permission for facility modifications or changes.

The Air Force Base Civil Engineer may make inspections of Air National Guard areas to insure that maintenance of ANG facilities is being performed effectively. The Air Force Base Civil Engineer will also provide consultation and technical advice on facility maintenance and related functions.

The ANG Commander should enter into a Memorandum of Understanding (MOU) with the Host Commander covering all prohibited and permitted activities on base by members of the ANG and any required procedures for seeking approval of activities not specifically covered by the MOU.

### **AIR NATIONAL GUARD AS JOINT USERS**

On occasions when an Air National Guard owned facility is near or immediately adjacent to an Air Force installation, the two components may both use some of the same facilities on the Air Force installation. If the sharing of facilities is all that needs to be addressed between the two components, a "license" may be all that is required. Such a license to co-use the property is prepared and issued by the U. S. Army Corps of Engineers. Licenses grant permission to do certain things, and are generally revocable at the will of the person or entity granting the license.

The Air Force Installation Commander and the Air National Guard Installation Commander will prepare and sign a joint use agreement in other cases. This agreement will outline each unit's responsibilities for administrative matters such as:

1. Maintenance, repair, and minor construction;
2. Liability for accidents;
3. Funding requirements; and
4. Permitted uses by the ANG of the Air Force facilities.

### **INSTALLATION AGREEMENTS**

An Air National Guard Unit when not in federal service is a part of the State, not federal, government. Agreements that provide for transfer of federal funds between the ANG, the active Air Force, or other federal agencies must be between federal entities. As a result, any agreement under which the ANG unit provides or receives funds for installation services must be between NGB (USP&FO) and the other federal entity. An ANG installation or unit commander has no authority to enter into an agreement obligating federal funds.

### **LICENSE REQUIRED**

All real property of the Air Force occupied by the Air National Guard must be documented by a license, whether such property is government owned or leased; or whether the Air National Guard has exclusive control of the property; or is simply a tenant having joint use of the property.

Units must initiate a request for renewal of licenses not later than one year before the expiration of the license.

### **FUNDING**

All Air National Guard utilities (power, water, heat, etc.) will be paid for as set out in AFI 32-1061.

The Air Force will not charge the Air National Guard for the use of jointly-used facilities such as runways, towers, crash equipment, or security, which the Air Force would have been supplying for itself even if the ANG were not present.

***KWIK-NOTE: Regardless of the relationship or situation in which an ANG unit occupies an installation, the ANG Commander should maintain and have as much input as possible into all agreements, leases, and licenses governing that occupancy.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Access to Military Installations	3-2
Air Base Security Guards	3-3
Arrest By Civilian Authorities	8-6
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Base Facilities Board	3-4
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Morale, Welfare and Recreation (MWR) Facilities, Funds and Programs	22-4
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Vehicle Registration	21-8

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## Issue Items and Equipment Turn-In

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** AFI 23-111, *Management of Government Property in Possession of the Air Force* (25 Jul 05); AFMAN 23-110, *USAF Supply Manual* (1 Apr 07); AFMAN 23-220, *Reports of Survey for Air Force Property* (1 Jul 96).

### **ISSUED PROPERTY IS ACCOUNTABLE**

Each unit is responsible for controlling military property within its custody. Issuance of property to individuals or other units should be documented. Individuals should know when the return of the property is expected and that they are responsible for it. Property management applies to each individual. Upon return, the property should be examined to verify its condition. Property that is not returned or is returned in a damaged condition may require processing a Report of Survey.

### **USE OF GOVERNMENT PROPERTY**

Property management responsibilities limit the use of government property to official purposes only.

### **FAILURE TO RETURN IT**

Problems arise when people are too busy to properly document the issuance and return of property, or they just get sloppy. Ultimately, someone will inevitably face responsibility for lost or damaged property. In today's climate of shrinking budgets, individuals are increasingly being held financially accountable when military property is not properly returned and such a failure is not satisfactorily explained. The individual held liable may be the issuer or receiver depending on the records maintained. The individual may be held liable for the loss, damage, or destruction of the property resulting from the individual's negligence, willful misconduct, or deliberate unauthorized use.

### **RECOVERY**

A number of options are available to recover property (or at least the value of the property) from ANG members. Such options range from administrative procedures, such as the Report of Survey process, to civil or criminal actions under Federal or State law.

### **SPREAD THE WORD**

Commanders need to periodically stress the importance of accountability for issued property. Personnel need to be advised by briefings, publications, or otherwise that personal liability for lost or damaged property can be a painful reality unless steps are taken to account for and maintain equipment properly.

***KWIK-NOTE: Both givers and receivers of military property may be held accountable for its loss or damage. PROPER documentation can save you time and money.***

### **RELATED TOPICS:**

Preventive Law Program  
Reports of Survey

### **SECTION**

17-15  
25-19

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# Loan of Air Force Equipment

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** AFMAN 23-110, *USAF Supply Manual* (1 Apr 07); AFI 23-111, *Management of Government Property in Possession of the Air Force* (1 Feb 96).

## INTRODUCTION

Commanders may receive requests to borrow their equipment. These requests may come from civilian entities such as schools. If you can loan the property to these entities, it fosters positive community relations. This topic discusses some of the rules and procedures involved in loaning your property to others.

## GENERAL RULES

All loans or custodial transfers of Air Force property must be in interests of National Defense or be in the general public interest. Property cannot be loaned unless the property is not in use or is on a stand-by status. The title for all loaned property remains with the Air Force and the loan or custodial transfer must be revocable at any time that it is considered to be in the best interests of the Air Force or the National Guard. Aircraft generally CANNOT be loaned unless unusual and compelling circumstances exist that involve immediate threats to the security of the United States.

## LOAN AND USE OF PROPERTY ISSUED TO THE AIR NATIONAL GUARD

The policy for managing and using Federal property issued to the ANG is contained in AFI 23-111, which provides a source of information and standard procedures for ANG organizations to use when loaning AF property for which they have custody .

The ANG air commander is the approval authority for loans of property with non-depreciated stock list value not to exceed \$100,000 for loan periods not to exceed 180 days.

The Adjutant General (AG) is the approval authority for loans of property with non-depreciated stock list value not to exceed \$1 million for loan periods not to exceed one year.

All requests for ANG loans of property exceeding the above limiting factors will be submitted through the AG to ANGRC/LGS for processing to the appropriate AF approving official.

All loans/use of AF property issued to the ANG will be coordinated through the loan agreements that are executed IAW the directives referenced in AFI 23-111. In emergency situations, this coordination may be accomplished after the loan is effected.

All loans/use of AF property will be coordinated with the unit staff judge advocate.

Emergency requests for civil authorities, Federal or state, in support of civil requirements must be directed to ANGRC/LGS for approval by ANGRC/CC. In emergency situations, obtain the name, agency, address, and telephone number of the official requesting assistance. Also, obtain the borrower's agreement to reimburse the DOD if reimbursement is necessary.

***KWIK-NOTE: Know what you can loan, to whom, and for how long. Decisions whether and under what circumstances to loan Air Force property involve command discretion.***

**RELATED TOPICS:**

**SECTION**

Aid to Civilian Authorities	6-2
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Community Relations Programs	6-4
Federal Government Property Furnished to the ANG	25-10
Counterdrug Support Program	6-5
United States Property and Fiscal Officer (USP & FO)	25-20

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## National Defense Area

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** 50 U.S.C. 797; 18 U.S.C. 1385; AFI 31-101, *The Air Force Installation Security Program* (1 Mar 03); ANG Supplement 1 to AFI 31-101 (1 Mar 04)

### USES AND EFFECTS

Pursuant to Title 50, U.S. Code, Section 797 as implemented by AFI 31-101, in an emergency situation involving military property off-base, the senior DOD (military) official at the scene is empowered to declare the scene of the emergency a National Defense Area.

This enables officials to control all aspects of the scene to protect the property in an emergency.

This declaration of non-DOD owned or controlled property as a National Defense Area may be deemed a “temporary taking” of private property for public use (although limited in scope and time) and the owner later may be compensated pursuant to the authority of the eminent domain clause of the 5th Amendment to the U.S. Constitution.

In light of the above, and potential resistance which may be encountered, the DOD official declaring the National Defense Area, should limit the area, in time and geography, and only take such actions as the emergency requires - remembering the first priority is the emergency. A National Defense Area can only be declared to protect classified information or property. Once the classified material is removed, there is no further authority for the National Defense Area, even though there may still be other DOD property at the site.

50 U.S.C. 797(b) also requires that the order declaring the area a National Defense Area be conspicuously posted. AFI 31-101 describes appropriate signs that should be posted. These signs are the implementation of the order. It is suggested you obtain preprinted iridescent “sticky-back” signs for use in the event you need them.

It is also very important to ensure that you coordinate all law enforcement activities in advance with the local civilian police. In that respect, one of the best uses of civilian law authority is to designate them as the arresting mechanism for civilian violators. Maintaining minimal involvement with civilians will allow your full attention to focus on the emergency.

Further explanation of the use of the National Defense Area is in the AIRCRAFT ACCIDENTS AND SAFETY INVESTIGATIONS OFF-BASE topic in this Deskbook.

Additional information on National Defense Areas is contained in the Attachment 1 to this discussion. Attachment 1 was published by the Air Force's Judge Advocate General's School in *The Military Commander and the Law*, Eighth Edition, 2006.

All Commanders should consult with their Staff Judge Advocates in advance to coordinate the proper implementation of the statute and regulations in establishing a National Defense Area.

***KWIK-NOTE: Know how and when to use a National Defense Area.***

### RELATED TOPICS:

Aircraft Accidents and Safety Investigations Off-Base

### SECTION

16-2

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Lawsuits Against National Guard Personnel	18-6
Personal Liability of Federal and State Officials	18-9
Memoranda of Understanding (MOUs)	6-6

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# Quarters

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** AFI 34-246, *Air Force Lodging Program* (17 May 01), Attachment 4; AFI 34-246/ANGSUP 1, *Air Force Lodging Program* (15 Sep 03).

## INTRODUCTION

This topic concerns your base providing quarters to eligible personnel.

## GENERAL PROCEDURES INFORMATION

Air National Guard (ANG) installations may provide lodging accommodations (either on the installation or in commercial lodging) for all eligible unaccompanied personnel requiring government lodging during inactive duty for training (IDT) or annual training (AT) whenever possible. Eligible unaccompanied personnel are members of the unit who reside beyond the established commuting area.

ANG installations should first use other military lodging accommodations within the surrounding area before securing commercial lodgings for eligible unaccompanied personnel during IDT and AT.

TDY personnel to ANG installations will be lodged either on the installations where military accommodations are available or in commercial lodgings at their own expense.

Lodging at no expense to the eligible unaccompanied personnel is not a benefit guaranteed by the Air National Guard and is contingent upon funding and is at the discretion of the Installation Commander.

The Installation Commander may establish a standard commuting area within the assigned local area. The following factors should be considered when establishing the standard commuting area: (1) the greatest distance that the full time air technician/Active Guard/Reserve (AGR) employees and state employees customarily commute on a daily basis; (2) commuting areas that have been established by other issuing authorities at the same location (*i.e.*, for active duty or other Reserve units); (3) the types and condition of the highway systems and/or public transportation in the area; (4) one way travel to the duty station.

All full time employees at ANG installations (AGRs and air technicians) are considered to be living within the commuting distance.

## ELIGIBLE PERSONNEL

Eligible unaccompanied personnel are members who reside outside the designated commuting distance and may use the lodging accommodations at no expense for IDT and AT. The unit is not authorized to pay lodging for Guard members employed full time (AGR/air technician) for IDT or AT unless required by military necessity. The unit may authorize lodging accommodations for non-eligible Guard members at no cost to the members due to inclement weather.

On base or commercial lodging may be provided to eligible members arriving the night before the first IDT and AT.

## RESERVATIONS

Authorized Guard members should advise the lodging manager at least 30 days in advance of their lodging

requirement. This allows the Guard unit to secure the required rooms at a military lodging accommodation or at commercial lodging establishments. Authorized Guard members wishing to share a room with ineligible dependents may do so provided there is neither an additional cost to the government nor a reduction in needed occupancy.

## **ASSIGNMENTS**

Married couples on duty status may be lodged together if private sleeping facilities and a private bathroom is available. In recognition of the need to accommodate the mission, these requirements are desired but not mandatory for deployment and exercises. The commander may allow for single occupancy as space availability, financial constraint, and military necessity permit. Rooms will be assigned based upon rank.

## **COORDINATION WITH ACTIVE DUTY BILLETING OFFICE**

Attachment 4 to AFI 34-246 sets forth requirements and establishes specific procedures for coordination between the ANG unit and any servicing active duty base billeting office regarding billeting for eligible members and payment.

## **CONCLUSION**

Units may find a need to publish a unit regulation in this area. If you have any questions about establishing the standard commuting area or quarters, contact your Judge Advocate, Services Officer and Contracting Officer.

***KWIK-NOTE: Special care is required because this is a potential Fraud, Waste and Abuse area. Quarters must only be provided to eligible personnel.***

## **RELATED TOPICS:**

## **SECTION**

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## Real Property - Acquisition and Retention

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**Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** AFI 32-1024, *Standard Facility Requirements* (31 May 94); AFI 32-9001, *Acquisition of Real Property* (27 Jul 94); ANGI 32-1003, *Facilities Board* (1 Jan 05).

### TYPES OF INTERESTS IN LAND

Mission requirements may necessitate acquisition of an interest in real property. Some of the types of property interest available are a fee simple ownership (full and unconditional ownership), lease (rental for a period of time), license (privilege to use land revocable at will), and easement (right of way).

### WHO ACQUIRES

When the need for acquisition of a real property interest arises, only the minimum amount of real property needed to meet these requirements will be permitted to be acquired. The Adjutant General (AG) will initially select the property. The selection is subject to the concurrence of the NGB. Before the interest can be acquired, the National Guard Bureau must determine whether the requirement can be met with a property interest currently available to the Guard.

Should a Commander find the acquisition of a real property interest necessary, that acquisition should be coordinated with the Judge Advocate's office at the outset of the acquisition process.

***KWIK-NOTE: The State AG and NGB will determine what land or buildings will be acquired for an ANG unit. Don't act on your own.***

RELATED TOPICS:	SECTION
Airport Joint Use Agreements	25-2
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## Reciprocal Fire Protection

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Col Douglas R. Jacobson, May 2007

**AUTHORITY:** 42 U.S.C. 1856; AFI 32-2001, *The Fire Protection Operations and Fire Prevention Program* (1 Apr 99); ANG Supplement 1 to AFI 32-2001 (8 Oct 99); 44 C.F.R. Part 151, *Reimbursement for Costs of Firefighting on Federal Property*; applicable state law.

### INTRODUCTION

Air National Guard fire protection organizations may cooperate with other local military or civilian fire departments, whenever feasible, to enhance mutual fire protection capabilities. This cooperation may result in agreements between the ANG and other fire departments. Entering into these agreements is encouraged, because it enhances community relations, and may save the civilian or other military fire department from purchasing specialized equipment the local ANG base already has.

### MUTUAL AID OR RECIPROCAL AGREEMENTS

Mutual aid or reciprocal fire protection agreements are agreements in principle between two departments (one military, one civilian) to assist each other upon request. Mutual aid or reciprocal agreements are authorized by 42 U.S.C. 1856 and AFI 32-2001/ANG Supp. 1 to be negotiated between an ANG fire department(s) and municipal fire department(s) located within the geographical area surrounding an ANG installation. Any fire department having a mutual aid or reciprocal agreement with surrounding jurisdictions must have radio communications with that agency. Attachment 4 to AFI 32-2001 sets forth an Agreement For Mutual Aid In Fire Protection And Hazardous Materials Incident Response that can be used as a sample.

### WAIVER OF CLAIMS AND INDEMNIFICATION

The parties to the mutual aid or reciprocal fire protection agreements, as required by 42 U.S.C. 1856 and AFI 32-2001/ANG Supp. 1, must mutually waive all compensation for loss, damage, personal injury, or death from the negligent party occurring in consequence of the performance of such agreement. These agreements may provide however, for the reimbursement, by the party issuing the call for assistance, of any and all costs incurred by the responding party.

State law must be consulted to determine if any conflicts exist between state law and the provisions of 42 U.S.C. 1856 and AFI 32-2001/ANG Supp. 1 regarding mutual waiver of compensation for loss, damage, personal injury or death occurring in consequence of the performance of the mutual aid or reciprocal fire protection agreement, and regarding reimbursement by the department issuing the call for assistance of any and all costs incurred by the responding fire department. For example, your state law may require that each fire department be responsible for its own negligence and that the two fire departments that are parties to the reciprocal fire protection agreement cannot waive their right to be compensated from the negligent party. If there is a conflict between state law and federal law in this area, the federal law will supersede state law because of the Supremacy Clause of the U.S. Constitution. The Supremacy Clause has generally been interpreted to mean that where the federal and state governments each have a valid law in the same area, when the two laws conflict, the federal law will control. In such event, your state law may need to be amended to permit these reciprocal fire protection agreements to be entered into pursuant to the requirements of 42 U.S.C. 1856 and AFI 32-2001/ANG Supp. 1.

Attachment 6 to AFI 32-2001/ANG Supp. 1 provides a Release of Claims and Indemnification Clause for Civil Airport Joint-Use Agreements to be used for ANG installations. The required clause is as follows:

(Name of Airport Operator) agrees to release, acquit, and forever discharge the United States its officers, agents,

employees and State of (STATE) employees for all liability arising out of or connected with the use of United States equipment, personnel, State of (STATE) employees, for fire control, crash, and rescue activities at or in the vicinity of (name of airport), and (name of airport operator) further agrees to indemnify, defend, and hold harmless the United States its officers, agents, employees, and State of (STATE) employees against any and all claims, of whatever description, arising out of or connected with such use of United States equipment or personnel, and State of (STATE) employees. The agreements contained in the preceding sentence do not extend to claims arising out of or connected with services rendered solely for the protection of United States property, personnel, or State of (STATE) employees, or to claims for damages caused solely by the negligence or willful misconduct of officers, agents, employees of the United States or State of (STATE) employees, without contributory fault on the part of any person, firm, or corporation; provided, however, that insofar as this paragraph may be consistent with the waiver or claims provisions contained in any reciprocal agreement for mutual aid in furnishing fire protection heretofore or hereafter entered into by the lessor with any agency of the United States pursuant to Public Law 84-46 (42 U.S.C. 1856, *et seq.*), the rights and obligations of the parties shall be governed by said waiver of claims provision and not by this paragraph.

### **FIRE PROTECTION PREVENTION POLICY**

The Civil Engineer of the ANG (ANG/CE) will execute the fire protection and prevention policy for the ANG. ANG/CEXF is the MAJCOM office for ANG Fire Protection.

The Staff Judge Advocate should be consulted whenever a mutual aid or reciprocal agreement for fire protection is being considered.

***KWIK-NOTE: These agreements are excellent for community relations since they usually save the local community from purchasing equipment the local ANG unit already has.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Aircraft Accidents and Safety Investigations Off-Base	16-2
Aircraft and Missile Accident Investigations and Reports	16-3
Airport Joint Use Agreements	25-2
Ambulance Response Off-Base	19-3
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# Reports of Survey

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Col Douglas R. Jacobson, May 2007

**AUTHORITY:** AFMAN 23-220, *Reports of Survey for Air Force Property* (1 Jul 96)

## INTRODUCTION

Statutory authority governing the accounting for government property lost, damaged, or destroyed and the fixing of responsibility and liability through the ROS system is found in various statutes. Chapter 1 of the above referenced AFMAN sets forth the various statutes, as well as DoD publications, that provide the basis for the ROS system.

## PURPOSE

A Report of Survey (ROS) is one way of determining and assessing liability against a military member or employee responsible for the loss, damage, or destruction of Air Force property proximately caused by their negligence, willful misconduct, or deliberate unauthorized use. It serves as the basis for the government's claim for restitution.

The purpose of the ROS includes the following: authorize adjustment of property accountability records, establish pecuniary liability, serve as authority for collection of indebtedness, and prescribe corrective action to prevent recurrence of loss, damage, or destruction of property.

Chapter 22 of AFMAN 23-220 provides ROS procedures unique to the ANG. All ANG personnel, including civilian employees, active guard and reserve (AGR), and military technicians are responsible at all times for the proper care and safekeeping of United States property. ANG Commanders are responsible for the real and personal government property under their control. Financial liability for property issued by the United States to the ANG that is lost, damaged or destroyed may be assessed as follows:

1. Against an ANG member when the loss, damage, or destruction is caused by the member's negligence or willful misconduct in performing ANG military duties or as a result of deliberate unauthorized use of the property;
2. Against the state when the loss, damage, or destruction is incident to duty or activity under the laws of and in direct support of the authorities of the state regardless of who was actually using the property at the time;
3. Against the full-time employee (civilian, AGR, or military technician) incident to employment as an ANG employee when the loss, damage, or destruction was caused by negligence, willful misconduct, or deliberate unauthorized used of the property.

Financial liability against an individual will be assessed only after an official investigation has been conducted specifically for the purpose of determining the facts and the circumstances related to the loss, damage, or destruction of the property.

Liability is based upon the preponderance of the evidence. Financial liability cannot be assessed unless, after considering all relevant factors, it appears more likely than not that an individual's actions, or failure to act, constituted negligence, willful misconduct, or deliberate unauthorized use, and proximately caused the loss, damage, or destruction at issue. If the weight of the evidence does not support either side, an individual is not held liable. This simple negligence standard does not apply to vehicles that are damaged, lost, or stolen. In those instances, the gross negligence standards apply. Chapter 18 contains guidance and procedures pertaining to vehicles.

Assessment of financial liability will not be used instead of, or as a form of, disciplinary action. Commanders must decide if a case warrants taking disciplinary action under the state military code or Uniform Code of Military Justice (UCMJ), if applicable. This is a separate action and is not related to the assessment or non-assessment of financial

liability. Also, commanders are encouraged to use administrative actions when assessment of financial liability by ROS is not practical or desirable.

### **ROS MAY BE MANDATORY**

A ROS may be mandatory in some situations and not mandatory in others. Chapter 3 provides details regarding when a ROS is mandatory and when a ROS is not mandatory.

### **GENERAL PROCEDURES FOR PROCESSING A ROS (DD FORM 200)**

When property is lost, damaged, or destroyed by an individual or an organization, the organization that has possession of the property will initiate the ROS and that unit commander will appoint an investigating officer who will determine the facts in the case. The investigating officer must be “disinterested” and have no interest in the custodianship, care, accountability, or safekeeping of the property. Further, when appointed as investigating officer, the completion of the investigation becomes a primary duty and the officer will be relieved of other duties or assignments that would interfere with the investigation. The investigating officer at a minimum will answer the following six questions: what happened, how, where, and when; who was involved, and was there any evidence of negligence, misconduct, or deliberate unauthorized use or disposition of the property. The investigating officer, based on the facts, makes findings and recommendations on the issue of liability of the person(s) involved.

The next step is to refer the ROS to the accountable officer so that the records may be adjusted. Next, the investigating officer 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. If financial responsibility is to be assessed, the ROS will be referred to the Staff Judge Advocate for review.

The Staff Judge Advocate has the duty to review the Report of Survey for legal sufficiency. That duty includes ensuring that the investigating officer has interviewed all necessary witnesses, obtained answers to all questions which would affect the liability issues, and obtained all necessary documents and photographs. As your attorney, the SJA knows what information is necessary in the Report of Survey to properly fix liability upon a member, or exonerate the member from liability.

If the investigating officer has not performed a thorough job, the ROS should be returned for reaccomplishment. In some cases the appointing authority may appoint a financial liability officer to re-investigate the case. This is a second investigation and is performed when it is necessary to reevaluate the initial investigation or because of the complicated nature of the case. Upon conclusion of these actions, the approving authority reviews the ROS and assigns financial responsibility or relieves the individual(s) of responsibility.

If loss, damage or destruction of property resulted from the negligence, willful misconduct, or deliberate unauthorized use of two or more persons, they are held jointly and severally (individually) liable for the full amount of loss or damage. Each person held liable jointly and severally with others is legally liable for the entire amount of the charge regardless of the extent of each person’s involvement. As a practical matter, the damages are shared among the persons found liable.

### **ANG APPROVING AND APPOINTING AUTHORITIES**

The Assistant Deputy Adjutant General - Air is the approving and appointing authority except where possible state liability is involved. The Assistant Deputy Adjutant General--Air or the Director Air National Guard may delegate this authority to the United States Property and Fiscal Officer (USPFO). The ANG approving and appointing authority takes action on all ROS for United States property issued to the ANG that is lost, damaged, or destroyed and designates in writing the officer or individual responsible for administering the ROS program.

ROS involving state liability are forwarded through the Adjutant General or designee, for comments, to the appropriate air directorate division for property (NGB/LG), real property (NGB/DE), or fiscal (NGB/FM). The appropriate air directorate division provides comments and, or recommendations and forwards through the legal office (NGB/JA) to the Director, Air National Guard (NGB/CF), who has final approval and disapproval authority.

## COLLECTION FROM STATES, ANG MEMBERS, AND TECHNICIANS

Where the state is held liable, the approving authority (Director, Air National Guard) directs the appropriate adjutant general to initiate collection action for the entire loss to the United States Government. Liability charged to a state is paid from state funds, or from any other non-federal funds. When the state is found jointly and severally liable with one or more ANG members or technicians, the state's liability is equal to that of the ANG members or technicians. Collections from ANG members and ANG technicians are accomplished as prescribed in Chapter 16.

### ROS APPEAL

ANG members or employees and states may appeal ROS that assess financial liability. A ROS that assesses financial liability and is appealed by an ANG member or employee is forwarded to the Assistant/Deputy Adjutant General - Air or designee, who either: approves the appeal and directs relief from the financial liability or disapproves the appeal and forwards it to the legal officer for review and recommendation to the State Adjutant General who has final approval and disapproval authority.

A ROS that assesses financial liability and is appealed by a state, either solely or jointly with an ANG member or employee, is forwarded to the National Guard Bureau legal office, (NGB/JA) for review and recommendation to the Director, Air National Guard, (NGB/CF) who either: approves the appeal and directs relief from the pecuniary liability or disapproves the appeal and forwards the ROS to the Chief, National Guard (NGB/CC) who has final approval and disapproval authority.

***KWIK-NOTE: Reports of Survey are serious business. Unit members found negligent for the loss, damage, or destruction of government property will pay for their negligent behavior.***

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## United States Property and Fiscal Officer (USP&FO)

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Col Douglas R. Jacobson, May 2007

**AUTHORITY:** ANGI 36-2, *United States Property and Fiscal Officer Appointment, Duties, and Responsibilities* (17 Dec 99).

### DUTIES AND AUTHORITY

In each state, an officer of the ANG or ARNG, nominated by state authorities and approved by the Secretary of the Air Force or Army, as appropriate, serves on active duty as the United States Property and Fiscal Officer for that state. The USP&FO's duties and authority are governed by law and applicable regulations, and can be summarized as follows:

1. Receives and accounts for all federal funds and property in the possession of a specified state, assuring federal funds are obligated and expended in accordance with applicable laws and regulations;
2. Provides financial and logistical resources for monitoring federal property in a state's custody;
3. Provides advice and assistance to entities within the state to assure proper usage of federal property in accordance with applicable regulations; and
4. Manages the federal logistic support system for the state and, if mobilized, provides the mobilized unit with necessary support for transition into active duty status.

Decentralization of some duties of the USP&FO is permitted, but the USP&FO retains authority, responsibility, and accountability for federal funds and property within the state. If the USP&FO has delegated some duties to an Assistant USP&FO (ANG), Commanders must be aware that although the Assistant USP&FO is responsible to the Commander, that Assistant is also responsible to the USP&FO when functioning within the authority delegated by the USP&FO. The desires and enthusiasm of a Commander cannot replace the fundamental requirements of the law and regulations that govern the USP&FO operations and any delegated operations.

USP&FOs are direct representatives of the Chief, NGB and also serve as personal staff officers to the Adjutant General and as advisors to other service officers within the state. Thus, Commanders at all levels should familiarize themselves with the duties and responsibilities of USP&FOs, and their relationship with their Commander's organization. Questions regarding the scope of authority or functions of the USP&FO should be directed to your Staff Judge Advocate.

***KWIK-NOTE: The USP&FO receives and accounts for all federal money and property in the state.***

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# Utilities

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**Updated by Col Douglas R. Jacobson, May 2007**

**AUTHORITY:** Federal Acquisition Regulation (FAR), 48 C.F.R. Part 41, Acquiring Utility Services; and Department of Defense supplement (DFARS) Part 241, Acquisition of Utility Services.

## INTRODUCTION

This topic applies only to the purchase of utilities with appropriated funds.

Utility services include electricity, gas, water, steam, and sewage. It also includes garbage collection and snow removal where these services are subject to public regulation.

## HOW SERVICES ARE ACQUIRED

The National Guard can purchase utility services by making an order under an area-wide General Services Administration (GSA) utility contract. When no area-wide contract is available or when it can be determined that more advantageous arrangements are available, the National Guard can negotiate a separate contract with the utility provider.

## RATE INCREASES

When a utility proposes to increase service rates, the National Guard must determine whether the increase is reasonable, justified and nondiscriminatory. When the increase is unreasonable, unjustified, or discriminatory, the National Guard may choose to become involved in the regulatory process that approves or disapproves the rate increase.

When a rate increase is proposed by a utility that is subject to public regulation, and when the increase is not objectionable, the utility contract will be amended by a change order to adopt the new rates. Where the utility is not subject to public regulation, the contract will be modified by supplemental agreement after negotiating with the utility provider.

For more information on this subject, contact your Contracting Officer.

***KWIK-NOTE: Most utility services purchased for ANG facilities are coordinated through higher headquarters.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
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Environmental Duties at Base Level	12-3
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## Cooperative Agreements

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Col Douglas R. Jacobson, May 2007

**AUTHORITY:** DoD Directive 3210.6, *Defense Grant and Agreement Regulatory System* (17 Dec 03); DOD 3210.6-R, *Department of Defense Grant and Agreement Regulations* (13 Apr 98 incorporating Change 3, 31 Jul 03); applicable state law.

### INTRODUCTION

Funding by the United States for the ANG's performance of its federal mission is provided through a variety of statutorily authorized means including: military pay, issuance and repair of equipment and supplies through the supply system, and construction of ANG facilities. A substantial portion of funding for the operation and maintenance of the ANG is provided to states by NGB through cooperative agreements. These cooperative agreements (replacing the old "FOMA") are non-procurement contracts between NGB and the State Military Department meeting the requirements of DoD 3210.6-R, the DOD Grant and Agreement Regulations. These agreements must be considered to be arms-length business transactions between the States and the United States; the ANG commander is on the State side of that relationship. In some cases, funds may also be provided to a State by a Military Construction Cooperative Agreement for the State's construction of ANG facilities. The ANG may also receive funds for special military or civilian programs cooperative agreements if Congress or DoD authorizes such agreements.

### ANG O&M COOPERATIVE AGREEMENTS

Each State has a Master O&M Cooperative Agreement that includes funding of both ARNG and ANG O&M activities. This Master Cooperative Agreement is normally executed by the TAG, or other official as required by State law, on behalf of the State and the USP&FO on the part of the United States. ANG O&M Activities are included and budgeted for in the Master Agreement by the inclusion of specific appendices in the Agreement. In the case of the ANG, the Master Cooperative Agreement will contain ANG Real Property, Environmental, Security Guard, and Fire Protection Appendices.

The State performs its obligations under the Master Cooperative Agreement by hiring state employees or entering into State contracts for the functions and activities to be performed. In some cases, as will be detailed in the applicable appendix and Agreement funding terms, NGB may contribute only a part of the funds required with the State being required to make up the difference (state share). As a matter of business judgment and efficiency, the USP&FO and the State may agree that NGB will contribute some services, supplies, or equipment "in-kind" for the State's performance of the cooperative agreement rather than simply reimbursing the State's cost. In such a circumstance, the cost of the "in-kind" contribution will be calculated for the purposes of determining the Federal contribution under the cooperative agreement and calculation of the state share of the total cost.

Master O&M Cooperative Agreements are normally for five-year terms with a new appendix negotiated for each federal fiscal year.

### INPUT

The ANG commander is an integral part of the State team for cooperative agreements. The ANG commander should be aware of, and participate in, the development of the ANG appendices to the Master Cooperative Agreement and is a key individual in managing the State's performance of the Agreement, financial management of the Agreement, and proper billing to NGB under the Agreement.

In addition, the ANG commander may be managing State employees performing the agreement and participating in State acquisitions under the agreement. All of these activities require the use by the Commander of Judge Advocate and other State legal resources to insure compliance with State law, regulations, and procedures and to insure the State's compliance with the terms, conditions, and requirements of the Master Cooperative Agreement.

Since NGB is prohibited by law from reimbursing a State's indirect costs under cooperative agreements, an ANG commander may be required to budget for such costs. The state share may be stated in the Agreement as part of the State budget system; or, the Agreement may require management of such costs as required by a State financial management system.

***KWIK-NOTE: An ANG commander must be aware of the terms, conditions and funding in the NGB Master O&M Cooperative Agreement and other cooperative agreements between NGB and his or her State as they pertain to his or her unit or installation and he or she must manage the State's performance of the Cooperative Agreement. To do this, the ANG Commander must utilize Judge Advocate resources to insure compliance with applicable State and Federal Law and regulation.***

**RELATED TOPICS:**

**SECTION**

United States Property & Fiscal Officer (USP & FO)

25-20

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## Glossary of Procurement Terms

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**Col Douglas R. Jacobson, May 2007**

The Defense Acquisition University (DAU) published the Twelfth Edition of its *Glossary: Defense Acquisition Acronyms and Terms* in July 2005. The *Glossary* contains most acronyms, abbreviations, and terms commonly used in the systems acquisition process within the Department of Defense (DOD) and defense industries. It focuses upon terms with generic DOD application but also includes some Service unique terms. The *Glossary* is published for use by DAU students and others working on defense acquisition matters, including Congressional staffs, headquarters staffs, DOD program managers, and defense contractors.

Appendix A of the *Glossary* contains a listing of common abbreviations and acronyms. Appendix B contains definitions of terms used throughout the DOD acquisition community.

The *Glossary* is on the DAU webpage at:

[http://www.dau.mil/pubs/glossary/12th\\_Glossary\\_2005.pdf](http://www.dau.mil/pubs/glossary/12th_Glossary_2005.pdf)

# Chapter 26, Training

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- 26-3 Training Outside the United States
- 26-4 Telecommuting
- 26-5 \*\* pending \*\* Withholding Training

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# Training

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**Updated by Lt Col Ramon Morales, August 2005**

**AUTHORITY:** ANGI 36-2001, *Management of Training and Operational Support Within The Air National Guard* (15 Jan 97)

## INTRODUCTION

Air National Guard members are authorized and required to perform training to meet their dual mission of providing the Air Force with operationally ready units to be called upon as needed, or responding to state emergencies. Training of Guard members generally falls into three categories: annual training (AT), special training (ST), or inactive duty for training (IDT).

## TYPES OF TRAINING

### Annual Training (AT)

Annual Training (AT) is training which is required to be performed by ANG members at least 15 days each fiscal year. AT is accomplished in two ways, either under Title 10 of the United States Code, in which case the member has a federal status, or under Title 32, which is performed in state status. This distinction is important for purpose of military discipline since a Guard member performing AT under Title 10 is subject to the UCMJ, and depending on state law, the Guard member in Title 10 status may also be subject to state law for military discipline purposes.

### Special Training (ST)

Special Training is performed in a paid status to accomplish training requirements that cannot normally be accomplished during UTA or in AT; *i.e.*, airlift support, deployments, exercises, etc. Special training days count toward the 15 days of AT required of each Guard member each fiscal year and may also be used for extra training days. See ANGI 36-2001, Chapter 4.

### Inactive Duty Training (IDT)

Inactive Duty for Training (IDT) is training other than annual training or special training and includes Unit Training Assemblies (UTA), Split Unit Training Assemblies (SUTA), Rescheduled Unit Training Assemblies (RUTA), equivalent training (EQT), additional flying training period (AFTP), proficiency training (PT), and training period preparation assembly (TPPA). IDT is performed under Title 32 and may only be performed in the United States and U.S. territories.

### Unit Training Assemblies (UTA)

All federally recognized units are required to conduct 48 UTAs each fiscal year. Accordingly, all Air National Guard members must attend 48 UTAs, or authorized substitutes each fiscal year. A UTA must be at least four hours in duration. However, under “exceptional circumstances,” Commanders may credit a member with attendance at a UTA for pay purposes as long as that member has been present for a minimum of two hours. In such instances, it is important for the Commander to document this and attach it to the file copy of the retained unit attendance records. Commanders cannot exercise this discretion for the “personal convenience” of the member concerned.

## **Equivalent Training (EQT)**

Commanders may allow individuals to make up a maximum of four missed UTA periods in a paid status per fiscal year. This is called Equivalent Training (EQT). EQT can be performed in a pay status for excused absences only. With the Commander's approval, unexcused absences may be made up for retirement points only. No pay entitlement accrues to an individual making up an unexcused absence. An EQT in pay status must be performed within 30 calendar days of the missed UTA and within the same fiscal year. At the Unit Commander's discretion, unexcused absences occur when a member fails to report to the UTA without prior approval, the member is either late for the UTA or leaves early without approval, or the member timely attends but fails to comply with all provisions of AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*.

## **ANNUAL TRAINING POLICY**

The requirement that Guard members participate in at least 15 days annual training during the fiscal year can be satisfied by active duty for training under Title 10, some form of Annual Training (AT) under Title 32 or Initial Active Duty Training (IADT) or special training. AT may be scheduled separately under a year-round training concept. Commanders may excuse a member from this requirement for any of the reasons set out in para. 3.3 of ANGI 36-2001.

## **EXTRA TRAINING**

AT will not normally exceed a total of 15 days per fiscal year per individual member. However, in order to address a multitude of factors, including training which realistically cannot be achieved during weekdays, additional workdays per individual, per fiscal year, may be approved. See Table 3-1, ANGI 36-2001, for guidance on the approval authorities and the number of days they may authorize. Before authorizing extra training, Commanders should check their Adjutant General's policy.

## **WITHHOLDING CREDIT FOR ATTENDANCE AT TRAINING**

Guard members must meet dress and appearance standards, physical fitness requirements and medical standards and qualifications when performing active service and inactive duty. If they do not, their Commander can withhold credit (*i.e.*, pay and points) for attendance. See ANGI 36-2001, para. 1.14.

## **TRAINING OVERSIGHT RESPONSIBILITIES**

Training of the ANG is conducted under command of State authorities pursuant to ANG directives, applicable Air Force training policies, standards and programs, and State directives. The highest command level on base is responsible for managing a master unit training plan which contains a specific training plan for all subordinate units. While unit training administrators have the function of ensuring compliance with the training plan, Commanders are ultimately responsible for ensuring their members are trained to accomplish their assigned mission.

At the Air Force level, each gaining MAJCOM is charged with inspecting and evaluating the training of the ANG units it will gain upon mobilization. Gaining MAJCOMs and numbered Air Forces conduct inspections to determine the effectiveness of each ANG unit's training program. See ANGI 36-2001, paragraphs 1.7 - 1.9.

## **WORKDAY PROGRAM**

The ANG workday program is designed to forecast training requirements, allocate resources, and maintain an audit trail of resources expended. It provides the mechanism by which units can forecast and monitor the use of training days to ensure they are being used to meet bona fide training requirements and needs. The mechanics of this program are set out in Chapter 2 of ANGI 36-2001.

## **CONCLUSION**

Attachment 1 to this topic is provided to clarify the kinds of training status Commanders can use to train their members.

***KWIK-NOTE: Commanders must know their authority and responsibilities under the governing training regulations.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Active Duty - Air National Guard Members	11-2
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Liability of National Guard Medical Personnel	18-8
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Status of National Guard Members	11-7

**Attachment 1**

**AIR NATIONAL GUARD - DUTY AND STATUS FOR TRAINING**

In order to attempt to summarize the various duty status possibilities of members of the National Guard, the following is provided for your use.

TITLE 32 STATUS		
Active Duty	Inactive Duty	
YES	NO	Active Duty for Special Work (ADSW)
YES	NO	Active Guard/Reserve (AGR)
YES	NO	Annual Training(AT)
YES	NO	Formal School Training (FST)
YES	NO	Full-Time National Guard Duty for Training (FTNGD for T) (Note 2)
YES	NO	Full-Time National Guard Duty for Special Work (FTNGD for SW) (Note 2)
NO	YES	Inactive Duty Training (IDT/UTA) (Note 1)
YES	NO	Special Training (ST)
TITLE 10 STATUS		
YES	NO	Active Duty (AD)
YES	NO	Active Duty for Special Work (ADSW)
YES	NO	Active Duty Training (ADT)
YES	NO	Active Guard/Reserve (AGR)
YES	NO	Annual Training (AT)
YES	NO	Extended Active Duty (EAD)
YES	NO	Formal School Training (FST)
YES	NO	Initial Active Duty Training (IADT)
YES	NO	Special Training (ST)

NOTES:

1. This chart applies only to the National Guard and does not apply to the Air Force Reserve.
2. Full-Time National Guard Duty is the Title 32 equivalent of active duty. It includes AGR duty, AT, ST, formal school training and ADSW in Title 32 State status. See ANGI 36-2001, para 1.3.5.

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## Training Outside the United States

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Updated by Lt Col Ramon Morales, August 2005

**AUTHORITY:** 10 U.S.C. 12301 (b) and (d); *Perpich v. Department of Defense*, 666 F. Supp. 1319 (D. Ct. Minnesota, 1987), 880 F. 2d 11 (8th Cir. 1989), 496 U.S. 334 (1990).

### BACKGROUND

During the mid-1980's increased training outside the United States was undertaken by the Army and Air National Guard pursuant to the provisions of 10 U.S.C. 12301 (b) and (d). Several governors viewed these deployments as an extension of U.S. foreign policy rather than military reserve training. They vocalized, and in a few cases exercised, their statutory authority to either consent or object to the deployment of their respective states' National Guard forces outside the United States.

To clarify this question Congress enacted legislation in the 1986 DoD Authorization Act, which became known as the "Montgomery Amendment," which limited the rights of governors to object to such training of their state's National Guard. The federal legislation added:

The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

### THE PERPICH CASE

Rudy Perpich, Governor of Minnesota, having first allowed Minnesota National Guard units to deploy overseas and return, then filed suit in the U.S. District Court in Minnesota seeking an injunction against the Department of Defense from, in the future, exercising its powers under the Montgomery Amendment and from limiting a governor's pre-Montgomery Amendment consent authority. Governor Michael Dukakis commenced similar litigation in Massachusetts. Their position was that the Montgomery Amendment violated the militia training clause of the U.S. Constitution which states in part:

The Congress shall have power . . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; . . . .

The case was unusual in that no contested facts were involved, and the federal courts were free to decide a purely constitutional issue. The case was tried totally on briefs, arguments and motions, without a trial.

In the U.S. District Court for Minnesota the Court ruled against Governor Perpich, essentially finding:

That the federal Guard was created pursuant to Congress' Article I, Section 8, power to raise and support armies; that the fact that Guard units also have an identity as part of the state militia does not limit Congress' plenary authority to train the units as it sees fit when the Guard is called to active federal service; and that, accordingly, the Constitution neither required the gubernatorial veto nor prohibited its withdrawal.

On appeal to the Eighth Circuit Court of Appeals, a three-judge panel agreed with Governor Perpich and reversed. But on a subsequent hearing before the full Eighth Circuit bench, the three-judge decision was reversed, once again in favor

of DoD. [The Dukakis case received similar treatment in the Massachusetts District Court and in the First Circuit, both decisions being against Governor Dukakis].

## THE DECISION

In 1989, the U.S. Supreme Court agreed to hear the Perpich case and afforded expedited treatment. Briefs were submitted by the parties, as well as by the National Guard Association of the United States and others as “Friends of the Court.” Each brief advocated a different theory as correct in constitutional law, historical background, and modern day needs. Only the plaintiff and defendant were allowed to present oral arguments to the Supreme Court. Following submission of briefs and argument there was much speculation as to what the Court would decide.

On June 11, 1990, the U.S. Supreme Court decided 9-0 against Governor Perpich and in favor of the Department of Defense. In essentially adopting the theory of the defendants, the Court held that there was harmony between the militia clauses and the army clause resulting in a proper federal interest in maintaining a well regulated and properly disciplined (trained) militia. The action of the Congress in enacting the Montgomery Amendment was held to not violate any constitutional rights of the states retained by the militia clauses.

The opinion’s syllabus (unofficial) summarizes the decision:

-- Article I’s plain language, read as a whole, establishes that Congress may authorize members of the National Guard of the United States to be ordered to active federal duty for purposes of training outside the United States without either the consent of a state governor or the declaration of a national emergency.

-- The unchallenged validity of the dual enlistment system means that Guard members lose their state status when called to active federal duty, and, if that duty is a training mission, the training is performed by the Army. During such periods, the second Militia Clause is no longer applicable.

-- This view of the constitutional issue was presupposed by the Selective Draft Law Cases, which held that the Militia Clauses do not constrain Congress’ Article I, Section 8, powers to provide for the common defense, raise and support armies, make rules for the governance of the Armed Forces, and enact necessary and proper laws for such purposes, but in fact provide additional grants of power to Congress.

-- This interpretation merely recognizes the supremacy of federal power in the military affairs area and does not significantly affect either the State’s basic training responsibility or its ability to rely on its own Guard in state emergency situations.

-- In light of the exclusivity of federal power over many aspects of military affairs, the powers allowed to the States by existing statutes are significant.

-- Thus, the Montgomery Amendment is not inconsistent with the Militia Clauses. Since the original gubernatorial veto was not constitutionally compelled, its partial repeal by the Amendment is constitutionally valid.

The net result is that the federal-state relationship within the National Guard, both as to authority and funding support, will continue as in the past.

***KWIK-NOTE: Governors cannot withhold consent for ANG training outside the United States.***

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# Telecommuting

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**Chapter Editor - Col Sandra Marsh**  
**Updated by Lt Col Ramon Morales, August 2005**

**AUTHORITY:** ANGI 36-8001, *AIR NATIONAL GUARD TRADITIONAL GUARD MEMBER TELECOMMUTING POLICY* (28 May 2004)

## INTRODUCTION

Telecommuting is a management tool that allows the ANG to authorize personnel to voluntarily work away from their official duty location. Computers, telephones, facsimile machines, e-mail, internet, and remote LAN access are the most common technologies used for telecommuting. ANGI 36-8001, issued on 28 May 2004, is only applicable to Traditional Guardsmen. It authorizes Commanders (or their written designees) to allow ANG drill status Guard members to work in an official capacity for pay and/or points away from the official duty location.

## RESPONSIBILITIES

### Headquarters, Wing, Group or GSU Commander

The Headquarters, Wing, Group, or GSU Commander (or their written designee) is the approval authority for telecommuting. The approval authority should grant telecommuting only when it is in the best interest of the ANG. Telecommuting is a privilege and not a right for the telecommuter. The Commander is responsible for approving the use of government-owned equipment and supplies. A commander may place government-owned computers, computer software, and telecommunications equipment in the telecommuter's alternate work location.

### Supervisor

The telecommuter's immediate supervisor is responsible for recommending the telecommuting project to the approval authority, preparing required documents and obtaining any necessary signatures, ensuring that project details are mutually agreed upon before beginning work, quality control of the telecommuter's completed project and maintaining the original approved work agreement with a copy to the telecommuter.

### Telecommuter

The telecommuter is responsible for ensuring that the alternate work location is a safe environment, reporting any injuries while telecommuting to their supervisor as soon as possible, documenting the time spent on an authorized telecommuting project (NGB Form 3630), ensuring that appropriate security measures are followed with regard to the use of a government-provided computer, and submitting pay documents in a timely manner. The telecommuter, supervisor and approval authority must sign a work agreement (Atch 2), telecommuter checklist (NGB Form 3631), and commander's authorization (Atch 3) before starting the telecommuting project. The agreement and checklist set forth details regarding the telecommuter's responsibilities, including a description of the project, the projected deliverables, start and end date, and type of duty.

## Miscellaneous

Personnel will be entitled to the same protections and indemnification under the Federal Tort Claims Act as would be available if the services provided through telecommuting were provided at the unit during a Unit Training Assembly (UTA) or during scheduled active duty. Personnel falsely certifying documents under the telecommuting instruction are subject to punishment and/or administrative action.

## COMPENSATION

Telecommuters will be compensated in accordance with their duty status. The approval authority will not authorize travel or per diem for telecommuting. Telecommuters in a military status may, subject to approval, perform duty on an incrementally accrued schedule, *i.e.*, the four hours required for a UTA period may be accrued over a period of days in increments as small as a quarter hour. See NGB Form 3630.

## CONCLUSION

Telecommuting provides ANG commanders with an alternate means of accomplishing the mission. Commanders may find telecommuting to be useful as a retention tool – members who are willing to work on special projects or who may have had to miss scheduled duty because of civilian job or other conflicts, may be permitted to perform the duty at a time and place which is more convenient for the member, to the benefit of both the member and the unit.

***KWIK-NOTE: Telecommuting is now authorized for ANG members, and should be approved when it is in the best interest of the Air National Guard.***

## RELATED TOPICS:

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# Chapter 27, Travel

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## Car Rentals by National Guard Members

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Major Glenn Rowley  
Updated by Lt Col Lt Karunesh Khanna, August 2002

**AUTHORITY:** Title 32, United States Code; Public Law 105-264, Travel and Transportation Reform Act of 1998 (TTRA); Under Secretary of Defense (Comptroller) Memorandum, *Implementation of the Travel Card Requirements Contained in the Travel and Transportation Reform Act of 1998 (TTRA)* (18 Feb 00); 64 Fed. Reg. 3054, GAO Final Rule re: Mandatory Use of the Travel Charge Card (19 Jan 00); Joint Federal Travel Regulations (JFTR); OpJAGAF 1996/44, *Use/Status of Rental Cars While on Temporary Duty* (29 Mar 96); OpJAGAF 1988/26, *Car Rental Discounts – Privilege Membership Club Benefits* (11 Apr 88); OpJAGAF 1984/39, *Propriety of Spouse Accompanying Member in Rental Vehicle on TDY* (24 Jul 84); Office of Government Ethics Opinion 86x7, 22 July 1986; applicable state law.

### INTRODUCTION

Rental of motor vehicles from commercial rental companies by National Guard members in a Title 32 duty status can cause a number of problems for Commanders. Generally, members of the National Guard are considered to be “employees of the federal government” while engaged in training or duty under sections 316, 502, 503, 504, or 505 of Title 32. In such cases, the members are covered by the Federal Tort Claims Act and are protected from personal liability, as they are under Title 10, provided they are acting “within the scope” of their employment. This protection, however, does not apply if the member is performing a state function or is in a state status other than the above (e.g. State active duty in support of a state function). In such cases, state law should be consulted in advance of the car rental to see if similar protection exists under state law. Therefore, it is important for the Commander to be sensitive to the potential liability members of the National Guard face when renting vehicles in support of a unit mission.

### THINGS TO CONSIDER

First, the Commander should consider how members pay for authorized rental cars. Commanders should ensure that members use the government-sponsored, contractor-issued travel charge card for all expenses arising from reimbursable official government travel, including car rental. Not only is use of the travel card mandatory for such expenses, using it for a rental car entitles the member to collision damage coverage for the actual cash value of the damage to the rental car. This coverage is offered worldwide and will preclude many travelers from filling out long insurance forms prior to renting a car. To qualify for the auto rental insurance, the traveler must decline the car rental company’s collision damage waiver (CDW/LDW) option, or similar provision, if offered by the car rental company. This is collision damage coverage only. It does not cover injury to persons, nor to property other than the rental car.

Second, Commanders should ensure that members use the special government rates negotiated by the Military Traffic Management Command (MTMC) by having the Contract Travel Office (CTO) make the car rental reservation. Only “compact” size cars should be authorized unless the number of passengers or mission requires a larger size. If the member procures a rental car through a source other than the CTO, the member’s reimbursement will be limited to the cost of the rental if it had been procured through the CTO or the actual cost of the rental, whichever is less.

Some rental car companies also offer the government rental rate to members even when traveling on unofficial or personal business. A member may use such discounted rates if the member discloses that he is not traveling on official business, if the government rate is offered to all federal government employees for personal travel, and

unless the member's official duties involve doing business with the car rental company so as to create an actual conflict of interest.

Third, Guard members belonging to rental company "membership clubs" may use club benefits such as upgrades, free weekend rental certificates, hotel or meal coupons, etc. to the extent that the benefits flowing from club membership are the direct result of the member maintaining the membership at personal expense and not as the result of official travel. (In other words, members must pay the annual membership fee out of their own pockets). "As long as the fees associated with club membership are borne by the member and not the U.S. Government, we do not believe that the Government has any entitlement to the benefits which accrue simply because a club member used one of his or her "chits" while on official travel." OpJAGAF 1988/26.

Fourth, the Commander must be concerned about damage to these vehicles. Accidents happen. Rental vehicles are damaged. However, for TDY personnel in a status listed above on orders authorizing the rental vehicle, a rental car agreement has been negotiated by the Military Traffic Management Command (MTMC). Any vehicle rented by a company which is a signatory to the agreement has automatic full insurance coverage and the member should not pay for Collision Damage Waivers (CDW) when the vehicle is being rented. If the member does pay for CDW for a rental within the United States, the member will not be reimbursed. In addition, the government-sponsored, contractor-issued travel charge card provides this coverage worldwide, but only if the member does not pay for CDW. And finally, members may have this coverage as part of their personal auto policy. Commanders should establish a program to assist the members of the unit in reducing their exposure to risk without needless expense. If a member is required to reimburse the car rental company for damage to the rented car, the Government will reimburse the member for those costs so long as the damage occurred in the performance of official duty.

Fifth, the Commander must be concerned with injury to persons. Members are often encouraged by rental agencies to purchase Personal Accident Insurance (PAI), which provides a stated amount of liability insurance for loss of life and medical benefits. However, for a member in a Title 10 or Title 32 status, the MTMC rental agreement provides liability coverage.

Members in any other status should be advised to check their personal auto policy to determine if they are covered in the event of an accident while driving a rental car in support of a National Guard mission. Depending on State law and their status when the accident took place, members may have personal exposure for injuries to others if they were negligent.

Note that when a member is authorized a rental car in the CONUS or its territories, any extra insurance offered by the rental companies and taken by the member is not reimbursable. The cost of buying extra insurance to provide full coverage collision insurance outside the CONUS or its territories is reimbursable.

Sixth, the Commander may be concerned about spouses or others riding along with traveling members in an authorized rental car. However, the Air Force position is that if a member rents a vehicle to use for TDY travel, his or her spouse, or for that matter, anyone else, may ride along as a passenger in the vehicle when the vehicle is an authorized means of conveyance for TDY travel. OpJAGAF 1984/39, 24 July 1984

## CONCLUSION

These issues should be reviewed with the Staff Judge Advocate to determine what exposure members of the unit have when driving a rental vehicle on National Guard business, and whether incurred expenses are reimbursable. Moreover, in the event of damage to the vehicle, or injury to other persons or the member, issues of Reports of Survey, Line of Duty Determinations, Medical Benefits, Scope of Employment and Federal Tort Claims Act indemnification may arise and should be discussed with the Staff Judge Advocate.

***KWIK-NOTE: Weigh carefully the decision to authorize a rental car to members on TDY orders. Supplement this topic with applicable state law.***

## RELATED TOPICS:

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## Civilian Travel Aboard Military Aircraft

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Major Sotera Anderson, July 2007

**AUTHORITY:** AFI 35-101, *Public Affairs Policy and Procedures* (29 Nov 05); DODI 5435.2, *Delegation of Authority to Approve Travel In and Use of Military Carriers for Public Affairs Purposes*; DOD 4500.54-G, *Foreign Clearance Guide*; AFI 24-101, *Passenger Movement*; AFI 11-401, *Aviation Management* (3 March 2007); OpJAGAF 1994/50, *Use of Reserve Personnel Appropriations for the AFROTC/CAP Initiative Flight Orientation Program* (18 Jul 94).

### INTRODUCTION

Civilians may receive approval to travel aboard Department of Defense owned aircraft under certain circumstances where such travel will provide direct benefit to and be primarily in the interest of the DoD. Approval authority will depend on the type and purpose of the travel. Civilian travel falls under two main categories: Public Affairs Travel and Orientation Flights.

### PUBLIC AFFAIRS (PA) TRAVEL

PA travel, that is, travel involving civilians aboard military aircraft, either by request or invitation, is intended to increase awareness and understanding of the Air Force's role in national security by inviting certain civilians to Air Force installations, which may include travel on Air Force aircraft. Ordinarily, PA travel will involve transportation of members of the news media to cover military exercises or operations and local and state government and community leaders to educate them on a particular unit's military mission.

Travel must reflect the following considerations:

1. Travel cannot compete with commercial carriers.
2. Travel is determined to be primarily in the interest of the DoD.
3. Travel cannot be designed *solely* to improve relations, increase goodwill, or serve humanitarian purposes.

Eligibility for travel:

1. News Media covering military exercises or operations.
2. Individuals on invitational or authorized travel in support of approved PA activities.
3. Individuals who, because of their position and contacts with various public organizations, can make positive contributions to public understanding of the roles and missions of the DoD.

Approval. The PA travel approval process begins in one of two ways: either representatives of the local news media or community contact the base to request the travel, or the base invites the local news media or community members to travel, subject to the grant of approval for the travel. In either way, the unit's PA Officer coordinates with the civilian representatives, and sends a properly documented request for travel through channels to the appropriate approval authority. See Table 19.1 of AFI 35-101, *Public Affairs Policy and Procedures* (29 Nov 05), for a matrix showing approval authorities for PA travel.

Types of PA events where travel may arise include, but is not limited to, the following:

1. Aeromedical Evacuation Flights. Media are permitted to travel aboard medical flights. However, media requests are considered on a case-by-case basis and requires approval of the supported combatant command PA, OASD/PA, the supported combatant command SG and Air Mobility Command.

2. Air Force Tour Program. There are different types of tours within the Program: National Civic Outreach, Community Relations and base tours. Each type of tour is conducted under the same basic guidelines. However, if a tour is three or more days in duration, a waiver by SAF/PANC is required prior to invitations being sent out. Such a request must include an itinerary, a letter of justification, as well as indicate any special aircraft configurations, among other items unrelated to the travel portion of the tour. For specific guidance see AFI 35-101, Paragraph 8.37, *Public Affairs Policy and Procedures* (29 Nov 05).

Prior to planning or scheduling a tour, complete and forward a tour plan template (found at Figure 8.1 of AFI 35-101) to the MAJCOM PA office for approval. MAJCOMs sponsoring tours must submit their completed tour plan template to SAF/PANC for review.

Funding will depend on the type of tour: National Civic Outreach Tours are centrally funded and managed at SAF/PANC, whereas Community Relations Tours are funded through the sponsors' own budgeting process. The Air Force Tour Program is supported as a special assignment airlift mission (SAAM) and commands are charged according to current hourly rates and type of aircraft.

NOTE: Civilian visitors are not permitted to operate any item of military equipment when such operation could cause, or reasonably be perceived as causing, an increased safety risk, including any aspect of the actual operation of military aircraft.

3. Overseas Travel. Country clearance is required from the American Embassy as appropriate, for personnel traveling to that country. Theater clearance is required from the combatant command for visits to overseas military activities on matter pertaining to the mission of the combatant command. Thirty days advance notice is typically required and the requirements to obtain clearance is detailed and specific. For specific requirements, see AFI 35-101, Paragraph 19.5, *Public Affairs Policy and Procedures* (29 Nov 05).

4. Media Travel. The categories for media travel are local, non-local and overseas. Media travel on an Air Force aircraft must be integral to the news coverage to be developed, such as demonstrating Air Force capability or to convey or enhance an Air Force position.

After the travel is completed, the unit PAO is required to send an after-action report of the travel to NGB-PA.

Transportation for news coverage of an emergency nature, such as a plane crash or other calamity, should be provided only where media coverage of the event will be impaired or delayed to the serious detriment of the Air Force and Air National Guard unless space aboard DoD aircraft is provided. Such requests must have higher headquarters approval.

Issues which arise concerning public affairs travel should be coordinated with PA and JA representatives, as necessary.

## **ORIENTATION FLIGHTS**

Orientation flights are continuous flights within the local flying area which terminate at the point of origin, and which are designed to reward or motivate unit personnel, ensure a better understanding of a particular weapons system and its role in the ANG mission, or which are determined to be in the best interest of the Air National Guard. Eligible categories of passengers include: ROTC cadets, Civil Air Patrol cadets, Explorer Scouts, FAA officials, and certain local public officials. Travelers must be in appropriate organizational uniforms, where appropriate, and have written parental consent if under 18 years of age. See Table 1.1 of AFI 11-401, *Aviation Management* (7 March 2007), for a matrix showing approval authorities for orientation flights.

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## Contract Airlift

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**Updated by Major Glenn Rowley, June 2001**

**AUTHORITY:** 10 U.S.C. 2640; DoDD 4500.53, *Department of Defense Commercial Air Transportation Quality and Safety Review Program* (12 Dec 00); 32 C.F.R. Part 861.

### BACKGROUND OF CONTRACT AIRLIFT LAW

As the result of 248 U.S. service member and eight aircrew fatalities in the crash of an Arrow Air contract flight at Gander IAP, Newfoundland, on 12 December 1985, 10 U.S.C. Chapter 157 was amended and DoDD 4500.53 was adopted.

The above legislation and DoD directive reflect DoD's safety concerns regarding commercial airlift carriers and provide enhanced legal authority for DoD to review and impose tough sanctions against commercial air carriers serving DoD to assure high standards of safety and airworthiness.

### REQUIREMENTS

The Secretary of Defense may not enter into contract with a commercial air carrier for the charter air transportation of members of the armed forces unless the carrier:

1. Meets, at a minimum, the safety standards established by the Federal Aviation Act of 1958;
2. Has at least 12 months of experience operating services in air transportation that are substantially equivalent to the service sought by the DoD; and
3. Undergoes a technical safety evaluation which includes inspection of a representative number of aircraft.

### INSPECTIONS

Each carrier that contracts with DoD for charter air transportation of members of the armed forces will be inspected. The Air Mobility Command (AMC) as the single DoD manager for movement of passengers and cargo by air, has increased inspection powers under this legislation. At a minimum, these inspections include:

1. An on-site capability survey of the air carrier at least once every two years;
2. A performance evaluation of the air carrier at least once every six months;
3. A preflight safety inspection of each aircraft conducted at any time during the operation of, but not more than 72 hours before, each internationally scheduled charter mission departing the U.S.;
4. A preflight safety inspection of each aircraft used for domestic charter missions conducted to the greatest extent practical; and
5. Operational check-rides on aircraft conducted periodically.

## **COMMERCIAL AIRLIFT REVIEW BOARD (CARB)**

The CARB, established by the Secretary of Defense under the statute, is composed of four general/flag officers or Senior Executive Service members from USTRANSCOM and its component commands. It has authority over DoD contract carriers and carriers which provide air transportation purchased by DoD individuals for which government reimbursement (GTRs) will be made. The Secretary of Defense, through the CARB, can suspend DoD use of these carriers if they are involved in a serious accident or are in violation of Title VI of the Federal Aviation Act of 1958 which prescribes various safety requirements. Reasons for suspensions have ranged from equipment condition to maintenance and quality assurance practices.

## **AUTHORITY TO LEAVE UNSAFE AIRCRAFT**

A representative of AMC, MTMC, or another Secretary of Defense designated agency (or, if no representative is reasonably available, the senior officer on board a chartered aircraft) may order armed forces members to leave a chartered aircraft if the representative (or officer) determines that a condition exists on the aircraft which may endanger the safety of the armed forces members. **THIS AUTHORITY POTENTIALLY ENABLES ON-BOARD ANG COMMANDERS OR OFFICERS TO ORDER THEIR MEMBERS OFF AN UNSAFE AIRCRAFT.**

## **CONCLUSION**

Because the statute and regulations may change from time to time, it is suggested that Commanders check with their Judge Advocates periodically to determine if the authority for ANG Commanders or officers (if they are the senior officer on board a chartered aircraft) has been amended in any way.

***KWIK-NOTE: All Commanders or officers who accompany their unit members on chartered commercial flights should be aware of the power to remove them from unsafe flights.***

## **RELATED TOPICS:**

## **SECTION**

Sources of Commander's Authority

2-7

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## Frequent Flyer Programs

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Updated by 2nd Lt Karunesh Khanna, August 2002

**AUTHORITY:** FY2002 DoD Authorization Act (Public Law 107-107, Section 116) (28 December 2001); 5 C.F.R. Part 2635, *Standards of Ethical Conduct for Employees of the Executive Branch*, Subpart D, *Conflicting Financial Interests*; Joint Federal Travel Regulation (JFTR), Volume I (uniformed members) and Joint Travel Regulation (JTR) Volume II (civilian employees) (revised 31 December 2001); 64 Fed. Reg. 3054, GAO Final Rule re: Mandatory Use of the Travel Charge Card (19 Jan 00); TJAG Policy Letter 8, *Frequent Flyer Programs* (4 Feb 98); OpJAGAF 1993/51, *Use of Airline Frequent Flyer Miles* (14 May 93); OpJAGAF 1993/75, *Use of Government Accrued Frequent Flyer Miles* (29 Jul 93); 5 U.S.C. 5701.

### INTRODUCTION

Ethics regulations permit federal employees, including military members and their families, who receive a promotional item as a result of traveling at government expense to keep the item for personal use under certain conditions.

### THE RULES

The following rules outline the policy regarding Air Force and Guard personnel who participate in frequent flyer programs (FFPs) sponsored by commercial airline carriers. These rules are applicable to Guard members and employees enrolled in FFPs who accumulate “bonus” mileage and other benefits while performing official government travel:

1. Federal employees and military members, and their families, who receive a promotional item as a result of traveling at government expense, or while traveling on official duty at the expense of a non-Federal entity under 31 U.S.C. 1353, are permitted to keep the item for personal use if the item: (1) is available to the public under the same terms; and (2) can be accepted at no additional cost to the government.
2. A bonus or discount ticket received by a member or employee as a result of trips paid by appropriated funds while on official travel is the property of the member or employee.
3. Access to VIP lounges or free food or drink offered to individuals due to their status as a member of FFPs or given to all passengers, may be accepted. In addition, “on-the-spot” upgrades may also be accepted provided they are not offered because of one’s official position.
4. Members and employees must travel by coach class, unless other accommodations are approved in advance of air travel in accordance with applicable travel regulations. Mileage credits accumulated while traveling on official business may be used to upgrade to first class, as long as there is no additional charge to the government and the upgrade is offered to the employee on the same terms as a member of the public. This means that while employees and members must generally perform official travel by using coach class accommodations, employees may upgrade transportation services at their own expense, which includes the use of personal frequent traveler mileage or upgrade benefits. The restriction on first class travel at government expense remains unchanged (see FTR 301-10.123 and JFTR U3125 for additional guidance). Air Force personnel may not wear their military uniforms when using frequent flyer miles to upgrade to business or first class. [Note: The law specifically permits the retention of travel benefits accrued while performing official travel funded by a non-Federal source under 31 U.S.C. 1353. However, the JFTR and JTR implementing regulations do not apply to situations where official travel is funded under 31 U.S.C. 1353. Instead, the guidance directs travelers to seek guidance from the “funding authority.” DoD officials

take the position that DoD regulations do not preclude the personal use of travel benefits earned while performing official travel funded by a non-Federal source under 31 U.S.C. 1353 if the donor-sponsor does not object.]

### **THE INVOLUNTARY BUMP RULE**

5. If a member or employee on official business is involuntarily “bumped,” delayed, or otherwise inconvenienced by the airline from a scheduled flight and accepts money, complimentary tickets, or lodging certificates from the airline, whether or not the government incurs additional subsistence expense or the traveler reports for duty at the same time as originally intended, the traveler must turn in such items received with the TDY travel voucher, and the Government pays for any additional per diem associated with the delay; and

7. Lodging certificates provided by hotels that overbook also belong to the government.

8. Members and employees on official business who voluntarily relinquish a seat and accept payment from an airline may keep the payment, but may not seek additional reimbursement from the government for expenses incurred by the resulting delay (i.e., per diem, lodging, miscellaneous expenses).

### **PART PERSONAL, PART “OFFICIAL” – PRIOR TO 28 DECEMBER 2001**

9. In those instances, prior to 28 December 2001 when the ethics rules changed to permit members to keep bonus miles, and where FFP participants may have unintentionally “commingled” personally earned mileage with official business travel mileage, the participants now may use the mileage for personal use, as long as that portion of the mileage earned on official government business was earned when it was available to the public under the same terms and was accepted at no additional cost to the government.

10. Official travelers are required to use the government travel card to cover official expenses. Thus, a traveler who has a personal credit card that would generate more desirable travel benefits in conjunction with an official trip cannot use that personal credit card in lieu of the government travel card

***KWIK-NOTE: ANG members may personally benefit from mileage accrued in a Frequent Flyer Program because of official travel. However, supervisors must exercise care to ensure the travel system is not abused. Travel-approving authorities are encouraged to ensure that government expenses are not inflated in an attempt to maximum frequent flier benefits.***

### **RELATED TOPICS:**

Car Rentals by National Guard Members  
Ethics  
Fraud, Waste and Abuse  
Official Travel

### **SECTION**

27-2  
7-3  
16-7  
27-6

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## Official Travel

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**Major Glenn Rowley**

**Updated by 2<sup>nd</sup> Lt Karunesh Khanna, August 2002**

**AUTHORITY:** Joint Federal Travel Regulations, Vol. I (military) and Joint Travel Regulations, Vol. II (civilian) (revised 31 December 01); AFI 24-101, *Passenger Movement* (25 Mar 01); AFPD 24-1, *Personnel Movement* (1 Sep 95); AFI 65-103, *Temporary Duty Orders* (23 Feb 01); AFMAN 34-255, *Directory of Government Quarters and Dining Facilities* (1Jan 98).

### INTRODUCTION

“Official travel” means travel undertaken pursuant to published orders for official purposes. Official travel can be accomplished by either military or civilian personnel under appropriate orders. Official travel expenses are reimbursed by completing and submitting a Travel Voucher, DD Form 1351-2, to the Travel Section within the local Financial Management Office (FM).

### ORDERS

All official travel is undertaken pursuant to properly issued orders. Travel orders are published by Information Management (IM) and must be obtained in advance through the unit orderly room. Travel orders specify your itinerary, mode of travel, days in TDY status, per diem and travel costs, and other pertinent information about your trip. These orders also include an accounting citation which specifies the government funds from which your trip expenses will be paid.

You should carry at least a dozen copies of your travel orders with you during your trip. Copies often must be provided to the Transportation Management Office (TMO) or the Government-Contracted Commercial Travel Office (formerly SATO, currently Carlson-Wagonlit Travel, Omega World, or another regional agency), when you make travel arrangements, as well as to the billeting office at your temporary duty (TDY) location, if you will be staying in DoD facilities.

### TRAVEL ADVANCES

Government travelers are now required to use a Government Travel Card (GTC) (currently through Bank of America) to charge authorized travel expenses incurred during official travel and to obtain cash advances. See Chapter 27-11. The GTC has taken the place of the travel advance issued through your AFO. The application may be obtained through your local finance office.

### AIRPLANE TRAVEL

If traveling by commercial airplane, you must obtain tickets through your servicing TMO or the Contracted Commercial Travel Office (CTO). The servicing TMO or CTO will schedule your travel using the most cost-effective government fare on commercial airlines. In most cases, these special fares permit scheduling changes without penalty. If changes in your travel arrangements are necessary during the course of your TDY, contact the nearest TMO or CTO for assistance, or call your airline directly. Be aware that certain routes require you to fly specified airlines, and failure to do so must often be explained in writing. In overseas areas, U.S. flag carriers should be used whenever possible. If emergency conditions require, travelers may use the government travel card to purchase airline tickets.

## **BILLETING**

Billeting arrangements should be made as soon as possible directly with the facility where you will be staying. If you will be staying at a commercial hotel, always ask for a U.S. Government rate. Members who stay in a commercial hotel may be reimbursed up to the maximum local per diem room rate. Current maximum reimbursable rates are available on-line at <http://www.dtic.mil/perdiem>. In some circumstances, you may make arrangements to stay in base billeting facilities, only to find upon arrival that there are no rooms available on base. If this happens, the billeting office will make arrangements for you to stay at a nearby civilian hotel. If this happens, ask the billeting office for a Certificate of Nonavailability of Government Quarters, which will entitle you to reimbursement for the civilian hotel expense.

Distinguished Visitor (DV) quarters on DoD installations are usually available for officers in the grades of 0-6 and higher, or enlisted members in the grade of E-9. DV quarters are allocated on the basis of grade. For example, if you are an 0-6, and an 0-7 happens to be visiting the base at the same time, the more senior officer will have priority for DV quarters.

## **PRIVATE VEHICLES**

Authority to travel by privately owned conveyance (POC) or use of a rental car at the TDY location must be specifically approved in your travel orders. Car rentals or POC travel not included in your orders will, in most cases, not be reimbursed.

***KWIK-NOTE: Always keep a copy of your travel orders on your person, and leave a copy at home with your dependents.***

## **RELATED TOPICS:**

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Government Travel Card	27-15

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## Space-Available Travel Aboard Military Aircraft

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Updated by Major Glenn Rowley, June 2001

**AUTHORITY:** DoD 4515.13-R, *Air Transportation Eligibility* (Nov 94, C3, 9 Apr 98), Chapters 4, 6; AFI 24-101, *Passenger Movement* (1 Oct 95); AFI 36-3003, *Military Leave Program* (14 Apr 00); 2000 National Defense Authorization Act.

### ELIGIBILITY

Air National Guard members qualify for **space-available** transportation on DoD flights involving both DoD-owned assets and commercial aircraft under contract to and scheduled by the Air Mobility Command (AMC). Authorized traffic moving between the continental United States (CONUS) and overseas areas, and traffic within overseas areas, usually will be transported by contract aircraft. ANG members are granted a lower priority for these flights than active duty members.

**Space-available** transportation is provided aboard both DoD-owned and contract aircraft on a first-come, first-served basis according to specific categories of priority listed in DoD 4515.13-R. Reservations are not accepted for **space-available** passengers. Members desiring **space-available** travel must register for their desired destinations, usually in person, at the servicing AMC terminal.

Passengers are selected based first upon the category to which they belong, then on their position on the list for their category. For example: the terminal representative calls all Category 1 members on the list; those who signed up first will be taken first, in order of their sign-up. When the Category 1 list is exhausted for that particular location or flight, the terminal representative will then start to draw from the Category 2A list. If all Category 2A passengers are given seats, then they continue to distribute seats to Category 2B passengers in the order in which they signed up, until the seats are gone.

### REQUIREMENTS

Passengers must be present at the terminal when a seat is offered; this is often two hours prior to departure time. Those who decline a seat or who are not available to accept the seat when offered are removed from the list.

DoD makes no guarantees whatsoever regarding continuation of travel or return to the point of origin for any **space-available** passenger. It is not unusual for an individual to be “bumped” from a flight during a stopover by someone with a higher priority. For example, if a flight is full and an individual at an intermediate stop is in emergency leave status (Category 1), then a passenger on the flight in ordinary leave status (Category 2B) will have to surrender that seat at the place where the Category 1 member boards the aircraft.

Active duty members on ordinary leave must present a valid leave authorization and a military identification card to fly **space-available**. ANG members must present a military identification card and a properly completed DD Form 1853, Authentication of Reserve Status for Travel Eligibility, to qualify for **space-available** transportation. Retired members and dependents must present an appropriate military retired or dependent identification card.

All **space-available** travelers are restricted to checking two pieces of luggage not to exceed 70 pounds each or 62 linear inches (the sum of length plus width plus the height). Passengers are allowed to hand-carry small luggage not to exceed 45 linear inches. The luggage must fit under the seat in front of them or in the overhead. Small luggage would be overnight bags, make-up cases, diaper bags, briefcases, etc.

Cat B travel is now permitted in appropriate civilian attire. Appropriate attire is defined as no shorts, tank tops, halters, or garments depicting obscene or offensive phrases or designs. Spouses and children should also be encouraged to dress appropriately. The key phrase here is, “use common sense.” Members whose clothing does not conform to the above will be denied travel.

Military protocol dictates that the highest-ranking passenger will depart the aircraft first in most situations.

### **TRAVEL BETWEEN CONUS AND OVERSEAS**

ANG members are eligible only for **space-available** travel to and from Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam. They are not eligible for **space-available** travel to foreign countries, except from authorized departure points within the CONUS to overseas locations for the purpose of performing IDTs. ANG members are granted Category 4 priority for **space-available** travel between CONUS and overseas, along with retirees and their dependents.

This category places ANG members behind active duty members on emergency leave and regular leave, as well as active-duty dependents accompanying their sponsors. **Space-available** travel is granted to these dependents under very limited circumstances, and only then for the trans-oceanic portion of overseas travel.

### **TRAVEL WITHIN CONUS**

ANG members are granted Category 4 priority for **space-available** travel within CONUS, behind active-duty members on leave, Medal of Honor winners, and those on permissive TDY. They share Category 4 priority with retired military members. Dependents are not eligible for **space-available** travel within CONUS.

Air National Guard members qualify for active duty priorities when in Title 10 status holding a green identification card. The above priorities apply only to those in a reserve status.

### **CONCLUSION**

You may obtain current information on **Space-Available** Travel from ARPC, c/o Entitlements Branch, Denver, CO 80280-5000, which publishes an ARPC Fact Sheet for this subject. To aid your recruiting and retention, widely disseminate this information among your unit members.

***KWIK-NOTE: Space-available travelers should always check the current status of priorities and flight destinations with the AMC terminal from which they will fly well before the actual flight.***

### **RELATED TOPICS:**

### **SECTION**

Space-Required Travel Aboard Military Aircraft

27-8

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## Space - Required Travel Aboard Military Aircraft

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Major Glenn Rowley

Updated by 2<sup>nd</sup> Lt Karunesh Khanna, August 2002

**AUTHORITY:** DoD 4515.13-R, *Air Transportation Eligibility* (Nov 94, C3, 9 Apr 98); 10 U.S.C. 18505 (as amended by Public Law 106-398, *FY 2001 National Defense Authorization Act* (30 Oct 00), Section 384); AFI 24-101, *Passenger Movement* (25 Mar 02).

### ELIGIBILITY

Air National Guard members qualify for space-required transportation aboard DoD aircraft when performing mission-essential travel. This includes flights on both DoD-owned assets and Air Mobility Command procured channel (DBOF-T) airlift services. Authorized traffic moving between the continental United States (CONUS) and overseas areas, and traffic within overseas areas usually will be transported by DBOF-T aircraft.

Space-required travel aboard military aircraft is paid for by the sponsoring organization or home station. Passengers must possess official travel orders, temporary active duty (TAD or TDY) orders, or transportation authorizations which include appropriate fund cites or the name and address of the issuing organization. Additionally, under the recent amendment to 10 U.S.C. 18505, members can now travel on DoD aircraft worldwide in a space-required status from their home to their authorized IDT assembly when performing IDT training. The travel eligibility is non-chargeable if the member moves on DoD aircraft. Seat reservations can be made 30 days in advance of travel for certain destinations. Members must provide written authorization for travel. All charges above and beyond the seat tariff rate are the responsibility of the member (head tax, excess baggage, federal inspection fees, meal charges, etc.). Members cannot use this travel in conjunction with man-days and annual tours.

ANG members on active duty traveling under official TDY or TAD orders qualify as Priority 2 passengers (just below those on emergency leave). ANG members traveling to perform IDTs qualify as Priority 4 passengers. As Space-Required travelers, Priority 4 passengers have priority over all space-available travelers. Dependents are eligible for space-required travel as paying passengers if traveling to, from, or between overseas areas pursuant to competent PCS orders. Unlike space-available travel, there are no geographic limitations on space-required travel based upon the STATUS of the ANG member.

### REQUIREMENTS

Active duty military, National Guard, and reserve personnel no longer must be in uniform for all flights, however, mission commanders may require that uniforms be worn in certain situations. Civilian clothing must be in good taste and must not conflict with accepted attire at the destination. Appropriate attire does not include shorts, tank tops, halters, or garments depicting obscene or offensive phrases or designs. Members whose clothing does not conform to the above will be denied travel.

Military protocol dictates that the highest-ranking passenger will depart the aircraft first in most situations.

Travelers are allowed to check two pieces of luggage not to exceed 70 pounds each or 62 linear inches (the sum of the length plus width plus height). Passengers are allowed to hand-carry small luggage not to exceed 45 linear inches. The luggage must fit under the seat in front of them or in the overhead. Travelers on contract aircraft may have more than 70 pounds per person, but might be required to pay excess baggage charges at the established tariff rate.

Space-required travel may be reserved through the local military terminal or the AMC Passenger Reservations Center.

***KWIK-NOTE: No ANG member will be permitted on military aircraft without the appropriate orders or written authorization.***

**RELATED TOPIC:**

**SECTION**

Space-Available Travel Aboard Military Aircraft

27-7

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## TDY and Travel

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Major Glenn Rowley

Updated by 2<sup>nd</sup> Lt Karunesh Khanna, August 2002

**AUTHORITY:** Joint Federal Travel Regulations (JFTR), Vol. 1, Appendix A; Joint Travel Regulations (JTR), Vol. II (31 Dec 01) HQ; AFI 65-103, *Temporary Duty Orders* (23 Feb 01); AFI 10-215, *Personnel Support for Contingency Operations* (1 May 99).

### LIMITS

Temporary Duty (TDY) tours are limited to six (6) months at any one location. Air Force policy limits funded TDY to 179 days (including travel time) except when approved in advance by the Secretary of the Air Force. TDY to attend courses of instruction may not exceed 20 weeks at one location (not including travel time). Holidays or periods of time when classes are suspended do not extend course duration.

### APPROPRIATENESS OF TDY

Issuing or approval authorities decide if TDY is appropriate. Among the factors to consider are:

1. Is there a cheaper means of communication such as a telephone call, message or letter sufficient to meet the desired goal;
2. The number of people who must travel for a single purpose should be minimized;
3. Can individuals nearer the TDY location do the job;
4. Review and reauthorize, if needed, all blanket and repeated travel orders insuring that minimum travel is accomplished consistent with command or the unit mission; and
5. Combine missions to carry out multi-purpose results with the goal of reducing unnecessary trips, number of people traveling, places to be visited, variations in itineraries and length of trips.

### TDY PROCEDURES TO ESTABLISH

Issuing and authorizing officials should establish procedures to:

1. Keep personnel participation at CONUS conferences, meetings and seminars to a minimum when travel is at government expense and does not relate directly to the mission;
2. Screen all requests for foreign travel to keep attendance at foreign conferences to a minimum and assure the USAF Foreign Clearance Guide is complied with before travel begins;
3. Coordinate local transportation requirements when sponsoring meetings and conferences to keep costs at a minimum;
4. Determine whether travel at government expense is mission or administrative in nature;
5. Plan far enough in advance to obtain appropriate discounts;

6. Direct the use of government procured transportation when appropriate and determine modes of transportation directed or authorized; and
7. Determine whether the individual will be carrying classified information or firearms and/or traveling to high-risk areas as special regulations will apply.

## **ORDERS**

Commanders should be aware that special regulations and restrictions control the following types of TDY orders:

1. Blanket TDY;
2. Repeated TDY;
3. Permissive or No Expense to Government Orders;
4. NATO Travel Orders; and
5. CED (Contingency, Exercise, Deployment) Orders.

Among items which you will want to ensure are contained on TDY orders are:

1. Security clearance;
2. Whether use of a private vehicle or rental vehicle is authorized;
3. A detailed description of the purpose of the trip as this will be useful for later audit purposes; and
4. Names of dependents.

If a traditional Guard member or AGR member is traveling in Title 10 status, it is important that the orders contain a notation that the member is assigned to the 201st MSS, Andrews AFB, MD for the purposes of administrative control (ADCON) and attached for a federal mission to [name of the active duty organization to which the member is assigned] for operational control (OPCON). Any traditional Guard member or AGR member traveling OCONUS must be in Title 10 status.

***KWIK-NOTE: Authorize only necessary TDY for the minimum time to accomplish its purpose.***

## **RELATED TOPICS:**

## **SECTION**

Orders - Problem Areas	1-25
Travel Advances	27-10
Travel Expenses	27-11
Travel Vouchers	27-12
Visits to Other Bases	27-13

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# Travel Advances

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**Major Glenn Rowley**

**Updated by 2<sup>nd</sup> Lt Karunesh Khanna, August 2002**

**AUTHORITY:** Joint Federal Travel Regulation, Vol. I (military) and Joint Travel Regulation, Vol. II (civilian) (31 Dec 01); AFI 65-103, *Temporary Duty Orders* (23 Feb 01); AFI 36-2906, *Personal Financial Responsibility* (1 Jan 98); AFMAN 34-255, *Directory of Government Quarters and Dining Facilities* (1 Jan 98).

## HOW TO GET IT

Official travelers may obtain an advance of their travel expenses solely through a Government Travel Card (GTC) program. This program is currently administered by Bank of America. All ANG travelers are eligible for the card, however, commanders have the authority to deny a card to anyone with financial problems or a history of card abuse. Members may obtain a card application from your local finance office. The finance office will forward the application to Bank of America. New card applications will be processed within three business days of receipt. Rush processing for delivery of GTCs within 24 hours is available at an extra charge to the Government.

Members are required to use the GTC for all official travel.

## GOVERNMENT TRAVEL CARD

**CASH ADVANCE:** GTC holders may obtain advance travel payments through automatic teller machines (ATMs). Maximum per-day dollar limits for travel advances payable through the ATM system are currently \$250 per day and \$500 per 7-day period. The benefit to travelers is that they have access to a regular supply of cash for meals and incidental expenses during the course of the TDY without the need to carry large sums of cash, which are susceptible to theft or other loss.

All cardholders will automatically receive a Personal Identification Number (PIN) with the card. This PIN allows cash withdrawals from most ATMs. PINs are received by mail usually within 10 days after receiving the Card.

Travelers in possession of or eligible for a card are limited to the following amounts of travel advances: 100% for meals and incidental expenses, and 80% for all authorized and allowable expenses such as meals, lodging and incidentals (taxi, registration) when the card cannot be used.

## HOW TO REPORT IT

Once travel is completed, members should file DD Form 1351-2, Travel Voucher or Subvoucher, to obtain full reimbursement. Members should use reimbursements to pay the card company. Cardholder statements are payable in full upon receipt and delinquency will not be tolerated. A long TDY trip is no excuse for late payment of the GTC bill. Members on a long TDY may make arrangements with the finance office to submit a voucher for payment for a portion of the TDY (ex: monthly vouchers for extended TDY).

**NOTE:** To ensure that applicable fees are reimbursed only for official travel expenses, travelers will not be reimbursed for ATM fees when the ATM advance was taken earlier than 5 days prior to departure.

**KWIK-NOTE:** *The Government Travel Card program is easily abused. Ensure that members know that they may use the GTC ONLY for official travel expenses.*

**RELATED TOPICS:**

**SECTION**

Ethics	7-3
Fraud, Waste and Abuse	16-7
Official Travel	27-6
Orders - Problem Areas	1-25
TDY and Travel	27-9
Travel Expenses	27-11
Travel Vouchers	27-12
Government Travel Card	27-15

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## Travel Expenses

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**Capt Tim Pomeroy, Sep 2007**

**AUTHORITY:** Public Law 105-264, Travel and Transportation Reform Act of 1998 (TTRA); Under Secretary of Defense (Comptroller) Memorandum, *Implementation of the Travel Card Requirements Contained in the Travel and Transportation Reform Act of 1998 (TTRA)* (18 Feb 00); Joint Federal Travel Regulation, Vol. I (military) and Joint Travel Regulation, Vol. II (civilian) (31 Dec 01); DoD 7000.14-R, *DoD Financial Management Regulation*, Vol. 9, Travel Policy and Procedures (Apr 2007); AFI 65-103, *Temporary Duty Orders* (5 Aug 05);

### REIMBURSEMENT

Travel expenses incurred for official travel are reimbursed by completing and submitting a Travel Voucher, DD Form 1351-2, to your servicing finance office.

### GOVERNMENT TRAVEL CARD

Government travelers are issued Government Travel Cards (GTC) for use in connection with official travel. The GTC is presently administered by Bank of America (BoFA). Prior to issuing a GTC, BoFA will perform a credit check. BoFA may recommend a restricted GTC be issued when the member is considered a credit risk or has no credit record. Individuals that refuse a credit check will be issued a restricted GTC. Standard GTCs have a charge limit of \$5000 per billing cycle (consisting of a maximum of \$4250 in travel expenses, \$500 in ATM advances, and \$250 in retail charges). Restricted GTCs have a charge limit of \$1250 per billing cycle (consisting of a maximum of \$1000 in travel expenses, \$200 in ATM advances, and \$50 in retail charges). Effective in May 2001, BoFA is permitted to establish lower cash and credit line limits for both standard and restricted GTCs by amendment to individual GTC holders' agreements.

GTC holders are required to use the GTC for all official travel expenses, including hotels, air fare (air fares may be charged to a central account instead of the members' individual travel card) and rental cars. Charges which are not required to be charged to the GTC are: expenses incurred at a vendor that does not accept the GTC; all expenses covered by the "meals and incidentals" portion of the per diem allowance; laundry/dry cleaning expenses; parking expenses; local transportation system fares; taxi fares; tips; or telephone calls (when a government calling card is available for use in accordance with agency policy). Exempted expenses incurred in connection with official travel may be paid using the GTC on a voluntary basis, or the member may use any of the following approved alternative payment methods: cash; personal check, charge or debit card, ATM, or travel advances.

### RECORD KEEPING

Use of the GTC provides an excellent way to keep track of official travel expenses and to obtain authorized travel cash advances. The card holder remains personally liable for all charges on the GTC, and must always file a travel voucher to obtain reimbursement of official travel expenses.

The traveler's primary responsibility is to properly complete and submit the travel voucher to the servicing finance office as soon as possible, and to provide all necessary supporting documentation. Travel vouchers should be prepared and submitted within five workdays after completion of the official travel. The servicing finance office will issue payment by direct deposit. For many ANG bases, payment is usually handled through the nearest Operating Location (OpLoc) of the Defense Finance and Accounting Service (DFAS).

## **REASONABLE EXPENSES**

Travelers are reimbursed nearly all reasonable expenses incurred in connection with their official travel according to a complex set of schedules and charges by location. Per diem rates include lodging and meals and incidental expenses. Actual lodging expenses are paid for either government quarters or commercial hotel rates, up to the maximum set by the JFTR for the particular area. Current maximum per diem room rates are available on-line at <https://secureapp2.hqda.pentagon.mil/perdiem/rateinfo.html>. The traveler also receives a meals and incidental expenses (M & IE) payment for each TDY day at a particular location. Different meals and incidentals rates are established for every TDY location, and vary according to whether the traveler is housed on-base or off-base. Per diem is designed to reasonably defray the costs for meals and incidental expenses during the trip. Members are required to use government billeting and mess, whenever available. Civilian employees are normally required to use government billeting when available and are now allowed to use the government mess, though they are not required to do so. If government billeting is not available, members should obtain a statement of non-availability from the billeting office at the TDY location.

## **VEHICLES**

Travel by privately-owned vehicle (POV) is reimbursed at the rate of \$.445 per mile as of 1 January 2006 for official miles traveled. (Rates are current as of February 2001, but be sure to check current rates). Rental of a car at the TDY location is reimbursed at the government rate, provided that the use of a rental car is specifically authorized by the travel orders. If the original travel orders did not authorize a rental car but a car was nonetheless rented, the member must show that the car was necessary and the unit commander or designee must still approve the expense before any reimbursement will be made. Commercial transportation (buses and taxis) are reimbursable when used for official business; claims for such expenses over \$25.00 must be accompanied by a receipt submitted with the travel voucher.

## **TRAVEL VOUCHERS**

Travel Vouchers must include the following supporting documents, as applicable:

1. Two copies of all travel orders, including amendments;
2. One copy of any Government Transportation Request;
3. Originals of all itemized hotel, billeting and airfare receipts;
4. Originals of all rental car receipts, if authorized;
5. One copy of a DD Form 1351-2 evidencing payment of advance travel payments, if any;
6. Originals of any receipts for reimbursable expenses exceeding \$25.00, such as taxi receipts, registration fees, etc. and
7. Original receipts of all ATM withdrawals against the GTC.

The traveler must complete all pertinent provisions of the travel voucher, and submit it to the servicing finance office within five days of the conclusion of your trip. When in doubt, the traveler should provide receipts or other pertinent documentation.

Intentionally filing a false claim or making false statements in a travel voucher may constitute one or more crimes punishable under the UCMJ, the state Code of Military Justice, or the United States Code, depending on the member's status. Innocent mistakes or simple negligence only result in denial of payment. Intentional fraudulent acts may result in prosecution. Travel voucher fraud is often easily detected through a comprehensive audit process, and is vigorously prosecuted. Many active duty, Reserve, and Air National Guard members, officer and enlisted alike, have not only lost careers but also ended up with prison terms as the result of travel voucher fraud.

## **MEDICAL EXPENSES**

If a member becomes ill while on official travel then he or she must seek treatment from the nearest active duty medical facility. If none is available, costs for treatment by a civilian treatment provider should be reimbursable upon submission of the proper documentation to the base clinic.

Contact the servicing finance office with any questions concerning travel payments or entitlements.

***KWIK-NOTE: Ensure that members are aware that they must document their travel expenses.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Car Rentals by National Guard Members	27-2
Fraud, Waste and Abuse	16-7
Official Travel	27-6
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Government Travel Card	27-15

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# Travel Vouchers

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**Capt Tim Pomeroy, June 2007**

**AUTHORITY:** Joint Federal Travel Regulations (JFTR); AFI 65-103, *Temporary Duty Orders* (5 Aug 2005).

## INTRODUCTION

Perhaps no other document used on a continuing basis is as fraught with potential problems for the Commander as the travel voucher. The rule, simply stated, is that a military member should submit for reimbursement only those expenses to which the member is entitled. Determining exactly what the member is entitled to is, however, a subject of some misunderstanding. Naturally, the exercise of this rule has led, on one extreme, to members not receiving the entitlements to which they are due and, to the other extreme, members being disciplined, and even involuntarily separated for claiming money to which they were not entitled. This latter occurrence sometimes happens innocently, and sometimes fraudulently.

The purpose of this topic is to highlight the problems associated with travel vouchers, and recommend ways you can avoid them.

## LACK OF UNDERSTANDING

The root of the problem with travel vouchers is that many members do not know what they are entitled to claim, and even if they do know, they do not know how to properly complete the travel voucher. Some members of your unit travel frequently, some periodically, and some rarely, if at all. Frequency of travel depends largely upon the nature of a member's duties and the training required to do them.

First, commanders must recognize this travel voucher "education gap." Many units have successfully reduced this gap by having their specialists in military pay prepare forms or booklets with instructions on what the various terms on the travel voucher mean, and how to complete it. These materials either are handed out and explained at classes for all unit members or are written in a style that is so easy to follow, that they are given to all squadron and flight first sergeants for passing on to their own personnel as needed. Whichever method you choose, having your travel voucher "guru" (every unit should have at least one) prepare written "how to" materials for distribution is strongly recommended.

Surprising as it may seem, some ANG members are not even aware of what a travel voucher is let alone know how to complete one. Even those members that have some experience with travel vouchers are confused by certain terms on the form, such as: "per diem," "cost of lodging," "deductible or nondeductible government or non-government meals," "mileage reimbursement," and "reimbursable expenses with receipts." Preparing and distributing the "how to" materials should eliminate much, if not all of the confusion. Even with these materials, some people will still need help in completing the vouchers so that they are properly and fully reimbursed.

Encourage your first sergeants to provide assistance to these members. Since the JFTR changes often, first sergeants should be encouraged to seek assistance on behalf of their personnel from your unit's travel voucher specialist(s) when questions arise.

Many Commanders have encouraged their Comptroller to have the unit travel voucher specialist(s) review all travel vouchers before they leave the base. A form of quality control, this review process better ensures that innocent members claim all expenses, but only those to which they are entitled. It also serves to detect fraudulent claims.

## FRAUDULENT CLAIMS

Most every Commander has known, heard or read about many of the “horror stories” involving travel vouchers. The sad part is that travel voucher fraud too frequently involves members with otherwise brilliant careers who, for as little as \$25.00, submit a fraudulent travel voucher.

Assume a member is on orders to travel for authorized military business. Here are some actual cases which, while hard to believe, involve some former commissioned officers and their travel vouchers:

1. The member was driven to the airport in a POV, but instead of properly claiming mileage which would have been \$22.00 round trip, submitted a receipt from a “friendly” limousine service for round trip reimbursement of \$70.00. The member might have gotten away with it, but obviously unknown to him was the fact that that limousine service (which had only one car) had actually driven another unit member to a different airport on the same date and at a time which would have made it impossible to have also driven the first member to the first airport. Not only was the member discharged in disgrace (he was also awaiting Senate confirmation for federal recognition to O-6), but he also was convicted of a felony in federal court. State law where the member lived provided for revocation of licenses required to practice a profession upon a felony conviction. This traditional Guard member, who was a school principal, was mandatorily fired from his civilian position two months later, two months short of vesting his civilian pension. Two of his children still went to school in that district.

2. Another member rented a car at the airport of the TDY station. Since there was no authority on the orders to be reimbursed for it, he paid for the rental car himself, which was perfectly permissible. He used the rental car during the TDY, having picked it up at the airport, driven it to the TDY station, and then back to the airport before boarding the plane home. People in his unit knew before, during and after his TDY that he rented a car during the TDY. The problem was, he submitted for reimbursement two commercial cab receipts (\$15.00 each) for travel from the airport to the TDY station and back. He might have gone undetected except another unit member who did not think too highly of this officer knew about the rental car, saw the signed travel voucher and turned him in. The officer chose to resign instead of being discharged. At the time he resigned, he had 19 good years of total service.

3. Our final case involves a member who, with authority, took her POV on TDY. Upon release from duty at 1200 hours on the last day of the tour, she did not go directly home, which would have taken her three (3) hours driving time. She stopped twice to socially visit friends at places which were clear deviations from her direct route home (she had properly listed on the travel voucher the direct route traveled to the TDY station). She arrived home at 1100 hours the day after the tour of duty ended. Her orders allowed one day for travel after the day the tour ended. While she did not claim the extra mileage or tolls incurred by the stops on the way home, she submitted her travel voucher claiming the extra day’s pay and per diem. The travel voucher specialist at her base caught the “error.” Only because she had not claimed the extra mileage and tolls, did her kindly Commander permit her to re-accomplish the travel voucher without the claim for the extra day’s pay and per diem, and not process her for discharge. However, because her actions were deemed by her Commander to, at the very least, constitute a “serious error in judgment,” her next OPR so reflected her actions. That OPR was the last one prepared before she met her second Board for promotion to O-5, having once previously been passed over. Needless to say, after the second Board considered her, she retired.

The moral of all this: there is no such thing as the perfect crime. For even if members “get away with it” once, they will only succumb to the temptation of trying to do it again. Sooner or later, in one way or another, they will be caught. And once the member has submitted a signed travel voucher, there is no escape. If falsely completed, that document is the member’s worst enemy. You never know who will turn you in or what will trip you up. JUST DON’T DO IT -- it’s not worth it.

## **EDUCATION**

Commanders, in recognition of the serious potential adverse consequences to those who submit false travel vouchers, should periodically remind their personnel of these adverse consequences, which include:

1. Quality force management actions;
2. Administrative separation;

3. Courts-martial;
4. Civilian criminal prosecution;
5. Loss of civilian employment, whether or not a license is required and is revoked, and its consequent effects on pension benefits; and
6. Personal disgrace (which, emotionally, may be the worst of all).

While your responsibility may not include finding out *why* people submit false travel vouchers, it can and should include educating and assisting all your unit members to submit proper and accurate travel vouchers. This topic has also been written to be adaptable to a briefing format for this purpose.

***KWIK-NOTE: Monitor all travel vouchers submitted, both to protect innocent members from themselves, and to protect the integrity of your unit.***

<b>RELATED TOPICS:</b>	<b>SECTION</b>
Car Rentals by National Guard Members	27-2
Fraud, Waste and Abuse	16-7
Investigations and Inquiries	16-11
Official Travel	27-6
OSI and SF Reports	8-14
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## Visits to Other Bases

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**Col Rex Hinesley, Sep 2007**

**AUTHORITY:** Command policy, customs and practice.

### **GUIDELINES**

Common sense dictates the following guidelines for visits to other bases or facilities:

1. A courtesy call to the host Commander before the visit to advise of the visit and its purpose. You would not want to be surprised by strangers on your base. Don't assume that the section or office being visited will always remember to tell its own Commanders;
2. If staying overnight, independently confirm your reservations to avoid any billeting snafus; and
3. Consider sharing your in-house after-visit report with the host Commander. It may help improve the host's operation and/or prevent a write-up by a future inspection team.

### **ORDERS**

The orders issued should state the purpose of the visit; for example, "on-site inspection of the maintenance facility at Pease ANGB, NH."

### **REPORT OF VISIT**

Whenever an ANG member is traveling on official duty to another base to view a facility similar to that of the home base, and which viewing is either the entire or a substantial reason for the travel, the person authorizing the travel should require a written after-visit report.

The report need not be more than one page in length. It should summarize what the visitor saw at the base and the impressions of what was learned from the facility's operation. The written report also serves as a source of information for other interested members of the unit, and could prove useful to the visitor's Commander or successor. In this way, the proverbial "wheel" need not be reinvented with each change in personnel or command.

***KWIK-NOTE: Advance planning and written after-visit reports are essential for visits to other military facilities.***

### **RELATED TOPICS:**

Official Travel  
Orders – Problem Areas  
TDY and Travel

### **SECTION**

27-6  
1-25  
27-9

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## Visits to United States Congress

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Col Rex Hinesley, May 2007

**AUTHORITY:** 18 U.S.C. 1913

### **RESTRICTIONS AND REQUIREMENTS**

All members of the National Guard should be aware in their contacts with the United States Congress to avoid impermissible activity. Impermissible activity includes lobbying in violation of 18 U.S.C. 1913 and misuse of government assets. Members should avoid even the appearance of impermissible activity. The responsibility rests with each of us to ensure public confidence in the United States Government.

Under 18 U.S.C. 1913, federal funds appropriated for the training and administration of the National Guard may not be used to facilitate a lobbying effort. For example, members may not use federal aircraft to fly to Washington to influence state interests in Congress. Likewise, when a member travels to Washington in a duty status, the purpose must be to perform official military duties.

If members of the National Guard are in Washington for a valid official purpose, they may also meet with their elected representatives or staff. However, this additional meeting must not be the primary purpose of the trip and the meeting may not be a subterfuge for lobbying. The meeting must not consume the major portion of the duty day nor interfere with official duties. Civilian attire should be worn by members visiting their representatives whenever possible.

To avoid the appearance of impermissible lobbying or the misuse of government property, and to avoid any misunderstanding, members who desire to meet with their representatives when conducting official business in the Washington area, or when traveling in conjunction with federally funded travel regardless of their duty status, may advise the National Guard Bureau Office of Legislative Liaison (NGB-LL) about the meeting in advance. NGB-LL may be contacted through their web site at [www.ngb.army.mil/ll](http://www.ngb.army.mil/ll), or by telephone at (703) 607-2770 or DSN 327-1823.

Members in federally-funded duty status should not appear in Congressional hearings regarding matters of interest to the National Guard unless subpoenaed by proper authority or requested to do so by the National Guard Bureau. Any such appearance may be coordinated through NGB-LL and members may arrange to meet with personnel at NGB-LL to discuss any areas of interest.

The National Guard Bureau does not intend to interfere with the right of individuals to communicate with their elected representatives. National Guard members may communicate with Congress individually or collectively, through private associations, the same as any other citizen, so long as no federal funds or other federal resources are involved in the activity.

***KWIK-NOTE: Use of federal funds or other federal resources by military members to lobby or influence members of Congress is PROHIBITED.***

### **RELATED TOPICS:**

Ethics  
Official Travel

### **SECTION**

7-3  
27-6



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## Government Travel Card

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**Capt Tim Pomeroy, June 2007**

**AUTHORITY:** Public Law 105-264, *Travel and Transportation Reform Act of 1998*; DoD 7000.14-R, *Financial Management Regulation*, Volume 9, Chapter 3, & Annexes 1-4 (March 2005); SAF Policy Letter, *Mandatory Travel Card Policy*, 17 April 2000, and attachments; TJAG Special Subject Letter 2002-01: *Providing Legal Assistance in Bank of America Travel Card Debt Cases*; TJAG Policy Letter Number 18, 4 February 1998, paragraph 2c.

### BACKGROUND

In 1998, the “Travel and Transportation Reform Act of 1998” (TTRA), went into effect *mandating* the use of a government travel card (GTC) for all costs incident to official government travel. Since that time, use of the GTC has become commonplace. For most members, use of the GTC poses few problems; for commanders, however, GTC misuse by members of their units has become an all too common annoyance. GTC misuse by an individual member can run the spectrum from a simple lack of financial knowledge and/or discipline to blatant fraudulent intent.

Additional information on the TTRA can be found on the [GPO](http://www.gpoaccess.gov/plaws/index.html) website at [www.gpoaccess.gov/plaws/index.html](http://www.gpoaccess.gov/plaws/index.html). The DoD Financial Management Regulations, including all nine volumes of 7000.14-R, can be found at [www.dtic.mil/whs/directives](http://www.dtic.mil/whs/directives).

### MANDATORY USE

According to SAF Policy Letter, *Mandatory Travel Card Policy*, 17 April 2000, and attachments, use of the card for travel-related expenses is required for all members on active duty. Mandatory use of the card is also required for guard members when in a Title 10 status.

Travelers must use the card for transportation (*i.e.*, airline tickets), lodging and rental cars. All airline tickets must be purchased through the Contracted Travel Office (CTO) with a centralized unit GTC or with a member’s individual card. Other items may be placed on the card, such as parking, dry cleaning, meals and incidentals, local transportation or taxi fares, telephone calls (local and long distance), tips, and any expense at a vendor that does not accept the travel card.

A commonly asked question is whether cash, obtained through use of the travel card or not may be used in lieu of the card itself for rental cars, hotel bills, and airline tickets. The answer is no. The law requires use of the card itself, not cash. The travel card can be used to obtain cash from ATMs to satisfy any cash requirement as stated above. However, there are charging limits on both “expenses” and cash withdrawals - any questions can be answered by your APC. Also remember that obtaining cash is expensive because the bank charges fees for each cash withdrawal based upon the amount withdrawn. In addition, the card offers safety and allows members the option of viewing their TDY expenses on-line while completing their voucher.

## **ELECTRONIC ACCOUNT GOVERNMENT LEDGER SYSTEM (EAGLS)**

Agency Program Coordinators (APC) are responsible for program execution and management and are to monitor delinquencies. Each base and unit should have an APC and an alternate appointed by the Commander and registered with the bank.

EAGLS provides each unit APC the ability to view cardholder's accounts, update credit and cash withdrawal limits, and maintain addresses and generic information pertinent to the cardholder online.

APCs can pull various reports using EAGLS such as delinquency reports, cardholder listings and individual cardholder statements on a monthly basis. The Air Force reporting cycle ends on the 3<sup>rd</sup> of each month---reports using EAGLS can be run after that point. This allows the APC, cardholders and commanders immediate access to relevant information, helping to resolve existing problems and alleviating potential problems before they occur.

The review of monthly reports helps commanders ensure that abuse is stopped before it "gets out of hand" (e.g., the airman who uses his card to rent a car when such is not authorized on his orders, or the member who is using her card to pay furniture payments at a local furniture store). Abuse can be stopped immediately and the military member encouraged to immediately pay the full amount of the debt before it is beyond their financial capability to do so. Members can also go to their APC and receive an ID and password that will allow them to view their account on-line using EAGLS. This is especially helpful for long TDYs---because the member is expected to pay their card by filing interim travel vouchers.

It is important to note that BofA *cannot disclose information to employers about the credit history of the military member*, only about the status of the card charges. However BofA can give a recommendation to the APC about whether the member should be allowed a "restricted card" (one that has a limited credit amount and is turned on and off for travel by the APC), or a standard card. If a person refuses a credit check, which is their right, they will be issued a restricted card. An APC can override the BofA recommendation and have a standard card issued. APCs can raise or lower limits on a card by calling the bank. APCs can also turn on/off cards using a touch-tone phone without talking to anyone at the bank.

## **SPLIT DISBURSEMENTS**

Split disbursements are now a mandatory feature of travel voucher reimbursements related to use of the GTC. This allows the traveler's payment to be automatically split between what is owed the bank with any remaining funds sent to the traveler's checking account, thus saving the traveler the time and trouble of paying the bank.

The most recent contract modification (Modification P00008-dtd 4/11/01) to the contract with BofA (MDA210-98-F-0031), also imposes a new "Default Split Disbursement." It is presumed that this will mean that the finance office will be allowed to pay all charges incurred for a particular travel voucher if the member leaves "Block One" on the travel voucher blank. In other words, if the member fills in an amount or puts "zero," those directions will be followed. If the amount is blank, the finance office can and will pay any debts incurred on the member's GTC. Policy guidance issued on June 14, 2001 by the Under Secretary of Defense/Comptroller indicates that only that portion of the travel settlement related to transportation, lodging and rental cars will be forwarded to the travel card contractor and the remainder of the entitlement will be forwarded to the member. Finance offices may want to take an active role in this process, because some members may pay the card debt, thereafter expecting reimbursement on their travel pay. Of course, members can seek reimbursement from BofA for any amounts overpaid on the card.

It is important to note that new procedures are forthcoming that allow payroll offset by the government on behalf of BofA, pursuant to this same contract modification. (Payroll offset has always been an authorized collection act by the bank in the public law referenced above.) Policy guidance issued on June 14, 2001 by the Under Secretary of Defense/Comptroller indicates these procedures will be used once an account is 90 days delinquent. Due process procedures will be substantially equivalent to those set forth in 31 U.S.C. 3716(a), and 41 C.F.R. 301-54.100, requiring written notice to the member which not only advises them of

their rights as a debtor, but gives them an opportunity to inspect and copy the records related to the claim and enter into a written agreement to pay the debt without pay-offset. It is presumed that due process will require notice to the member, probably at the 90-day point of delinquency. Commanders and supervisors are highly encouraged to take an active interest in notifying members that pay offset will take place in the event of delinquency. (The term “garnishment” is not used because it refers to a legal process using civil courts.)

## **PROACTIVE WING POLICY**

Many units have proactive comptroller review of the government travel card program. Other units perceive these measures as best left to the squadron level APC. The following are proactive suggestions-you can probably think of others!

Create a wing instruction that carefully details prohibited practices and the progressive disciplinary steps that will be taken in the event of a violation of the policy. Discipline for misuse can differ from delinquency. Consider disciplinary measures for non-mandatory use of card; remember, however, that mandatory use “technically” only applies to ANG members in a Title 10 status--however, it is increasingly impossible to obtain travel funds without using the card. Guidelines should be established within a wing policy as to how a member can be administratively disciplined for failure to use the GTC for mandatory expenses.

Create an acknowledgment form for each member to sign that indicates that they have read the wing policy and understand that the card is for official use only, not to be used for local purchases, and acknowledging that they understand the progressive disciplinary steps that will be taken in the event of a violation of the wing instruction.

Control access to the card by requiring an application on all individuals, even those transferring into the unit. Make sure that people leaving and transferring into the unit have their card hierarchy transferred with them to the correct hierarchy. This also ensures that they are briefed on the wing policy regarding the card and that they have signed the wing acknowledgement statement. It also ensures that the member’s supervisor has acknowledged that the member can have a card.

In fact, policy guidance issued on June 14, 2001 by the Under Secretary of Defense/Comptroller requires that DoD components ensure that inprocessing and outprocessing procedures of personnel include addressing travel card issues, including a requirement that personnel will have to inprocess and outprocess through their unit level agency program coordinator.

Cards can be cancelled in two ways. If a member abuses her card or becomes delinquent, the unit can request the card’s deactivation. Also, Bank of America will deactivate the card if the card becomes 126 days delinquent.

Cards are closed when a member separates from the wing. If the member is transferring, they are allowed to take the card to their new unit but it is deactivated if not transferred within 3 months (a lesser period of time, such as one month is also encouraged) of their departure. The cards of separating members are closed immediately. In addition, lowering the credit limit to one or zero dollars on cards that are deactivated prevents charges being posted to a closed account.

Two monthly reports should be run.

- First is the transaction report for the previous month’s activity. This report lists all charges for the members of the unit with government travel cards. The report is then checked for misuse transactions such as local cash withdrawals while not on orders and purchases with unauthorized vendors.
- The second report is the delinquency report. Any account that is more than 60+ days delinquent is flagged. The misuses and delinquencies should be reported to the unit commanders on a monthly basis for follow-up action under the wing instruction. When the delinquent accounts are

identified, the accounts 30+ days delinquent are noted. An e-mail is sent to all individuals in the 30+ day category reminding them of their bill and listing the methods of payment. This is a non-punitive action taken simply because too many individuals who used split disbursement were becoming 60+ days delinquent despite the fact that they thought the entire bill had been paid.

#### **WHAT HAPPENS IF A PERSON MISUSES THE CARD OR FAILS TO PAY?**

To prevent misuse, a member will not be able to use the card at certain categories of merchants. Some of the categories include golf courses, liquor stores, funeral, medical providers, and 1-900 numbers. Any attempt to use the card at one of the blocked categories of merchants, will result in a failure of the card to be accepted. If a mission requires this charge, the merchant can contact VISA or a member may use the number on the back of their card to authorize an override.

Just because a card was accepted by a merchant does not mean that the use is permissible--it must be for official government travel purposes.

Failure to pay the travel card bill will affect a member's ability to use it. Once an account is 60 days delinquent, it will be suspended. When it is 120 days delinquent, it will be cancelled. BofA may charge up to \$29.00 for a late fee for accounts that are 75 calendar days past due. Fees may be charged monthly until the account is paid up-to-date. Delinquent payments that are more than 126 days past the original due date may be reported to credit bureaus and can damage a member's credit rating. Members should also be warned that BofA may continue to attempt to recover amounts due even if the member is discharged or separated from the military. It is important that members review their monthly statement carefully for accuracy. Members are not expected to pay invalid charges but must dispute them with the Bank of America as soon as possible.

On 1 October 2001, the Defense Finance and Accounting Service (DFAS) issued procedures to effect salary offsets from Air Force members who are more than 120 days delinquent on their DoD Travel Card accounts. Pursuant to the statute and implementing regulations, BofA is not required to seek a court – ordered garnishment of wages to initiate these offsets. The involuntary allotment process has been statutorily replaced by a distinct salary offset process with its own set of rules and procedures that are internally managed by DFAS. Nevertheless, once the commander and DFAS are contacted regarding a BofA account that apparently warrants initiation of the salary offset process, legal office involvement should stop, except for providing guidance or official handouts as information about the offset process. Due process procedures will be in place and the law as presently written states that the pay offset amount cannot exceed 15% of the disposable pay owed the employee for that pay period, unless written consent of the employee authorizes more.

Units should be proactive in educating members about the rules concerning their government credit cards. Units are also encouraged to have local wing policies concerning the card's use and misuse. As with the old card, UCMJ or state code and administrative disciplinary actions may be taken if the card is used for prohibited purposes or a member is delinquent in paying their account. *Any discipline should be "measured" and "graduated" and progressive in accordance with Air Force policy.* As noted above, ensure that discipline be based on "dereliction of duty," or a violation of wing or MAJCOM directives or instructions until and if a new AFI is placed into effect. And remember, without a wing or other directive that establishes disciplinary procedures for non-mandatory use of the card, there is no other mechanism at this time to support discipline.

If you have any questions or need additional information about the government travel card, you can contact your unit Travel Card APC, your financial Service Office or Bank of America Customer Service, whose telephone number is found on the back of the card.

***KWIK-NOTE: Be proactive – create wing policies and notify your members of their contents, educate your members on the use of the government travel card, and monitor your people to ensure that abuse does not occur.***

**RELATED TOPICS:**

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# Chapter 28, Domestic Operations

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# ACTIVATION, CHAIN OF COMMAND, AND DISCIPLINE IN THE FORCE

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**Major Marshall L. Wilde, Sep 2007**

**AUTHORITY:** 10 U.S.C. § 10103, 10111-3, 10213, 10215, 12301-4; 18 U.S.C. § 1385; Title 32, United States Code; DoD Directive 1235.10, *Activation, Mobilization, and Demobilization of the Ready Reserve* (23 September 2004); AFRD 10-3, *Air Reserve Component Forces* (17 May 2006); applicable provisions of state law.

## INTRODUCTION

Command authorities may activate National Guard forces for domestic operations in state active duty, Title 32 (state commanded, federally funded) or Title 10 (federally commanded and funded) status. This status determines both the kind of missions the Guard may perform and who pays for those missions. Activation in a state status puts very few limitations on the nature of the mission the Guard may perform, but often creates funding issues for states with stretched budgets. For that reason, federal law provides a variety of mechanisms to fund specific ANG activities on a direct payment or reimbursable basis. Activation in a federal status provides greater funding resources, but places legal limitations on the permissible missions. This section discusses the capabilities and limitations of each status, how status affects the chain of command, and the authority to discipline members in different statuses.

## STATE ACTIVE DUTY STATUS

The state status activation process starts when the Governor of a state identifies a public need that she cannot meet with her existing civilian resources, or receives a request for assistance from another Governor or a representative of the federal government. While the reasons for activation vary greatly, the process has certain set points, including the identification of the need, the request for forces, the identification of the forces appropriate to meet the public need, the activation of those forces, the employment of the forces, and the deactivation of the forces. When the activation is in state status, the Governor of the state retains administrative control, although she may delegate operational or tactical control of the forces to another state. Because of this, the Governor and the state chain of command retain command of the activated forces, despite their deployment to another state or their work alongside federal (full time active duty) or federalized (National Guard on Title 10 orders) forces.

The Governor of each state, acting as Commander in Chief of the state militia, may activate National Guard troops under the limitations of laws of the state. Usually, state law permits the Governor to activate the Guard as a state militia to respond to a need for governmental services that exceeds local and state civilian capabilities. The Governor may activate the Guard in state active duty status subject only to state law limitations, or Title 32 status, with limitations imposed by the federal government, which provides the funding for Title 32 personnel.

## TITLE 32 (STATE COMMAND/FEDERAL FUNDS) STATUS

The federal government provides Title 32 funds to the states to permit the training and operation of National Guard forces. In essence, Title 32 funds are the money that the federal government pays the states to ensure that they maintain a militia that meets federal standards and performs missions that the federal government has delegated to the states. Title 32 troops remain under the command of the Governor and Adjutant General of the State, despite the federal funding.

Funding for state active duty funds usually initially come from the state and do not have inherent federal restrictions. However, as a practical matter, states often receive reimbursement for placing troops on state active duty from the federal government, particularly after the President declares a situation as a major disaster. For instance, in the aftermath of Hurricane Katrina, the states sent Guard members to affect states in a state active duty status. The

federal government later made Title 32 funds available. Most states took these funds to pay for their Guardsmen's salaries and operational costs. However, some declined to place their troops on Title 32 status, because the benefits to the Guardsmen were better on state active duty. Engaging in activities beyond the scope of those authorized by the federal government for reimbursement may prevent reimbursement to the state from the federal government. As a practical matter, commanders should spend these funds only for the operations and support missions specified at the time of activation or as later authorized by the funding authority.

In both state active duty and Title 32 status, the Governor retains command of the National Guard. The Governor may detail troops outside the state and subordinate them to officers from another state for operational purposes (OPCON). The Governor usually retains administrative control of her state's National Guard forces. As a practical matter, the Governor may also coordinate training and support with non-state organizations, although she typically retains disciplinary authority. To give an example, the Governor may send pararescue troops and equipment to another state to conduct search and rescue missions under the TACON of another state's National Guard and supported by that state's logistics chain. However, she would probably require that the member's home station chain of command impose any discipline necessary.

The mechanism used to "lend" one state's Guardsmen to another state is usually an Emergency Management Assistance Compact or EMAC. States execute bilateral EMACs with a variety of common and specific articles. However, the general EMAC does not contain a provision for the loaning of forces to perform law enforcement duties, despite the fact that one of the primary advantages of using non-federalized Guardsmen to respond to a natural disaster is their ability to perform law enforcement missions without implicating the Posse Comitatus Act. When the mission contemplates using loaned forces for law enforcement purposes, the commander should review the applicable law enforcement compact, if it exists, or raise the issue through the chain of command to ensure the speedy execution of such a compact.

When the need for state status forces expires or the Governor decides to deactivate the troops for other reasons, she generally may do so without reference to federal authorities. Of course, if the need has not ended, the President may choose to federalize the troops under Title 10 to keep them on the scene, accepting the restrictions that federal status imposes. As a practical matter, however, the state and federal governments seek to coordinate early in the process to ensure continued funding, manpower and availability of troops suitable to complete the mission.

## **TITLE 10 (FEDERAL) STATUS**

Traditionally, the federal government has used National Guard troops in a Title 10 role in three general roles: augmentation of active duty forces for deployed military operations, domestic natural disaster response under the Stafford Act, and to enforce federal law under the Insurrection Act. Activation of National Guard forces to augment active duty forces for overseas military operations has a long history in the United States. Under 10 U.S.C. 12301-12304, the President, with certain limitations depending on the length and nature of the call up, may activate National Guard forces from 15 days to the duration of a war or national emergency plus six months. The forces may be required to train or engage in military operations. The consent of the Governor of the state is not required for these activations.

When an emergency occurs that exceeds the ability of the state and local authorities to handle, the Governor of the state will generally request that the President declare an emergency or major disaster. The President, providing he agrees, may then use the instrumentalities of the federal government available to deal with the disaster, including, if necessary, the military. The Department of Defense acts in a supporting role in responding to emergencies. The head of the lead federal agency responding to the emergency will make a request to the Department of Defense for forces to support its actions. The Department of Defense then identifies the forces available and capable of providing the requested support and sends them to respond. Often, National Guard forces can respond most readily.

Until recently, the consent of the Governor of the state was required for the federalization of their National Guard forces for domestic emergencies. The traditional exceptions to this consent requirement included certain types of training and federalization to enforce federal law within the state under the Insurrection Act, the third traditional mission of federalized National Guard forces. This latter exception was used occasionally during the Civil Rights Era to enforce federal judicial rulings in recalcitrant Southern states. During natural disasters, gubernatorial consent was traditionally required to avoid pulling forces currently involved in the disaster response away from their duties.

However, in the 2007 Defense Authorization Act, Congress amended the Insurrection Act to expand the federalization of state forces without gubernatorial consent in natural disasters, terrorist incidents and all other incidents that compromise the effectiveness of the enforcement of federal law or impact the exercise of civil liberties. This represents a potentially huge expansion of the federal role on disaster response, but has yet to be tested in a major disaster or incident.

When the President calls the National Guard into federal service under Title 10, he assumes responsibility for the support and discipline of those forces. However, ANG members called to federal service do not become part of the Regular Air Force, but rather come under the administrative control of an organization called the Air National Guard of the United States, more commonly known as ANGUS. Typically, federal authorities assign activated ANGUS troops to the operational control of a commander, but they remain under the administrative control of ANGUS and its units, the Air National Guard Readiness Center and the 201<sup>st</sup> Mission Support Squadron. Despite lacking administrative control of federally activated members, the home units typically provide certain support functions, such as finance, family support, and a certain degree of personnel support.

While in Title 10 status, ANGUS members generally operate under the same rules and restrictions as active duty Air Force members. For instance, they may not engage in law enforcement activities that violate the Posse Comitatus Act and are subject to the Uniform Code of Military Justice, rather than their state disciplinary code. Title 32 officers usually may not command Title 10 troops and vice versa. Thus, the state ANG commander does not retain command of forces in Title 10 status (unless also activated in Title 10 status). As a practical matter, we recommend coordination between the state ANG commander and the Title 10 commander on any issue that would impact both commanders. For instance, AFI 51-202, *Nonjudicial Punishment*, 7 November 2003, requires coordination with the parent organization commander before a deployed commander may impose nonjudicial punishment on an activated ANGUS member.

## **DISCIPLINE IN THE FORCE**

In the complex mix of civilian, military, federal, state, volunteer and career personnel responding to a major emergency, maintaining discipline and mission focus can present major challenges. Often, people working side-by-side in the same workplace or on the same missions will fall under different chains of command or responsibility. We recommend early and continuous coordination with co-actors in the mission to facilitate effective discipline.

The most common problem in discipline during an emergency response is lack of direct supervision. A commander may receive a complaint about indiscipline by one of his troops assigned to support another command, or may have a complaint about a military member or civilian sent to support him. Clear communication and deliberate action ensure accountability and effective discipline. A commander receiving a complaint about one of his troops should reserve judgment until receiving all the available facts and should give due regard to the observations of the people exercising direct supervision of the troop. A commander with a disciplinary problem with a troop or civilian under his direct supervision, but not under his command for disciplinary purposes, should communicate the problem clearly and directly to the party responsible for discipline. That party should give due deference to the observations of the supervisor on the scene and correlate the incident with what she knows about the member's past performance before making a disciplinary decision.

Consistent discipline may require a degree of conformity with unfamiliar institutional cultures. For instance, federalized troops responding to a disaster will generally be banned from consuming alcohol. Civilians responding to the same disaster will probably not have the same restriction. While a commander cannot prevent civilians from consuming alcohol, he may explain the situation, and, if necessary, restrict alcohol from areas under military control.

## **CONCLUSION**

Activation of a unit or airman under state or federal authority has profound implications for the chain of command, discipline, funding and support. The type of activation also determines the type of missions a unit may conduct. Be sure to know the type of activation proposed and its consequences for your mission and airmen.

***KWIK-NOTE: The Air National Guard has tremendous flexibility because of the ability to act in either state or federal status. However, each status has limitations that may impact a commander's decisions.***

**RELATED TOPICS:**

Posse Comitatus and Law Enforcement Operations  
Active Duty - Air National Guard Members  
Status of National Guard Members  
Enforceability of Orders by AF Officers  
Active State Duty  
Pre-Mobilization Legal Counseling  
Mobilization of Air National Guard

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## POSSE COMITATUS AND ITS EXCEPTIONS

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**Major Marshall L. Wilde (review and contributions from NGB/JA, Col Cindi Ryan and Mr. Daryl Phillips),  
Sep 2007**

**AUTHORITY:** 18 U.S.C. § 1385; 10 U.S.C. §§ 331-335; 10 U.S.C. §§ 371-382; 32 U.S.C § 112; DoDD 3025.12, *Military Assistance for Civil Disturbances* (4 February 1994); DoDD 3025.15, *Military Assistance to Civil Authorities* (18 February 1997); DoDD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials* (15 January 1986); DoD 4515.13-R, *Air Transportation Eligibility* (November 1994); DoDI 5525.10, *Using Military Working Dog Teams (MWDTs) to Support Law Enforcement Agencies in Counterdrug Missions* (17 September 1990); AFI 10-801, *Assistance to Civilian Law Enforcement Agencies* (15 April 1994); AFI 10-802, *Military Support to Civilian Authorities* (19 April 2002); AFD 10-8, *Homeland Defense and Civil Support* (7 September 2006); AFMAN 31-201V6, *Civil Disturbances* (17 May 2002); NGR 500-1/ANGI 10-8101, *Military Support to Civil Authorities* (1 February 1996) ANGI 10-801, *National Guard Counterdrug Support* (31 March 2000) applicable provisions of state law.

### INTRODUCTION

This topic deals with The Posse Comitatus Act (“PCA”) and those circumstances to which it does not apply. The Act generally prohibits the use of the federal military forces in a law enforcement role, except in certain specific cases. The PCA applies only to forces in federal (Title 10) status, and not to the National Guard in State Active Duty or Title 32 status. However, given that most large domestic operations occur in a total force environment, you should consider PCA in the planning and execution of any operation in the United States.

Unlike most statutes governing operation of the military, PCA applies criminal penalties for violations of its prohibition. PCA violations can result in a fine or imprisonment of the military member involved. Further, a court may order the suppression of evidence obtained, or the release of an accused arrested, by forces operating in violation of PCA.

**CONGRESS SIGNIFICANTLY MODIFIED THE INSURRECTION ACT IN THE 2007 DEFENSE AUTHORIZATION BILL TO SIGNIFICANTLY EXPAND THE USE OF FEDERALIZED GUARD TROOPS IN A LAW ENFORCEMENT ROLE. SEE “THE INSURRECTION ACT” BELOW FOR ADDITIONAL DETAILS.**

### BACKGROUND

The term “posse comitatus” is best defined with the familiar concept of the posse gathered by the frontier sheriff to track down and apprehend a criminal. The translation is “the power of the county.” The legal definition of posse comitatus describes a group of people, usually taken from the population of the county over the age of 15, who, under the authority of a sheriff or police, are engaged in the search and arrest of a criminal. An important aspect of the definition is that the posse comitatus has the authority of search and arrest. For practical purposes, military forces conducting law enforcement missions operate as a posse comitatus, unless they fall under an exception.

The Posse Comitatus Act is the common name of 18 U.S.C. 1385, “Use of Army and Air Force as Posse Comitatus.” This statute provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus, or otherwise to execute the laws, shall be fined not more than \$10,000.00, imprisoned not more than two years, or both.

The statute was originally enacted in 1879 during the Reconstruction Era to eliminate the direct use of federal troops by civil authorities to police state elections in ex-Confederate states where civil power had been restored. Congress believed that the excessive use of federal troops undermined their policy of re-uniting the war-torn country and guaranteeing all races the right to vote. Over time, parties have viewed the PCA variously as an important check on the power of the federal government, an impediment to efficient governmental operations, and a firewall between the civilian and military functions of government.

## TO WHOM IT APPLIES

The statute applies to the active component (Title 10) Air Force, Army, and Reserves; and to the National Guard while in Title 10 (federal) service. While the Act does not specifically address the participation of the Navy and Marines in law enforcement activities, 10 U.S.C. 375 directs SECDEF to promulgate regulations forbidding them from directly participating in law enforcement missions. Accordingly, DoDD 5525.5 requires that these forces also abide by the restrictions of the PCA. The statute does not apply to the Coast Guard, or to the National Guard while in Title 32 (state) status, because such personnel do not fall within the definition of “Army” in 10 U.S.C. 3062. The statute also does not apply when the National Guard performs state active duty pursuant to state law, nor does it apply to active duty personnel who are off duty and acting in a private capacity. Finally, the PCA does not apply to DoD civilians unless they are under the direct command and control of a military officer.

While the PCA does not apply to the National Guard in state active duty or Title 32 status, National Guard troops do not necessarily have the right to act in a law enforcement role, absent an authorization to do so by the state. Although the PCA states what is prohibited and its various case law interpretations discuss what activities are prohibited and not prohibited, “NOT PROHIBITED” DOES NOT NECESSARILY MEAN “PERMISSIBLE” OR “AUTHORIZED.” THIS IS A CRUCIAL DISTINCTION. Law enforcement activities conducted by National Guard troops usually rely on an explicit authorization to act in this role. Generally, this authorization comes from a state statute, order of the Governor, or interstate compact between governors.

## TO WHAT ACTIVITIES IT APPLIES

The statute and implementing guidance in DODD 5525.5 generally prohibit the direct involvement of active duty forces in assisting civilian law enforcement officials in enforcing civilian laws, except when authorized by the U.S. Constitution or another federal statute. The statute prohibits active duty personnel from:

1. **Pursuing and arresting civilians** even though they have committed crimes; and
2. **Any active or direct assistance to civilian law enforcement officials to enforce civilian law** (such as interdiction of a vehicle, vessel, aircraft, or other similar activity; a search or seizure; an arrest, apprehension, stop and frisk, or similar activity; and use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators). See DoDD 5525.5.

Three different tests have been applied by the courts to determine whether the use of military personnel has violated the PCA.

1. Whether the action of military personnel was “**active**” or “**passive**.” (See *United States v. Red Feather*, 392 F Supp 916, at 921 (WDSO 1975)).
2. Whether armed forces personnel’s involvement in the activities of civilian law enforcement officials was “**pervasive**.” (See *Hayes v. Hawes*, 921 F.2d 100 (7<sup>th</sup> Cir. 1990)).
3. Whether military personnel subjected citizens to **the exercise of military power which was either regulatory, proscriptive, or compulsory**. (See *United States v. Kahn*, 35 F.3d 426 (9<sup>th</sup> Cir. 1994)).
4. For further guidance see the “military purpose activities” as described in DoDD 5525.5 para E4.1.2.1.

## WHAT IS NOT PROHIBITED and/or EXCEPTIONS TO PCA

1. PCA does not prohibit military personnel, when permitted to patrol areas outside a military base, from removing **military members from situations which could involve violations of civilian law**.
2. PCA does not prohibit military personnel from actively **pursuing and arresting military members**.
3. PCA does not prohibit military personnel, pursuant to the inherent authority of the commander, from **executing laws on a military base** when the action is necessary to fulfill a military purpose, such as the protection of military personnel or property.
4. PCA does not prohibit military personnel from **detaining civilians on military bases who violate laws** while on such bases. Upon detention of a civilian, the military should immediately summon civilian authorities to take custody of the detainee, as only civilian law enforcement agencies may arrest or apprehend a civilian violator. Advise security policemen to choose their words carefully, both orally and in written reports, and to avoid terms like “arrest” and “apprehension;” use “detain” instead.
5. PCA does not prohibit military personnel from engaging in **passive activities** (such as installation of traffic control measures, the passive use of observers, the loan and maintenance of military equipment, and the use of military installations and facilities in the normal course of military activities) in aid of civilian law enforcement.
6. PCA does not prohibit military personnel from participating in **humanitarian acts**, such as the search for a lost child, search and rescue, and disaster relief. However, the true purpose must be humanitarian, and must not be a subterfuge to disguise prohibited activities under the statute. For instance, civil authorities requested UAV support for law enforcement purposes after Hurricane Katrina. While the National Guard could provide information it obtained about criminal acts while performing other missions, the active control of a UAV for a law enforcement mission would have violated DODD 5525.5.
7. PCA does not prohibit **off-duty conduct**, unless it is induced, required, or ordered by military officials to whom the statute otherwise applies. Thus, if otherwise permitted, an ANG member could have an off-duty job in law enforcement, but an ANGUS Security Force commander could not order federalized troops to actively assist local law enforcement officers on law enforcement missions.
8. It is not a violation of the PCA for civilians to receive an **incidental benefit** from some of the military activities described above (Military Purpose Doctrine), as long as the primary purpose of the activity was to further a military interest (DoDD 5525.5).
9. PCA does not prohibit military personnel from **protecting classified military information or equipment, DoD personnel, DoD equipment, and official guests of the DoD**, or other acts that are undertaken primarily for a military or foreign affairs purpose.
10. The use of DoD personnel in **civil disturbances** is governed by DoDD 3025.12, which details special approval/coordination requirements for that type of support. Military resources may be employed in support of civilian law enforcement operations in the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. territories and possessions. Any employment of military forces in support of law enforcement operations shall maintain the primacy of civilian authority.
11. DoDD 3025.15 governs all DoD military **assistance provided to civil authorities** within the 50 States, District of Columbia, Puerto Rico, U.S. possessions, and territories, and provides criteria for evaluating all requests for support. Matters to be considered include the legality and lethality of the mission, its cost, and whether the mission impacts DoD’s ability to perform its own missions.
12. The Secretary of Defense has reserved the authority to approve DoD support for **civil disturbances, responses to acts of terrorism, and other civil support** that will result in a planned event with the potential for confrontation with specifically identified individuals or groups, or which will result in the use of lethal force.

13. The traditional uses of the Insurrection Act, 10 U.S.C. §§ 331-335, permit the President to use the armed forces to enforce the law to **prevent the loss of life or wanton destruction of property or to restore governmental functioning**, in cases of civil disturbances, if the duly constituted local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization, or when duly constituted state or local authorities are unable or decline to provide adequate protection for federal property or functions. The use of federal and federalized forces under the Insurrection Act was traditionally limited to: “insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy,” but has recently been expanded, as discussed below. However, the overarching policy of providing **support** to civilian officials should always be kept in mind. Active duty military personnel (other than Security Forces or similar personnel) are not trained in law enforcement. National Guard personnel may receive some law enforcement training.

14. In response to the events following Hurricane Katrina and over the objections of a large majority of state governors, Congress significantly expanded the President’s authority to use federal and federalized troops for law enforcement under the Insurrection Act. The Defense Authorization Act of 2007 allows the President to use federal and federalized troops to restore order in any “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition” if he determines, in his sole discretion, that the conditions obstruct the execution of federal laws or otherwise deny the people their civil rights. The Act even changed the name of the chapter in the United States Code from “Insurrection” to “Enforcement of the Laws to Restore Public Order,” fundamentally changing the nature of the Act. While the scope of application of this new section has not yet been tested, it could potentially be used to totally federalize most responses to major disasters in the United States. As a practical matter, commanders should ensure that they know their status as state or federal actors and the authorized scope of their duties in a domestic operation.

15. **Loan/Lease of Military Equipment to Civilian Law Enforcement.** Civilian law enforcement officials often request the loan of military equipment during civil disturbance operations. In light of the DoD goal to minimize the military presence in such operations, this practice is viewed as an effective means of accomplishing that goal. The details of providing this support to civilian authorities is discussed elsewhere.

16. **Exercise of Authority over Civilians.** When permitted by their operations orders T32 military personnel do have the authority to detain or take into custody rioters, looters, or others committing offenses. Generally, however, searches should be conducted by civilian law enforcement because of their greater familiarity with search and warrant procedures.

17. Because **military working dogs** qualify as “equipment” and are thus subject to loan to civilian law enforcement agencies, DoD policy requires requests for military working dog support, if approved, to be filled with dogs and their handlers. MWD support may only be provided under circumstances that preclude confrontation between the MWD and civilian search subjects. Accordingly, MWDs providing civilian law enforcement support may not be used to search or track people, to seize or retrieve evidence, to search buildings or other areas for personnel, or to pursue, bite, and hold, or in any way assist in apprehending, arresting, or detaining persons. See DoDI 5525.10.

Remember that T10 military personnel cannot execute or aid civilian authorities in *executing civilian laws*, directly or actively, *except in certain very limited circumstances*. PCA does not prohibit the use of federal property for such purposes, but be careful because other statutes or regulations may prevent the use of federal property for such purposes.

NGR 500-1/ANGI 10-8101 provides detailed explanations of the use of National Guard personnel and property in support of civil authorities, and is applicable when National Guard personnel are not in a Title 10 status. Note that when federal property is used by the Guard in responding to emergencies within a state, reimbursement for the costs incurred are required.

Also be aware that new programs and new legislation may be developed concerning the use of the Guard to perform the mission of “homeland defense.” Homeland defense is a new area that will combine many of the issues faced by the National Guard when responding to state emergencies with issues faced by the Guard in the counterdrug program. All guidance in this area, whether statutory or regulatory, should be strictly construed.

## **LAW ENFORCEMENT DUTIES IN STATE STATUS**

This subsection addresses general law enforcement duties by Air National Guard troops in state active duty status, as well as the specific provisions of the federally funded counterdrug program. Specific law enforcement concerns, such as the Rules for the Use of Force, are addressed in separate sections. In general, Air National Guard troops in state status have few federal restrictions on their activities, leaving the most common issues those of state law, the use of forces outside of their home state, and any restrictions arising from the type of funding provided for the operation.

### **GENERAL LAW ENFORCEMENT DUTIES IN STATE ACTIVE DUTY STATUS**

1. Authorization. State laws vary widely on their treatment of troops in the state militia acting in support of law enforcement missions. Guardsmen may or may not have the same privileges and duties as peace officers in the state. Federal law does not provide any particular authorization for Guardsmen to act in this role and does not provide them with any additional privileges.

Always ensure that airmen are trained in their issue weapon and in the Rules for use of Force prior to engaging in law enforcement missions.

Absent a specific state law granting law enforcement powers to the state militia, the ANG generally will only have the limited powers granted under the applicable civil arrest statute, deputization rules, or the terms of the activation by the Governor. The terms of the authorization will determine the nature of the mission and what Rules for the Use of Force will apply. Commanders have the responsibility to provide appropriate guidance on the use of force to their troops and bear responsibility for the actions of their troops acting under that guidance. Always ensure that troops issued weapons and ammunition know when they may use them.

2. Out of State Missions. In times of emergency, Governors may “lend” troops in a state active duty or Title 32 status to the Governor of another state. Usually, they accomplish this under the auspices of an Emergency Management Assistance Compact, or EMAC. EMACs do not contain an annex for law enforcement activities, although governors may negotiate a parallel agreement for the use of forces in law enforcement duties. This agreement, or the provisions of law in the receiving state, will determine the type of missions the unit may engage in, and the limitations the unit may have on the use of force in the performance of these missions.

3. Funding. In the event of an emergency in a state, the Governor will usually use National Guard troops only when civilian resources cannot meet the anticipated or actual need for services during or following an emergency. Initially, the Governor will generally activate National Guard troops in state active duty status using state funds. However, states usually have limited emergency response budgets. The declaration of an emergency by the President frees up federal funds, usually disbursed through the Federal Emergency Management Agency, to the state or states in which the emergency occurred. If approved by FEMA, the state may request these funds to support National Guard activities in response to the emergency. If troops go to another state under EMAC or another agreement, the sending state may need to request reimbursement from the receiving state, who may, in turn, request the funds from FEMA.

### **COUNTERDRUG SUPPORT**

The federal government provides funding for certain counterdrug activities under 32 U.S.C. § 112. To receive these funds, the state must submit a plan through the National Guard Bureau, have it approved, and agree to abide by the restrictions imposed by the program and plan. While the Posse Comitatus Act does not prohibit Guardsmen in Title 32 status from performing law enforcement duties, as a policy matter the program prohibits Guardsmen from directly participating in the arrest of suspects, conducting searches which include direct contact of National Guard members with suspects or the general public, or becoming involved in the chain of custody for any evidence. State law may impose additional restrictions on Guardsmen acting in a law enforcement role.

The program allows Guardsmen to provide the following services: program management, technical assistance, general support, counterdrug-related training, reconnaissance, and drug demand reduction support. Consistent with these duties, the program does not anticipate that Guardsmen will generally bear arms in the performance of

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## WILDLAND FIRE FIGHTING

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Major Marshall L. Wilde, Sep 2007

**AUTHORITY:** ANGI 10-8101, *Military Support to Civil Authorities*, (1 February 1996), National Interagency Fire Center Military Use Handbook (July 2006), applicable provisions of state law.

### INTRODUCTION

Every year, wildland fires break out across the United States and particularly in the West. In particularly bad fire years, Governors and the President may declare an emergency, disaster, or fire management assistance declaration and activate the National Guard for forest fire fighting duty, usually in a state status. The Forest Service, through the National Interagency Fire Center, publishes a comprehensive guide to active duty military operations, called the "Military Use Handbook." State status National Guard troops technically fall under local Memoranda of Understanding, rather than the Handbook, but the Military Use Handbook still serves as a good reference for the issues that arise in these operations.

### GENERAL AND GROUND OPERATIONS

The Forest Service or state forestry service requests assistance for wildland fire fighting to the Governor of the state. The Governor then activates National Guard troops, usually in a state active duty status, but occasionally in Title 32 status. Before serving on a fire, ground troops receive a 2 ½ day training program from the Forest Service on the basics of fire fighting. Deployments to fires often involve lodging in field conditions, requiring coordination of the types of equipment that the Forest Service will provide and those that the deploying unit should bring. (Note: Synthetic and steel-toed boots may not be used on any fire and Forest Service policy may prohibit the possession of firearms in the base camp or on the fire.) Usually, the Forest Service provides the majority of logistical support, in terms of food and expendables, however the specific incident may require the use of military tactical vehicles (typically HMMWVs, trucks, and water buffaloes, not APCs or heavier armored vehicles).

Upon arrival at the fire, if assigned to ground duties, ANG troops usually serve in 20 member "mop-up" crews, helping extinguish fires that other personnel of contained. However, as the team grows in experience or as the need arises, the Forest Service may employ them in hot line or even initial attack duties. The Forest Service will provide supervision and information about the type of duty. The Forest Service stresses safety and should provide safety planning, but this does not excuse the supervisory chain from assessing the threats to safety and addressing them appropriately.

The military chain of command retains command authority, although the Forest Service will direct all fire fighting activities. Military commanders should recognize that the military acts in a supporting role to Forest Service priorities and their primary duties involve implementing Forest Service priorities through appropriate planning and support. The Forest Service essentially directs the operations of ANG forces, while the military chain of command advises and supports them. However, military commanders should advise their Forest Service liaisons when their directives violate good military practice.

### AIR OPERATIONS

Forest Service policy places control of aviation assets under the control of the military component involved. The Forest Service designates 5 general categories of support for military aviation, called "designated military missions": reconnaissance/command and control activities, emergency evacuation/medevac, crew transportation in and around the fire perimeter, cargo transportation, internal or external, and crew and cargo staging from airports to base camps for the purpose of incident support. Fire suppression by aerial bombardment with water or retardant falls under a different category – non-designated military missions. ANG aircrews will not generally engage in these activities, and will never do so without completing the necessary additional training to do so. Forest Service policy

discourages the use of active duty military forces in this role because of the additional training required. Instead they prefer to identify ANG and Reserve crews well in advance for the advanced training required.

Once assigned to an incident, the Forest Service assigns military aircraft to missions on the same basis as civilian aircraft. Military commanders should advise Forest Service aviation planners regarding the roles and missions their aircraft can perform. The Forest Service has the expertise in how to combat the fire, but military commanders have the expertise regarding the appropriate use of their troops and equipment and must advise the Forest Service on employment issues.

## **CONCLUSION**

Governors often turn to their National Guard troops to respond to emergencies that exceed the capabilities of civilian agencies to handle, including wildland fires. ANG troops serve in a supporting role to the Forest Service in wildland fire fighting and generally serve under their tactical control. However, the military chain of command remains intact to provide supervision, support, and advice regarding the appropriate use of their troops.

***KWIK-NOTE: Do not assume that the Forest Service liaisons know much about the military. Your job is to advise them regarding your capabilities and limitations.***

## **RELATED TOPICS:**

	<b>SECTION</b>
Activation, Chain of Command and Discipline in the Force	28-2
Fiscal Law and Title 10 Activations	28-6
Arming and Rules for the Use of Force	28-7
Medical Issues	28-9
Liability and Environmental Issues	28-10

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## **SUPPORT OF BORDER OPERATIONS/OPERATION JUMP START**

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**Major Marshall L. Wilde and LTC Jeffrey R. Csokmay, Sep 2007**

**AUTHORITY:** Operation Jump Start Memorandum of Agreement Between the States of Arizona, California, New Mexico, and Texas and the Department of Defense, 5 June 2006; Operation Jump Start Rules for the Use of Force (might call and get date); 32 U.S.C. 502(a) and (f); DoDD 3025.15, *Military Assistance to Civil Authorities (18 February 1997)*; ANGI 10-8101, *Military Support to Civil Authorities*, (1 February 1996), applicable provisions of state law.

### **INTRODUCTION AND MISSION**

On May 15, 2006, President George W. Bush addressed the nation and presented a plan to reform both U.S. immigration law and border security. As an immediate step to enhance security along the U.S. border with Mexico, the President initiated "Operation Jump Start" calling for up to 6000 National Guardsmen to support the efforts of the U.S. Customs and Border Protection Service ("CBP") in the States of Arizona, California, Texas and New Mexico. The primary mission of the deployed National Guard forces is to provide the CBP with administrative, engineering, logistical and surveillance support so that CBP agents can concentrate their efforts on direct law enforcement. Operation Jump Start's planned duration is two years, during which time the CBP is expected to hire and train 6000 additional agents.

### **NATIONAL GUARD DUTIES ON THE BORDER**

National Guardsmen deploying on Operation Jump Start conduct the following four primary missions in support of the CBP:

1. Observation. The majority of Guardsmen are performing border observation and surveillance duties from static and mobile observation posts. Basically, these troops watch the border and immediately inform the CBP when they observe people crossing the border. The National Guard thus serves as the eyes and ears of the CBP whose agents conduct all actual apprehension and detention of suspects.
2. Electronics/Technical Support. Guardsmen are operating and maintaining electronic equipment for the CBP. This equipment includes computers, sensors, communication gear and other assets.
3. Personnel and Administration Support. Guardsmen are performing payroll and personnel support functions for the CBP.
4. Vehicle Maintenance. The CBP operates a large number of on and off road vehicles and Guardsmen are assisting in maintaining this fleet.

In addition to the four above major continuous missions, Guardsmen have also performed other duties as needed. These have included the provision of medical support and the construction of border security infrastructure. ANG troops have also provided transportation and limited intelligence gathering services.

Military forces have a long history of performing the border observation mission on an episodic basis. We anticipate that this mission will probably continue, at least intermittently, well into the future. In the past, armed confrontations have erupted between border crossers and military forces observing the border, leading to certain policy restrictions on the use of military forces on the border.

### **ADMINISTRATION**

**National Guardsmen deploying in support of Operation Jump Start perform their duties under Title 32 U.S.C. Sections 502(a) and (f) and are therefore considered Federal employees within the meaning of the Federal Tort Claims Act. Accordingly, they are exempt from tort liability while acting within the scope of their assigned duties. The governors of the supporting states retain, for administrative purposes, command and control of supporting state forces. The governors of the supported states, through their respective adjutants general, exercise operational control of all assigned, attached or detailed National Guard forces.**

## **RULES FOR THE USE OF FORCE**

The arming policy and Rules for the Use of Force for Operation Jump Start focus on the inherent right of self-defense. National Guardsmen deployed on Operation Jump Start are not to engage in direct law enforcement activities. They are not to attempt to detain or interfere with people crossing the border. National Guardsmen may, however, always use the minimum force necessary to defend themselves or others or to control the situation. If possible, an escalating level of force shall be applied, and any force utilized must be proportional to the threat. Force of any kind shall not be used in response to verbal provocation alone. The RUF require that each of the following three criteria be met before any use of deadly force is authorized:

- 1) a reasonable belief that the subject of the deadly force poses an imminent danger of death or serious bodily injury to the guardsman or another person;
- 2) all other means have been exhausted or are not readily available, or the situation does not permit use of lesser force; and
- 3) the use of deadly force does not unreasonably increase the risk of death or serious bodily injury to innocent bystanders.

## **CONCLUSION**

Operation Jump Start has already proven to be a success. The National Guard's support of the CBP has freed up CBP agents from non-law enforcement duties thus enabling them to concentrate their efforts on policing the border. Further, Operation Jump Start has resulted in a much strengthened border security infrastructure with miles of fencing, lighting, vehicle barriers and road improvements being added. A drop in the numbers of illegal aliens apprehended has been attributed to the deterrent effect Operation Jump Start has had on people trying to illegally cross the border.

***KWIK-NOTE: Take extra care to ensure that airmen deploying to Operation Jump Start know their role and the limits on the use of force.***

### **RELATED TOPICS:**

	<b>SECTION</b>
Aid to Civilian Authorities	6-2
Activation, Chain of Command and Discipline in the Force	28-2
Posse Comitatus and Law Enforcement Operations	28-3
Arming and Rules for the Use of Force	28-7
Medical Issues	28-9
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## FISCAL LAW, TITLE 10 ACTIVATION, AND REIMBURSEMENT

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Major Marshall L. Wilde, Sep 2007

**AUTHORITY:** 10 U.S.C. §2567; DoDD 3025.1, *Military Support to Civil Authorities*, (15 January 1993); AFI 10-801, *Assistance to Civilian Law Enforcement Agencies* (15 April 1994); AFI 10-802, *Military Support to Civil Authorities* (19 April 2002); ANGI 10-8101, *Military Support to Civil Authorities*, (1 February 1996), applicable provisions of state law.

### INTRODUCTION

National Guard troops may be activated in either state or federal status. Generally, for emergencies within their state, the Governor will activate them when local resources are exhausted or are anticipated to be inadequate to meet the need. If state resources, including the state's National Guard, cannot meet the need for services generated by the event, then the President may send federal forces, including activated National Guard of the United States forces in some cases, to meet the need for services. In addition to the issues discussed in other sections, federalized forces often run into fiscal law issues, coordination issues with the lead federal agency on an event, and issues working with non-governmental organizations.

### FISCAL LAW ISSUES

Fiscal law issues often place limits on the type and nature of operations a commander may order his unit to conduct. Generally speaking, fiscal law places limits on the time, purpose and amount of expenditures of federal funds. First, when Congress allocates funds to the military, it sets time limits for their expenditure before they revert to the Treasury. Anyone familiar with "end of year fallout money" has experienced this phenomenon. Having money left over from last year's Operations and Maintenance (O&M) appropriation will not help you in the current fiscal year, as O&M funds are generally appropriated for a single year period of availability. Congress also appropriates funds for a particular purpose. Commanders must spend appropriated funds for the specified purpose, or for expenses necessary and incident to the proper execution of the general purpose of the appropriation, for purposes not prohibited by law, and not for projects provided for in another appropriation. Appropriations also obviously have limits on the amount of an appropriation. The Anti-Deficiency Act (ADA) imposes a criminal penalty for violating fiscal law restrictions, especially for committing the federal government to pay funds not authorized by Congress.

"What color is your money?" is a not-uncommon question in both the domestic and overseas deployed environments. Typically, Congress allocates certain funds for every contingency. Commanders get into trouble when the funds allocated directly to the military do not suffice to accomplish the mission, but private contractors have not arrived on the scene. Logically, they must take action, but they lack the funds to do so. In the immediate response to emergency situations, DoD Directive 3025.1, *Military Support to Civil Authorities (MSCA)* (Jan. 15, 1993) allows commanders to address "[i]mminently serious conditions resulting from any civil emergency or attack may require immediate action by military commanders, or by responsible officials of other DoD Agencies, to save lives, prevent human suffering, or mitigate great property damage. When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DoD Components are authorized by [DoD Directive 3025.1], ... to take necessary action to respond to requests of civil authorities. All such necessary action is referred to ... as 'Immediate Response.'"

Congress recently expanded the authority to provide support in response to natural disasters, terrorist incidents, and other emergencies. Under 10 U.S.C. §2567, If the President exercises authority to respond to such an incident because the incident interferes with the functioning of federal law, the Department of Defense may provide "supplies, services and equipment" to persons affected by the situation, without regard to the 10 day limitation applicable under the Stafford Act. This 10 day limitation had previously represented the limit of a commander's authority to render aid in an emergency. However, this support may only be used if it does not affect military readiness and may not be used if other state resources are adequate to meet the need.

## **REIMBURSEMENT**

In non-immediate situations, the Stafford Act allows DoD to provide FEMA (generally the lead federal agency) with services on a reimbursable basis. Remember, to be reimbursable, the expense must be directly for the purpose specified by FEMA or reasonable and incident to the purpose given by FEMA. Reimbursement can become a major issue in a domestic operation, and should not be assumed absent prior coordination with FEMA.

## **WORKING WITH A LEAD FEDERAL AGENCY**

As noted above, FEMA serves as the lead federal agency (LFA) in major disasters. DoD sends federal or federalized forces to support the Federal Coordinating Officer, the individual in charge of coordinating federal and state recovery efforts. The Stafford Act provides for reimbursement only for defense activities conducted under the direction of the FCO or as necessary to fulfill the demands of the FCO. To give an example, if the state and federal governments disagreed on the use of the federalized forces, the state could not request that the federalized forces act independently of the FCO. However, non-federalized forces could act in response to the state's requests, although reimbursement for their expense might be a problem.

As always, military commanders remain the experts on the employment of their forces. The FCO works with the Defense Coordinating Officer, who coordinates the DoD response, to help determine which missions the forces available can accomplish, and which need to be accomplished by other forces. As a practical matter, military commanders should not assume that federal civilian officials know the capabilities and restrictions of military forces and should take a proactive role in advising them. For instance, a FEMA civilian may not know that, while the Army Corps of Engineers has unique expertise in the operation of major civilian works, like dams, a typical deployed Air Force civil engineering team would not have that particular expertise. Of particular concern, the declaration of a major disaster does not suspend the provisions of the Posse Comitatus Act. The FCO may not use federalized forces in a law enforcement role, despite the military's familiarity with use of force issues. As non-federalized forces often do these missions, military commanders have to draw a firm line between federal and non-federalized missions.

## **WORKING WITH NON-GOVERNMENTAL ORGANIZATIONS**

As evidenced by the response to Hurricane Katrina, the federal government works with NGOs extensively in domestic operations. While these organizations provide invaluable services, they do create certain fiscal law issues. First of all, the Anti-Deficiency Act prohibits the acceptance of voluntary services, unless a specific exception applies. Fortunately, there are several exceptions: immediate assistance to protect life or property, medical care, natural resources programs, family support activities, the Red Cross, and certain gratuitous services provided under a written waiver of compensation. Further, certain gifts can present problems. For financial gifts, federalized troops cannot accept donations directly. Absent an exception, funds given to the federal government must be deposited into the Treasury. This does not prohibit a contribution to a NGO supporting deployed troops or a similar organization. Sometimes, people wish to give non-financial gifts to federalized ANGUS forces. AFI 51-601 governs these gifts, allowing installation commanders to accept gifts of \$5,000 or less. However, the usual prohibition on the augmentation of appropriated funds applies and donors should be willing to sign a written instrument documenting the gift.

## **CONCLUSION**

Fiscal law issues come up often in the activated environment. Good legal advice can help you find the permissible ways to accomplish your mission. Often effective alternatives exist to prohibited expenditures. Remember that reimbursement of your O&M expenditures can become a major issue if your actions are not properly coordinated with FEMA.

***KWIK-NOTE: Know the amount of money available for the mission and the limits on your authority to spend it.***

**RELATED TOPICS:**  
Aid to Civilian Authorities

**SECTION**  
6-2

Activation, Chain of Command and Discipline in the Force	28-2
Posse Comitatus and Its Exceptions	28-3
Wildland Fire Fighting	28-4
Support of Border Operations/Operation Jump Start	28-5
Liability and Environmental Issues	28-10

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## ARMING AND THE USE OF FORCE

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**Major Marshall L. Wilde (review and contributions from NGB/JA, Col Cindi Ryan, Mr. Daryl Phillips and Maj Dave Bolgano), Sep 2007**

**AUTHORITY:** 18 U.S.C. § 1385; 10 U.S.C. §§ 331-334; 10 U.S.C. §§ 371-382; 32 U.S.C § 112; CJCS SROE/SRUF (CJCSI 3121.01B); DoDD 3025.12, *Military Assistance for Civil Disturbances* (4 February 1994); DoDD 3025.15, *Military Assistance to Civil Authorities* (18 February 1997); DoDD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials* (15 January 1986); DoD 4515.13-R, *Air Transportation Eligibility* (November 1994); DoDI 5525.10, *Using Military Working Dog Teams (MWDTs) to Support Law Enforcement Agencies in Counterdrug Missions* (17 September 1990); AFI 10-801, *Assistance to Civilian Law Enforcement Agencies* (15 April 1994); AFI 10-802, *Military Support to Civilian Authorities* (19 April 2002); AFPD 10-8, *Homeland Defense and Civil Support* (7 September 2006); AFMAN 31-201V6, *Civil Disturbances* (17 May 2002); NGR 500-1/ANGI 10-8101 (Note: this instruction is in the process of being revised and renamed.), *Military Support to Civil Authorities* (1 February 1996) ANGI 10-801, *National Guard Counterdrug Support* (31 March 2000); applicable provisions of state law.

### INTRODUCTION

The mission dictates the Rules for the Use of Force (RUF) and the arming policy. The RUF and arming policy for state forces in a law enforcement mission will sometimes differ from those of a federalized unit performing domestic operations. . The National Guard is at all times, except when called or ordered to federal active duty, a state government entity. The policies of the Department of Defense and service regulations governing RUF apply to elements of the Department but not to the states. As a result, the law that is the basis for the RUF applicable to the National Guard of a state while in any status but federal active duty status is the criminal law of the state in which a National Guard unit is located. See LtCol Wendy Stafford, *How to Keep Military personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, Army Lawyer, November 2000. CJCS SRUF applies to the National Guard only when in a federal status (Title 10). Remember that, in all roles, commanders should not unduly limit the right to individual or collective self-defense, or they risk the RUF becoming irrelevant. Domestic RUF should emphasize the importance of de-escalating situations to avoid the need to use force, if possible. However, when NG members are in a Title 32 status, being paid with federal funds, DoD, through NGB, may in fact provide limitations as a condition to receiving funds. Nevertheless, the RUF cannot violate state law. A source for assessing the permissive nature of an individual State's use of force policy is the Use of Force policy of the State Police or Highway Patrol.

### TRAINING

It is imperative that National Guard forces be properly trained on the use of force in a particular mission. It is not enough just to give them a "PowerPoint" presentation. Our forces need to be provided situations, facts, and circumstances that allow them the opportunity to "think on their feet" and learn to respond appropriately within minutes if not seconds. Proper training will not only improve operational security, the security of our own personnel and prevents lawsuits, but it will further enhance our relationship with the United States public. Especially important when training personnel, is ensuring that they realize that the RUF apply to domestic missions within our homeland and when citizens of the United States, rather than enemy combatants, are involved. They must understand that RUF, which are based upon state law, are ultimately grounded in the Fourth Amendment to the United State Constitution which applies to their missions even when in State Active Duty and Title 32 status.

### STATE STATUS RULES FOR THE USE OF FORCE AND ARMING POLICY

#### 32 USC 112 (Counter-Drug Missions)

For counterdrug missions funded by 32 USC §112, special RUF apply Although National Guard units under State command and control have greater flexibility than active component forces in conducting counterdrug missions

because the PCA does not apply to them, the National Guard Bureau has imposed several policy restriction on National Guard counterdrug operations in National Guard Bureau Regulation (NGR) 500-2/ANGI 10-801, *National Guard Counterdrug Support*. As a matter of policy, National Guard personnel will not directly participate in the arrest of suspects, conduct searches which include direct contact of National Guard members with suspects or the general public, or become involved in the chain of custody of any evidence, except in exigent circumstances, or when otherwise authorized.

For civil disturbance control operations performed in SAD and 32 USC statutes, and as a condition to using federal property and equipment, ANGI 10-8101 provides the following RUF, unless state law provides more restrictive provisions:

1. The use of force must be restricted to the minimum degree consistent with mission accomplishment.
2. The use of deadly force can be justified only by extreme necessity. It is authorized only where all three of the following circumstances are present –
  - a. Lesser means have been exhausted or are not available.
  - b. The risk of death or serious bodily harm to innocent persons is not significantly increased by its use.
  - c. The purpose of its use is one or more of the following
    1. Self defense to avoid death or serious bodily harm, including the defense of other persons.
    2. Prevention of a crime that involves a substantial risk of death or serious bodily harm; for example, setting fire to an inhabited dwelling or sniping.
    3. Prevention of the destruction of property vital health and safety.
    4. Detention or prevention of the escape of a person who, during the detention or on the act of escaping, presents a clear threat of loss of life or serious bodily harm to another person.

The rules on the use of force for civil disturbance missions in a federalized status are governed by the Garden Plot \* plan. The CJCS SRUF does not apply to civil disturbance missions.

For other domestic operations, state law governs.

## **THE USE OF FORCE IN A FEDERAL ROLE**

In the federal role, troops conducting operations in the US generally abide by the unclassified Enclosure L of CJCSI 3121.01B (13 June 2005). The enclosure states that unit commanders always retain the inherent right and obligation to exercise unit self defense and may limit the right of individuals to act in self-defense when performing a mission with the unit. Commanders should exercise extreme caution in attempting to limit the right to individual self-defense and should always remember their obligation to effectively protect their forces.

The use of force should be reasonable in intensity, duration and magnitude based on the totality of the circumstances. The federal RUF allow the use of non-lethal weapons, including pepper spray, but do not authorize warning shots. They permit the use of deadly force when all lesser means have failed or cannot be reasonably employed in the following circumstances – self-defense, defense of others, protection of assets vital to national security, protection of inherently dangerous property, protection of national critical infrastructure and in three instances involving criminal conduct. These authorize deadly force to: 1) prevent the commission of a serious offense that involves an imminent threat of death or serious bodily harm, 2) prevent the escape of a prisoner suspected of committing or attempting to commit a serious offense, and 3) arrest or apprehend (or detain) a person who is suspected to have committed a serious offense involving death or serious bodily harm. These general rules do not cover all missions. The CJCS SROF has additional annexes for specific missions. Commanders should consult these annexes, which may be classified, before deploying on a mission.

## **ARMING ORDERS**

Arming considerations follow the mission and the RUF. Arming orders are a state of preparedness to use force.

They should not be confused with the authority to use force once an airman is faced with a threat.

In almost all domestic missions, troops are armed primarily to defend themselves and critical assets. Fully automatic weapons and explosives should require a special justification of need. If non-lethal means are employed, troops should receive training on their employment. ANGI 10-8101 requires a locking plate to prevent the use of the M16/A1/A2 in full automatic mode during civil disturbances, as fully automatic fire does not meet the requirement to minimize the risk to innocent parties. ANG personnel should only receive weapons that they have qualified to use. Keep in mind that weapons policies vary between the services. Commanders should not require troops to carry weapons in an unfamiliar loading or safety status.

## CONCLUSION

The RUF for a given mission may vary with the federal or state status of NG personnel, the location of the mission, and the nature of the mission. Commanders should balance the RUF they adopt for their troops with the need to protect their force and their mission. Good RUF do not substitute for good judgment on the scene. Commanders should stress the importance of de-escalating conflict and resolving conflict without the use of force.

***KWIK-NOTE: Commanders have the obligation to provide RUF prior to arming troops.***

### RELATED TOPICS:

	SECTION
Aid to Civilian Authorities	6-2
Activation, Chain of Command and Discipline in the Force	28-2
Posse Comitatus and Its Exceptions	28-3
Support of Border Operations/Operation Jump Start	28-5

\* For the USNORTHCOM AOR, Garden Plot has been replaced by USNORTHCOM CONPLAN 2502, *Civil Disturbance Operations*, 23 January 2007. The SRUF will be used as modified by SECDEF and the US Attorney General based upon mission needs Garden Plot will remain in effect for the PACOM and SOCOM AOs.

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## INTELLIGENCE OVERSIGHT IN FEDERAL STATUS

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Major Marshall L. Wilde, Sep 2007

**AUTHORITY:** 50 U.S.C. § 401 et seq., 50 U.S.C. §1801; EO 12333; DoDD 5200.27, Acquisition of Information Concerning Persons and Organization Not Affiliated with the Department of Defense; DoDD 5240.1, DoD Intelligence Activities; DoD 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components That Affect U.S. Persons; Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation (C) (5 April 1979) and 20 June 1996 Supplement.

### INTRODUCTION

Federal law puts substantial limitations on the activities of intelligence personnel in the United States. Generally speaking, military organizations in Federal status may only collect information on US persons (including corporations and unincorporated associations) essential to protect DoD functions and property, maintain personnel security, and conduct operations related to civil disturbances. Basically, OSI and Security Forces personnel usually conduct those missions under restrictive policies. In the context of domestic operations, the issues of intelligence oversight come to light mostly in response to requests from civilian authorities.

### REQUESTS FOR ASSISTANCE

Requests for intelligence support do not always violate the restrictions on intelligence collection. For instance, we may conduct missions for damage assessment, search and rescue, and disaster relief operations with ANG assets. These do not violate the restrictions. However, we will not generally support requests for intelligence to support law enforcement assets, unless authorized by SECDEF. When we obtain law enforcement intelligence incidentally to our operations, we may pass that information to appropriate law enforcement agencies. For instance, if we used UASs to survey an area struck by a tsunami for damage, and happened to see individuals engaged in criminal activity, we should pass that information on to civilian law enforcement authorities. However, we could not support a direct request by law enforcement authorities to survey an area for the purpose of finding criminal activity.

We may use ISR platforms or other technology to detect and identify direct threats to DoD forces, facilities, and personnel. For instance, we could use a UAS to maintain overwatch and threat detection for a group of airmen conducting search and rescue operations. We could not, however, use the same assets under federal control to perform the same mission for non-federalized National Guard troops conducting law enforcement operations.

As a general rule, remember that the federal government “owns” much of the equipment we operate. While we retain the ability to act in a number of roles in state status, when we activate, we follow the same restrictions as active duty Air Force personnel. Federal law has evolved to include several restrictions to keep the federal military mission focus away from internal intelligence gathering and law enforcement. When we use “our” equipment, we have to take into account the restrictions that federal law may place on it.

### GUIDANCE ON THE USE OF UNMANNED AERIAL SYSTEMS (UAS)

The Department of Defense recently (Sep 2006) released new guidance on the use of Unmanned Aerial Systems. The new policy encourages the use of UAS in domestic operations, but does not change the backdrop of legal restrictions on intelligence gathering on specific people within the United States. Prior to the use of UAS in Defense Support of Civil Authorities missions, the consent of the Secretary of Defense (or his designee) must be obtained using the processes spelled out in DODD 3025, Defense Support of Civil Authorities, DODD 5525.5, Military Support of Civilian Law Enforcement, or CJCSI 3701.01, DoD Counterdrug Operations. However, DoD encourages the states to incorporate the use of UAS systems in their homeland security and consequence management planning. As a matter of policy, National Guard personnel conducting DoD UAS domestic Homeland Defense or Defense Support of Civil Authorities mission will be in Title 10 status, unless otherwise directed by the Secretary of Defense.

## CONCLUSION

While Air Force ISR platforms have the ability to assist law enforcement operations, intelligence law restrictions often prevent their use. As a general rule, we may use these assets only for non-law enforcement missions, although we may protect our own forces, facilities and operations and pass on incidentally collected information.

***KWIK-NOTE: The intelligence law restrictions mirror the Posse Comitatus Act - we may not use them to support law enforcement directly.***

### RELATED TOPICS:

	SECTION
Aid to Civilian Authorities	6-2
Activation, Chain of Command and Discipline in the Force	28-2
Posse Comitatus and Law Enforcement Operations	28-3
Support of Border Operations/Operation Jump Start	28-5
Fiscal Law, Title 10 Activation, and Reimbursement	28-6

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## MEDICAL ISSUES

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**Major Marshall L. Wilde, Sep 2007**

**AUTHORITY:** 10 U.S.C. §; 18 U.S.C. § 1385; 42 U.S.C. 300hh-11; 42 U.S.C. § 264; 42 C.F.R. Part 70; DoDD 6200.3, Emergency Health Powers on Military Installation (12 May 2003), AFI 48-105, *Surveillance, Prevention, and Control of Diseases and Conditions of Public Health or Military Significance* (1 March 2005); applicable state law.

### INTRODUCTION

Medical ANG elements may respond in a variety of roles to a major disaster. While they do not have a prohibition on treating civilians, they should place a priority on accomplishing the assigned mission. Medical issues arise in the immediate aftermath of a disaster, during employment as a supporting unit of a military deployment and when used to conduct missions under the direction of the Public Health Service. Reimbursement of funds can become a major issue in medical missions, requiring coordination with FEMA and the Public Health Service prior to deployment.

### IMMEDIATE RESPONSE AUTHORITY

Commanders have the authority to respond immediately to emergencies to save the life or health of people in the immediate area. This immediate response authority allows them to take such steps as may be immediately necessary to treat injured or ill people in the immediate aftermath of a disaster, or who they encounter in the performance of another mission. This authorization only applies to immediate actions or actions taken to address an emergency. So, in the event of a hurricane, military personnel could take care of civilians injured in the immediate aftermath of the hurricane. However, they could not use this authority to, for instance, vaccinate the community against the flu. This authority includes the authority to conduct necessary medical duties in support of other operations, such as search and rescue.

### RESPONSE AS A SUPPORTING ELEMENT OF A DEPLOYING MILITARY FORCE

ANG units may deploy with integral medical elements to maintain a healthy force. While these units may engage in immediate and emergency responses to civilian crises, they should maintain their general focus on maintaining military readiness, not providing services to the civilian community.

### RESPONSE AS A PART OF THE NATIONAL DISASTER MEDICAL SYSTEM

The military serves in the National Disaster Medical System under the direction of FEMA, the Department of Health and Human Services (HHS), and the Public Health Service (PHS). HHS provides the medical response for FEMA during a major disaster. The Public Health Service is the organization in HHS which conducts these activities. In this role, rather than providing support to a deployed military element, ANG medical elements may perform the duties detailed to them by FEMA and the Public Health Service. These duties may include specialized military missions, such as aerovac, or more general medical support, such as aiding in vaccination to prevent outbreaks in disaster survivors. The scope of these duties should be made clear by the requesting agency. Military medical elements should avoid mission creep and exceeding the authority given in these missions, although they may point out military capabilities to the civilian agencies they support.

### SPECIAL ISSUES

**Mortuary Services and the Handling of Dead Bodies.** While civilian authorities may task military units to conduct these missions, care should be taken to avoid the handling of bodies by unqualified personnel. In addition to the real public health risks involved, exposure to dead bodies entails substantial risk of psychological damage.

Commanders should avoid exposing their troops to this risk without preparing them. Also, remember that the services element has responsibility for mortuary affairs, not the medical element.

**Enforcement of Quarantine.** State authorities have the primary role in imposing and enforcing quarantine. The CDC has certain limited authority to respond as the lead federal agency if state resources are exhausted or the threat comes from outside the country. Generally speaking, the issue of quarantine enforcement is one of state law and is accomplished with the use of forces in a state status, if necessary, when civilian resources are exhausted. If the need exceeds state resources, federal or federalized forces may act in their traditional support roles. The Posse Comitatus Act does not contain an exception for the enforcement of quarantine, so these duties will generally entail medical and logistical support, rather than law enforcement duties.

**Enforcement of a Base Quarantine.** Base commanders have the authority under DoD and Air Force policy to exercise extraordinary health powers on a military installation. Commanders not in a federal status may or may not have these same or similar powers under state law. In general, commanders will have public health powers on base that they do not have off base. These may include enforcing a base quarantine or sanitary cordon to prevent infection of the base populace or prevent the spread of an infection off-base.

## CONCLUSION

ANG medical assets may respond to a major disaster in a number of roles. While they may always act to preserve life and health in an emergency, they should generally limit their efforts to the specific mission assigned.

***KWIK-NOTE: Medical services serve both general support and specific mission support in a crisis.***

### RELATED TOPICS:

	SECTION
Aid to Civilian Authorities	6-2
Activation, Chain of Command and Discipline in the Force	28-2
Fiscal Law, Title 10 Activation and Reimbursement	28.6
Liability and Environmental Issues	28-10
Pandemic Influenza Response	28-11

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## LIABILITY AND ENVIRONMENTAL ISSUES

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Lt Col Charles Young (with contributions by Marshall L. Wilde), Feb 2007

**AUTHORITY:** 28 U.S.C. § 1346(b); 28 U.S.C. §§ 2671-2680; 42 U.S.C. § 1983; AFI 32-7040, *Air Quality Compliance* (9 May 1994), AFI 32-7041, *Water Quality Compliance* (10 December 2003); AFI 32-7042, *Solid and Hazardous Waste Compliance* (12 May 1994); AFI 51-501, *Tort Claims* (15 December 2005); applicable state law.

### INTRODUCTION

Commanders can run into issues of liability and environmental protection in domestic operations, just as at their home station or in the deployed environment overseas.

### LIABILITY ISSUES IN STATE AND FEDERAL STATUS

When troops act in a state active duty status, the state law of the state they are operating in will govern their liability. Often, states have a degree of limited immunity for state employees. National Guard troops may or may not qualify as state employees outside of their state. When acting under Title 32, the National Guard Claims Act applies. This statute allows compensation through a claims process, generally through the nearest active duty Air Force Base. When acting in Title 10 status, the Federal Tort Claims Act applies. The FTCA allows claimants to pursue an administrative claim through the active duty Air Force, then to file suit in federal court if the agency declines to settle for an amount the claimant will accept. In all cases, the military response to an incident creating the possibility of liability should be the same – the prompt investigation of the facts and forwarding of the file to the office responsible for processing the claim or defending the litigation.

While ANG members do not usually have individual liability for their actions in the scope of their duties, certain duties may expose a member to individual liability. Of particular interest in domestic operations, 42 U.S.C. § 1983 allows civil suits against law enforcement personnel for the deprivation of civil rights. Also, certain provisions of environmental law allow individual liability. The best practice is to treat these claims as any others, by investigating and determining the facts so that the claim may be settled or defended, as merited by the facts.

Commanders should anticipate receiving complaints and claims due to military operations. While we seek to avoid liability for claims, the nature of military operations makes them inevitable. For instance, military forces may need to take certain property or occupy certain land for a period of time to conduct military operations. Private property owners may recover for these losses. While we seek to avoid causing such damage, the Air Force has no interest in denying just compensation to legitimately injured individuals.

### CLAIMS PROCESSING

Often claimants just want to know who to seek compensation from. This can be a surprisingly complicated question. Generally speaking, in state active duty status, the state employing the troops will process claims of damage or injury from military operations. When in Title 32 status, the National Guard Claims Act allows processing of the claim by the nearest ADAF installation. In Title 10, the nearest active duty base will also process the claim. Commanders should not solicit claims, but may provide information about the appropriate agency to contact for claims processing.

### ENVIRONMENTAL ISSUES

Environmental statutes do not generally have exceptions for contingency operations. On the positive side, deployed National Guard forces often lack the “big footprint” that home station airfield activities can create. The responsibility for environmental compliance generally falls on the “owner” of the facility. However, ANG commanders deployed for domestic operations should consider the air, water, and waste footprint of their activities

to avoid environmental liability after the operations.

The Clean Air Act generally covers emissions of certain air pollutants, particularly ozone, carbon monoxide, sulfur dioxide, particulate matter, nitrous oxide, and certain hazardous air pollutants like benzenes, perchlorethylene, and methylene chloride. In general, the facility manager will be responsible for considering the additional impact of National Guard troops on the facility. However, in the event that ANG forces bring generators or other equipment, they may need to coordinate with the facility manager on their use. Most mobile sources will meet Clean Air Act requirements by virtue of qualifying under tailpipe emissions standards at home station.

The Clean Water Act regulates water emissions. Deployed forces generally avoid CWA problems by using existing infrastructure or contracted services. However, if such are unavailable, the commander may need to coordinate with the lead federal agency and state regulating agency to avoid CWA violations.

The management of hazardous waste presents unique problems in the deployed domestic environment. While hazardous waste generators in the ANG know the requirements of hazardous waste management, the usual channels for processing the waste may not be available. When hazardous waste generation cannot be avoided, advance planning is necessary to arrange for the storage, transportation and disposal for hazardous waste.

## **SPECIAL ISSUES**

**Aerial Spraying.** After Hurricane Katrina, the Centers for Disease Control requested, through FEMA, that the AF conduct aerial missions to eradicate mosquito populations. This would control potential disease outbreaks in the region. Time did not permit the use of the environmental impact statement (EIS) process. Since the spraying was done at the request of the CDC and the State of Louisiana, the AF agreed to perform the mission, but requested that the requesters execute a hold harmless agreement to protect the Air Force from liability. This comports with the military's role as a supporting agency in a disaster response.

## **CONCLUSION**

A disaster does not eliminate the need to address liability and environmental impacts. Advance planning and the use of existing channels for disposal of waste can mitigate the potential liability of the military for damage.

***KWIK-NOTE: Consider the liability and environmental consequences before acting.***

### **RELATED TOPICS:**

	<b>SECTION</b>
Aid to Civilian Authorities	6-2
Activation, Chain of Command and Discipline in the Force	28-2
Posse Comitatus and Law Enforcement Operations	28-3
Wildland Fire Fighting in State Status	28-4
Support of Border Operations	28-5
Fiscal Law, Title 10 Activation, and Reimbursement	28-6

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# PANDEMIC INFLUENZA RESPONSE

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**Major Marshall L. Wilde, February 2007**

**AUTHORITY:** 10 U.S.C. 331-335; 42 U.S.C. 264; 42 CFR Section 70; National Strategy for Pandemic Influenza, Homeland Security Council, November 2005; HHS Pandemic Influenza Plan, November 2005; DODD 6200.2, Use of Investigational New Drugs for Force Health Protection, 1 August 2000; DODD 6200.3, Emergency Health Powers on Military Installations, 12 May 2003; DOD Pandemic Influenza Preparation and Response Planning Guidance, 15 September 2004; AFI 10-2603, Emergency Health Powers on Air Force Installations, 7 December 2005; HQ AFNORTH CONPLAN 2591-06 (Draft), Concept Plan for Pandemic Influenza Response; Model State Emergency Health Powers Act (not adopted in all states, list by state at <http://www.publichealthlaw.net>); applicable state law.

## INTRODUCTION

Recently, the public health response to epidemics has emerged as a possible military mission. Although we're all familiar with the common flu and get flu shots annually, different variants of the flu virus erupt each year, as the virus mutates or transfers from other animals. The Centers for Disease Control (CDC) estimates that 5-20% of people get the flu annually, 200,000 Americans are hospitalized with complications of the flu, and 36,000 people die of the flu and complications. The flu usually kills by causing pneumonias – the accumulation of fluid in the lungs, causing hypoxia and death.

The most effective way to combat the flu is to receive a vaccination – the flu shot. The flu shot contains three killed viruses - one A (H3N2) virus, one A (H1N1) virus, and one B virus. (The H and N refer to antigens on the surface of the A virus, while the flu has three more general strains, A, B, and C.) Scientists select based on a variety of factors, including their prevalence in the prior Southern Hemisphere winter. Scientist grow the vaccine in eggs, process it, and then provide the vaccine to patients. The killed virus causes an immune reaction that allows the body to fight off the live virus 70-90% of the time. The flu virus mutates easily, so the flu shot cannot catch all variants that a person might encounter. Some evidence exists that vaccination for one type of flu might help the body fight off other types. The world capacity for vaccine production in 2006 is about 400 million, including about 110 million doses for use in the US. The government has undertaken a number of efforts to increase production of flu vaccines to create a larger industrial base to respond to an epidemic, but vaccinations remain a low-profit enterprise, limiting the number of companies interested in producing them.

The flu most often spreads through respiratory droplets. When a person coughs or sneezes, it creates a flurry of droplets, which will contain the flu virus if a person has been infected. More rarely, other bodily fluids can transmit the flu. Once infected, the flu has no specific "cure". Some forms of the flu respond to antiviral drugs, like Tamiflu, while others do not. Antibiotics have no effect on the flu, although they can help prevent secondary bacterial infections. Generally speaking, most people receive only supportive care ("get plenty of rest and drink lots of liquids") for the flu.

The military role in flu response evolves rapidly. Epidemic prevention and protection of the force from the flu remain the most common ongoing missions. The structure of military life makes military members especially susceptible to flu exposure. In recent years, the threat of pandemic avian influenza caused an increase in planning for a pandemic response mission. This section explores the history of flu epidemics, the unique characteristics of avian flu, and possible military prevention and response strategies.

## THE "SPANISH FLU" EPIDEMIC OF 1918

*I had a little bird,  
Its name was Enza.*

*I opened the window,  
And in-flu-enza.*

- Children's rope skipping rhyme from 1918

Scholars have described the influenza epidemic of 1918 as the most devastating epidemic in recorded world history. It killed between 20 and 40 million people worldwide in 1918-1919, more than in four years of the Black Plague in the Fourteenth Century. Also called the swine flu because of its ability to infect pigs as well as humans, it was a type A H1N1 virus. Although we affiliate this flu outbreak with pigs, scientists still don't know whether the flu started in pigs, or started in people and spread to pigs. It infected 28% of Americans and killed an estimated 675,000 of them. The death rate for the flu hit 2.5%, far exceeding the 0.1% of previous outbreaks. People often died within hours of feeling the first symptoms. Medical science had little ability to combat the outbreak, as studies into the biological basis of disease had yet to reveal viruses.

Unlike most influenza, which primarily kill children and the elderly, this epidemic was most deadly for people between 20 and 40 years old. The death rate for people 18 to 34 years old was 20 times what it had been in earlier outbreaks. The close quarters environment of the military multiplied the effect of the flu. At one point, despite General Pershing's demands for more troops, President Wilson had to consider discontinuing troop movements to Europe because of the risk that the flu would kill too many troops in the confines of the troopships. 43,000 American soldiers died, ten times as many as died in World War I. The combination of close quarters and the disproportionate death rate for military age men made the disease particularly threatening to the military.

The outbreak went around the world. It lasted about 18 months before disappearing. The only country remotely effective in controlling the outbreak was Japan, which severely limited maritime traffic during the outbreak.

## **AVIAN INFLUENZA**

Types of the A and C flu have the ability to jump species. Sometimes the flu has the same mortality in both an animal species and humans, but, more commonly, it will have a lesser effect on one of the species. Often, the virus "shelters" in the species it kills less often, then jumps to the other species, killing many of that species. Of particular concern, certain type A flu viruses, including the H5N1 variant, have shown the ability to jump from birds to humans in certain circumstances, resulting in the name "the bird flu". (Please note that Type A influenza does not usually refer to the avian flu generally or the H5N1 variant specifically. The A does not stand for avian.)

Currently, the H5N1 variants do not have a strong ability to jump between humans, although the effects of infection with H5N1 influenza can be devastating. There are few reports of human-to-human transmission. The reported cases of H5N1 flu have arisen from close contact between birds and humans. The affinity of this variant to the Far East arose because of living conditions involving close contact with birds. Unfortunately, as of October 31, 2006, 152 of the reported 256 cases of human highly pathogenic H5N1 influenza have resulted in death, a death rate of 59%, or 23 times the death rate for the 1918 flu epidemic. However, it should be noted that the lethality of a virus strain can vary as much as its transmissibility. For instance, the Ebola-Zaire virus kills 50-90% of people infected, but does not travel easily through the air, while Ebola-Reston apparently can travel through the air, but is probably harmless in humans.

The threat of pandemic avian flu arises from the high mutation rate for the flu virus. Flu virus mutations often change their ability to survive in a new host and transmit between hosts. While H5N1 does not currently transmit between humans easily, it could mutate to do so with relative ease and no notice. The interconnected nature of the modern world and the migratory nature of birds create serious concerns about the quick worldwide propagation of such a mutation.

## **TYPES OF PANDEMIC RESPONSE**

Medical responses to pandemics vary from direct treatment to transportation to enhanced prevention and protection. Many examples of military involvement in direct treatment exist in recent memory. Air Force medics from Lackland AFB responded to the Houston floods and 9/11 to provide direct medical services. The Air Force serves as the lead agency for medical evacuation in the military. In response to Hurricane Katrina, we provided medevac services for seriously ill patients in the New Orleans area. The military could also serve to assist in mass

immunizations, a capability we exercise internally annually with the flu vaccine. The medical roles contemplated in the current response plans generally mirror common military medical tasks.

Traditionally, societies have taken three general types of non-treatment response to prevent the spread of disease: isolation, quarantine and sanitary cordon. Isolation, often mistakenly called quarantine in non-technical contexts, means taking people or animals who have a disease and preventing them from infecting others by removal or restraint. For instance, hospitals isolate people with active tuberculosis in special rooms to prevent the spread of the disease. Many states have laws that allow for the involuntary commitment of people with certain disease to hospitals as a type of isolation. Countries often require that animals imported from other countries stay for a period in a quarantine zone, until it becomes clear that they do not have an infectious agent. Quarantine refers to the restriction of certain healthy subjects because of concerns of exposure. Sanitary cordon, or cordon sanitaire, means the prohibition on crossing a certain border to prevent the spread of disease. California enforces a sanitary cordon on fruit through the use of inspection stations at points of entry to protect their agriculture. While each of these terms has a different spectrum of meanings, they overlap in common usage, making it important to be specific when describing a particular action.

Even without military involvement, the restrictions on movement entailed in isolation and quarantine may require a degree of due process. The State Model Health Emergency Powers Act, for instance, has procedures for isolation with and without notice and provides for hearings for those who are involuntarily isolated. Not all states have adopted this Act and they will often have their own idiosyncratic processes. AFI 10-2603 provides for a notice process for civilians quarantined on base. Before implementing or assisting in the implementation of any of these measures, check the level of process required under the authorizing law or regulation and ensure that the required procedures are followed.

ANG units may engage in other types of response to a pandemic. These may include traditional Guard roles in emergency response and serving as a well managed labor reserve for governmental services. Health emergencies may require an increase in government services unrelated to the health response, including backfilling the government service positions usually held by state employees detailed to emergency duties.

## **RESPONSE PLANS**

Response plans rely on certain assumptions of the nature of an outbreak. Important planning assumptions include: 1) no one will be immune to the virus initially and antivirals will be in limited supply; 2) the disease will affect 30% of the general population and 20% of working age adults; 3) 50% of those infected will seek outpatient care; 4) hospitalization rates will range from roughly 1-10% of those infected; 5) the incubation period before onset of symptoms will be about two days, but a person may pass on the disease up to a day before the onset of symptoms; and 6) the outbreak will last about 6-8 weeks in a community, 18 months worldwide and may have a number of waves.

**1. Immediate Response/Force Protection/Base Security/Mission Continuity.** In the event of an outbreak, the commander's first duty is to preserve her forces to continue the military mission. AFI 10-2603 provides base commanders, including Air National Guard commanders, broad authority to respond to protect the force from infection. This includes restricting access to the base, closing facilities, decontamination, providing lodging and sustenance for forces, and a wide variety of other powers. Commanders exercise these powers through the appointment of a Public Health Emergency Officer, generally the medical element commander or a senior provider from the medical element. Additionally, the commander may have powers to preserve military or civilian life, health and property under her immediate response authority in areas under her command or nearby. The law grants this authority for two important reasons: 1) to allow for continuity of ongoing missions, such as homeland defense; and 2) to conserve military forces for use to respond to the emergency.

**2. State Response.** The Model State Emergency Health Powers Act and similar state laws give the states the primary authority to regulate public health within their boundaries. Of general interest, these laws usually allow the Governor to declare a public health emergency, to declare and enforce isolation, quarantine and sanitary cordons, to activate the National Guard as a state militia, and to use the Guard to enforce isolation and quarantine rules. The states have begun to create their own pandemic flu response plans, although not all states currently have a plan and not all plans explicitly address the role of the National Guard.

In general, ANG commanders should anticipate and plan for the use of their forces in a variety of roles. Of immediate interest, units with ongoing Title 10 or Homeland Defense missions will need a plan to continue these operations and to inform state authorities of the impact on the availability of their forces. Given the progressive nature of influenza outbreaks, commanders also may have to recall troops activated in state active duty status or Title 32 status from their state duties for assignment to Title 10 duty, should they be federalized.

Commanders should also consider the availability and use of their medical elements. Full-time medical troops will presumably have their hands full with medical duties involving force protection. Activating additional troops for military missions may impact the civilian medical community, which will presumably have manpower challenges of its own. Medical commanders should be aware of this impact and plan accordingly. Also, commanders may need to take proactive steps to inform state authorities of their medical capabilities. For instance, most medical elements could support a mass immunization line, but not all units could man a field hospital. Further, medical elements have particular susceptibility to recall for federalized medical missions, making early coordination between state and federal authorities to determine the role of the medical element a must.

Forces not used in base security, federal, or medical missions may be used in a variety of state roles. These roles do not substantially differ in character than those performed for other civil support missions and may include assisting the provision of government or health services on a variety of levels, logistics management, and security, quarantine or law enforcement duties. Please remember that the performance of law enforcement duties should be pursuant to a specific authorization to do so in state law or by the Governor's orders. Federalized troops may not generally be used in a law enforcement role, unless an exception to the Posse Comitatus Act applies (such as military installation security and law enforcement).

**3. Federal Response.** NORTHCOM plans currently envision that many ANG personnel will not be available for federal service due to the critical nature of their civilian duties in a health emergency. Also, all plans envision that ANG forces will suffer infection rates at the same rate as the civilian community, further limiting the available troops. NORTHCOM response plans set forth the following lines of effort: 1) force protection/force health protection; 2) slowing the spread of pandemic influenza; 3) support public health care; 4) support civil order; 5) support public information efforts; 6) ensure the continuity of government functions; 7) ensure essential transportation and commerce; and 8) foreign humanitarian assistance and disaster relief. In particular, the plans anticipate requests for defense support of civil efforts in: 1) medical laboratory, personnel or equipment; 2) logistics distribution and storage support, and 3) air transportation expertise to include delivery of antivirals and PPE to infected area and retrograde lift for those approved personnel to be repatriated back to the United States.

NORTHCOM also envisions standing up 6 regional centers for civil support operations. ARNORTH will command the response and Army components will command four regional centers. Two centers will be under the command of AFNORTH teams. ANG assets may be federalized to serve in any of the regions. The nature of support will vary by the requests made and the forces available. The nature of a widespread outbreak would probably severely limit the defense support available to any particular area.

## CONCLUSIONS

A real risk exists for pandemic influenza in the near future. The history of influenza outbreaks suggests that a large percentage of people would get sick, and the possibility of a large number of deaths exists. The ANG response to pandemic influenza should focus on preserving military capabilities first, then on the capabilities that the ANG can bring to the state and federal responses.

***KWIK-NOTE: Pandemic flu will require a complex response from ANG forces on the local, state and federal levels.***

### RELATED TOPICS:

Aid to Civilian Authorities  
Activation, Chain of Command and Discipline in the Force  
Posse Comitatus and Its Exceptions  
Medical Issues

### SECTION

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# The Ten Commandments of Command

WRITTEN FROM A JUDGE ADVOCATE'S PERSPECTIVE



- I. *Thou shalt ONLY DO, ORDER, or PERMIT AUTHORIZED acts, lest thou MAY become PERSONALLY LIABLE.*
- II. *Thou shalt NOT DO, ORDER, or PERMIT ANY PROHIBITED acts lest thou shalt SURELY BECOME PERSONALLY LIABLE.*
- III. *Thou shalt constantly maintain a vigorous POLICY AGAINST all forms of DISCRIMINATION, including SEXUAL HARASSMENT.*
- IV. *Thou shalt FAIRLY and UNIFORMLY enforce all REGULATIONS, ORDERS and POLICIES.*
- V. *Thou shalt ALWAYS ADHERE to ETHICAL CONDUCT and AVOID even the APPEARANCE of a CONFLICT OF INTEREST.*



- VI. *Thou shalt aggressively DISCOURAGE FRATERNIZATION and ENCOURAGE only PROPER, PROFESSIONAL RELATIONSHIPS among thy unit members.*
- VII. *Thou shalt be ever mindful of the duty status of thy unit members .. for STATUS IS EVERYTHING.*
- VIII. *Thou shalt promptly and thoroughly INVESTIGATE all allegations of MISCONDUCT.*
- IX. *Thou shalt STRICTLY FOLLOW applicable REGULATIONS in and thoroughly DOCUMENT all ADVERSE ACTIONS lest thy decisions may be overturned in court.*
- X. *Thou shalt teach thyself to RECOGNIZE all situations and actions WHERE JUDGE ADVOCATE ADVICE or LEGAL REVIEW is NECESSARY lest thy flanks shalt become unnecessarily exposed.*



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