THE MILITARY COMMANDER AND THE LAW

Tenth Edition *2010*

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PREFACE

The United States is founded upon the Constitution, the rule of law that stems from the Constitution, and the institutions designed to preserve and protect the law—including the armed forces. Our respect for the law is a reflection of our values as a nation.

Military commanders hold a special position of authority under the law. Today's commanders must make decisions in an environment of increasingly complex laws, rules, and regulations both nationally and internationally. *The Military Commander and the Law* is widely-recognized as a valued resource for leaders at every level and as a first-stop for commanders who need insight into the challenging legal issues that confront them. After reviewing the materials in this publication, a commander's next stop is the local staff judge advocate, who will provide personal assistance resolving specific issues. Together, commanders and judge advocates are partners in safeguarding good order and protecting our Nation's most-cherished freedoms.

Please refer to this book early and often, and I trust it will become one of your most useful resources.

RICHARD C. HARDING
Lieutenant General, USAF
The Judge Advocate General

The Military Commander and the Law
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Sources of Command Authority

Article II, § 2 of the United States Constitution provides the original source of command authority to the President as Commander-in-Chief.

Chain of Command

- Chain of command runs from the President and the Secretary of Defense to the combatant commander
  - -- Chairman of the Joint Chiefs functions within the chain of command by transmitting communications to the commander of the combatant commands from the President and the Secretary of Defense
  - -- Service chiefs are responsible to the secretary of the military department for management of the services
  - -- Subordinate command authority may be conferred by statute, delegated, or assumed

The Concept of Command by Uniformed Military Personnel

- Concept of command carries dual functions
  - -- Legal authority over people, including power to discipline
  - -- Legal responsibility for the mission and resources
- Command devolves upon an <u>individual</u>, not a staff
  - -- Command is exercised by virtue of the office and the special assignment of officers holding military grades who are eligible by law to command. A commander exercises control through subordinate commanders. Staff, including vice and deputy commanders, have no command functions. They assist the commander through planning, investigating, and recommending.
  - -- Some command <u>duties</u> may be delegated. <u>Responsibilities</u> of command may never be delegated.

Command Authority Over Active Duty Forces

- The commander's authority over military members extends to conduct of the members whether on or off the installation. The commander exercises authority by virtue of his or her status as a superior commissioned officer.
- Enlisted members take an oath upon enlistment to obey the lawful orders of those appointed over the member
- Articles 89, 90, and 92 of the UCMJ include prohibitions of disrespect towards, or the failure to obey, superior officers

Command Authority Over Reservists

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

Command Authority Over Civilians

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

References:

U.S. Const. art. II, § 2

UCMJ arts. 89, 90, 92

AFI 51-604, *Appointment to and Assumption of Command* (4 April 2006)

Command Succession

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

- Assumption of command is a unilateral act taken under authority of law and regulation by the officer who assumes command
  - -- Command passes to the senior military officer assigned to the organization who is present for duty and eligible to command
  - -- Authority to assume command is inherent in that officer's status as the senior officer in both grade (captain, lieutenant colonel, colonel) and rank (seniority within a grade)
  - -- An officer can assume command only of an organization to which that officer is assigned by competent authority, except that the officer serving as the Commander, Air Force Forces (COMAFFOR) for a given contingency operation exercises command authority over those Air Force members deployed in support of that contingency. Assignment to a subordinate organization is an assignment to all superior organizations having the subordinate organization as a component.
- Appointment to command occurs by an act of the President, the Secretary of the Air Force, or by his or her delegee
  - -- An officer assigned to an organization, present for duty, and eligible to command may be appointed to command if they are at least equal in grade to all other eligible officers, without regard to rank within grade
- A temporary assumption or appointment is used when the commander being replaced is only temporarily absent or disabled
  - -- Absence or disability for only short periods does not incapacitate the commander and normally does not warrant an assumption of command by another officer
  - -- No need to publish assumption of or appointment to command orders when officer who originally held the command position resumes command after a temporary absence, so long as they are still equal or senior in grade to any other officer then present for duty, assigned to the organization, and eligible to command
  - -- If during the permanent commander's temporary absence, another officer senior in grade to him/her, who is eligible to command, is assigned or attached to the organization, then the returning commander may not resume command unless appointed to command

Special Rules and Limitations to Command

- There is no title or position of "acting commander." The term is not authorized.
- Officers assigned to HQ USAF cannot assume command of personnel, unless competent authority specifically directs
- No officer may command another officer of higher grade who is present for duty and otherwise eligible to command
- Enlisted members cannot exercise command
- No commander may appoint his own successor
- Chaplains cannot exercise command, although they do have the authority to give lawful orders and exercise functions of operational supervision, control, and direction
- Students cannot command an Air Force school or similar organization
- Judge Advocates may only exercise command if expressly authorized by The Judge Advocate General, as the senior ranking member among a group of prisoners of war, or under emergency field conditions
- Flying organizations may only be commanded by Line of the Air Force crewmembers occupying active flying positions—except that officers from other military departments who have USAF-equivalent crewmember ratings or certifications can command consolidated flying training organizations in accordance with appropriate interservice agreements
- Certain types of organizations, such as air base wings or groups, which have multiple missions that include responsibility for controlling or directing flying activities, are considered non-flying units and may be commanded by non-rated officers
- Only Reserve Component officers on extended active duty orders can command organizations of the Regular Air Force. "Extended active duty" is defined as a period of 90 days or more during which the officer is on active duty (other than for training) orders. The COMAFFOR or delegee may authorize Reserve Component officers not on extended active duty to command Regular Air Force units operating under the COMAFFOR's authority, though COMAFFOR may delegate this authority no lower than the commanders of aerospace expeditionary wings for expeditionary units operating under the COMAFFOR's authority.
- Regular officers and Reserve officers on extended active duty cannot command organizations of the Air Force Reserve unless approved by HQ USAF/RE

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

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

- Civilians may lead a unit, hold supervisory positions, and provide supervision to military and civilian personnel in a unit. They cannot assume military command or exercise command over military members within the unit. Except as required by law (e.g., the Uniform Code of Military Justice), a civilian leader of a unit is authorized to perform all functions normally requiring action by the respective unit commander. When a civilian is designated to lead a unit, that individual will be the director of that unit. Units lead by directors will not have commanders and members of the unit or subordinate units may not assume command of the unit. However, alternative arrangements for functions for which the law requires a commander will be established by competent command authority, either by attaching military members for these limited purposes to a unit led by a commander, or by accomplishing these functions at a command level above the unit. Because members of the unit may not assume command, individuals should be designated in advance to perform the duties of civilian leaders should they become unable to perform those duties.

Method for Assumption or Appointment to Command

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

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

References:

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

AFI 51-604, *Appointment to and Assumption of Command* (4 April 2006)

Functions of the Staff Judge Advocate

Mission

The mission of the Judge Advocate General's Corps is to deliver professional, candid, independent counsel and full-spectrum legal capabilities to command and the warfighter.

Definitions

- Judge Advocate: An Air Force officer designated as such by The Judge Advocate General
  - -- Graduate of a law school accredited by the American Bar Association
  - -- Licensed in active status in at least one state, the District of Columbia, American Samoa, the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands
- Staff Judge Advocate (SJA): Senior judge advocate on extended active duty normally on the installation commander's staff unless otherwise specified by The Judge Advocate General
  - -- Serves as the legal advisor for the wing commander in his or her capacity as the representative of the Air Force
  - -- Supervises the members of the base legal office
- Assistant Staff Judge Advocates (ASJA): Other judge advocates assigned to the staff judge advocate's office. ASJAs support the SJA in his or her role as the wing commander's legal advisor. In this capacity, they may perform duties such as:
  - -- Chief of legal assistance
  - -- Chief of military justice
  - -- Chief of civil law
- Area Defense Counsel (ADC): Judge advocate performing defense counsel duties at an installation
  - -- Reports through the defense community chain of supervision to TJAG
  - -- Not assigned to the SJA

Functional Organization of the Base Legal Office

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

- Military Justice Division: Advises commanders on discipline and military justice matters. Includes advising commanders on, and preparing documents for, courts-martial and nonjudicial punishment under Article 15, UCMJ.

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

- Claims Division: Manages the initial processing of tort claims against the Air Force and claims by the Air Force against individuals and entities. Also assists the Air Force Claims Service Center in processing household goods claims submitted by military members.

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

- Civil Law Division: A range of legal topics fall under the category of civil law, which may be grouped in a single division or they may be organized separately. Areas within the civil law division may include: contract law; labor law; environmental law; and, general civil law, which includes issues such as private organizations, use of Air Force assets, various personnel issues and noncriminal investigations such as reports of survey and line of duty determinations.

- Legal Assistance and Preventative Law Division: Responsible for educating the base population on legal issues that affect military members and their dependents as well as providing legal assistance. Legal assistance attorneys cannot draft court documents or represent members or their families in court but they can provide advice on a range of legal issues including, but not limited to, adoption, consumer law, divorce and child custody, income taxes, the Servicemembers Civil Relief Act, and wills. This division also provides free notary services.

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

Personal Liability of Commanders and Supervisors

Federal employees are generally entitled to Department of Justice representation if lawsuits are brought against them for acts they commit in the scope of their employment, if those acts do not violate federal statutes. Historically, suits against present or former federal officials in their personal capacity for money damages based upon official conduct were rare. Similarly, common law tort suits brought in state courts were dismissed because of the doctrine of official immunity.

Liability For Constitutional Torts

- In 1971, the Supreme Court of the United States held for the first time in *Bivens v. Six Unknown Named Agents* that an alleged violation of the United States Constitution could serve as the basis for a suit for money damages against federal officials

- However, the Court said that a federal official would have absolute immunity if the official was acting in the scope of employment and if there were "special factors counseling hesitation" on the part of the court to allow a civil action for damages to proceed

  -- In 1983, the Court found, in *Bush v. Lucas*, that the administrative remedies given an aggrieved employee by the Civil Service Reform Act were "special factors" that protected federal supervisors from liability

  -- However, in *Otto v. Heckler*, a supervisor engaging in sexual harassment was found to be outside the scope of his employment and was not immune

  -- Also in 1983, in *Chappell v. Wallace*, the Court held that the relationship between military personnel, including civilian supervisors, was a "special factor" as long as the act had been "incident to service" at the time of the alleged wrong, based upon the circumstances at that time

  -- In 1987, in *United States v. Stanley*, the Court ruled that there need not be a superior/subordinate relationship for this immunity to apply, e.g., a civilian employee allegedly injuring an enlisted member

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

Liability For Common Law Torts

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

- The Act does not apply to constitutional torts (discussed above) or to acts violating a federal statute, e.g., environmental torts

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

Environmental Torts

- The major environmental statutes (Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act) either contain immunity provisions for federal employees acting in scope or have been held by courts to grant immunity. *Meyer v. United States Coast Guard*.

- However, federal officials have been held criminally liable for violations of various environmental statutes that contain criminal penalties. *United States v. Carr*.

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

Representation of Federal Employees

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

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

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

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

References:

28 U.S.C. § 2679, Federal Employees Liability Reform and Tort Compensation Act

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)

Chappell v. Wallace, 462 U.S. 296 (1983)

Bush v. Lucas, 462 U.S. 367 (1983)

United States v. Stanley, 483 U.S. 669 (1987)

United States v. Carr, 880 F.2d 1550 (2d Cir. 1989)

Otto v. Heckler, 781 F.2d 754 (9th Cir. 1986), modified, 802 F.2d 337 (9th Cir. 1986)

Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986)

28 C.F.R. Part 50, *Department of Justice Policy*

Article 138 Complaints

Article 138 of the Uniform Code of Military Justice (UCMJ) gives every member of the Armed Forces the right to complain that he or she was "wronged" by his or her commanding officer. The right even extends to those subject to the UCMJ on inactive duty for training.

Scope of Article 138 Complaints

- Matters appropriate to address under Article 138 include discretionary acts or omissions by a commander that adversely affects the member personally and are:
  - -- In violation of law or regulation
  - -- Beyond the legitimate authority of that commander
  - -- Arbitrary, capricious, or an abuse of discretion; or
  - -- Clearly unfair, e.g., selective application of administrative standards/actions
- Matters outside the scope of the Article 138 complaint process
  - -- Acts or omissions affecting the member which were not initiated or ratified by the commander
  - -- Disciplinary action under the UCMJ, including nonjudicial punishment under Article 15. However, deferral of post-trial confinement is within scope of Article 138.
  - -- Actions initiated against the member where the governing directive requires final action by SecAF
  - -- Complaints against the general court-martial convening authority (GCMCA) related to the resolution of an Article 138 complaint, except for alleging the GCMCA failed to forward a copy of the file to the SecAF
  - -- Complaints seeking disciplinary action against another
  - -- Complaints based on a commander's actions implementing the recommendations of a board authorized by Air Force regulations and governed by AFI 51-602, *Boards of Officers*

Article 138 Procedures

- Procedures for filing complaint
  - -- Within 180 days of the alleged wrong, the member submits his or her complaint in writing, along with supporting evidence, to the commander alleged to have committed the wrong
  - -- The commander receiving the complaint must promptly notify the complainant in writing whether the demand for redress is granted or denied
    - --- The reply must state the basis for denying the requested relief
    - --- The commander may consider additional evidence and must attach a copy of the additional evidence to the file
  - -- If the commander refuses to grant the requested relief, the member may submit the complaint, along with the commander's response, to the officer exercising general court-martial convening authority over the commander
    - --- Must be submitted within 90 days from the notice of denial
    - --- May be submitted directly to the GCMCA or forwarded through any superior commissioned officer
    - --- An intermediate commander or any other superior commissioned officer receiving such a complaint will immediately forward the file to the GCMCA. The officer may attach additional pertinent documentary evidence and comment on availability of witnesses or evidence, but may not comment on the merits of the complaint.
- GCMCA's responsibilities
  - -- Conduct or direct further investigation of the matter, as appropriate
  - -- Notify the complainant, in writing, of the action taken on the complaint and the reasons for such action
  - -- Refer the complainant to appropriate channels that exist specifically to address the alleged wrongs, i.e., performance reports, suspension from flying status, assessment of pecuniary liability. This referral constitutes final action.
  - -- Retain two complete copies of the file, and return the originals to the complainant
  - -- After taking final action, forward a copy of the complete file to HQ USAF/JAA for review and disposition by the SecAF

- The GCMCA is prohibited from delegating his or her responsibilities to act on complaints submitted pursuant to Article 138

References:

UCMJ art. 138

AFI 51-904, *Complaint of Wrongs Under Article 138, Uniform Code of Military Justice* (30 June 1994)

Special Court-Martial Convening Authority Duties

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

Military Justice Duties

- Appoints military magistrates to authorize apprehensions, searches, and seizures
- Appoints pretrial confinement reviewing officers (PCRO)
  - -- PCRO holds a hearing and makes a neutral determination of whether an accused should be continued in pretrial confinement awaiting trial
  - -- There is no limit to the number of PCROs the SPCMCA can appoint
  - -- PCROs should be mature officers with good judgment
- Details court members
- Refers charges and specifications to special or summary courts-martial
- Approves pretrial agreements (PTAs) for an accused to be tried by a special or summary courts-martial
- Takes action on findings and sentences of special and summary courts-martial
- Appoints Article 32, UCMJ, investigating officer (IO)
  - -- Occurs after charges have been preferred and when the SPCMCA believes a general court-martial may be the appropriate forum for the charge and specification
  - -- The IO completes an Article 32 hearing, which is roughly similar to a grand jury proceeding in the civilian community, and writes a report for the SPCMCA, which recommends action the SPCMCA should take on the charge and specification
  - -- If the SPCMCA believes a GCM is appropriate, he/she then forwards the Article 32 report, charge(s) and specification(s), and recommendations on disposition to the general court-martial convening authority (GCMCA)

ADMINISTRATIVE ACTION DUTIES

- Disapproves or recommends approval of requests for discharge in lieu of court-martial
  - -- SPCMCA may disapprove a request for discharge in a special court-martial
  - -- SPCMCA may not approve a request for discharge, even in a special court-martial
  - -- If the SPCMCA wants the request for discharge in a special court-martial approved, he/she must forward it to the GCMCA, with a recommendation for approval and appropriate characterization of discharge
  - -- If the SPCMCA has ordered an Article 32 hearing, but the Article 32 report has not been forwarded to the GCMCA, the SPCMCA may disapprove the request
  - -- If the Article 32 report has been forwarded to the GCMCA, the SPCMCA forwards the request for discharge to the GCMCA, with a recommendation for action on request
- Convenes discharge boards, depending upon the status of the respondent and act on the findings and recommendations of the board
- Acts as separation authority depending upon the status of the respondent, the basis for the discharge, and/or the findings and recommendations of the board

REFERENCES:

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

AFI 51-201, *Administration of Military Justice,* Chapter 3 (21 December 2007), Incorporating Through Change 1 (3 February 2010)

Unlawful Command Influence

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

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

  -- Withholding a subordinate's authority to act in an individual case or types of cases

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

  -- Consulting with subordinates on judicial decisions at the subordinate's request. The subordinate alone must decide what action to take.

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

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

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

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

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

  -- A commander expresses his concern about court-martial cases in which subordinate commanders preferred charges, recommended a court, and then testified during sentencing on behalf of the accused. The suggestion was they refrain

from testifying for the accused in upcoming courts. Any attempt to discourage a witness from testifying is improper.

  - A commander, speaking informally to a group of officers, jokingly says he does not care how long a particular court takes, as long as the members "hang the SOB." The impression is that he believes the accused to be guilty and expects the members to agree.

  - A convening authority may not exclude classes of individuals from serving as court members if done to obtain a more severe sentence

  - Interfering with a party's access to witnesses

  - Intent to actually interfere with a case is not required. Command actions that unintentionally discourage witnesses to testify or cause witnesses to alter their testimony may constitute UCI.

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

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

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

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

References:

Manual for Courts-Martial, United States (2008)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

Serving as a Court Member

At some time in your military career you may be detailed to sit as a member of a court-martial. Court members serve essentially the same function in a military court-martial as jurors serve in civilian trials. The following are some important facts:

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

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

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

- If a detailed court member needs to be excused, keep the following in mind:

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

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

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

  -- Both the trial and defense counsel can challenge any member for cause. There is no limit to the number of court members who can be removed for cause. Each side is also permitted one challenge without cause. This is called a peremptory

challenge. Its only limitation is that it may not be used to improperly remove a member on the basis of that member's race, gender, or other constitutionally protected status.

- If the accused pleads "not guilty," the court members receive evidence, arguments from counsel, and instructions on the law from the military judge in order to determine whether the accused is guilty or not guilty. The members must be convinced beyond a reasonable doubt that the evidence presented during the trial shows the accused committed the offense to find the accused "guilty." The decision of the court is called the "finding."

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

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

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

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

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

- Court members are allowed to take notes during the trial. A court member may refer to his or her notes during deliberation, but the notes are not evidence, cannot be used by any court member as evidence, and may not be shown or read to other members. Ultimately, if the members cannot agree on whether particular evidence was present-

ed, or what the exact nature of the evidence was, the members may ask the military judge to reopen the court and present the evidence again.

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

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

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

References:

UCMJ art. 25

Rules for Courts-Martial 501-505, 804-807, 813, 901, 911-1007 (2008)

U.S. Dep't of Army Pam. 27-9, Legal Services: Military Judges' Benchbook (1 July 2003)

Testifying as a Witness

As a commander, first sergeant, or supervisor, you or one of your subordinates may be called upon to testify at a court-martial or other administrative hearing

- Either the trial counsel or defense counsel may call witnesses during the findings portion (determining whether the accused is guilty or not guilty) of the trial to either help prove an element of the offense or provide a defense to the charge

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

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

  -- When testifying about the accused's potential for rehabilitation, the witness must be able to show that he/she possesses sufficient information and knowledge about the accused, separate and apart from the offenses committed by the accused. In short, the witness must have knowledge of the accused as a "whole person."

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

- You have an absolute duty to testify honestly when called, and you should immediately report any attempts to influence your testimony to the staff judge advocate

Reference:
Rule for Courts-Martial 1001 (2008)

Attachment:
Tips to Witnesses in Preparation for a Hearing or Trial

Tips to Witnesses in Preparation for a Hearing or Trial

- Always tell the truth
- Review the facts prior to trial
- Do not worry about being nervous. It is a normal reaction.
- Never argue with the military judge or counsel for either side. Use military courtesy when addressing the military judge or officers of superior rank.
- Be yourself on the stand and answer questions in a natural, conversational tone. Try not to be overly emotional or to appear insolent.
- Do not try to answer a question you do not understand. Simply state, "I'm sorry, I do not understand your question."
- Do not be afraid to say you do not know the answer to the question. If it is the truth, "I don't know" is a perfectly acceptable answer.
- Be prepared for cross-examination. Do not forget that the court members or the military judge can also ask you questions. Remain on the stand until the military judge states that you are excused.
- Do not be baited into emotional or angry reactions if the cross-examiner is verbally aggressive or is questioning your truthfulness. Remember that the counsel who called you as a witness can always set the record straight during subsequent examination.
- Do not give conclusions or express an opinion unless you are requested to do so and no objection is made to your expression of opinion
- If an objection is made to any question asked of you, wait until the military judge rules on the objection before answering the question
- If you are asked for a "yes" or "no" answer to a question that cannot be answered with a "yes" or "no," state that the question cannot be answered with a "yes" or "no" and explain your answer when you are asked to do so
- If you are asked if you have discussed the case with the representative of either party, reply truthfully. Remember that there is a distinction between discussing a case and being told what to say.
- Do not try to guess why a counsel may ask a question that seems unusual during cross-examination. If there is no objection to the question, just answer it the best you can.

CHAPTER TWO:
QUALITY FORCE MANAGEMENT

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Administrative Counselings, Admonitions, and Reprimands

Counselings, admonitions, and reprimands are quality force management tools available to supervisors, superiors, and commanders. These management tools are designed to improve, correct, and instruct those who depart from standards of performance, conduct, bearing, and integrity and whose actions degrade the individual and unit's mission. These tools are corrective in nature, not punitive. When properly used, they help maintain established Air Force standards and enhance mission accomplishment.

What Action Is Appropriate

- When a member departs from standards, there are many factors to consider in determining what action, if any, is appropriate

- The Basics: AFI 36-2907, *Unfavorable Information File (UIF) Program*, Chapter 3, contains guidance on administrative counselings, admonitions, and reprimands. The counseling is the lowest level of administrative action. An admonition is more severe than a counseling. A reprimand is more severe than a counseling or admonition and carries a stronger degree of official censure.

- Primary Considerations: The decision to issue a letter of counseling, admonition, or reprimand should be based primarily on two factors:

  -- First is the nature of the incident. Counselings, admonitions, and reprimands may be administered for any departure from Air Force standards. Unlike nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), they are not limited to offenses punishable by the UCMJ. The seriousness of the departure should be considered before deciding what type of action is appropriate to take.

  -- Second is the previous disciplinary record of the member. Counselings, admonitions, and reprimands should be used as part of a graduated pattern of discipline in response to repeated departures from standards. In other words, each time a service member departs from standards, the response should usually be more severe.

Issuing The Counseling, Admonition, Or Reprimand

- Counselings, admonitions, and reprimands may be either verbal or written. Usually the counseling, admonition, or reprimand should be in writing because the corrective action is more meaningful to the member and the infraction is documented. A verbal counseling may be recorded on an AF IMT 174, *Record of Individual Counseling* (RIC). Letters of counseling (LOCs), letters of admonition (LOAs), and letters of reprimand (LORs) should be typed on letterhead and must comply with the requirements listed below. The attachment following this section is a sample format for an LOC, LOA, or LOR. Failure to follow the requirements for drafting and maintaining these documents could limit the use of the documents in a subsequent proceeding. Failing to include the second indorsement noting the commander's consideration of a response, for example, will likely render an LOR inadmissible in a later court-martial or discharge proceeding.

- Drafting the Letter – LOCs, LOAs, and LORs must state the following:

  -- What the member did or failed to do, citing specific incidents and their dates

  -- What improvement is expected

  -- That further deviation may result in more severe action

  -- That the member has three duty days to respond and provide rebuttal matters (30 days for non-EAD reservists)

  -- That all supporting documents become part of the record

  -- That the person who initiates the LOC, LOA, or LOR has three duty days to advise the individual of their decision regarding any comments submitted by the individual

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

- Procedures: A person intending to issue an LOC, LOA, or LOR should

  -- Investigate to determine the infraction occurred

  -- Draft the letter according to the requirements of AFI 36-2907 as set forth above

-- Read the individual the letter and have the member immediately acknowledge receipt on the original letter by filling in the date received and signing the acknowledgement

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

-- Give the member a copy of the letter

-- After three duty days (30 days for non-EAD reservists) from the date the letter was issued, have the member indicate in an indorsement (example in attachment at end of this section) of the original letter whether or not the member is submitting a response to the letter. Have the member fill in the date of the indorsement, strike through the inapplicable language in parentheses, and sign the indorsement.

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

-- If the member refuses to complete or sign the indorsement, the person who issued the letter should write on the original letter beneath the member's signature block, "<<Rank and Name of Member>> failed to provide matters in response to this letter within three duty days (or 30 days for reservists not serving on extended active duty) and refused to complete the 1st Ind," along with the issuer's signature block, signature, and the date

-- If the member submits a response, advise the member within three duty days (30 days for non-EAD reservists) of the submission of the response of the final decision concerning information submitted by the member in an indorsement (example in attachment at end of this section). See AFI 36-2907, para 3.5.1.6, concerning this requirement. If using an indorsement similar to that in the attachment, the issuer of the letter should fill in the date of the indorsement, strike through the inapplicable language in parentheses, and sign the indorsement.

-- Inform the member's chain of the letter. If appropriate or requested, send the letter, member's written acknowledgement, 1st Ind, 2nd Ind (if applicable), and any documents submitted by the member to the member's superiors or commander for information, action, or approval for entry in the member's PIF, UIF, or both.

Record Keeping

- There are detailed rules concerning the maintenance and disposition of specific documents:

Rules for LOC, LOA, and LOR Disposition		
Letters Issued to Enlisted	**Type of Letter**	**Disposition**
	LOC	**May** be placed in PIF or UIF
	LOA	**May** be placed in PIF or UIF
	LOR	**May** be placed in PIF or UIF
Letters Issued to Officers	**Type of Letter**	**Disposition**
	LOC	**May** be placed in UIF and **must** be placed in PIF if not placed in UIF
	LOA	**May** be placed in UIF and **must** be placed in PIF if not placed in UIF
	LOR	**Must** be placed in UIF

- Commanders who wish to establish a UIF on optional letters (LOCs, LOAs, and LORs for enlisted members and LOCs and LOAs for officers) must notify the member on an AF IMT 1058 before establishing a UIF. LORs issued to officers must be filed in a UIF via AF IMT 1058, but the commander does not need to submit the AF IMT 1058 to the officer because the officer is provided with an opportunity to refute the LOR when it is initially presented.

Reserve/Guard Members

- Commanders, supervisors, and other persons in authority can issue administrative counselings, admonitions, and reprimands to reservists who commit an offense even while in civilian status

- Non-EAD reservists have 30 calendar days from the date of receipt of the certified letter to acknowledge the notification, intended actions, and provide pertinent information before the commander makes a final decision. In calculating the time to respond, the date of receipt is not counted. If the individual mails the acknowledgment, the date of the postmark on the envelope will serve as the date of acknowledgment. An individual is presumed to be in receipt of official correspondence if it is delivered by certified mail to the individual's address or best available address.

- AFI 36-2907 does not apply to Air National Guard (ANG) members. Many state codes of military justice authorize letters of admonition or reprimand. There is no AFI or Air National Guard Instruction (ANGI) that addresses the issuing of counselings, admonitions, and reprimands to ANG members; however, commanders and supervisors have inherent authority to do so. Consult the servicing staff judge advocate before issuing an LOC, LOA, or LOR to an ANG member.

References:

AFI 33-332, *Privacy Act Program* (29 January 2004)

AFI 36-2608, *Military Personnel Records System* (30 August 2006)

AFI 36-2907, *Unfavorable Information File (UIF) Program* (17 June 2005)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 3 (3 February 2010)

Suggested format for letters of Counselings, admonitions, and reprimands

<<Date>>

MEMORANDUM FOR <<Member's Grade, Name, SSN>>

FROM: <<Issuer's Office Symbol>>

SUBJECT: Letter of <<Counseling>><<Admonition>><<Reprimand>>

1. Investigation has disclosed that <<describe what the member did or failed to do, citing specific incidents and dates>>.

2. You are hereby <<counseled>><<admonished>><<reprimanded>>. <<Tailor the language in this paragraph to discuss the impact of what the member did or failed to do and what improvement is expected>>. Your conduct is unacceptable and any future misconduct may result in more severe action.

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

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

<<NAME, Rank>>, USAF
<<Position of Person Issuing Letter>>

ACKNOWLEDGEMENT

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

<<MEMBER'S NAME, Rank>>, USAF

1st Ind, <<Member's Rank, Name, SSN>> Date: _____

MEMORANDUM FOR <<Issuer's Office Symbol>>

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

<<MEMBER'S NAME, Rank>>, USAF

[INCLUDE INDORSEMENT BELOW AS REQUIRED]

2nd Ind, <<Issuer's Office Symbol>> Date: _____

MEMORANDUM FOR <<Member's Rank, Name, SSN>>

I have considered the response you submitted on <<date member submitted response>>. (The letter of <<counseling>><<admonition>><<reprimand>> remains in effect) (I have decided to withdraw the letter of <<counseling>><<admonition>><<reprimand>>).

<<NAME, Rank>>, USAF
<<Position of Person Issuing Letter>>

Unfavorable Information Files (UIF)

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

Enlisted Personnel

- Optional Entries: The commander may place the following documents, among others, into a UIF for up to one year:
  - -- A record of nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) when punishment is not suspended or does not exceed one month. Commanders may only remove the record early if the punishment is complete.
  - -- A record of conviction by a civilian court or an action equivalent to a finding of guilty for an offense where the maximum confinement penalty authorized for the offense is one year or less
  - -- Written letters of reprimand, admonition, or counseling
  - -- Confirmed incidents involving discrimination or sexual harassment of personnel
- Mandatory Entries: The following information must be placed into a UIF:
  - -- Records of nonjudicial punishment under Article 15 of the UCMJ when punishment is suspended or when the punishment period is in excess of one month (maximum two year disposition). Commanders may only remove the record early if the punishment is complete.
  - -- Records of conviction by civilian courts or actions equivalent to a finding of guilty of an offense which resulted in or could have resulted in a penalty of confinement for more than one year or death (maximum two year disposition)
  - -- Records of court-martial convictions (maximum two year disposition). Only the wing commander or convening authority (whichever is higher in rank) may remove a court-martial order early, and it cannot be removed if the court-martial punishment, sentence, judgment or action is incomplete.
  - -- Control roster actions (maximum one year disposition)

Officers

- An officer UIF must be established when an officer receives nonjudicial punishment under Article 15 of the UCMJ (regardless of punishment imposed), a letter of reprimand (LOR), or a court-martial conviction
  - -- A record of court-martial conviction must remain for a period of four years or PCS plus one year (whichever is later), only the wing commander or the convening authority (whichever is higher in rank) may remove it early, and it cannot be removed if the court-martial punishment, sentence, judgment, or action is incomplete
  - -- Records of nonjudicial punishment under Article 15 of the UCMJ and LORs remain on file for a maximum period of two years, and only the wing commander or issuing authority/imposing commander (whichever is higher in rank) may remove them early. A record of nonjudicial punishment under Article 15 may only be removed early if the punishment is complete.
- A UIF must be established when an officer is convicted by a civilian court or there is an action equivalent to a finding of guilty of an offense which resulted in or could have resulted in a penalty of confinement for more than one year or death. A record of a civilian conviction remains on file for a period of four years, or PCS plus one year (whichever is later). Only the wing commander may remove it early.
- A UIF must be established when an officer is placed on the control roster. Placement on the control roster remains on file for one year, and only the wing commander or issuing authority (whichever is higher in rank) may remove it early.
- Letters of admonition and letters of counseling may be filed in a UIF
  - -- <u>If filed in the UIF</u>, they will stay in the UIF for a period of no more than two years and only the wing commander or the issuing authority (whichever is higher in rank) may remove them early
  - -- <u>If not filed in the UIF</u>, they must be filed in the member's personnel information file (PIF), and they will stay in the PIF until the officer's PCS

Access and Review

- <u>Access</u>: Besides the commander, only certain individuals are to have access to UIFs and their contents
  - -- The member who has the UIF
  - -- First sergeants

- -- Rating officials, when preparing to write or endorse a performance report or when preparing a promotion recommendation
- -- The senior Air Force officer or commander of an Air Force element in a joint command
- -- The Air Force element section commander in a joint command
- -- MPF personnel, IG personnel, inspection team members, legal office personnel, law enforcement personnel, MEO personnel, and substance abuse counselors authorized by the commander to review the document in the course of their official Air Force duties
- -- Program managers for AF Reserve programs

- Review: All UIFs require periodic review to ensure continued maintenance of documents in the UIF is proper
- The unit commander must review all UIFs
  - -- Within 90 days of assuming or being appointed to command
  - -- Annually, with the assistance of the staff judge advocate
  - -- Whenever individuals are being considered for, among other things, promotion, reenlistment, PCS, PRP duties, retraining, EPRs, or OPRs

References:

AFI 36-2608, *Military Personnel Records System* (30 August 2006)

AFI 36-2907, *Unfavorable Information File (UIF) Program* (17 June 2005)

Control Rosters

Commanders at all levels are authorized to use a control roster for individuals whose duty performance is substandard or who fail to meet or maintain Air Force standards of conduct, bearing, or integrity, on or off duty.

Purpose

- The control roster is a rehabilitative tool
- Control rosters assist commanders in controlling or evaluating a member's performance and provide the member an opportunity to improve that performance
- A single incident of substandard duty performance or an isolated breach of standards not likely to be repeated should not ordinarily be a basis for a control roster action. Other rehabilitative tools should be considered before placing a member on the control roster.
- Placing an individual on the control roster is not a substitute for more appropriate administrative, judicial, or nonjudicial action. Additionally, individuals are not shielded from other appropriate actions by virtue of being placed on the control roster.

Procedure

- Commanders place an individual on the control roster by using AF IMT 1058, which puts the member on notice that his performance and behavior must improve or he will face more severe administrative action or punishment
  - -- Members acknowledge receipt of the action and have three duty days to respond before the AF IMT 1058 is finalized
  - -- The control roster observation period may last for up to six months for active duty personnel
  - -- Commanders at all levels have the authority to add enlisted members to or remove them from the control roster
  - -- Commanders at all levels have the authority to add officers (if the commander is senior to the officer) to a control roster, but officers can only be removed from a control roster by the wing commander or issuing authority, whichever is higher in rank
  - -- If the member's conduct or performance does not improve during the observation period, the commander should consider whether a more severe response is required, such as initiating an administrative discharge

- -- Commanders may direct an OPR or EPR before entering or removing the person from the control roster, or both
- -- UIF action is required if an individual is placed on the control roster

- Numerous personnel actions are affected by placing a member on a control roster, including, but not limited to the following:
  - -- PCS/PCA reassignment is limited
  - -- All formal training must be canceled
  - -- Eligibility for promotions and reenlistments

References:

AFI 36-2608, *Military Personnel Records System* (30 August 2006)

AFI 36-2907, *Unfavorable Information File (UIF) Program* (17 June 2005)

Administrative Demotions

An administrative demotion is another quality force management tool commanders have available to help ensure a quality enlisted force. In cases where demotion actions may be appropriate, members should be given the opportunity to overcome their deficiencies prior to the initiation of the action.

Demotion and Appellate Authorities

- The demotion authority is the group commander (or equivalent level commander) for master sergeants (E-7) and below. For senior master sergeants (E-8) and chief master sergeants (E-9), the MAJCOM/CC, FOA/CC, or DRU/CC is the demotion authority (unless delegated to the CV, CS, MP, DP, or NAF/CC).
- The appellate authority is the next level commander

Reasons For Demotion

- Do not use administrative demotions when it is more appropriate to take action under the Uniform Code of Military Justice
- The basis for the demotion must have occurred in the current enlistment unless the commander does not become aware of the facts and circumstances until the subsequent enlistment
- If a sufficient reason exists to initiate a demotion action, a commander should use the entire military record in deciding whether a demotion action is appropriate
- Reasons for demotion include:
  - -- Officer trainees or pipeline students if eliminated from training
  - -- Termination of student status of members attending TDY Air Force schools
  - -- Failure to maintain or attain the appropriate skill/grade level
  - -- Failure to fulfill NCO responsibilities
  - -- Failure to keep fit
  - -- Failure to perform

Due Process

- Commanders should consult with the servicing staff judge advocate prior to initiation to ensure appropriateness of the action and legal sufficiency
- The following procedures must be followed in an administrative demotion action:
  - -- The immediate commander notifies the member in writing of the intention to recommend demotion, citing the paragraph, the demotion authority if other than the initiating commander, and the recommended grade. The notification must also include the specific reasons for the demotion and a complete summary of the supporting facts.
  - -- The immediate commander informs the member of his right to counsel and the right to respond within three (3) duty days orally, in writing, or both
    - --- The initiating commander should get a signed acknowledgement of receipt of the action from the member
    - --- The initiating commander must also inform eligible members of their right to apply for retirement in lieu of demotion
  - -- Following the member's response, if the commander elects to continue the proceedings, the case file is forwarded with a summary of the member's written and verbal statements to the military personnel flight for processing prior to forwarding to the demotion authority
  - -- The member must be notified in writing of the decision to forward the action to the demotion authority
  - -- The demotion authority obtains a written legal review before making a decision
  - -- The demotion authority may demote more grades than recommended by the initiating commander
  - -- If the demotion authority decides to demote the member, the member is informed of his right to appeal

"Demotable" Grades

- The following demotions are permitted:
  - -- E-2 to E-1
  - -- E-3 to E-2

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

Restoration of Grade

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

Reference:
AFI 36-2502, *Airman Promotion/Demotion Programs* (31 December 2009)

Selective Reenlistment

The selective reenlistment program (SRP) is designed to ensure only enlisted members who consistently demonstrate the capability and willingness to maintain high professional standards are afforded the privilege of continued military service.

- Commanders have total SRP selection and nonselection authority
- Decisions should be in line with other qualitative recommendations, such as promotion, and must be based upon substantial evidence. Commanders may reverse their decisions at any time.
- The SRP applies to all enlisted personnel eligible for consideration or reconsideration
- SRP nonselection makes members ineligible for promotion and automatically cancels projected promotion line numbers
- Commanders will conduct early SRP consideration for members who have not previously received formal SRP consideration, are otherwise eligible to reenlist, and request early separation for the following reasons:
  - -- PALACE CHASE
  - -- Early separation directed by HQ USAF (except special separation benefit/voluntary separation incentive)
  - -- Officer training program, other than AFROTC
  - -- Early release to further education
  - -- Sole surviving son or daughter
  - -- Early release from extension
  - -- Accepting public office
  - -- Miscellaneous reasons
  - -- Pregnancy or childbirth
  - -- End of year early release
- Immediate supervisors are responsible for ensuring members meet quality standards
  - -- Provide unit commanders with recommendations of a member's career potential
  - -- Prepare AF IMT 418, *Selective Reenlistment Program Consideration*

- Unit commanders consider the supervisor's recommendation, the member's duty performance and career force potential before making a decision
  - -- If the member is selected for reenlistment, the commander completes the SRP roster
  - -- If the supervisor recommends nonselection or the commander nonconcurs with the supervisor's recommendation to allow the member to reenlist, the commander must:
    - --- Notify the member of the specific reasons for nonselection, areas needing improvement, appeal opportunity, promotion ineligibility, and the possibility of future reconsideration and selection
    - --- Permit the member three workdays to decide whether to appeal the decision
- The appellate authority may be the group commander, wing commander, or Secretary of the Air Force, depending on the member's length of service
- A legal review is only required when a member appeals SRP decisions; however, it is recommended that commanders contact the servicing legal office prior to notifying a member of a nonselection decision
- Coordination with the legal office can identify any potential problems with the package and avoid issues during the appeal process

Reference:

AFI 36-2606, *Reenlistment in the United States Air Force* (21 November 2001), Incorporating Through Change 2 (10 March 2010)

Officer and Enlisted Performance Reports

The single most important element needed for successful mission accomplishment is performance. The officer and enlisted evaluation systems emphasize the importance of performance and serve a variety of purposes. First, they provide meaningful feedback to individuals on what is expected of them, advice on how well they are meeting those expectations, and advice on how to better meet those expectations. Second, they provide a reliable, long-term, cumulative record of performance and potential based on that performance. Finally, they provide officer central selection boards, senior NCO evaluation boards, the weighted airman promotion system, and other personnel managers sound information to assist in identifying the best qualified officer and enlisted personnel.

The following is a summary of officer performance reports (OPRs) and enlisted performance reports (EPRs). A properly prepared performance report is critical in determining who should be selected for advancement and should accurately reflect an individual's performance. As a key quality force indicator, it should take into account any adverse administrative or punitive actions taken against the individual.

Performance Feedback

- Performance feedback is a private, formal communication a rater uses to tell a ratee what is expected regarding duty performance and how well the ratee is meeting those expectations. The rater documents the ratee's performance on a performance feedback worksheet (PFW) and uses the PFW format as a guide for conducting feedback sessions. Providing feedback encourages positive communication, improves performance, and professional growth.

- The rater is responsible for preparing, scheduling, and conducting the feedback session. These sessions can only be productive when supervisors stay abreast of current standards and expectations. They must provide realistic feedback to improve the ratee's performance and written comments, not just marks on the form. Any behavior that may result in further administrative or punitive action should be documented in a separate document.

- The rater provides the original PFW to the ratee, with a signed and dated feedback notice forwarded to the command support staff for filing. The rater may keep a copy for personal reference, but the PFW will not be made part of any official personnel record or be included in an individual's PIF, <u>unless</u> the ratee introduces it first or alleges he or she did not receive required feedback or claims the sessions were inadequate.

- The ratee may use the completed form for any purpose he or she desires

Performance Reports – Required and Prohibited Comments

- Some specific comments or entries are required and must be included in OPRs and EPRs. These comments should be drafted as stated in the AFI. Slight deviations are allowed, but entries significantly deviating from the recommended format are unacceptable. These comments and entries include, but are not limited to:
  - -- For a referral report or training report (TR), the evaluator must specifically detail the behavior or performance that caused the report to be referred (referral reports are discussed in detail below)
  - -- Explaining any significant disagreement with a previous evaluator on a performance report
  - -- Comments relating to the ratee's behavior are mandatory on the ratee's next OPR, EPR, TR, and an officer's next promotion recommendation form (PRF), if the ratee has been convicted by court-martial
  - -- If performance feedback was not accomplished, comment on that fact is mandatory
- Certain comments are inappropriate to include in performance reports. Some of the common mistakes include, among others:
  - -- Promotion recommendations for officers
  - -- Duty history or performance outside the current reporting period, except as allowed in AFI 36-2406, paragraphs 3.7.6 and 3.7.7
  - -- Comments referring to performance feedback sessions, except in the "Performance Feedback Certification" block
  - -- Events that occur after the close-out date
  - -- Any action against an individual that resulted in an acquittal or failure to implement an intended personnel action. This does not necessarily bar commenting on the underlying misconduct that formed the basis for the action, but consult with the servicing staff judge advocate before doing so.
  - -- Actions taken by a member outside the normal chain of command that represent guaranteed rights of appeal, such as issues raised with the inspector general
  - -- Race, ethnic origin, gender, age, or religion of the ratee
  - -- Temporary or permanent disqualification under AFMAN 10-3902, *Nuclear Weapons Personnel Reliability Program* (PRP)
  - -- Participation in drug or alcohol abuse rehabilitation programs

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

Referral Reports

- Certain comments or ratings in a performance report may result in it being "referred" to the ratee for comments. An evaluator whose ratings or comments cause a report to become a referral report must give the ratee a chance to comment on the report. Referral procedures are established to allow the ratee to respond to the items that make a report a referral before it becomes a matter of record.
- Refer a performance report when:
  - -- An evaluator marks "Does Not Meet Standards" in any performance factor in Section IX of the OPR or places a mark in the far left block of any performance factor in Section III or marks a rating of "1" in Section V of an EPR; or
  - -- Any comments or attachments are derogatory; imply/refer to behavior incompatible with standards of personal or professional conduct, character, judgment, or integrity; and/or refer to disciplinary actions.
- The procedures involved when referring an OPR or EPR are provided in AFI 36-2406, beginning with paragraph 3.9

References:

AFMAN 10-3902, *Nuclear Weapons Personnel Reliability Program* (PRP) (13 November 2006), Incorporating Change 1 (10 September 2008)

AFI 36-2406, *Officer and Enlisted Evaluation Systems* (15 April 2005), Certified Current (17 February 2007)

Officer Promotion Propriety Actions

Officer promotion propriety action by a commander includes presenting information to the Secretary of the Air Force (SecAF) or a selection board to find an officer is not qualified for promotion, removing an officer from a promotion list, or delaying a promotion date. If an officer is not qualified to perform the duties of the next grade, the proper authority must take promotion propriety action before the effective date of promotion. If commanders or supervisors have information showing an officer is not qualified to perform the duties of the next grade, they should discuss that information with the servicing staff judge advocate to determine whether sufficient evidence exists to support a proprietary action.

Preliminary Considerations

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

- Unqualified officers should neither be selected for promotion nor allowed to remain on a promotion list if already selected. Accordingly, several tools are available to ensure that unqualified officers are not promoted.

Not Qualified For Promotion (NQP)

- When it is more likely than not that an officer is not mentally, physically, morally, or professionally qualified to perform the duties of the higher grade, the commander recommends the SecAF find the officer NQP

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

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

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

Removal From A Promotion List

- A commander may initiate action to remove an officer from a promotion list when it is more likely than not that an officer is not mentally, physically, morally, or professionally qualified to perform the duties of the higher grade
- The officer's immediate commander initiates the removal action and forwards it with appropriate coordination to the major command commander for review. The package then goes to the SecAF, who must approve any removal action.
- The immediate commander's notification of the officer of the removal action automatically delays the officer's promotion until SecAF makes a decision on the removal action

Delaying A Promotion

- The action should be initiated when there is cause to believe the officer is not mentally, physically, morally or professionally qualified to perform the duties of the higher grade
- The officer's immediate commander initiates the delay of promotion before the effective date of promotion and forwards it with appropriate coordination to the major command commander for review. The delay is effective when the immediate commander notifies the officer of the delay, either verbally or in writing.
- The major command commander approves initial promotion delays up to 6 months, although SecAF may grant extensions for up to an additional 12 months. The officer may make a written response to SecAF.

Propriety Action Procedures

- The commander must inform the officer, verbally or in writing, of the propriety action before the effective date of promotion
- Notification in writing is preferred. If written notification is not possible, confirm the action in writing as soon as possible.
- The action itself must contain a clear statement of reasons for the decision and must list the evidence supporting the action. It must also show that the affected officer had an opportunity to review the information.
- The officer should acknowledge the action and be allowed five working days to respond. Include in the package any comment from the officer.
- AFI 36-2501, Table 5.1 contains procedures for processing propriety actions

Reserve and Air National Guard Officers

- Commanders have the responsibility to ensure that officers in the Air Force Reserves and Air National Guard have the necessary qualifications to meet the responsibilities of a higher grade
- Commanders of officers in the Air Force Reserves and Air National Guard initiate a propriety of promotion action if the preponderance of the evidence indicates it is more likely than not that the officer is not mentally, physically, morally, or professionally qualified to perform duties of a higher grade
- An officer's wing commander or equivalent initiates the promotion proprietary action
- The procedures for actions involving officers in the Air Force Reserves and Air National Guard can be found in AFI 36-2504, Table 7.1

References:

AFI 36-2501, *Officer Promotions and Selective Continuation* (16 July 2004), Incorporating Change 2 (13 September 2007) and Interim Change 3 (17 August 2009)

AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force* (9 January 2003), Incorporating Through Change 5 (19 October 2007), Certified Current (22 January 2010)

Enlisted Promotion Propriety Actions

Air Force promotion policy is to select individuals (active duty or reserve) for promotion based on potential to serve in the next higher grade. Only the best should be promoted due to the limited vacancies in higher grades. The responsibility for maintaining a quality enlisted force rests with commanders who make recommendations for promotions. The following tools are available to commanders when managing enlisted promotions.

Nonrecommendation

- An enlisted member is considered ineligible for promotion when nonrecommended or removed from the promotion list by the promotion authority before the effective date of promotion, commonly referred to as "redlining"
- Typical grounds for removal include poor or declining performance trends or recent serious misconduct
- A promotion authority can nonrecommend E-3s and below in monthly increments up to 6 months. All other ranks are nonrecommended for a specific promotion cycle.
- Airmen also become ineligible for promotion under other circumstances as outlined in AFI 36-2502, Table 1.1, which include, but are not limited to:
  - -- Placement on the control roster
  - -- Serving a probationary period as part of an involuntary discharge action
  - -- Under a suspended reduction in grade imposed through nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ)
  - -- Conviction by court-martial or undergoing punishment or suspended punishment imposed by a court-martial
  - -- Conviction by a civilian court or undergoing punishment or suspended punishment, probation, or work release program, excluding minor traffic violations

Withholding

- The immediate commander has the authority to withhold a promotion for up to one year after a member's selection for the next higher grade, but before the effective date of promotion
- A higher authority (wing or equivalent level commander) must approve extensions beyond a year

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

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

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

  -- Under court-martial or civilian charges

  -- Placed into the alcohol and drug abuse prevention and treatment program (ADAPT)

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

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

- If the commander terminates the withhold action, the member receives his original DOR, and the effective date is the date the commander terminates the withhold action and recommends promotion

Deferral

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

- A deferral action is begun to determine if the member meets acceptable behavior and performance standards for the higher grade. If there is clear evidence an NCO is not suited to take on the increased responsibilities of the higher grade, then nonrecommendation is the right course of action, not deferral.

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

Procedures

- In all instances of nonrecommending, deferring, and withholding promotions, the commander

  -- Informs the member of adverse actions in writing or verbally before the promotion effective date, confirming verbal notification in writing within 5 workdays

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

- -- The individual should acknowledge receipt of the notification or confirmation
- -- Files the letter and the airman's acknowledgment in the unit personnel record group (UPRG)

Reserve Enlisted Members

- Commanders have the responsibility to ensure that reserve enlisted members have the necessary qualifications to meet the responsibilities of a higher grade
- If the preponderance of the evidence indicates it is more likely than not that a reserve enlisted member does not have the qualifications to be promoted, the member's commander can disapprove the promotion using AF IMT 224

References:

AFI 36-2502, *Airman Promotion/Demotion Programs* (31 December 2009)

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

CHAPTER THREE: NONJUDICIAL PUNISHMENT UNDER ARTICLE 15, UCMJ

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Nonjudicial Punishment Overview and Procedures

Nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction.

- Generally, any commander who is a commissioned officer may impose NJP for minor offenses committed by members under his or her command. The offense must violate the UCMJ. (A Reservist must be in Title 10 status subject to the UCMJ at the time of the offense.)
  - -- In deciding whether or not an offense is minor, commanders should consider:
    - --- The nature of the offense and the circumstances surrounding its commission
    - --- The need for good order and discipline
    - --- The member's age, rank, duty assignment, record, and experience
    - --- The effect of NJP on the member and the member's record
  - -- Ordinarily, an offense is not considered minor if the offense is one for which the maximum imposable punishment at a general court-martial includes a dishonorable discharge or confinement for more than one year
  - -- The decision whether an offense is "minor" is a matter of discretion for the commander imposing NJP
- Commanders must confer with the staff judge advocate (SJA), or a designee, before initiating nonjudicial punishment proceedings and before imposing punishment. The military justice section of the base legal office prepares the Air Force (AF) IMT 3070, *Record of Nonjudicial Punishment Proceedings*.
  - -- An AF IMT 3070A is used to impose NJP on a member in the grade of Airman Basic through Technical Sergeant
  - -- An AF IMT 3070B is used to impose NJP on a member in the grade of Master Sergeant through Chief Master Sergeant
  - -- An AF IMT 3070C is used to impose NJP on an officer
- While no specific standard of proof is applicable to NJP proceedings, commanders should recognize that a member is entitled to demand trial by court-martial, where proof beyond a reasonable doubt by competent evidence is required for conviction. Commanders should consider whether such proof is available before initiating action under Article 15. If not, NJP is usually not warranted.

- Commanders should consider the maximum punishment that can be imposed based on the commander's grade and the grade of the member when deciding whether a more senior commander should impose the NJP. Limitations are on the AF IMT 3070 and in AFI 51-202, Tables 3.1 and 3.2 (attached).

- Commanders initiate NJP action by serving the AF IMT 3070. Commanders should serve the AF IMT 3070 on members within 10 days of the "date of discovery." The date of discovery is identified as the date when an investigative agency (e.g., OSI, SFOI, IG, legal office, or commander, supervisor or first sergeant) becomes aware of an allegation and has identified a subject"

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

- Once notified of NJP proceedings, by way of the AF IMT 3070, members are allowed three duty days to respond (30 days for Non-EAD reservists). Upon written application and for good cause, the initiating commander may approve a request for additional time to respond.

  -- Commanders should encourage members to consult with the area defense counsel (ADC) in all cases. The AF IMT 3070 requires that an appointment with an ADC be established on behalf of a member prior to the commander notifying that member of the commander's intent to impose NJP. Typically, an ADC appointment will be arranged for the member by the First Sergeant or by legal office personnel before the member is notified of the commander's intent to impose NJP.

  -- Once served with the AF IMT 3070, the member has the right to examine all statements and evidence upon which the commander intends to rely in arriving at a decision to impose punishment, and as to the quantum of punishment to be imposed, unless the matters are privileged or restricted by law, regulation, or instruction. The legal office normally supplies the evidence to the ADC.

  -- If the member fails to indicate within three duty days (30 days for Non-EAD reservists) whether he or she will accept the Article 15, the commander may continue with the proceedings. The commander notes the member's failure to respond on the AF IMT 3070.

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

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

--- Acceptance of NJP is not an admission of guilt. It is simply a choice by the member not to assert the right to a trial by court-martial and to instead allow the commander to determine whether the member is guilty or not guilty of the alleged offense and the punishment, if any, to be imposed.

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

-- A member is generally entitled to appear personally before the imposing commander and present matters in defense, mitigation, or extenuation, except under extraordinary circumstances or when the imposing commander is unavailable. If the member chooses to make a personal appearance, the member also has the right to:

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

--- Present witnesses who are reasonably available

-- A member may request that a personal presentation be open to the public. The commander may open the personal appearance to the public, even though the member does not request it or agree that the appearance should be open. However, public NJP at commander's calls, unit training assemblies and other public gatherings is inappropriate. NJP proceedings may be attended by a limited number of people in a more private setting, i.e., the commander's office. The individuals in attendance at NJP proceedings should normally be limited to those in the member's supervisory chain or people who can assist the commander in making a decision.

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

-- Whether the member committed the offense

-- If so, what punishment to impose

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

- Commanders should tailor the punishment to the offense <u>and</u> the member

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

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

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

-- There are limitations on the combination of certain punishments

--- The Remotivation Program (formerly Correctional Custody, which the AF no longer uses) cannot be imposed in combination with restriction or extra duties

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

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

-- Unless the commander otherwise specifies, unsuspended reductions in grade and forfeitures take effect on the date the commander imposes punishment. All other unsuspended punishments take effect immediately upon notification to the member. Suspension of a punishment takes effect on the imposition date.

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

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

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

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

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

- The appellate authority may deny all relief, grant partial relief, or grant all relief requested by the member. The appellate authority's decision is final.
- Punishments are not stayed during the appeal process. However, if the commander and/or appellate authority fail to take action on an appeal within five days after submission, and if the member so requests, any unexecuted punishment involving restraint or extra duties will be delayed until after appeal.

References:

UCMJ art. 15

Manual for Courts-Martial, United States, Part V (2008)

AFI 51-202, *Nonjudicial Punishment* (7 November 2003), Incorporating Through Change 2 (16 May 2007)

AFI 51-202, *Nonjudicial Punishment*, Air Force Reserve Command Supplement (17 July 2006)

Attachment:

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

Table 3.1. Enlisted Punishments.

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

NOTES:

1. See MCM, Part V, paragraph 5d for further limitations on combinations of punishments.

2. CMSgt or SMSgt may be reduced one grade only by MAJCOM commanders, commanders of unified or specified commands, or commanders to whom promotion authority to these grades have been delegated. See AFI 36-2502, Airmen Promotion Program.

3. Neither bread and water nor diminished rations punishments are authorized.

4. Frocked commanders may exercise only that authority associated with their actual pay grade. No increased punishment authority is conferred by assumption of the title and insignia of the frocked grade.

Table 3.2. Officer Punishments.

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

NOTES:

1. Officers in the grade of Lt Colonel and below (includes frocked Colonels) may not impose NJP on officers.

2. Only MAJCOM commanders, commanders of unified commands and their equivalents, or higher may impose NJP on general officers.

3. See MCM, Part V, paragraph 5d, for further limitations on combinations of punishments.

Supplementary Nonjudicial Punishment Actions

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

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

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

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

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

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

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

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

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

- -- With the exception of reduction in grade, only the unexecuted part or amount of the punishments can be mitigated
- -- A reduction in grade may be mitigated even after it has been executed. Reduction in grade may only be mitigated to forfeitures and may only be done within four months after the date of execution. In such cases, the mitigation date will become the offender's new date of rank and effective date of rank. The member will not be entitled to receive back pay.
- -- Punishments involving loss of liberty, such as correctional custody or restriction, cannot be mitigated to forfeitures or reduction in grade
- -- Mitigated restraints on liberty (for example mitigating correctional custody to extra duties) cannot run for a longer period than the remaining amount of punishment that was originally imposed

- Remission: Remission is the cancellation of any unexecuted portion of a punishment. Remission is appropriate under the same circumstances as mitigation.
  - -- Commanders may remit punishments any time before the execution of the punishment is completed
  - -- An unsuspended reduction in rank is executed at imposition, so it can never be remitted
- Set Aside: Set aside occurs when the punishment, or any part of the punishment, whether executed or unexecuted, is removed from the record. A set aside of all punishment voids the entire NJP action.
  - -- Any property, privileges, or rights, affected by the portion of the punishment set aside are restored to the member
  - -- Unlike suspension, mitigation, and remission, setting aside a punishment is not normally considered rehabilitative in nature and should not be used on a routine basis
  - -- Commanders should exercise this discretionary authority only in the rare and unusual case where a question concerning the guilt of the member arises or where the best interests of the Air Force are served by clearing the member's record
  - -- Punishments should be set aside within a reasonable time (4 months, except in unusual circumstances) after the punishment is originally imposed

REFERENCES:

UCMJ art. 15

MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part V (2008)

AFI 51-202, *Nonjudicial Punishment* (7 November 2003), Incorporating Through Change 2 (16 May 2007)

Vacating Suspended Nonjudicial Punishment

Vacating suspended nonjudicial punishment (NJP) means imposing punishment that was previously suspended either at the time the original NJP was imposed or as part of supplementary NJP relief. A commander (including a successor in command) may vacate the suspension of punishment under Article 15 if he or she had the authority to impose the original punishment. Commanders must consult the servicing SJA before taking action to vacate suspended punishment.

- Vacating a suspended punishment may be appropriate if, during the suspension period, the member violates either a condition of the suspension specified in writing by the commander or any punitive article of the UCMJ. With respect to a violation of a punitive article of the UCMJ, the new offense does not have to be serious enough to warrant imposition of NJP, nor does it have to be of the same nature as the original offense.

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

- Procedure for vacation actions

  -- The commander must notify and advise the member of the intended vacation action by causing the member to be served with an AF IMT 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishmen*t. It contains:

    --- The new offense which the commander suspects the member has committed (or what condition of the member's suspension was violated)

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

    --- The member's rights during the vacation proceedings

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

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

- Member's elections

  -- The member has three duty days to make elections

  -- The member is entitled to consult with a lawyer, attach a written presentation, and/or request a personal appearance before the commander

- -- If the member fails to respond within three duty days, the commander can continue by noting in item 3 of the AF IMT 366 "member failed to respond." However, if the commander believes the failure to respond was out of the member's control, the commander may not proceed with the vacation proceedings without good cause.

- -- The member does not have the right to demand a trial by court-martial during a vacation action

- Commander's decision: Following the commander's consideration of the evidence, including any matters presented by the member, the commander takes one of the following actions on the AF IMT 366:

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

  - -- Finds the members violated the UCMJ or a condition of the suspension

- Effects of vacation action on suspended reductions: If a suspension of a reduction in grade is vacated, the member's date of rank will be the date the commander imposed the original punishment. The effective date, however, will be the day the suspension is vacated. The member will not be required to return any additional pay received while holding the higher rank.

References:

Manual for Courts-Martial, United States, Part V (2008)

AFI 51-202, *Nonjudicial Punishment* (7 November 2003), Incorporating Through Change 2 (16 May 2007)

The Remotivation Program
(Correctional Custody)

The remotivation program, formerly known as correctional custody, is a form of non-judicial punishment (NJP) available under Article 15 of the Uniform Code of Military Justice (UCMJ) that a commander may impose on enlisted members of his or her command. The remotivation program provides commanders a secure setting in which to maintain discipline with correctional treatment that returns members punished under Article 15 to the mainstream Air Force.

- The remotivation program provides commanders a secure setting in which to maintain discipline while reeducating and remotivating Airmen for return to the mainstream Air Force. It educates, rehabilitates and deters program entrants from repeating the offenses. Because depriving Airmen of their liberty is a severe punishment, imposing this program requires careful consideration.
  - -- The remotivation program is not considered confinement, but is a significant restraint on an individual's liberty
  - -- The remotivation program includes the involvement of a number of referral services (such as religious, medical, legal, and/or personal affairs) to assist individuals in understanding the extent of their misconduct, the avenues available to assist them in the future, and ways to avoid future problems
  - -- The remotivation program should only be used in cases where the commander believes the member can benefit from the program and is a candidate for rehabilitation
- In order for the remotivation program to be most effective, it should be imposed early in a member's career
  - -- Commanders should consider the remotivation program particularly when administering NJP to first-time offenders in the grades of E-1 through E-4, assuming the member has rehabilitative potential
  - -- Commanders should not normally consider the remotivation program in cases where the member:
    - --- Will be separated for cause following completion of the NJP proceedings
    - --- Has previously been enrolled in the remotivation program
    - --- Is within six months of normal discharge and has not been recommended for retention
    - --- Is not a candidate for rehabilitation

- -- Although legally permissible, the remotivation program is strongly discouraged for NCOs except in cases where an E-5 has been reduced to E-4 and thereby loses his or her NCO status

- Commanders in the rank of major or above should strongly consider entering members into the remotivation program for a full 30 days to afford the member the maximum benefit of the program

  - -- In cases where it appears appropriate, company grade commanders (who are limited to imposing seven days in the remotivation program) should normally consider having the next superior field grade commander impose the NJP

  - -- Commanders may consider remitting a portion of the punishment in cases where members demonstrate a commitment to meet program objectives. However, the program is designed as a 30 day program and careful consideration should be given to remitting any portion of enrollment too early in the process.

- Unit commanders maintain command authority for personnel assigned to the remotivation program, regardless of location

  - -- The commander or first sergeant must review their member's progress weekly

  - -- The commander disciplines members who commit violations while in the remotivation program

- The remotivation program is an optional program. The installation commander determines whether to support a remotivation program using a cost/benefit analysis and is responsible for developing local policies and procedures for operating the remotivation program. If a local program does not exist, a commander may consider placing members in a regional program.

References:

Manual for Courts-Martial, United States, Part V (2008)

AFI 31-208, *Correctional Custody* (*Remotivation) Program* (30 July 2009)

AFI 51-202, *Nonjudicial Punishment* (7 November 2003), Incorporating Through Change 2 (16 May 2007)

Quality Force Management Effects of Nonjudicial Punishment

Commanders have a great deal of discretion concerning quality force management consequences related to nonjudicial punishment (NJP) actions. The following guidance applies primarily to enlisted personnel. Please consult with the staff judge advocate regarding the quality force management consequences of NJP actions on officers.

- Unfavorable information file (UIF) entries

  -- Mandatory Entries: Where an enlisted member is punished under Article 15, a UIF entry is required if any portion of the executed or suspended punishment will not be completed within one month

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

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

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

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

    --- The commander may remove the NJP action and related documents from the member's UIF any time after the punishment or suspended punishment is completed (if removal is clearly warranted), or if the Article 15 is set aside. If the commander takes no action to remove the NJP action, it will remain in the UIF for two years.

  -- Discretionary Entries: A commander has the discretion to enter an NJP action into the member's UIF when entry is not required (when punishment does not exceed 1 month)

    --- As in mandatory UIF entries, the commander must notify the member of his or her intent to enter an NJP action into the member's UIF

    --- The commander may remove the NJP action from the member's UIF any time after the punishment or suspended punishment has been completed or remitted. If the commander takes no action, the NJP will remain in the UIF for one year.

- Officer Article 15 UIF actions
  - -- Any record of an NJP action for officers is a mandatory UIF entry
  - -- Generally, such NJP actions are retained in a UIF for two years
  - -- Early removal by the wing commander or issuing authority (whomever is higher in rank) is authorized if punishment has been completed
  - -- Commanders should also consider whether comments should be made in the next OPR and/or promotion recommendation form (PRF). Seek the advice of the SJA for assistance in determining when comments may be appropriate.
- Related Administrative Actions: In addition to NJP, commanders may take other appropriate administrative actions. Such actions may include but are not limited to:
  - -- Control roster action
  - -- Entry of the member into counseling or rehabilitation programs such as ADAPT
  - -- EPR comments concerning the member's underlying misconduct
  - -- Administrative discharge (in serious cases)
  - -- Removal from the personnel reliability program, withholding a security clearance, or withholding access to sensitive materials; and
  - -- NJP may also adversely affect promotion, reenlistment, and assignment eligibility
- Officer and Senior NCO Promotion Selection Records
  - -- In cases involving officers and senior NCOs, commanders who impose NJP must also decide whether to include the Article 15 in the member's promotion selection record
  - -- The imposing commander's decision to file the Article 15 in a selection record is subject to review by the next senior Air Force commander, unless the GCMCA imposed the punishment
  - -- Article 15s placed in a senior NCO's promotion selection record remain there for two years or until after the member meets one senior NCO evaluation board
  - -- Article 15s placed in an officer's promotion selection record (for lieutenant colonels and below) are generally kept in the record until after the officer meets one IPZ or APZ promotion board and an appeal for removal has been approved
  - -- Selection record decisions are recorded on an AF IMT 3070B for senior NCOs and on AF IMT 3070C for officers

References:

AFI 36-2406, *Officer and Enlisted Evaluation Systems* (15 April 2005), Certified Current (17 February 2007)

AFI 36-2608, *Military Personnel Records System* (30 August 2006)

AFI 36-2907, *Unfavorable Information File (UIF) Program* (17 June 2005)

AFI 51-202, *Nonjudicial Punishment* (7 November 2003), Incorporating Through Change 2 (16 May 2007)

CHAPTER FOUR: ADMINISTRATIVE SEPARATION FROM THE AIR FORCE

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Involuntary Separation of Enlisted Members: General Considerations

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

Preprocessing Considerations

- Before initiating discharge, a commander must consider all the factors that make the member subject to discharge, including:
  - -- The seriousness of the circumstances that make the member subject to discharge and how the member's retention might affect military discipline, good order, and morale
  - -- Whether the circumstances that are the basis for discharge action will continue or recur
  - -- The likelihood that the member will be disruptive or an undesirable influence in present or future duty assignments
  - -- The member's ability to perform duties effectively in the present and in the future
  - -- The member's potential for advancement and leadership
  - -- An evaluation of the member's military record, which must include, but is not limited to:
    - --- Records of nonjudicial punishment
    - --- Records of counseling
    - --- Letters of reprimand or admonition
    - --- Records of conviction by courts-martial
    - --- Records of involvement with civilian authorities
    - --- Past contributions to the Air Force
    - --- Duty assignments and EPRs
    - --- Awards, decorations, and letters of commendation

--- The effectiveness of preprocessing rehabilitation, when required

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

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

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

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

  -- Cases involving homosexual conduct, fraudulent enlistment, erroneous enlistment, or the interest of national security

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

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

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

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

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

  -- <u>Under other than honorable conditions (UOTHC)</u>: appropriate if based on a pattern of behavior or one or more acts or omissions constituting a significant departure from the conduct expected of Airmen. This characterization can be given

only if the member is offered an administrative discharge board or if a discharge is unconditionally requested in lieu of trial by court-martial.

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

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

  -- A service characterization of UOTHC is authorized and warranted, or

  -- The Secretary of the Air Force determines that characterization as honorable is clearly warranted by unusual circumstances of personal conduct and performance

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

Mandatory Discharges

- A commander must initiate discharge processing if the reason for discharge is homosexual conduct unless the member engaged in the conduct to avoid or terminate service and separation would not be in the best interest of the Air Force

- A commander must initiate discharge processing or seek a waiver of the discharge if the reason for discharge is one of the following:

  -- Fraudulent or erroneous enlistment

  -- Civil court conviction for an offense for which a punitive discharge and confinement for one year or more would be authorized under the UCMJ, or

  -- Drug abuse

- A commander must make a discharge or retention recommendation when a member remains in a poor fitness category for a continuous 12-month period or receives 4 poor fitness assessments in a 24-month period

References:

AFI 36-2905, *Fitness Program* (1 July 2010)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

Involuntary Separation of Enlisted Members: Reasons For Discharge

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

Convenience of The Government

- Discharge is appropriate when discharge would serve the best interest of the Air Force and discharge for cause is not warranted. Such separations may be based on:
  - -- Parenthood, if the member fails to meet military obligations because of parental responsibilities
  - -- Insufficient retainability for required training, if the cost of retraining for a brief period of service may not warrant retention
  - -- Conditions that interfere with military service, which include:
    - --- Enuresis and sleepwalking
    - --- Dyslexia, severe nightmares, ADHD, stammering/stuttering, incapacitating fear of flying, air sickness, and claustrophobia. The condition must have an adverse effect on assignment or duty performance.
    - --- Mental disorders
      - ---- Must be supported in writing by a report of evaluation by a psychiatrist or clinical psychologist that confirms a diagnosis of a disorder contained in the Diagnostic and Statistical Manual of Medical Disorders (DSM-IV);
      - ---- Must be documented in a report as so severe that the member's ability to function in the military environment is significantly impaired; and
      - ---- Must have an adverse effect on assignment or duty performance
    - --- Transsexualism or gender identity disorder of adolescence or adulthood, non-transsexual type (GIDAANT). The condition must be supported by a report of evaluation by a psychiatrist or clinical psychologist that confirms a diagnosis

of transsexualism or GIDAANT and have an adverse effect on assignment or duty performance.

- Discharge for conditions that interfere with military service is not appropriate if the member's record supports discharge for another reason, such as misconduct or unsatisfactory performance
- Service is characterized as entry-level separation or honorable
- Before recommending discharge, commanders must be sure
  - -- Preprocessing rehabilitation requirements in AFI 36-3208, paragraph 5.2, have been met
  - -- They have complied with all requirements of the paragraph authorizing discharge
  - -- Circumstances do not warrant discharge for another reason

Defective Enlistments

- Enlistment of minors: a person under 17 years of age is barred by law from enlisting
- Void enlistments: the enlistment was not a voluntary act by a sane, sober person of age; or enlistee was a deserter from another service
- Erroneous enlistment: the Air Force should not have accepted the enlistee, but the case does not involve fraud
- Fraudulent enlistment: involved deliberate deception on the part of the enlistee
- A commander must initiate discharge or seek a waiver of discharge for erroneous/fraudulent enlistments
  - -- Erroneous/fraudulent enlistments concerning alienage cannot be waived
  - -- If the commander has knowledge of an erroneous or fraudulent enlistment and fails to act within a reasonable time, that failure to act may result in a constructive waiver of the commander's ability to discharge the member
- Authorized characterizations of service and the approval authorities are listed in AFI 36-3208, Table 5.4
- Members approved for discharge are not eligible for probation and rehabilitation (P & R)

Entry Level Performance Or Conduct

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

- Discharge processing must start during the first 180 days of continuous active duty
- Eligibility for discharge based on entry level performance or conduct does not preclude separation for another reason
- Before processing a member for discharge for entry level performance or conduct, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented
- Discharge is not formally characterized, but is described as entry level separation (ELS)
- Members approved for discharge for entry level performance or conduct are not eligible for P & R

Unsatisfactory Performance

- Members should be discharged when unsatisfactory performance or conduct shows they are not qualified for service in the Air Force
- Performance includes assigned duties, military training, bearing and behavior, as well as maintaining the high standards of personal behavior and conduct required of all military members at all times
- Unsatisfactory performance may be evidenced by any of the following:
  - -- Unsatisfactory duty performance, which may include
    - --- Failure to properly perform assigned duties,
    - --- A progressively downward trend in performance ratings, or
    - --- Failure to demonstrate the qualities of leadership required by the member's grade
  - -- Failure to maintain standards of dress and personal appearance, other than fitness standards, or military deportment
  - -- Failure to progress in military training required to be qualified for service with the Air Force or for the performance of primary duties
  - -- Irresponsibility in the management of personal finances
  - -- Unsanitary habits
  - -- Failure in the fitness program

- Before processing a member for discharge for unsatisfactory performance, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented
- Service is characterized as honorable or general
- Members approved for discharge should be considered for P & R

Drug Or Alcohol Abuse Rehabilitation Failure

- Members are subject to discharge for failure in drug or alcohol abuse rehabilitation if they
  - -- Are in a program of rehabilitation for abuse of drugs or alcohol and fail to complete the program due to inability, refusal to participate, or unwillingness to cooperate; and
  - -- Lack the potential for continued military service or need long-term treatment and are transferred to a civilian medical facility for treatment
- Service is characterized as honorable, general, or entry level
- Members approved for discharge are eligible for P & R

Homosexual Conduct

- Strict rules and procedures apply to discharges based on homosexual conduct
- Homosexual orientation is not a bar to continued service unless manifested by homosexual conduct
- Homosexual conduct is grounds for separation from military service
- A member of the armed services shall be separated if the member engages in homosexual conduct, which is defined as conduct falling into one of the following three categories:
  - -- A homosexual act:
    - --- Bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires
    - --- Bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts
  - -- A homosexual statement:
    - --- Language or behavior that a reasonable person would believe was intended to convey a statement that the member is a person who engages in, attempts

to engage in, has the propensity to engage in or intends to engage in homosexual acts

--- This may include statements such as "I am homosexual," "I am gay," "I am lesbian," or "I have a homosexual orientation" and the like

--- The member may rebut the presumption of the statement by offering evidence demonstrating he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts

-- Homosexual marriage or attempted homosexual marriage

- Only a General Court-Martial Convening Authority (GCMCA) who is also a general officer is authorized to initiate a fact-finding inquiry involving homosexual conduct. A commander initiating a fact-finding inquiry into homosexual conduct must comply with guidelines set forth in AFI 36-3208, Attachment 4 (active duty) or AFI 36-3209 (reserves).

- Only a GCMCA who is also a general officer is authorized to initiate or approve a discharge for homosexual conduct

- A commander must initiate discharge when there is probable cause to believe a member has engaged in homosexual conduct unless the member engaged in the conduct to avoid or terminate service and separation would not be in the best interest of the Air Force

- Ordinarily, service is characterized as honorable or general (under honorable conditions), but

  -- Discharge may be described as entry level separation (ELS) if applicable

  -- A UOTHC is authorized if aggravating circumstances are present

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

- Consult the servicing staff judge advocate regarding recoupment issues

Misconduct

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

- Usually, the characterization for misconduct cases under AFI 36-3208, paragraphs 5.50, 5.51, 5.52, and 5.54 should be UOTHC, but characterization may be honorable, general, or entry level separation in appropriate cases

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

-- The special court-martial convening authority, usually the wing commander, will approve recommendations for retention, separation with a general service characterization, or entry level separation

- Types of misconduct include:

  -- Minor disciplinary infractions: consists solely of infractions during the current enlistment resulting in letters of counseling, letters of admonition, letters of reprimand, and nonjudicial punishment actions

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

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

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

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

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

  -- Civilian Conviction: when the member is convicted or there is a finding that amounts to a conviction of an offense which would authorize a punitive discharge under the UCMJ or when the sentence by civilian authorities actually includes confinement for six months or more

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

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

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

-- Commission of a serious offense: includes offenses for which a punitive discharge would be authorized under the UCMJ. Members approved for discharge are eligible for P & R.

--- Noncompliance with "safe sex" order: having human immunodeficiency virus (HIV) and not complying with lawfully ordered preventive medicine procedures. Members approved for discharge are not eligible for P & R.

-- Drug abuse: the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug

--- The term "drug" includes anabolic and androgenic steroids, and any intoxicating substances, other than alcohol, that are inhaled, injected, consumed or introduced into the body for purposes of altering mood or function

--- The term "drug abuse" includes improper use of prescription medications

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

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

--- Members approved for discharge are not eligible for probation and rehabilitation

Discharge In The Interest of National Security

- A member whose retention is clearly inconsistent with the interest of national security may be discharged
- Discharge may only be initiated after criteria in AFI 36-3208, paragraphs 5.57.1 and 5.57.2 have been met
- Discharge may be characterized as entry level, honorable, general, or UOTHC

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

Failure In Prisoner Retraining/Rehabilitation

- Applies to members in correction and rehabilitation programs
- Service is ordinarily characterized as general

Failure In The Fitness Program

- A member who does not meet fitness standards as set out in AFI 36-2905 may be discharged when the failure is the result of a cause in the member's control
- Characterization of service is restricted to honorable if failure in the program is the sole reason for discharge
- Members approved for discharge should be considered for P & R

References:

AFI 36-2905, *Fitness Program* (1 July 2010)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

Involuntary Separation of Enlisted Members: Procedures

Enlisted members may be involuntarily separated through two different processes (1) notification procedures, and (2) board hearing procedures. Most cases are processed using notification procedures. However, if a member is entitled to an administrative discharge board, board hearing procedures are used. Before initiating involuntary separation of a member, commanders must consult with the servicing staff judge advocate (SJA) and military personnel flight.

Board Entitlement

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

Notification Procedures

- Before the member may be discharged, a medical examination must document
  - -- Any medical aspects pertaining to the reason for discharge, and
  - -- That the member is or is not medically qualified for worldwide service and separation.
- An EPR or LOE must be generated for discharges based on parenthood, conditions that interfere with military service, unsatisfactory performance, or failure in the fitness program
- If there is sufficient documentation or evidence supporting a basis for discharge, the commander serves a notification memorandum on the member (AFI 36-3208, Figure 6.1 or 6.2)
- The member immediately signs a receipt of notification memorandum (AFI 36-3208, Figure 6.3)

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

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

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

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

  -- If the SPCMCA is also the separation authority, the SPCMCA determines four questions: (1) if there is a basis for discharge, (2) if the member should be discharged, how to characterize the member's service, (3) if the member should be discharged and (4) whether to offer P&R (if available) if the member should be discharged

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

Board Hearing Procedures

- After receiving the notification memorandum, the member has seven duty days to:

  -- Request a board hearing or waive his or her right to a board hearing unconditionally (AFI 36-3208, Figure 6.8), or

  -- Waive the board hearing contingent upon receiving a specific type of discharge, which is called a conditional waiver (AFI 36-3208, Figure 6.9).

- The commander considers the member's response, if any, and if the commander still recommends discharge, he or she signs a recommendation for discharge to the SPCMCA (AFI 36-3208, Figure 6.5)

- In cases where the member requests a board hearing, the SPCMCA reviews the recommendation for discharge and either sends the file back to the unit for further action (normally to withdraw the action or reinitiate the action using different grounds or evidence) or convenes a discharge board

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

  -- Findings of fact as to whether each allegation set out in the notification memorandum is supported by a preponderance of the evidence (more likely than not)

- -- A separate finding on each allegation set out in the notification memorandum
- -- Findings as to whether a basis for discharge exists
- -- A recommendation to discharge or retain
- -- A recommended characterization of service if the board recommends discharge
- -- A recommendation concerning P&R (if member is eligible) if the board recommends discharge

- The servicing SJA prepares a legal review of the package and forwards the package to the SPCMCA
- The SPCMCA takes final action if referral to the GCMCA is not required or forwards the package to the GCMCA if referral to the GCMCA is required
- Members with more than 16 but less than 20 years service are entitled to special probation consideration (called lengthy service consideration) upon request and may not be separated before forwarding to HQ AFMPC/DPMARS2 for review

Reference:

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

Involuntary Separation of Enlisted Members: Probation and Rehabilitation

The Air Force program of probation and rehabilitation (P&R) allows the Air Force to retain a trained resource while allowing enlisted members another opportunity to complete their service honorably. P&R is a conditional suspension of an approved administrative discharge for cause. In deserving cases, it lets a member prove he or she is able to meet Air Force standards.

P & R Considerations

- Only the discharge authority can suspend the execution of a discharge for P&R
- Members who have completed at least 16 but less than 20 years of active service are entitled to special consideration upon their request and their cases are forwarded to HQ AFMPC/DPMARS2 for review concerning probation
- P&R is appropriate for members
  - -- Who demonstrate a potential to serve satisfactorily
  - -- Who have the capacity to be rehabilitated for continued military service or completion of the current enlistment
  - -- Whose retention on a probationary status is consistent with the maintenance of good order and discipline

Who is Eligible

- Members are not eligible for P&R if the reason for discharge is one of the following:
  - -- Failure to comply with preventive medicine counseling (safe-sex order) by a member with human immunodeficiency virus (HIV)
  - -- Fraudulent entry
  - -- Entry level performance or conduct
  - -- Homosexual conduct
  - -- In the interest of national security
  - -- Drug abuse
  - -- In lieu of trial by court-martial

- If the reason for discharge is unsatisfactory performance or misconduct (except failure to comply with preventive medicine counseling by a member with HIV and drug abuse):
  - -- The case file must show the initiating commander, board members if a hearing is involved, and the separation authority considered P&R;
  - -- If the initiating commander does not recommend P&R, he or she must give the reason for not recommending P&R; and
  - -- If the initiating commander recommended P&R and the separation authority disapproved that recommendation, the separation authority must state the reason for his or her decision

P & R Procedures

- Suspending the execution of an approved discharge is contingent on successful completion of rehabilitation
  - -- The separation authority sets a specific period of rehabilitation, which is not less than 6 months or more than 12 months
  - -- The probationary period is usually served in the current unit of assignment, but reassignment to another local unit or within the MAJCOM may be authorized if warranted by the circumstances of the case
- If the decision is made to offer a member P&R, the commander must:
  - -- Give the member a factsheet with information about the program (AFI 36-3208, Figure 7.2)
  - -- Counsel the member, emphasizing
    - --- The importance of an honorable service characterization
    - --- Difficulties in civilian life which the approved discharge might cause
    - --- The very remote chance that the type of discharge, once executed, would be changed
    - --- The fact that an offer of P&R does not excuse the member's conduct
    - --- The member can prevent execution of the discharge only by good conduct and duty performance
    - --- The commander will be the judge of performance and conduct during the period of P&R
    - --- The offer of P&R is not an attempt at involuntary retention

-- Find out whether the member has enough retainability to complete P&R, and if not, try to get a voluntary request for extension

-- Require members who accept P&R to sign statements of understanding and acceptance of the terms of probation

-- Ensure the terms of probation are set out in a letter from the separation authority and countersign the letter (AFI 36-3208, Figure 7.1)

-- Require members who refuse P&R or fail to satisfy the retention requirements to sign a statement:

--- Acknowledging understanding of the rehabilitation privilege,

--- Giving the date the commander counseled the member, and

--- Acknowledging understanding of the effects of refusal to accept P&R

-- Ensure the statement and the letter from the separation authority are returned to the separation authority

WHAT HAPPENS DURING P & R

- The commander is the primary judge of the member's performance

  -- Commanders are not required to set up a special rehabilitation program because the member is expected to perform duties appropriate to his or her grade, skill level, and experience

  -- An EPR is prepared every 90 days

  -- Promotion consideration is according to AFI 36-2502

  -- Members are <u>not</u> selected for formal training while in P&R

  -- A commander usually should not place a member in P&R on the control roster, and the commander should consider removing the member from the control roster if the member is on it when placed in P&R

  -- Reenlistment consideration is according to AFI 36-2606

COMPLETING P & R

- If a member successfully completes P & R

  -- The approved discharge is automatically and permanently canceled on the date the suspension expires

  -- Separation at ETS will result in an honorable service characterization

- -- Future failure to maintain standards may be the basis for new discharge proceedings
- -- Eligibility for reenlistment will be according to AFI 36-2606 and none of the reasons for recommending discharge that existed before P&R began may be used as a basis for denial of reenlistment

Other Command Options

- Commanders have other options during P&R, including:
  - -- Canceling the probation in whole or in part where member's good conduct clearly shows goals of P&R have been met
  - -- Extending the probationary period (original period plus extension may not exceed one year) where member has made progress but the commander is not sure rehabilitation is complete

Terminating Before P & R is Completed

- If a decision is made to initiate vacation (termination) of the suspension, the commander notifies the member by a letter, which gives:
  - -- The reason for the action
  - -- The name, address, and phone number of military legal counsel (often the ADC)
  - -- Instruction that the member may secure civilian counsel at his own expense
  - -- Instruction to reply within seven workdays (rebuttal or waiver of right to rebut)

References:

AFI 36-2502, *Airman Promotion/Demotion Programs* (31 December 2009)

AFI 36-2606, *Reenlistment in the United States Air Force* (21 November 2001)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

Voluntary Separation of Enlisted Members Prior to Expiration of Term of Service

In contrast to involuntary discharges, there are instances when the voluntary separation of an enlisted member prior to expiration of term of service (PETS) benefits the member and the Air Force. An immediate commander's primary role is to recommend approval or disapproval of the action. If recommending disapproval, the commander must provide reasons for recommending disapproval of the package. Reasons for separation PETS are discussed below.

- Convenience of the government: enlisted members may request separation for the following:
  - -- Entering an officer training program
  - -- Early release to further education
  - -- Training at an accredited school for medical education as a physician, dentist, osteopath, veterinarian, optometrist, or clinical psychologist
  - -- Elimination from Officer Training School (OTS) if the member enlisted specifically for OTS
  - -- Nonfulfillment of enlistment or reenlistment agreement by the Air Force
  - -- Becoming a sole surviving son or daughter after enlistment
  - -- Early release from extension of service
  - -- Acceptance of public office
  - -- Conscientious objection
  - -- Pregnancy or childbirth
  - -- Early release for Christmas, if the date of separation falls on or after 9 December and before 8 January the following year
  - -- Medal of Honor recipient
  - -- Other situations when early separation is in the best interests of the Air Force
- Dependency or hardship: Enlisted members may request discharge when genuine dependency or undue hardship exists

-- Undue hardship does not necessarily exist because of altered income, the family is separated, or the family suffers from the inconveniences incident to military service

-- If all of the following factors are present, a basis for discharge may exist:

--- The dependency or hardship is not temporary

--- Conditions have arisen or have been aggravated to an excessive degree since the member entered active duty

--- The member has made every reasonable effort to remedy the situation

--- Separation will eliminate or materially alleviate the conditions

--- There are no means of alleviation available other than separation

REFERENCE:

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

Officer Separations

Officer separations operate similarly to enlisted separations. However, certain key differences exist. Most of the differences revolve around definitions, terminology, and authorities for officer separations.

Definitions

- Nonprobationary officer:
  - -- Regular officer with five or more years of active commissioned service as determined by the officer's total active federal commissioned service date, or
  - -- Reserve officer with five or more years of commissioned service (inactive or active) as determined by the officer's total federal commissioned service date
- Probationary officer:
  - -- Regular officer who has completed less than five years of active commissioned service as determined by the officer's total active federal commissioned service date, or
  - -- Reserve officer who has completed less than five years of commissioned service (inactive or active) as determined by the officer's total federal commissioned service date

Voluntary Separation

- Officers may apply for voluntary separation prior to expiration of term of service under AFI 36-3207, Chapter 2, for a variety of reasons, which include:
  - -- Completion of Active Duty Service Commitment (ADSC)
  - -- Hardship
  - -- Pregnancy
  - -- Conscientious objector status
  - -- Medal of Honor recipient
  - -- Other miscellaneous reasons
- Voluntary separations are subject to approval by the Secretary of the Air Force (SecAF). The SecAF or designee may disapprove an application if, among other reasons, the officer:

- -- Has had charges preferred or is under investigation
- -- Remains absent without leave or absent in the hands of civil authorities
- -- Defaulted with respect to public property or funds
- -- Has been sentenced by a court-martial to dismissal
- -- Is being considered for administrative discharge proceedings
- -- Submits an application during war, when war is imminent, or during an emergency declared by the President or Congress
- -- Has an ADSC for advanced educational assistance, government-funded education or training programs, special pay, or bonus pay (restriction applies even when the reason for separation is pregnancy)

- Characterization of service is honorable

Involuntary Separations Not "For Cause"

- Officers may be separated involuntarily under AFI 36-3207, Chapter 3, Section 3B, for various reasons that are not for cause
- Many involuntary separations are required by law, e.g., reserve officers who reach age limit, those nonselected for promotion, and officers who have reached maximum years of commissioned service or service in grade
- Other involuntary separations include loss of ecclesiastical endorsement; failure to complete or pass medical training, nursing examinations, nursing intern programs; and officers in health care fields who do not have required licenses
- Only an honorable characterization is authorized for involuntary separations that are not for cause

Involuntary Separations "For Cause"

- Grounds for discharge for cause are found in AFI 36-3206, Chapter 2 (substandard performance of duty) and Chapter 3 (misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security)
- <u>Substandard Performance of Duty</u>
  - -- Restricted to an honorable or general (under honorable conditions) characterization
  - -- Includes broad categories subjecting an officer to separation, including:
    - --- Failure to show acceptable qualities of leadership or proficiency

--- Failure to achieve acceptable standards of proficiency required of an officer in his or her grade

--- Failure to discharge duties equal to his or her grade and experience

--- Substandard performance of duty resulting in an unacceptable record of effectiveness

--- A record of marginal service over an extended time as shown by performance reports covering two or more jobs and prepared by at least two different supervisors

--- Mental disorders that interfere with the officer's performance of duty and do not fall within the purview of the medical discharge process

--- Apathy or defective attitude

--- Failure in the fitness program as specified in AFI 36-2905

--- Failure to conform to prescribed standards of dress, physical fitness, or personal appearance. For cause separation under AFI 36-3206, Chapter 3, is appropriate if failure is deliberate.

--- Inability to perform duties because of family care responsibilities

--- Failure to maintain satisfactory progress while in an active status student officer program

-- Before discharging an officer under this chapter, there should be a documented history of problems and documented efforts to correct the officer's conduct

-- If an officer is being separated for reasons under this chapter and received education assistance, special pay, or bonus money, the officer is subject to recoupment

- <u>Misconduct, Moral or Professional Dereliction, or In the Interest of National Security</u>

-- When officers engage in some form of misconduct, discharge under this chapter is often the most appropriate basis

-- Although not necessarily considered misconduct, discharges for homosexual conduct and fear of flying for rated officers fall under this chapter

-- Some other specific grounds for discharge, besides homosexual conduct and fear of flying for rated officers, include:

--- Having human immunodeficiency virus (HIV) and not complying with lawfully ordered preventive medicine procedures (i.e., safe-sex order)

--- Failure to meet financial obligations

--- Intentional or discreditable mismanagement of personal affairs

--- Drug abuse, which is defined as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug

--- Serious or recurring misconduct punishable by civilian or military authorities

--- Intentional neglect or intentional failure to either perform assigned duties or complete required training

--- Misconduct resulting in the loss of professional status necessary to perform duties

--- Intentionally misrepresenting or omitting facts concerning official matters

--- Sexual perversion, including lewd and lascivious acts, sodomy not of a homosexual nature, indecent acts with a child

--- Sexual deviation, including transvestitism, exhibitionism, voyeurism

--- Retention is not clearly consistent with interests of national security

--- Sentence by a court-martial to a period of confinement for more than six months and not sentenced to a dismissal

-- The service of officers separated under this chapter may be characterized as under other than honorable conditions (UOTHC). The exceptions to this are homosexual conduct, (unless it is accompanied by aggravating factors), and drug use revealed as a result of self-identification or commander-directed urinalysis.

-- If an officer is being separated for reasons under this chapter, except homosexual conduct, and received education assistance, special pay, or bonus money, the officer is subject to recoupment. Special rules apply concerning homosexual conduct cases that may or may not make the officer subject to recoupment.

Discharge Procedures Under AFI 36-3206

- The first step is for the unit commander to evaluate information and consult with the servicing staff judge advocate

- If appropriate, the unit commander recommends discharge to the show cause authority (SCA), who is usually the wing commander if he or she is a general officer or the general court-martial convening authority, usually the numbered air force (NAF) commander, for wings not commanded by a general officer

- If appropriate, the SCA initiates discharge action by signing a letter to the officer notifying him or her of the discharge action

- Within 10 calendar days of receipt of the letter of notification, the officer submits evidence in response, applies for voluntary retirement (if eligible), tenders a resignation, or requests a delay to respond
- If the SCA determines no action is warranted, the action is terminated
- If the SCA determines discharge action is warranted, the type of processing that occurs depends on the officer's status and the characterization recommended
  - -- Not Board entitled: If the officer is probationary, the case does not involve a recommendation for a UOTHC service characterization, and the reason for discharge is not homosexual conduct, the SCA notifies the officer that the case will be reviewed by the Air Force Personnel Board (AFPB). The officer is not entitled to appear in front of or present witness testimony to the AFPB.
  - -- Board entitled: If the officer is nonprobationary; or the officer is probationary and a UOTHC discharge is recommended; or the officer is probationary and the reason for discharge is homosexual conduct; then the SCA notifies the officer that the officer will be required to show cause before a board of inquiry (BOI). The officer is entitled to appear in front of and present witness testimony to the BOI.
- Final approval authority for separations initiated under AFI 36-3206 is SecAF

Resignations In Lieu of Further Administrative Discharge Proceedings (AFI 36-3207, Chapter 2, Section 2b)

- When the SCA notifies an officer to show cause for retention, an officer may:
  - -- Submit a resignation, or
  - -- Submit a resignation to enlist and retire if eligible to apply for retirement in enlisted status
- These options should not be confused with resignations for the good of the service, which an officer may submit when facing a court-martial for alleged criminal conduct
- The officer may be entitled to separation pay
- SecAF is the approval authority

References:

AFI 36-2905, *Fitness Program* (1 July 2010)

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), AFGM1 (2 April 2010)

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), AFGM1 (13 April 2010)

Administrative Separation of Reservists

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, applies to both officer and enlisted members of the reserve components not serving on extended active duty (EAD) with the regular Air Force. Table 2.1 lists all the permissible reasons for officer separations. Similarly, Table 3.1 lists all the permissible reasons for enlisted separations.

- Processing of reservist discharge actions varies depending on whether the member is a Category A (CAT A) or Category B (CAT B) reservist
- Remember that letters of counseling, letters of admonition, and letters of reprimand for reservists are not procedurally correct unless they allow the member 30 days to respond, as opposed to the 3 duty days for active duty members
  - -- <u>CAT A (Unit)</u>
    - --- The member's unit commander initiates the discharge action and the servicing staff judge advocate (SJA) reviews the action for legal sufficiency
    - --- The unit forwards the file through the wing commander to HQ AFRC/DPML for processing to AFRC/CC or AFRC/CV, the discharge authorities for CAT A reservists
    - --- HQ AFRC/DPML notifies the member of the discharge recommendation by certified mail and gives the member the opportunity to respond
    - --- HQ AFRC/JA reviews the case file and determines if it is sufficiently documented to support the basis for discharge
    - --- If the case file lacks such documentation, HQ AFRC will ask the unit to get the supporting documentation
  - -- <u>CAT B Individual Mobilization Augmentees (IMAs)</u>
    - --- IMA discharges are processed through the Readiness Management Group (RMG). The RMG is the Air Force Reserve Command's agency responsible for shared administrative controls (ADCON) of IMAs.
    - --- Program Managers (PM) are a part of the RMG staff and are located at each MAJCOM, Joint Command, or Defense Agency. The PM with administrative oversight responsibility for the IMA initiates the discharge process by forwarding the discharge recommendation to the RMG/CC for action.
    - --- The RMG/CC forwards the file to HQ AFRC/DPML for processing to AFRC/CC or AFRC/CV, the discharge authorities for CAT B reservists

--- HQ AFRC/DPML notifies the member of the discharge recommendation by certified mail and gives the member the opportunity to respond

--- HQ AFRC/JA reviews the case file and determines if it is sufficiently documented to support the basis for discharge

--- If the case file lacks such documentation, HQ AFRC will ask the unit to get the supporting documentation

- The following reservists are entitled to present their cases before an administrative discharge board:

  -- Enlisted: if the recommended characterization of service in the letter of notification is under other than honorable conditions (UOTHC), the respondent is a noncommissioned officer, the respondent has six or more years of satisfactory service for retirement, or the discharge recommended is based upon an allegation of homosexual conduct

  -- Officers: an officer who has completed five or more years of service as a commissioned officer in any of the armed forces as determined from the total federal commissioned service date; a probationary officer (an officer who has completed fewer than five years of service as a commissioned officer in any of the armed forces as determined from the total federal commissioned service date) when the recommended characterization of service contained in the letter of notification is UOTHC or when the basis for discharge is homosexual conduct

References:

AFI 36-2115, *Assignments within the Reserve Components* (8 April 2005), Certified Current (2 May 2008)

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), Incorporating Through Change 2 (31 July 2008), Certified Current (7 June 2010)

Loss of Veterans' Benefits

To become eligible for veterans' benefits, the active duty member must have been discharged or released under conditions other than dishonorable, which is broader in this context than the term as defined in Rule for Courts-Martial 1003(b)(3)(B).

- Discharge or release because of any of the following offenses is considered to have been issued under dishonorable conditions:
  - -- Acceptance of an under other than honorable conditions (UOTHC) discharge to avoid trial by general court-martial
  - -- Mutiny or spying
  - -- An offense involving moral turpitude, including (generally) a conviction of a felony
  - -- Willful and persistent misconduct, including a UOTHC discharge if it is determined that the discharge was issued for willful and persistent misconduct, but not including a discharge because of a minor offense if service was otherwise honest, faithful, and meritorious
  - -- Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty, including:
    - --- Child molestation
    - --- Homosexual prostitution
    - --- Homosexual acts or conduct accompanied by assault or coercion
    - --- Homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status
- Benefits are also not payable where the member was discharged or released under one of the following conditions:
  - -- As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities
  - -- By reason of the sentence of a general court-martial
  - -- Resignation by an officer for the good of the service
  - -- As a deserter

- -- As an alien during a period of hostilities where it is shown the member requested his or her release
- -- By reason of a UOTHC discharge as a result of an absence without leave for a continuous period of at least 180 days

- A punitive discharge or UOTHC characterization does not necessarily deprive a member of benefits administered by the VA
- Normally, benefits earned during an earlier period of honorable service are not voided by a punitive discharge or a UOTHC discharge during a subsequent enlistment (38 U.S.C. § 5303(a); *United States v. McElroy*, 40 M.J. 368, 372 (C.M.A. 1994))
- Any person may be denied VA benefits, regardless of an earlier period of honorable service, if shown by evidence satisfactory to the Secretary of Veteran's Affairs to be guilty of:
  - -- Filing a fraudulent claim for benefits,
  - -- Treason, or
  - -- Subversive activities.

References:

38 U.S.C. §§ 5303, 6103-05

38 C.F.R. § 3.12

United States v. McElroy, 40 M.J. 368, 372 (C.M.A. 1994)

CHAPTER FIVE: CRIMINAL AND MILITARY JUSTICE

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Installation Jurisdiction

To understand the degree of control a commander has over an Air Force installation, one must be familiar with the concepts of title and jurisdiction.

Title

- Title in relation to a military installation is virtually the same as in a private real estate transaction. Title simply means legal ownership—the legal right to the use and possession of a designated piece of property.
- In most cases, the Air Force has title to the property on which its installations are located. However, some installations sit on leased property or have portions of the base sitting on leased property.
- The installation civil engineer maintains the deed or lease to the installation. Questions concerning title to the installation's real property should be referred to the staff judge advocate (SJA).

Jurisdiction

- The concept of jurisdiction is separate and distinct from that of title
- Jurisdiction includes the right to legislate (i.e., implement laws, rules and regulations) and to enforce those laws. Having title does not necessarily include legislative jurisdiction.

Sources of Legislative Jurisdiction

- Article I, § 8, cl. 17, of the United States Constitution confers upon Congress the power to exercise legislative jurisdiction over federal property. The government can acquire the right to exercise legislative jurisdiction in three ways.
- Purchase and Consent: The federal government purchases the property and the state legislature consents to giving the federal government jurisdiction
- Cession: After the federal government acquires title to property, the state may cede jurisdiction, in whole or in part, to the federal government. The federal government can, with the consent of Congress, later retrocede jurisdiction back to the state. Prior to 1940, it was presumed that jurisdiction was ceded at the time the government acquired the property. Since 1940, however, there must be an affirmative acceptance of jurisdiction before the federal government will have legislative jurisdiction. 40 U.S.C.S. §§ 3111 and 3112. Check the deed to determine when the federal government acquired the property.

- Reservation: At the time the federal government ceded property to establish a state, particularly in the western United States, it reserved some of the land as federal property. In that case, the federal government retained legislative jurisdiction over the property it reserved. Again, check the deed.

Types of Legislative Jurisdiction

- The inquiry does not stop with determining if the federal government has legislative jurisdiction. It is also necessary to determine what type of jurisdiction it has. There are four types of legislative jurisdiction.

  -- Exclusive Jurisdiction: As the term implies, this type of jurisdiction gives the federal government sole authority to legislate. Unless exclusive jurisdiction was reserved at the time land was granted to the state, it is necessary to go back to the state for exclusive jurisdiction. The state may have elected to reserve some authority, e.g., authority to serve civil and criminal process on the property. If the state failed to reserve such authority, it is waived. For some years now, it has been federal policy not to acquire exclusive jurisdiction. While at first blush this may seem odd, there are legitimate reasons for the policy. For instance, state and local authorities may be able to deal better with particular situations than the federal government, e.g., child welfare services, domestic relations matters, etc.

  -- Concurrent Jurisdiction: Both the state and federal governments retain all their legislative authority. In the event of conflict, the federal government prevails under the Supremacy Clause of the Constitution. Art. VI, Clause 2, U.S. Constitution.

  -- Partial Jurisdiction: Both the state and federal government have some legislative authority, but neither one has absolute power. For instance, the state may have reserved the authority to impose and collect taxes or it may have ceded only criminal jurisdiction over the property. Again, federal supremacy applies in the event of a conflict.

  -- Proprietary Jurisdiction: In this case, the U.S. is like any other party who has only a possessory interest in the property it occupies. The U.S. is simply a tenant with virtually no legislative authority. The federal government maintains immunity and supremacy for inherently governmental functions. The only federal laws that apply are those that do not rely upon federal jurisdiction, e.g., espionage, bank robbery, tax fraud, counterfeiting, etc. However, the installation commander can still exclude civilians from the area pursuant to the commander's inherent authority. *Greer v. Spock*, 424 U.S. 828 (1976).

References:

U.S. Const. art. I, § 8, cl. 17

U.S. Const. art. VI, cl.2

40 U.S.C. §§ 3111 and 3112

*Greer v. Spoc*k, 424 U.S. 828 (1976)

AFI 32-9001, *Acquisition of Real Property* (27 July 1994)

Federal Magistrate Program

The federal magistrate program provides an additional means of enforcing discipline on the base. The availability of the program depends on the location and jurisdiction of the base, the type and locale of the offense, and the status of the offender. The commander has the full range of administrative sanctions, as well as criminal sanctions under the UCMJ, available when dealing with misconduct by a military member. The options are more limited when dealing with a civilian offender.

Commander Responsibilities and Options

- Civilian employees
  - -- Administrative sanctions run the gamut from administrative counseling and reprimands to removal. AFI 36-704, *Discipline and Adverse Actions.*
  - -- A civilian employee may also be subject to any other administrative or criminal sanctions discussed below. However, there may be some restrictions.
- Any civilian may be subject to administrative sanctions
  - -- The installation commander may suspend or revoke privileges, such as
    - --- Commercial solicitation
    - --- Driving on the installation
    - --- Base exchange and commissary use
  - -- For misconduct, the commander may terminate entitlement to military family housing. Must give 30 days written notice and the government pays for the move.
  - -- The commander may bar any civilian from the installation. Must allow access for medical care for dependent family members and retirees.
- Criminal actions committed by civilians on an installation with federal jurisdiction may be handled in federal court, including magistrate court
  - -- Any federal statute that does not rely on territorial jurisdiction may result in prosecution regardless of the status of the base, e.g., counterfeiting, espionage, sabotage, bribery of federal officers
  - -- If the base has only proprietary jurisdiction, federal statutes that rely on territorial jurisdiction may not be enforced in federal court. They must be handled in state court.

-- If the base has exclusive federal jurisdiction, the state may not prosecute for offenses committed on the installation. Federal courts provide the only remedy.

-- If the offender violated state law, a violation of the Assimilative Crimes Act, 18 U.S.C. § 13, may be alleged

--- This potentially makes violating a state statute a federal offense

--- This is available where the conduct does not otherwise violate a federal statute

How Magistrate Court Works

- Federal magistrate court is an alternative to prosecution in federal district court
- Prosecution in magistrate court requires the consent of the defendant
- Magistrates normally try misdemeanor offenses (an offense for which the authorized penalty does not include more than 1 year imprisonment), and may try juvenile offenders
- Air Force judge advocates, acting as special assistant U.S. attorneys, may prosecute cases in magistrate court under the provisions of AFI 51-905
- The installation commander decides whether to refer the case to federal court after finding administrative steps inadequate
- However, if safety, discipline, or other considerations warrant, a commander may make a blanket determination that administrative disposition of certain offenses committed by civilians on base is not appropriate and that all such offenses should be referred to a U.S. magistrate judge for trial

References:

18 U.S.C. § 13

AFI 36-703, *Civilian Conduct and Responsibility* (1 August 1999), Incorporating Change 1 (6 August 2007), Certified current (17 February 2009)

AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)

AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (1 June 1998)

Court-Martial Jurisdiction Under the UCMJ

Types of Jurisdiction

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

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

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

  -- A military member may be tried for the same misconduct by both court-martial and state court. However, if a military member was tried by a state court, regardless of the outcome, as a matter of policy, Secretary of the Air Force approval is required before proceeding with a court-martial, AFI 51-201, para 2.5.2.

  -- Host nation treaties govern exercise of jurisdiction over military members overseas

Jurisdiction Over The Offense (RCM 203)

- Courts-martial may try any offense under the UCMJ and in general courts-martial the law of war. R.C.M. 203.

- The Supreme Court has held that jurisdiction in a court-martial is based solely on the accused's status as a person subject to the UCMJ, and not the "service-connection" of the charged offense. *Solorio v. United States*, 483 U.S. 435 (1987).

Jurisdiction Over The Person (RCM 202)

- General Rule: Article 3(a), UCMJ, authorizes court-martial jurisdiction in all cases in which the service member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial. Article 2 of the UCMJ lists classes of persons who are subject to the UCMJ.

- Fraudulent Enlistment: Article 2(c), UCMJ, provides that, notwithstanding any other provision of law, a person serving with the armed forces is subject to the UCMJ until such person's active duty service has been terminated in accordance with law or regulations promulgated by the Secretary of the Air Force if the person:

  -- Submitted voluntarily to military authority;

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

-- Received military pay or allowances; and

-- Performed military duties

- Air Force Reserve: Articles 2(a)(1) and 2(a)(3), UCMJ, extend court-martial jurisdiction over reservists whenever they are in Title 10 status (meaning that they are on inactive duty training (IDT), active duty (AD), or annual training (AT)). For guidance in this area, see R.C.M. 202 and 204(b)(1) and AFI 51-201, para 2.9, "Jurisdiction over Air Force Reserve and Air National Guard Members."

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

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

  -- An Air Force Reserve member may be ordered to active duty by an active component general court-martial convening authority. AFI 51-201, para 2.9.4. The commanders of Air Force Reserve Command, Fourth Air Force, Tenth Air Force, or Twenty second Air Force may also order members assigned or attached to their respective commands to active duty. AFI 51-201, para 2.9.4.4.

  -- An Air Force Reserve member recalled to active duty for court-martial may not be sentenced to confinement, or be required to serve a punishment consisting of any restrictions on liberty during the recall period of service, without approval of the Secretary of the Air Force. The staff judge advocate will coordinate approval, as needed, to recall an Air Force Reserve member for court-martial when the sentence may include confinement. AFI 51-201, para 2.9.5.

  -- Do not involuntarily call Air Force Reserve members to active duty solely for nonjudicial punishment or summary court-martial, although major command commanders or equivalents may grant waivers to this restriction in appropriate cases. AFI 51-201, para 2.9.3.

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

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

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

--- Generally, a member performing inactive duty training (IDT) or a unit training assembly (UTA) is subject to the UCMJ from the beginning to the end of the duty day, e.g., 0730 –1630

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

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

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

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

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

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

- Air National Guard (ANG): A member of the National Guard is subject to court-martial jurisdiction only when in federal service. UCMJ art. 2(a)(3), 10 U.S.C. §§ 12301, 12401 (2005).

-- ANG members serve in one of two duty capacities: state duty status (referred to as "Title 32" status) and federal duty status (referred to as "Title 10" status). When ANG members are serving in their state duty (or Title 32) status they are subject to their state codes of military justice.

-- It is very important to coordinate with your local SJA when addressing ANG military justice matters to ensure that we have jurisdiction over that person

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

-- Retired members should not be court-martialed unless their conduct clearly links them with the military or is adverse to a significant military interest of the United States

-- Commanders should not prefer charges without Secretary of the Air Force approval unless the statute of limitations is about to run. The staff judge advocate will coordinate approval, as needed, to recall a retired member for court-martial. AFI 51-201, para 2.10.

Termination of Jurisdiction

- General Rule: A valid discharge terminates jurisdiction. There must be:
  - -- Delivery of a valid discharge certificate;
  - -- A final accounting of pay; and
  - -- Completion of the clearing process required by appropriate service instructions
- Exceptions under Article 3, UCMJ
  - -- The member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial
  - -- A fraudulently obtained discharge does not terminate military jurisdiction
  - -- An Air Force Reserve member is not, by virtue of the termination of a period of active duty or inactive-duty training, "shielded" from jurisdiction for an offense committed during such period of active duty or inactive-duty training

References:

U.S. Const. amend. V

10 U.S.C § 12301, 12401

UCMJ arts. 2 & 3

Rules for Courts-Martial 201-204 (2008)

AFI 36-3209, *Separation Procedures for Air Force National Guard and Air Force Reserve Members* (14 April 2005), Incorporating Through Change 2 (31 July 2008), Certified Current (7 June 2010)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1(3 February 2010)

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

A Commander's Guide to the AFOSI

The Air Force Office of Special Investigations (AFOSI) provides specialized investigations and services to protect Air Force and DOD personnel, operations, and interests.

Organization

- Established following WWII to preclude "self-investigation"
  - -- Patterned after the Federal Bureau of Investigations
  - -- Removed from command channels as an independent centralized organization to ensure unbiased and factual investigations
- Became operational 1 August 1948, accountable to the Secretary of the Air Force. AFOSI is now organized under SAF/IG
- Missions include investigating allegations of criminal activity and fraud, as well as counterintelligence and specialized investigative activities, counter-drug activities, protective service operations, and integrated force protection
- A combat-ready military organization that provides the Air Force a wartime capability to conduct, in hostile and uncertain environments, counter-threat operations to find, fix, track, and neutralize enemy threats
  - -- To provide complete services to assist commanders in carrying out the responsibilities of command
  - -- Since 1972, AFOSI's CONUS personnel security investigation function transferred to DOD Defense Security Service (DSS). AFOSI still assists DSS with overseas requirements.

AFOSI and Command

- Requesting AFOSI investigative service
  - -- AFI 71-101 V1, AFMD 39 and AFPD 71-1
    - --- Only SecAF may direct AFOSI to delay, suspend or terminate an investigation, unless the investigation is conducted at the request of DOD/IG
    - --- Investigations initiated on authority of AFOSI/CC, as delegated to subordinate AFOSI commanders and special agents in charge
    - --- AFOSI will brief Air Force commanders on progress of investigations affecting command

--- Direct contact with commanders is essential for mission, e.g., search authorizations

--- Any Air Force commander responsible for security, discipline, or law enforcement may request investigative support

--- Coordination with AFOSI and the staff judge advocate (SJA) is required prior to commanders reassigning a person subject to an AFOSI investigation or ordering/permitting a commander directed inquiry/investigation when there is ongoing AFOSI investigation

-- AFI 71-101 V1, Attachment 2 (AFOSI and SF investigative responsibilities)

--- Generally, AFOSI will only investigate major offenses

--- Minor offenses are normally handled by security forces, office of investigations

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

- Mutual support requirements

-- Command role

--- AFOSI requests and the appropriate commander or magistrate issues search and seizure authorizations based on probable cause requirements. The SJA should be involved in every case involving a probable cause determination.

--- Operations security (OPSEC) of AFOSI investigations

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

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

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

--- Crime scene protection support

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

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

---- Merely walking through or around a crime scene can add or remove trace items that could hamper an investigation

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

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

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

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

--- Protection of agent's grade (AFPD 71-1 and AFI 71-101 V1)

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

---- Commanders are required to ensure special procedures exist to protect agents' personnel, medical and other administrative records

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

--- Handling complaints against AFOSI personnel

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

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

-- <u>AFOSI support to command</u>

--- AFOSI developmental files

---- Preliminary inquiry initiated by AFOSI/CC or Region/CC and used to examine situation to determine if there is criminal activity warranting an investigation

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

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

--- Child abuse/neglect

---- Assist command in family advocacy program

---- All allegations of serious child abuse or neglect must be reported to AFOSI, regardless of origin of complaint (personnel of family support and child care centers, social actions, medical, etc.)

----- AFOSI has greater access to certain records

----- Can provide fact-finding role to assist command and staff to make decisions

--- AFOSI's specialized functions

---- Single manager of USAF polygraph program

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

---- Information operations and investigations assistance

---- Regionally located computer crime investigators serve as specialists in the investigation of cyber crime, e.g., computer network intrusions and computer media search and seizure

---- Forensic science consultants

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

----- May provide consultation, training, specialized investigative techniques in criminal cases, e.g., death investigations and sexual assaults

---- Technical services

----- Process and support requests to intercept wire, oral, or electronic communications for law enforcement or counterintelligence purposes. See AFI 71-101 V1 or V4 for approval authorities.

---- Technical surveillance countermeasures

----- Detection and neutralization of technical surveillance devices deployed against Air Force facilities

----- Conducts security vulnerability surveys

---- Protective Services

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

----- Assessments and estimates on terrorist and foreign intelligence threats to Air Force deployments, exercises, weapons facilities, and other base facilities upon request. HQ AFOSI/JA, not the base legal office, provides legal advice for counterintelligence operations.

---- Security violations

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

----- Does not investigate routine security violations

AFOSI Policy Information

- Apprehension/arrest

  -- Civilian special agents are authorized to arrest civilians under many circumstances. However, not all detachments have civilian agents. In addition, this authority will be used judiciously and only when necessary.

    --- Civilian agent's authority is derived from 10 U.S.C. § 9027

    --- Specific guidelines promulgated by SECDEF and Attorney General

  -- Military agent's authority is derived from the Manual for Courts-Martial

    --- Limited to individuals subject to UCMJ, not family members or nonmilitary U.S. citizens

    --- Only if required by operation or emergency (security forces routinely do so at AFOSI's request)

    --- Military law enforcement personnel may temporarily detain civilians suspected of on-base offenses until civilian authorities arrive

- Arming

  -- AFPD 71-1 authorizes agents to carry firearms (including concealed) for duties

  -- AFOSI offices required to maintain at least one handgun and ammunition for each agent assigned

  -- Weapons stored within AFOSI facilities or in security forces armory if the local detachment is inadequate for security purposes

- Sources and undercover agents
  - -- Base human sources of information may be overt (officials) or covert (on a confidential basis)
  - -- AFOSI undercover agents are specially trained and sent to installation to perform duties
  - -- OPSEC and safety concerns dictate identity protections
    - --- Investigative reports may conceal identities of sources; release of identities requires either concurrence of AFOSI detachment commander/special agent in charge or an order from a military judge. See M.R.E. 507.
    - --- Threatened Airman Program is a personnel program; AFOSI provides threat validation and assessment as prelude to reassignment action
  - -- Excellent investigative tool to develop valuable information about crimes planned/in progress

Types of AFOSI Reports and Release of Information

- Routinely provided to commanders and their representatives, (i.e., SJA)
- Interim case reporting
  - -- AFOSI may up-channel internal reporting of special interest cases where publicity or Congressional interest is expected
  - -- Informs HQ AFOSI, Air Staff, commanders, and other agencies of significant matters affecting Air Force and DOD
  - -- Separate and distinct from major command up-channel reporting
- Report of investigation (ROI) provided to command officials when investigation is complete
  - -- Information obtained through investigation and witness interviews
  - -- No recommendations or suggestions on appropriate command action
- Special reports provided by HQ AFOSI highlighting a particular kind of investigative activity and pinpointing problems so commanders can better handle them
  - -- Provides description of weaknesses or susceptible areas under command to alert functional managers for possible correctional or remedial actions, e.g., fraud information reports; narcotics information reports; narcotics briefs

-- Reports requested by the Air Staff or other senior Air Force or DOD officials containing in-depth analysis of some area of concern Air Force-wide, e.g., damage to USAF aircraft

- Command reporting of actions taken

  -- Commanders should provide AFOSI with a report of action taken. This allows AFOSI to ensure command action is included in appropriate national level databases.

- Release of information

  -- "For Official Use Only" and should be treated as sensitive records covered by the Privacy Act

  -- Safeguarding, handling, and releasing information from AFOSI reports

    --- May be released in whole or in part, only to persons who require access for official duties

      ---- Refer all requests for release to non-Air Force officials to the servicing AFOSI detachment

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

      ---- SJAs must appropriately redact ROI prior to release to defense attorneys for discovery

    --- Safeguard ROIs in locked file cabinets

  -- Press or news inquiries for information require close coordination between public affairs, SJA, and AFOSI in all cases

References:

10 U.S.C. § 9027, Civilian Special Agents of the Office of Special Investigations: Authority to Execute Warrants and Make Arrests

Mil. R. Evid. 507 (2008)

DODD 5400.7, *DOD Freedom of Information Act (FOIA) Program* (2 January 2008)

AFI 71-101 V1, *Criminal Investigations* (1 December 1999), Incorporating Change 1 (17 March 2009)

AFI 71-101 V4, *Counterintelligence* (1 August 2000)

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

AFMD 39, *Air Force Office of Special Investigations (AFOSI)* (1 November 1995)

Functions of the Area Defense Counsel

The area defense counsel (ADC) program provides Air Force members independent legal representation. Airmen suspected of an offense or facing adverse administrative actions receive confidential legal advice from an experienced JAG outside the local chain of command, avoiding conflicts of interest or command influence.

- The ADC is a certified judge advocate performing defense counsel duties in the following areas:
  - -- Counsel in courts-martial, administrative discharge actions and Article 32 investigations
  - -- Counsel in Article 15 actions
  - -- Counsel in interrogations
  - -- Any other adverse actions in which counsel for an individual is required or authorized
- All ADCs are assigned outside the local chain of command
  - -- The ADC's responsibility is to vigorously and ethically represent the client
  - -- The ADC is an advocate for the client, not an advisor for the command. The ADC office is physically separate from the base legal office.
- If an active duty military member under any type of investigation requests legal advice, refer them to the ADC
  - -- Civilians are not entitled to ADC representation
  - -- The ADC at Air Reserve Personnel Center in Denver, Colorado will represent Category B members of the Air Force Reserve
  - -- The ADC at Air Force Reserve Command at Robins AFB, GA will represent Category A reservists facing discharge action
- The ADC program requires strong command and SJA support to enhance perception of fairness of military justice/disciplinary process
- The ADC is available, subject to workload and client confidences, to help educate the base population on the military justice system and the ADC's function

References:

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

Military Magistrate Program

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

- The SPCMCA may appoint one or two officers, of judicial temperament, to serve as military magistrate for the installation
  - -- AFI 51-201, para 3.1 is the authority for appointment of a military magistrate to authorize searches on the installation
  - -- Absent general court-martial convening authority (GCMCA) approval, a military magistrate must be in the grade of lieutenant colonel or above
  - -- May not be a chaplain, a member of an office of a staff judge advocate having responsibility for that installation, security forces member, AFOSI agent, or convening authority
  - -- Appointment must be in writing, specifying the installation over which the magistrate has authority
  - -- If two magistrates are appointed, each exercises concurrent authority with the other and with the installation commander
- Once appointed, magistrates are authorized to issue search and seizure authorizations based upon probable cause
  - -- They may exercise this authority concurrent with installation commander
  - -- Availability of the installation commander is not a factor in their exercise of authority
- Each installation's staff judge advocate will brief the magistrates on their duties when appointed and thereafter when appropriate

References:

Mil. R. Evid. 315 (2008)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

National Security Cases

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

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

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

Actions Permitted Pending Decision to Proceed:

- Courts-martial: In general or special courts-martial, command may complete preferral of charges and an Article 32 investigation, if applicable, but cannot refer charges without permission to proceed. Restrictions do not apply to summary courts-martial.

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

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

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

- Judge Advocate Notifications

-- Any case with potential to be a national security case must be reported immediately to the Air Force Legal Operations Agency's Military Justice Division (AFLOA/JAJM) by the local SJA. Such cases include:

--- Aiding the Enemy (Art. 104, UCMJ)

--- Spying (Art. 106, UCMJ)

--- Espionage (Art. 106a, UCMJ)

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

--- Subversion (Art. 94, UCMJ)

--- Violations of punitive instructions, regulations, or criminal statutes concerning classified information, or U.S. foreign relations (Art. 92, UCMJ)

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

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

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

References:

Manual for Courts-Martial, United States (2008), Appendix 3, 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

AFI 31-501, *Personnel Security Program Management*, Chapter 8 (27 January 2005)

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

AFI 51-201, *Administration of Military Justice*, paras 3.3.2, 6.6.3, and 13.8 *et seq*., (21 December 2007), Incorporating Change 1 (3 February 2010)

Sexual Assault Response and Prevention

Sexual assault is criminal conduct. It falls well short of the standards America expects of its men and women in uniform. It violates Air Force Core Values. Inherent in our Core Values of Integrity First, Service Before Self, and Excellence in All We Do is respect: self-respect, mutual respect, and respect for our Air Force as an institution. Our core values and respect are the foundation of our Wingman culture; a culture in which we look out for each other and take care of each other. Incidents of sexual assault corrode the very fabric of our Wingman culture; therefore we must strive for an environment where this behavior is not tolerated and where all Airmen are respected.

- Air Force policy and responsibilities are provided in *Department of the Air Force Policies and Procedures for the Prevention of and Response to Sexual Assault*, issued on 8 June 2005, AFPD 36-60, *Sexual Assault Prevention and Response (SAPR) Program*, issued on 28 March 2008, and AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program* issued on 28 September 2008. The instructions implement DOD Directive 6495.01, *Sexual Assault Prevention and Response (SAPR) Program*, issued on 7 November 2008 and DOD Instruction 6495.02, *Sexual Assault Prevention and Response Program Procedures*, issued on 13 November 2008.
    - The policy applies to all levels of command and all Air Force organizations and personnel, including active duty, Air Force government civilian employees, Air Force Academy, Air National Guard, and Air Force Reserve components while in federal service
    - Installation commanders will implement local sexual assault prevention and response programs. The installation vice commander or equivalent is designated as the responsible official to act for the installation commander and supervises the Installation Sexual Assault Response Coordinator (SARC).

Definition of Sexual Assault

- Intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority or when the victim does not or cannot consent. It includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive or wrongful (to include unwanted and inappropriate sexual context), or attempts to commit these acts.
- This definition is for training and educational purposes only and does not affect in any way the definition of any offenses under the Uniform Code of Military Justice. Commanders are encouraged to consult with their staff judge advocate for complete understanding of this definition in relation to the UCMJ.

Installation Sexual Assault Response Coordinator (SARC)

- Reporting directly to the installation Vice wing commander, the SARC implements and manages the installation level sexual assault prevention and response programs
- The SARC is responsible for assisting commanders in meeting annual sexual assault prevention and response training requirements
- The SARC serves as the single point of contact for integrating and coordinating sexual assault victim care from an initial report of sexual assault, through disposition and resolution of issues related to the victim's health and well-being
- The SARC is responsible for ensuring a victim support system that provides a 24 hour/7 day a week sexual assault response capability for all victims within his or her designated area of responsibility
- The SARC tracks the status of sexual assault cases in his or her designated area of responsibility and provides regular updates to the Vice Wing Commander

Victim Advocate (VA)

- Responsibilities include providing crisis intervention, referral, and ongoing non-clinical support, including information on available options and resources to assist the victim in making informed decisions about the case. VA services will continue until the victim states support is no longer needed.
- VAs are volunteers who must possess the maturity and experience to assist in a very sensitive situation. Only active duty military personnel and DOD civilian employees selected by the SARC may serve as VAs.
- Personnel assigned to the MTF (unless approved by the MDG/CC), MEO, SF, the legal office, or the office of the wing chaplain are not eligible to serve as victim advocates due to potential conflict of interest
- VAs do not provide counseling or other professional services to a victim. Appropriate agencies will provide clinical, legal, and other professional services
- VAs may accompany the victim, at the victim's request, during investigative interviews and medical examinations. However, they and the victims they accompany must be made aware that their presence could later result in them being called as witnesses in court-martial or administrative proceedings.

Response to A Sexual Assault Incident

- Upon notification, the SARC will immediately assign a VA to the victim. To the extent practicable, the assigned VA should not be from the same unit as the victim.

- The assigned VA will immediately contact the victim
  - -- Unless VA assistance is declined, the VA will provide the victim accurate information on the sexual assault response process, including the option of unrestricted or restricted reporting as applicable
  - -- The VA will inform the victim of the availability of healthcare, including the option of a forensic medical examination and the collection of evidence
  - -- The victim will be requested to sign a Victim Preference Statement indicating his or her choice of restricted or unrestricted reporting and understanding of the consequences of his or her decision
- The assigned VA and the SARC will continue to monitor the case through disposition of the case and resolution of the victim's health and well-being
  - -- The SARC will provide updates to the victim and commanders as appropriate and in accordance with Air Force policy
  - -- The VA will provide referral and ongoing non-clinical support to the victim. Services will continue until the victim indicates services are no longer required, or the SARC makes this determination based on the victim's response to offers of assistance.

Restricted Reporting

- Restricted reporting is intended to give a victim additional time and increased control over the release and management of the victim's personal information, and to empower the victim to seek relevant information and support to make an informed decision about participating in the criminal process
- Who may make a Restricted Report? Restricted reporting is available only to military personnel of the Armed Forces and the Coast Guard when attached to the Department of Defense
- Who may not make a Restricted Report?
  - -- Members of the Reserve Component not performing federal duty
  - -- Retired members of any component
  - -- Dependents
  - -- Air Force civilian employees
-

- Who may receive a Restricted Report?
  - -- Only SARCs and healthcare providers may receive restricted reports of sexual assault
  - -- A report made to a healthcare provider under circumstances where it cannot reasonably be ascertained whether it is intended as a restricted report will be treated as a restricted report until the SARC can ascertain the victim's intentions
  - -- Consistent with current policy, a report may also be made to a chaplain if it is reported or forwarded to a SARC or healthcare provider
  - -- VAs may receive restricted reports from a designated victim only after they have been appointed by the SARC to act as the victim advocate for that individual
- Only allegations of sexual assault may be made under the restricted reporting option
- When the SARC receives a restricted report of a sexual assault, the victim will be informed of the availability of healthcare, including the option of a forensic medical examination and the collection of evidence

Disclosure of A Restricted Report

- If an individual makes a restricted report of a sexual assault, such a report may not be disclosed to any law enforcement official, command authority, or other entity not authorized to receive restricted reports, except as provided in the following exceptions:
  - -- Command officials or law enforcement when the disclosure is authorized in writing by the victim
  - -- Command officials or law enforcement when disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of the individual or another
  - -- Disability Retirement Boards and officials when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations
  - -- SARC, VAs, or healthcare provider when disclosure is necessary for the supervision of direct victim services
  - -- Military or civilian courts of competent jurisdiction when disclosure is ordered by or required by federal or state statute
- Healthcare providers may also convey to command any possible adverse duty impact related to the victim's medical condition and prognosis in accordance with DOD 6025.18-R, as well as any applicable Air Force instructions

- In the event a disclosure is made under a recognized exception to Air Force policy, the disclosure will be limited to that necessary to satisfy the purpose of the disclosure

- In cases of an unrestricted report of a sexual assault or information concerning a sexual assault is otherwise known, information concerning the victim and the offense will only be provided to governmental entities or persons with an established official "need to know"

- Unauthorized disclosure of a covered communication, improper release of medical information and other violations of this policy may result in action under the Uniform Code of Military Justice for military personnel, or other personnel or administrative action for all personnel, including loss of medical credentials

Notification to Command of A Restricted Report

- Within 24 hours of receipt of a restricted report of an alleged sexual assault, the SARC will notify the Vice Wing commander that a restricted report has been made. The SARC will provide the following information while ensuring that the information is not sufficient to identify the victim or incident.

  -- The incident will be characterized as recent (within the last 30 days) or not recent (older than 30 days)

  -- Time of occurrence (night or day)

  -- General information as to location (a dorm, parking lot, off base, etc.)

  -- Number of alleged assailants

  -- Number of alleged victims

  -- Nature of assault (rape, forcible sodomy, indecent assault, etc.)

- Because non-identifying information under the restricted reporting option is intended to provide commanders with general environmental information about the number and types of sexual assaults on the installation and is to be used to provide a better understanding of incidents of sexual assault, neither commanders nor law enforcement officials may initiate investigations based on information provided by SARCs under this rule

- Commanders, however, may use the information to enhance preventive measures, to enhance the education and training of their personnel, and to more closely scrutinize their organization's climate and culture for contributing factors, but may not use the information for investigative purposes or in a manner that is likely to discover, disclose, or reveal the identities being protected

Unrestricted Reporting

- Any report of a sexual assault made through normal reporting channels, including the victim's chain of command, law enforcement, and the AFOSI or other criminal investigative service is considered an unrestricted report
- A report made to a SARC or healthcare provider where the individual does not elect restricted reporting is considered an unrestricted report
- The SARC will be notified of any unrestricted report and will assign a VA to the individual
- Details of the allegation will be provided only to those personnel who have a legitimate "need to know"

Independent Reports

- Should information about a sexual assault be disclosed to command from a source independent of restricted reporting avenues or to law enforcement from other sources, and an investigation into an allegation of sexual assault is initiated, that report is considered an independent report
- An official investigation may be initiated based on that independently acquired information
- When the SARC or VA learns that a law enforcement official has initiated an official investigation that is based upon independently-acquired information and after consulting with the law enforcement official responsible for the investigation, the SARC or VA will notify the victim, as appropriate
- Covered communications from the restricted report will not be released for the investigation unless the victim authorizes the disclosure in writing or another exception applies

Addressing Victim Misconduct

- An investigation into the facts and circumstances surrounding an alleged sexual assault may develop evidence that the victim engaged in misconduct like underage drinking or other related alcohol offenses, adultery, drug abuse, fraternization or other violations of instructions, regulations or orders
    - -- In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, and Air Force instructions, commanders are responsible for ensuring victim misconduct is addressed in a manner that is consistent and appropriate to the circumstances

- -- Commanders have the authority to determine the appropriate disposition of alleged victim misconduct, to include deferring disciplinary action until after disposition of the sexual assault case
- -- When considering what corrective actions may be appropriate, commanders must balance the objectives of holding members accountable for their own misconduct with the intent to avoid unnecessary additional trauma to sexual assault victims and to encourage reporting of sexual assaults
- -- The gravity of any collateral misconduct by the victim and its impact on good order and discipline should be carefully considered in deciding what, if any, corrective action is appropriate
- -- Commanders must also be mindful of any potential statute of limitations when determining whether to defer action
- -- Commanders are expected to consult with their servicing staff judge advocate and use appropriate personnel actions to resolve any allegations

- Administrative separation actions involving victims of sexual assaults will be processed as required by the applicable Air Force instruction
  - -- When a commander proposing administrative or medical separation action was previously aware, or is made aware by the respondent or others, that the member has filed a past complaint, allegation, or charge that they were a victim of sexual assault, the proposing commander shall ensure the separation authority is aware the discharge proceeding involves a victim of sexual assault
  - -- The separation authority must be provided sufficient information concerning the alleged assault and the victim's status to ensure a full and fair consideration of the victim's military service and particular situation

Sexual Assault Case Disposition Authority

- To ensure consistent and appropriate level of command attention and the full responses required by the nature of sexual assault cases, group commanders of Air Force groups or higher will sign the commander's report of disposition setting out action taken in all sexual assault cases
- Authority to dispose of cases that resulted from an allegation of sexual assault is withheld from squadron section commanders and is reserved to commanders of squadrons and above
- A commander authorized to dispose of cases involving an allegation of sexual assault may do so only after receiving the advice of the servicing staff judge advocate

- As with any case, any disposition decision on a case involving an allegation of sexual assault is subject to review by superior commanders as appropriate

Commander's Response to Allegations of Sexual Assault

- Commanders notified of a sexual assault through unrestricted reporting must take immediate steps to ensure the victim's physical safety, emotional security and medical treatment needs are met, and that the AFOSI or appropriate criminal investigative agency is notified

- Attachment 4 to the Air Force Sexual Assault Policy is a checklist for assisting commanders in responding to allegations of sexual assault. Its primary objective is to assist commanders in safeguarding the rights of the victim and the subject, as well as addressing appropriate unit standards and interests. In all cases, commanders should seek the advice of the SJA in using the checklist before taking action.

- The appropriate commanders should determine whether temporary reassignment or relocation of the victim or subject is appropriate

- Commanders should consider whether no contact orders or Military Protective Orders (DD Form 2873) are required

References:

10 U.S.C. § 113

DODD 6495.01, *Sexual Assault Prevention and Response (SARP) Program* (6 October 2005), Incorporating Change 1 (7 November 2008)

DODI 6495.02, *Sexual Assault Prevention and Response Program Procedures* (23 June 2006), Incorporating Change 1 (13 November 2008)

AFPD 36-60, *Sexual Assault Prevention and Response (SAPR) Program* (28 March 2008)

AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program* (29 September 2008), Incorporating Change 1 (30 September 2009)

Memorandum, Under Secretary of Defense for Personnel and Readiness, *Collateral Misconduct in Sexual Assault Cases* (JTF-SAPR-001) (12 November 2004)

Memorandum, Under Secretary of Defense for Personnel and Readiness, *Increased Victim Support and A Better Accounting of Sexual Assault Cases (JTF-SAPR-002*) (22 November 2004)

Memorandum, *Department of the Air Force Policies and Procedures for the Prevention of and Response to Sexual Assault* (8 June 2005)

Air Force Victim and Witness Assistance Program

- The objectives of the Air Force Victim and Witness Assistance Program (VWAP) are to:
  - -- Mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by U.S. Air Force authorities
  - -- Foster cooperation between victims, witnesses, and the military justice system
  - -- Ensure best efforts are extended to protect the rights of victims and witnesses
- The installation commander is the local responsible official (LRO) for identifying victims and witnesses of crimes and providing the services required by VWAP. He or she normally delegates this responsibility in writing to the base staff judge advocate (SJA).
- LRO responsibilities to crime victims
  - -- Inform victims about sources of medical and social services
  - -- Inform victims of restitution or other relief to which they may be entitled
  - -- Assist victims in obtaining financial, legal, and other social services
  - -- Inform victims concerning protection against threats or harassment
  - -- Provide victims notice of the status of investigation or court-martial, preferral of charges, acceptance of a guilty plea or announcement of findings, and the sentence imposed
  - -- If administrative action is taken
    - --- You may reveal "appropriate administrative action was taken"
    - --- You <u>may not</u> reveal the specific action taken, i.e., Article 15 punishment, because it is not public knowledge and is protected by the Privacy Act
  - -- Safeguard the victim's property if taken as evidence and return it as soon as possible
  - -- Consult with victims and consider their views on preferral of court-martial charges, pretrial restraint, dismissal of charges, pretrial agreements, discharge in lieu of court-martial, and scheduling of judicial proceedings. Although victims' views should be considered, nothing in the VWAP limits the responsibility and authority of officials involved in the military justice process from taking any action deemed necessary in the interest of good order and discipline and/or preventing service discrediting conduct.

  - Designate a victim liaison when necessary

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

- LRO responsibilities to all witnesses

  - Notify authorities of threats and assist in obtaining restraining orders

  - Provide a waiting area removed from and out of the sight and hearing of the accused and defense witnesses

  - Assist in obtaining necessary services such as transportation, parking, child care, lodging, and court-martial translators/interpreters

  - If the victim/witness requests, take reasonable steps to inform his/her employer of the reasons for the absence from work, as well as notify creditors of any serious financial strain incurred as a direct result of the offense

  - Provide victims and witnesses necessary assistance in obtaining timely payment of witness fees and related costs

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

- Each installation should prepare an information packet modeled after figure 7.3 of AFI 51-201 and provide the packet to each victim/witness. See also DD Form 2701, *Initial Information for Victims and Witnesses of Crime*; DD Form 2702, *Court-Martial Information for Victims and Witnesses of Crime*; and DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime*.

References:

42 U.S.C. §§ 10601-10603, Victims of Crime Act of 1984

42 U.S.C. §§ 10607, Victims' Rights and Restitution Act of 1990

DODD 1030.01, *Victim and Witness Assistance* (13 April 2004), Certified Current (23 April 2007)

DODI 1030.2, *Victim and Witness Procedures* (4 June 2004)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1(3 February 2010)

Transitional Compensation for Victims of Abuse

Federal legislation provides for transitional assistance to abused dependants of military members. The assistance provided can be an extension of benefits and/or a monetary pay for a set period of time. It is DOD policy to provide monthly transitional compensation payments and other benefits for dependents of members who are separated for dependent abuse. Applicants initiate requests for transitional compensation through the member's unit commander or Military Personnel Flight (MPF).

Eligibility For Transitional Compensation

- Dependents of members of the armed forces who have been on active duty for more than 30 days and who, after 29 Nov 93, are:
  - -- Separated from active duty under a court-martial sentence resulting from a dependant-abuse offense
  - -- Administratively separated from active duty if the basis for separation includes a dependent-abuse offense
  - -- Sentenced to forfeiture of all pay and allowances by a court-martial which has convicted the member of dependent-abuse offense
- Dependents are ineligible to receive any transitional compensation if they remarry, cohabitate with the member, or are found to have been an active participant in the dependent abuse

Types Of Transitional Compensation

- Monthly monetary compensation (10 U.S.C. §1059)
- Commissary and exchange benefits (10 U.S.C. §1059)
- Medical and dental care (10 U.S.C. §1076)

Application Procedures

- Eligible dependents request transitional compensation by completing DD Form 2698
- Requests are made through the member's unit commander or through the MPF at any Air force installation when the applicant is no longer at the installation in which the member was assigned
- The unit representative will assist the dependent with the completion of DD Form 2698
- The MPF commander will coordinate the package and obtain a written legal review from the SJA

- The installation commander is the approval authority
- If approved, transitional compensation can last between 12 and 36 months, depending on the circumstances
- The monthly amount for transitional compensation is set by Congress. In 2009, the compensation was set at $1091 per month, plus $271 for each dependent child.

References:

10 U.S.C. §1059

10 U.S.C. §1076

38 U.S.C. §1311

DODI 1342.24, *Transitional Compensation For Abused Dependents* (23 May 1995), Incorporating Change 1 (16 January 1997)

AFI 36-3024, *Transitional Compensation For Abused Dependents* (15 September 2003), Incorporating Change 1 (4 December 2007), Certified Current (10 November 2009)

Media Relations in Military Justice Matters

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

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

Providing Information

- AFI 51-201, Section 13D, covers the rules for releasing information pertaining to criminal proceedings. It prohibits release of information that has a substantial likelihood of prejudicing the criminal proceeding.
- AFI 51-201, para 13.6.1.1, states that release of extrajudicial statements is a command responsibility. Obviously, the installation's SJA and its public affairs officer (PAO) must work closely to provide informed advice to the commander. If a proposed extrajudicial statement is based on information contained in agency records, the office of primary responsibility for the record should also coordinate prior to release. The convening authority responsible for the criminal proceeding makes the ultimate decision about release of extrajudicial statements relating to that criminal proceeding. Major command (or equivalent) commanders may withhold release authority from subordinate commanders. In high interest cases, the SJA and the PAO should consult with their major command representatives.
- Rules for release of permissible extrajudicial statements are complex and vary according to the type of information to be released and its source, the type of proceeding, and the stage of the proceeding when the information is released

Extrajudicial Statements Generally

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

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

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

Prohibited Extrajudicial Statements

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

  -- The existence or contents of any confession, admission or statement by the accused or the accused's refusal or failure to make a statement

  -- Observations about the accused's character and reputation

  -- Opinions regarding the accused's guilt or innocence

  -- Opinions regarding the merits of the case or the merits of the evidence

  -- References to the performance of any examinations, tests or investigative procedures (e.g., fingerprints, polygraph examinations and ballistics or laboratory tests), the accused's failure to submit to an examination or test, or the identity or nature of expected physical evidence

  -- Statements concerning the identity, expected testimony, disciplinary or criminal records, or credibility of prospective witnesses

  -- The possibility of a guilty plea or other disposition of the case other than procedural information concerning such processes

  -- Information government counsel knows or has reason to know would be inadmissible as evidence in a trial

  -- Before sentencing, facts regarding the accused's disciplinary or criminal record, including nonjudicial punishment, prior court-martial convictions, and other arrests, indictments, convictions, or charges. Do not release information about nonjudicial punishment or administrative actions even after sentencing, unless admitted into evidence. However, a statement that the accused has no prior criminal or disciplinary record is permitted.

Permissible Extrajudicial Statements

- When deemed necessary by command, the following extrajudicial statements may be made regardless of the stage of the proceedings, subject to the limitations stated

above (substantial likelihood of prejudice and prohibitions under FOIA, PA, and/or VWAP)

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

- The following extrajudicial statements may be made only after preferral of charges, subject to the limitations stated above (substantial likelihood of prejudice and prohibitions under FOIA, PA, and/or VWAP)
  - -- The accused's name, unit, and assignment
  - -- The substance or text of charges and specifications, along with a mandatory statement explaining that charges are merely accusations and that the accused is presumed innocent until and unless proven guilty. As necessary, redact all VWAP and PA protected data from the charges and specifications.
  - -- The scheduling or result of any stage in the judicial process
  - -- Date and place of trial and other proceedings, or anticipated dates if known
  - -- Identity and qualifications of appointed counsel
  - -- Identities of convening and reviewing authorities

- -- A statement, without comment, that the accused has no prior criminal or disciplinary record, or that the accused denies the charges
- -- The identity of the victim where the release of that information is not otherwise prohibited by law. Generally, however, seek to avoid release of the name of victims of sex offenses, the names of children or the identity of any victim when release would be contrary to the desire of the victim or harmful to the victim.
- -- The identities of court members and the military judge. Do not volunteer the identities of the court members or the military judge in material prepared for publication. This information may be released, if requested, after the court members or the military judge have been identified in the court-martial proceeding, if the convening authority's SJA determines release would not prejudice the accused's rights or violate the members' or the military judge's privacy interests.

Article 32 Investigations

- Article 32 investigations should ordinarily be open to the public
  - -- Access by spectators to all or part of the proceeding may be restricted or foreclosed by the commander who directed the investigation or by the investigating officer (IO) when, in that officer's opinion, the interests of justice outweigh the public's interest in access
  - -- For example, it may be necessary to close an investigation to encourage complete testimony of a timid or embarrassed witness, to protect the privacy of an individual, or to ensure an accused's due process rights are protected
  - -- Make every effort to close only those portions of the investigation that are clearly justified and keep the remaining portions of the investigation open
  - -- If a commander or IO orders a hearing closed, he or she should provide specific reasons, in writing, for the closure. Attach the document to the IO's report.
  - -- The commander directing the investigation may maintain sole authority over a decision to open or close an Article 32 investigation by giving the IO procedural instructions at the time of appointment or at any time thereafter
  - -- Prior to issuing procedural instructions to open an Article 32 investigation that has been closed, the commander must consider the investigating officer's written reasons for closing the investigation

Reducing Tension With The Media

- Command should take positive steps to reduce tension with the media

- -- Have JA and PA work together to develop a coordinated press release that explains how the military justice system works, and how it compares and contrasts with the civilian system
- -- Advise the media up-front of the prohibition against courtroom photography, television, and audio and visual recording, and provide an alternate location, room or office for media interviews, broadcasts, etc.
- -- Air Force representatives must not encourage or assist news media in photographing or televising an accused being held or transported in custody
- -- Provide reserved seating in the courtroom for at least one pool reporter and a sketch artist
- -- Advise PA about regulatory and ethical requirements that limit trial counsel from commenting on the case
- -- Consider establishing controlled parking and access areas for military judge, counsel, witnesses, and court members
- -- When appropriate, discuss with the SJA the possibility of having trial counsel request a "gag order" from the military judge. Such an order can direct court members not to view media accounts of the case, or discuss the case with the media.

References:

5 U.S.C. § 552, The Freedom of Information Act

5 U.S.C. § 552a, The Privacy Act of 1974

Rule for Courts-Martial 405 (2008)

AFI 33-332, *Privacy Act Program* (29 January 2004)

AFI 35-101, *Public Affairs Policies and Procedures* (29 November 2005), Interim Change 3 (5 March 2010)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

Arrest By Civil Authorities

When a commander receives notice from any source (e.g., a unit member, security forces (SF), or the Air Force Office of Special Investigations (AFOSI)) that a member of his or her command is being held by civilian authorities and is charged with a criminal offense, Air Force directives require certain actions.

- The commander or a representative of the unit should contact the civilian authorities, inform them the person is a military member, and gather the following information:
  - -- The charge against the member
  - -- The facts and circumstances surrounding the charged offense; and
  - -- The maximum punishment the member faces
- If possible, make arrangements for the member's return to military control
  - -- Do not state or imply the Air Force will guarantee the member's presence at subsequent hearings
  - -- Do not post bond for the member or personally guarantee any action by the member (unless you are willing to accept personal responsibility and liability)
- The commander may make a statement as to the member's character and prior record of reliability, but do not make slanderous statements concerning the member
- Off-base offenses committed by a military member on active duty may be tried by court-martial. The question of personal military jurisdiction turns on the status of the offender at the time of the offense, not where the offense occurred.
  - -- The court-martial convening authority may request that the civilian authorities waive jurisdiction and permit the Air Force to prosecute the offender
  - -- The staff judge advocate (SJA) will assist in coordinating with the local authorities
- As a general rule, military status will not be used to avoid civilian court jurisdiction or court orders
  - -- Air Force policy is to deliver a member to federal authorities upon request if the request is accompanied by a warrant
  - -- Air Force policy is to deliver a member to state authorities upon request, if the member is physically present in the state and state procedural rules have been followed

-- The Air Force will not transfer a member from one base to another to make the member present in the jurisdiction. The state seeking the member must proceed through normal civilian extradition channels.

-- The Air Force will return a member from an overseas assignment upon request, if the member is charged with a felony (an offense that carries a potential punishment of confinement for one year or more), or if the offense involves taking a child out of the jurisdiction of a court or from the lawful custody of another person

--- The Judge Advocate General can approve a request to return a member from overseas and the Under Secretary of Defense, Personnel & Readiness, can deny such a request. The Air Force Legal Operations Agency, Military Justice Division, processes requests for return from overseas.

-- A commander can subject a member to restraint pending delivery to civilian authorities, provided there is probable cause to believe the member committed an offense and is a flight risk

- An AF IMT 2098 reflecting a duty status change must be prepared and forwarded to the military personnel flight (MPF) when a member is in civilian custody

- If the member is convicted of an offense which would, if tried by court-martial, subject the member to a punitive discharge, the member is subject to involuntary administrative separation from the Air Force with a less than honorable service characterization (general or under other than honorable conditions discharge)

- If the member is convicted of an offense (or one closely related to an offense under the UCMJ) that would, if tried by court-martial, subject the member to a punitive discharge and confinement for one year or more, the commander must recommend involuntary separation or waive discharge processing. In either case, the decision should be made promptly. An extended period of inaction may waive the right to process the member for separation.

-- It is the maximum allowable punishment, not the actual sentence imposed, that determines if separation is an option

-- The member's absence due to confinement in a civilian facility does not bar processing the member for separation

-- The commander must obtain information from the civilian authorities concerning the final disposition of the case. The SJA, with the SF or AFOSI, will assist.

-- If a member is charged with or convicted of a less serious offense (one that would not warrant separation) various disciplinary actions may be appropriate (consult with the SJA)

--- Placing documents concerning the incident into an unfavorable information file

--- Placing the member on the control roster

--- Issuing an administrative reprimand to the member

References:

UCMJ art. 14

DODI 5525.09, *Compliance of DOD Members, Employees, and Family Members Outside the United States With Court Orders* (10 February 2006)

DODI 5525.11, *Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* (3 March 2005)

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), AFGM1 (13 April 2010)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial* (20 October 2006)

AFPD 51-10, *Making Military Personnel, Employees, and Dependents Available to Civilian Authorities* (19 October 2006)

Advising Suspects of Rights

Good order and discipline is a function of command. At times, a commander may need to question a member suspected of breaching good order and discipline or of committing some other crime.

- It is important that a commander understands when and how to advise the member of his/her Article 31 rights

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

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

  -- Unadvised admissions and confessions cannot normally be admitted as evidence at trial. Additionally, other evidence, both physical and testimonial, that may have been discovered or obtained as a result of the unadvised confession is usually inadmissible at trial.

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

- When must Article 31 rights be given?

  -- Whenever there is formal or informal questioning in which an incriminating response is either sought or is a reasonable consequence of such questioning. This is an interrogation.

  -- An interrogation does not have to involve actual questions. Sometimes actions, if they are intended to elicit responses, are deemed to be interrogation. For example, a commander declares, "I don't know what you were thinking, but I'm assuming the worst," while shrugging his shoulders and shaking his head. Even though the commander has not asked a question, his statement and actions could be deemed an interrogation because they were likely to elicit a response.

- Who must give Article 31 rights advisement?

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

- -- Military supervisors and commanders are presumed to be acting in a disciplinary capacity when questioning a subordinate. Supervisors and commanders are held to a high standard. When in doubt, give the rights advisement and consult with your staff judge advocate (SJA).

- What must Article 31 rights include?

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

  - -- The right to remain silent

  - -- The consequences of making a statement

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

  - -- Article 31 does not include a right to counsel, although one is provided in the Constitution. The right is listed on the rights advisement card, however, and should be included when reading a suspect his/her rights.

- Rights advisement must be understood and acknowledged by the suspect

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

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

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

  - -- If the suspect wavers over whether or not to assert his/her rights, the best practice is to clarify whether or not he/she will waive their rights and not ask any further questions until all doubt is resolved

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

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

- -- There are several complex legal rules relating to re-initiating questioning once a suspect has requested counsel. The rules vary depending on whether or not the suspect has been in continuous custody, whether or not the suspect re-initiates the questioning, and whether or not you are questioning about the same or a different offense.
- -- As a rule of thumb, if a suspect has asserted his/her rights, do not speak to that individual again regarding the offense in question unless you have consulted with the SJA regarding this area of the law

- If the individual waives his/her rights and agrees to talk
  - -- When possible, obtain the waiver in writing using AF IMT 1168, *Statement of Suspect*
  - -- Have a witness present
  - -- Try to get the statement in writing. A handwritten statement by the suspect is preferred.
  - -- If, after electing to talk, the suspect changes his/her mind, stop all questioning!
  - -- Prepare a memorandum for record after the session ends, including:
    - --- Where the session was held
    - --- What and when you advised the suspect
    - --- What the suspect said
    - --- What activities took place (suspect sat, stood, smoked, drank, etc.)
    - --- What the suspect's attitude was (angry, contrite, cooperative, combative, etc.)
    - --- Duration of the session with inclusive hours

References:

UCMJ art. 31

Mil. R. Evid. 304, 305 (2008)

AF Visual Aid 31-231, *Advisement of Rights*

AF IMT 1168, *Statement of Suspect*

ADVISEMENT FOR MILITARY SUSPECTS

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

ADVISEMENT FOR CIVILIAN SUSPECTS

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

Inspections and Searches

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

As a commander, military law authorizes you to direct inspections of persons and property under your command and to authorize probable cause searches and seizures of persons and property under your command. However, a commander who authorizes a search or seizure must be neutral and detached from the case and facts. Therefore, the command functions of gathering facts and maintaining overall military discipline must remain separate from the legal decision to grant search authorization.

Most bases have centralized the search authorization role in the installation commander, who is also often the special court-martial convening authority. The installation commander has discretion to appoint, in writing, up to two military magistrates who may also authorize search and seizure (including apprehension) requests. Each magistrate must receive training provided by the staff judge advocate on search and seizure issues.

A commander should also know the difference between inspections/inventories and searches/seizures. Understanding this distinction will help ensure crucial evidence can be introduced at trial.

Key Terms

- Searches are examinations of a person, property or premises for the purpose of finding criminal evidence
- Seizures are the meaningful interference with an individual's possessory interest in property
- Inspections are examinations of a person, property or premises for the primary purpose of determining and ensuring the security, military fitness, or good order and discipline of your command
- Inventories are administrative actions that account for property entrusted to military control

Searches

- A search may be authorized for
  - -- Persons subject to military law and under your command

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

- A search may be authorized for the following types of evidence:
  - -- Contraband, i.e., drugs, unauthorized government property
  - -- Fruits of a crime, i.e., stolen property, money
  - -- Evidence of a crime, i.e., bloody t-shirt, weapon, fingerprints, photographs

Probable Cause Searches

- As a general rule, probable cause must be present before a commander can legally authorize a search
  - -- Probable cause exists when there is a reasonable belief that the person, property, or evidence sought is <u>currently</u> located in the place or on the person to be searched
  - -- Probable cause may arise from your personal knowledge, oral or written evidence, or both
  - -- The search authority will make a decision based on the "totality of the circumstances," e.g., believability of information and specific known facts
  - -- An anonymous telephone call, by itself, does not justify a probable cause search
  - -- When relying on military working dogs to establish probable cause, the search authority should be aware of the dog's successful training exercises as well as the dog's actual record of success in similar search situations
  - -- While not legally required, when requesting the authorization for a search, a witness should swear to the information used in finding probable cause. Commanders and military magistrates are authorized to administer oaths or affirmations for these purposes.
- The search may be an oral authorization to search, based upon probable cause, when exigent circumstances exist and delay may otherwise impair the likelihood of success
- Putting together a search request
  - -- Refer source of information to security forces who will investigate or refer to Air Force Office of Special Investigations (AFOSI)
  - -- Do not personally investigate

-- If you discover information which may justify a search

--- "Freeze" the situation

--- Immediately notify security forces office of investigations or AFOSI

--- Note any incriminating evidence or statements

--- Coordinate facts that can be presented to the search authority to support a finding of probable cause with the legal office

Exceptions to Probable Cause Searches

- A search warrant or authorization is not required for the following searches:
- Consent searches

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

-- Consent must be knowing and voluntary. Consent cannot result from threats, coercion, or pressure. The best practice is to have a witness present.

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

-- Consent may be orally given or in writing. Written consent is preferred. When possible, use AF IMT 1364, *Consent For Search and Seizure*.

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

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

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

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

-- If a suspect is present and does not consent, another person's consent, even when that person has joint interest in the premises, will not prevail

- Besides consensual searches, there are other searches and seizures that may be conducted without probable cause, such as the following:
  - -- Border searches
  - -- Searches upon entry to, or exit from, U.S. installations, aircraft, or vessels outside the United States
  - -- Searches of government property not issued for personal use. Government property issued for personal use include: dorm rooms, lockers and family housing.
  - -- Searches within jails
  - -- Searches incident to a lawful stop or apprehension
  - -- Other searches as deemed valid under the Constitution and case law, such as an emergency search to save life, searches of open fields, etc.

Special Search Issues

- Computer searches
  - -- Computer users have a reasonable expectation of privacy in computer files stored on personal computers and in personal mass data storage devices, such as flash drives, disks and CDs
  - -- To search personal computer files or storage devices, one must obtain either authorization based on probable cause or consent
  - -- A person may have a reasonable expectation of privacy in some aspects of government computers, networks, storage devices, and e-mails. The law in this area is complex—consult with your legal office in every instance.
  - -- Network administrators who discover evidence of misconduct on a users' account while performing network maintenance may disclose that information to law enforcement or the commander
- Searches of privatized/leased housing
  - -- The installation commander and the military magistrate probably have power to authorize searches of privatized housing located on the installation. Since Congress passed the Military Housing Privatization Initiative (MHPI), 10 U.S.C. §§ 2871-2885 (2000), there has been some question. Under the MHPI, the military leases land to private developers who are responsible for housing construction and upkeep. The issue centers on whether the installation commander retains sufficient control over family housing when he leases the property to a private entity—especially on bases with concurrent jurisdiction. Consult with your local staff judge advocate (SJA).

-- Whether a commander has power to authorize searches of leased housing located outside the installation depends upon the amount of control the commander has over the property. Normally commanders do not have sufficient control over leased housing outside the installation to allow them to authorize searches. Commanders should review the lease agreement and consult with their local SJA.

Inspections

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

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

  -- Inspections may be "announced" or "unannounced" and may be authorized <u>without probable cause</u>

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

  -- An examination for the <u>primary purpose</u> of obtaining evidence for use in disciplinary proceedings <u>is not</u> an "inspection." It is a "search" and, if not authorized based on probable cause, is illegal.

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

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

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

- Two requirements for conducting an inspection

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

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

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

--- For example, if the purpose of an inspection is to look for fire hazards near office electrical outlets, inspecting the contents of the desk drawers would probably be unreasonable since items located in the desk drawers would not risk an electrical fire. The inspection will have gone beyond the scope of the purpose of the inspection.

Inventories

- Inventories may be conducted for valid administrative purposes including:
  - -- Furniture inventories of dormitories or dormitory rooms
  - -- Inventories of an AWOL member's or a deserter's property left in a government dormitory room. Commanders should consult with the legal office in these cases.
  - -- Inventories of the contents of an impounded or abandoned vehicle
- Unlawful weapons, contraband, or other evidence may be lawfully seized during a valid inventory

Use of Blood Alcohol Tests

- A blood alcohol test (BAT) is not required to prove a driving under the influence (DUI) offense. Observation of the suspect by the security forces specialist, including a field sobriety test, <u>may</u> be enough.
- Blood alcohol tests
  - -- Voluntary
    - --- You may, after consultation with your SJA, ask a member of your command who is suspected of being under influence of alcohol to voluntarily take a BAT
    - --- Follow procedures of local hospital/clinic laboratory
  - -- Nonvoluntary
    - --- Although commanders have authority over subordinate members within their units, BAT tests are normally directed by a military magistrate (appointed by the installation commander), based on probable cause
  - -- Implied consent
    - --- Drivers give implied consent to tests of their blood, breath, and/or urine for alcohol or drugs when driving on base
    - --- Invoked by the security forces regulations governing DUI offenses
    - --- Often results in automatic adverse action for refusal to cooperate

-- Physician authorized

--- For medical reasons determined by examining physician

--- Results may be used criminally

Use of Military Working Dogs

- Military working dogs may be used at any time in common areas since there is no reasonable expectation of privacy in a common area
- Common areas include dormitory hallways, day rooms, parking lots, and duty sections
- Military working dogs may be used during inspections anywhere within the scope of the inspection, i.e., dormitory rooms, whether the occupant is present or not
- What to do when a military working dog "alerts" in a common area
  - -- Can immediately "search" all common areas for contraband
  - -- If it appears the "alert" in a common area is on contraband in a non-common area, for example, a dormitory room or automobile, immediately call the search authority to obtain a search authorization before proceeding further with the search
- What to do when a drug dog "alerts" during an inspection
  - -- Immediately stop the inspection in the area of the dog alert, e.g., that particular dormitory room, and secure that area
  - -- Call the search authority and obtain a search authorization before proceeding with the inspection or a search in that particular area
  - -- After the search of that particular area has been completed pursuant to a search authorization, continue the inspection

References:

10 U.S.C. § 2871-85

Mil. R. Evid. 311-317 (2008)

AFI 31-202, *Military Working Dog Program* (16 May 2009)

AFI 31-204, *Air Force Motor Vehicle Traffic Supervision* (14 July 2000), Incorporating Change 1 (20 July 2007)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

UCMJ art. 31

Preliminary Inquiry into Reported Offenses

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

- In some cases, the commander or first sergeant may conduct the preliminary inquiry, e.g., failure to go, dereliction of duty. This may involve nothing more than talking with the member's supervisor.
- In more serious cases, law enforcement agents such as the Security Forces Office of Investigations (SFOI) or the Air Force Office of Special Investigations (AFOSI) will conduct the investigation and report results to the commander for disposition of the case. When the commander receives a report of investigation (ROI) from law enforcement, he or she may fulfill the preliminary inquiry requirement by reviewing the ROI and any witness statements.
- In any case involving a disciplinary action or a criminal offense, the commander should consult with the staff judge advocate
- The commander determines the appropriate action. Allegations of offenses should be disposed of at the lowest appropriate level. Options available to the commander include:
  - -- No action
  - -- Administrative action, e.g., letter of reprimand, removal from supervisory duties, involuntary discharge, denial or reenlistment, etc.
  - -- Nonjudicial punishment under Article 15
  - -- Preferral of court-martial charges
    - --- Before preferring charges against a military member, be sure to thoroughly review the ROI and any other evidence or documentation
    - --- At the time of preferral of charges, the accuser is required to take an oath that he or she is familiar with facts underlying the charges. The accuser is traditionally the commander.
- A commander who is a court-martial convening authority or who grants search authority must remain neutral and detached from the cases they are involved in. Those commanders will not generally act in an investigative capacity.

Reference:

Rule for Courts-Martial 303 (2008)

Military Justice Actions and the Inspector General

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

- Both nonjudicial punishment proceedings and courts-martial have statutory appeal provisions
- Additionally, Congress and the Air Force have provided additional administrative review mechanisms, such as the Air Force Board for the Correction of Military Records, Congressional Inquiries, etc.
- AFI 90-301, *Inspector General Complaints Resolution*, should not be used as authority for an IG inquiry into military justice matters
- IG personnel and investigating officers must have expeditious and unrestricted access to all Air Force records, reports, investigations, audits, reviews, documents, papers, recommendations, and other materials relevant to the investigation concerned
- Role of the IG in UCMJ matters should be guided by the following information:
  - -- Prior to a commander's initiation of an action under the UCMJ, the IG may conduct an investigation authorized by applicable regulations. If misconduct is involved, follow the procedures of AFI 90-301, para 2.15 and table 2.9 requiring the IG to refer the case to the appropriate agencies or consult with the SJA.
  - -- If charges have been preferred in a case, the IG should generally not have any direct involvement
  - -- If the investigation of matters tangential to the charges becomes necessary, the IG should consult the SJA to ensure the investigation does not in any way prejudice the administration of justice under the UCMJ
  - -- If action is initiated under Article 15, UCMJ, the IG should apply the policies of AFI 90-301, para 2.15 and table 2.9
    - --- Appeal rights under AFI 51-202, *Nonjudicial Punishment*, Article 15 of the UCMJ, and Part V of the Manual for Courts-Martial (MCM) must first be exhausted
    - --- If it is necessary to process a complaint of procedural mishandling, the investigation should be confined to the procedural aspects of the Article 15 process and should <u>not</u> involve
      - ---- Assessing the sufficiency of the evidence

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

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

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

References:

Manual for Courts-Martial, Part V, United States (2008)

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

AFI 51-202, *Nonjudicial Punishment* (7 November 2003), Incorporating Through Change 2 (16 May 2007)

AFI 90-301, *Inspector General Complaints Resolution* (15 May 2008)

Preparation, Preferral, and Processing of Charges

The preparation of court-martial charges involves drafting the charges and specifications. Preferral of charges in the military is the act of formally accusing a military member of a violation of the Uniform Code of Military Justice (UCMJ). Processing of the charge involves forwarding the charges and specifications to a convening authority for disposition.

Preparation of charges

- The charge states which article of the UCMJ has allegedly been violated
  - -- The specification is a concise statement of exactly how the article was allegedly violated
  - -- Since precise legal language is required, the legal office drafts charges and specifications
  - -- Charges are documented in Section II, block 10 of the DD Form 458, or "charge sheet"
- Preferral of the charge
  - -- It is the first formal step in initiating a court-martial
  - -- Anyone subject to the UCMJ can prefer charges against another person subject to the UCMJ
  - -- By Air Force custom, the accused's immediate commander ordinarily prefers the charge
  - -- Preferral is documented in section III, block 11 of the DD Form 458
  - -- Preferral requires the "accuser," the one preferring the charge, to take an oath that he/she is a person subject to the Code, that he/she either has personal knowledge of or has investigated the charge and specification, and that they are true to the best of his/her knowledge and belief
    - --- This oath is normally given by a judge advocate
    - --- The accuser must only believe that the charges are true when preferring them, not that they are proved beyond a reasonable doubt
- Processing of the charge
  - -- Preferral does not require the presence of the accused. However, after preferral, the commander must cause the accused to be informed of the charge. Since the

commander is normally the accuser, notice to the accused typically occurs at the same time as preferral by the commander reading the charge to the accused.

-- The commander then forwards the charge with a transmittal indorsement to the summary court-martial convening authority (SCMCA). The SJA may be authorized by the SCMCA to receive the charges on the SCMCA's behalf.

-- To convene a court-martial, the charge must be forwarded to a convening authority, usually the special court-martial convening authority (SPCMCA). In the Air Force, the SCMCA is also normally the SPCMCA, so this extra step of forwarding the charge from the SCMCA to the SPCMCA is not required.

-- The SPCMCA can dismiss the charges or return the charges to the commander for alternate disposition. If the SPCMCA decides the charges should go to a court-martial, he can take one of the following actions:

--- Refer the charge to a special court-martial or summary court-martial; or

--- Appoint an Article 32 investigating officer (IO) to conduct an Article 32 investigation, if a general court-martial may be appropriate

---- The IO completes and forwards a report of investigation to the SPCMCA, who reviews the report. If the SPCMCA thinks a general court-martial is appropriate, the SPCMCA forwards it along with the charges to the general court-martial convening authority (GCMCA) for review and possible referral to a general court-martial.

---- The GCMCA can refer the charges to a general court-martial, return the charges to the SPCMCA for disposition, or dismiss the charges

- Once the charge has actually been referred to trial, the appointed trial counsel will then formally serve the accused with a copy of the charges and specifications. This is documented in block 15 of the DD Form 458.

- Time constraints are involved in the preferral and trial of court-martial charges. The accused's right to a speedy trial and the impact delayed processing can have on the effectiveness of military justice demand that charges be disposed of promptly.

References:

Rule for Courts-Martial 307 (2008)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

DD Form 458, *Charge Sheet*, May 2000

Pretrial Confinement

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

- Never confine anyone without first consulting your staff judge advocate!
  - -- The imposition of pretrial confinement starts the speedy trial clock, regardless of whether charges have been preferred
  - -- If confinement is not appropriate, imposing it can hurt the government's case at trial
- A person may be ordered into pretrial confinement only when there is reasonable belief that:
  - -- An offense triable by court-martial has been committed;
  - -- The person to be confined committed it; and
  - -- Confinement is required by the circumstances
- Upon entry into confinement, the person to be confined must be promptly notified of the following:
  - -- Nature of the offenses for which he or she is being held
  - -- Right to remain silent and that any statement made may be used against him/her
  - -- Right to request assignment of military counsel; or
  - -- Retain civilian counsel at no expense to the U.S.
  - -- Procedures by which pretrial confinement will be reviewed
- 24-hour Notification: If the person ordering confinement is not the confinee's commander, then the confinee's commander must be notified within 24 hours of the entry to confinement
- 48-hour Probable Cause Determination: Within 48 hours of entry into confinement, a neutral and detached officer must review the adequacy of probable cause to continue confinement by considering the following:
  - -- The nature and circumstances of the suspected offense
  - -- The weight of the evidence against the accused

-- The accused's ties to the local community, including family, off-duty employment, financial resources, and length of residence

-- The accused's character and mental condition

-- The accused's service record

-- The accused's record of appearance at similar proceedings

-- The likelihood the accused will commit further serious misconduct if not confined

-- Effectiveness of lesser forms of restraint

- 72-hour Commander Review: If confinement is continued, within 72 hours of entry into confinement, the confinee's commander must prepare a written memo justifying continued confinement

  -- Continued confinement is warranted if the commander has a reasonable belief that

    --- An offense triable by court-martial has been committed

    --- The prisoner committed it

    --- Confinement is necessary because it is foreseeable that

      ---- Prisoner will not appear at trial; or

      ---- Prisoner will engage in further serious criminal conduct; and

      ---- Less severe forms of restraint are inadequate.

    --- It is not necessary to try lesser forms of restraint but they must be considered in determining whether confinement is appropriate.

  -- If the commander is neutral and detached and acts within 48 hours, the provision calling for a 48-hour probable cause determination will be satisfied. However, if the commander is not neutral and detached, another officer must make the 48-hour probable cause determination.

- Pretrial Confinement Hearing: A reviewing officer must make written findings, within seven days of entry into confinement, whether the confinee shall be released or remain confined

  -- Reviewing officer must be neutral and detached

    --- Pretrial confinement review officer (PCRO) may be with limited exception, a member appointed by the convening authority,

    --- A military magistrate appointed by the convening authority; or

--- A military judge, although it is unusual for a judge to conduct initial review of pretrial confinement unless it is after referral of charges

-- The PCRO must review the commander's 72-hour memorandum to determine whether the requirements for pretrial confinement are met

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

-- A representative of command, such as the commander, first sergeant or other person, may also appear before the hearing officer

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

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

- Pretrial confinees <u>must not</u> be subjected to pretrial punishment

  -- Pretrial confinees may not be treated the same as sentenced prisoners, such as required to wear special uniforms for sentenced prisoners, perform punitive labor, or undergo punitive duty hours. Whether a particular condition amounts to pretrial punishment is a matter of the intent of the official imposing the condition.

  -- Commingling pretrial and sentenced prisoners, without more, is not automatically considered pretrial punishment. Case precedent has established commingling with sentenced prisoners or non-resident aliens may lead to credit toward an adjudged sentence.

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

  -- Limits of restriction

  -- Limits on activities (e.g., was the accused able to go to the gym, BX, etc.)

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

- Prisoners usually receive day-for-day credit for pretrial confinement against any confinement adjudged by the court. Credit for unlawful pretrial confinement, including pretrial punishment, or for restriction tantamount to confinement may lead to additional credit.

- Review by military judge

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

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

References:

Rule for Courts-Martial 304-05, 707 (2008)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

Pretrial Restraint

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

- Always consult with your staff judge advocate before imposing any pretrial restraint!
  - -- The imposition of restriction, arrest, or pretrial confinement starts the speedy trial clock
  - -- Speedy trial violations can result in dismissal of the charges, regardless of a commander's good intentions
- Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts
  - -- May be imposed in conjunction with other forms of restraint or separately
  - -- Typical examples include orders to report periodically to a specified official, orders not to go to a certain place, and orders not to associate with specified persons
- Restriction in lieu of arrest is imposed by ordering a person to remain within specified limits
  - -- Normally restriction is to remain within the confines of the base
  - -- A restricted person shall, unless otherwise directed, perform full military duties
  - -- A judge may find certain restriction tantamount to confinement in cases where the conditions of the restriction amount to physical restraint that deprives a person of their freedom of movement. If the judge believes that restriction was tantamount to confinement, the accused may receive day-for-day credit off any sentence.
- Arrest is the restraint of a person, directing the person to remain within specified limits
  - -- An arrested person does not perform full military duties
- Pretrial confinement is physical restraint imposed by order of competent authority, depriving a person of freedom pending court-martial, such as placing them in jail
- Who may order pretrial restraint?
  - -- Only a commanding officer to whose authority an officer is subject may impose pretrial restraint on an officer. This authority may not be delegated.
  - -- Any commissioned officer may impose pretrial restraint on any enlisted person

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

- Pretrial restraint requires a reasonable belief that:
  - An offense triable by court-martial has been committed;
  - The person to be restrained committed it; and
  - Restraint is required by the circumstances
- The restraint should not be more rigorous than the circumstances require to ensure the presence of the person restrained or to prevent foreseeable serious criminal misconduct
- The decision whether to impose pretrial restraint, and, if so, what type or types, should be made on a case-by-case basis
- The restrained individual must be personally notified of the nature and terms of the restraint
  - An officer must be personally notified by the restraining authority or another commissioned officer
  - An enlisted member must be notified by the restraining authority or through another person subject to the Uniform Code of Military Justice (UCMJ)
  - Upon restraint, the individual must be advised of the suspected offense that is the basis for the restraint
- A person may be released from pretrial restraint by any person authorized to impose the restraint
- Pretrial restraint is not punishment and may not be used as a form of punishment

References:

Rule for Courts-Martial 304-05, 707 (2008)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

Immunity

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

- There are two types of immunity under Rule for Courts-Martial 704
  - -- Testimonial immunity or "use" immunity bars the use of the immunized person's testimony, statements, and information directly or indirectly derived from such testimony or statements against that person in a later court-martial
  - -- Transactional immunity bars any subsequent court-martial action against the immunized person concerning the immunized transaction, regardless of the source of the evidence against that person
- Testimonial or "use" immunity is preferred because it does not prevent the government from trying the person for the criminal offense, so long as the government does not use statements made under the grant of immunity in any way to prosecute the person
  - -- Because of the limitations on the use of statements under a grant of immunity, if you intend to prosecute an individual who possesses information that may be helpful to the government in prosecuting another case, it is best to prosecute him or her first, then obtain a grant of immunity to obtain statements or testimony to be used in the prosecution of the other case
  - -- If prosecution of an immunized person occurs after that person has testified or provided statements under the grant of immunity, the government has a heavy burden to show that it has not used the person's immunized testimony or statements in any way for the prosecution of that person. Often the government cannot meet this burden and will be unable to prosecute offenses that were disclosed as a result of the testimonial immunity.
- Only a general court-martial convening authority (GCMCA) may grant testimonial or transactional immunity
  - -- The GCMCA may grant immunity to any person subject to the Uniform Code of Military Justice (UCMJ)
  - -- The GCMCA can disapprove immunity requests for witnesses not subject to the UCMJ
  - -- The GCMCA can only approve immunity requests for witnesses not subject to the UCMJ with authorization from the Department of Justice (DOJ)

- -- If the witness is subject to federal prosecution, requests for immunity must be approved by DOJ, even if the individual is subject to the UCMJ
- -- In national security cases, immunity requests must be coordinated with DOJ and other interested U.S. agencies

Approval Authority For Cases Other Than National Security

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

- A grant of immunity may also include an order to testify
  - -- Under Military Rule of Evidence 301(c), an immunized person may not refuse to testify by asserting the Fifth Amendment right against self-incrimination because, as a result of the grant of immunity, he or she will not be exposed to criminal penalty
  - -- An immunized person may be prosecuted for failure to comply with an order to testify
  - -- Immunity does not bar prosecution for perjury, false swearing, or a false official statement arising as a result of any statement made by an individual while testifying under a grant of immunity
- Care is required when dealing with an accused or suspect to avoid a grant of de facto immunity. This occurs when a person other than the GCMCA:
  - -- Manifests apparent authority to grant immunity (commanders, first sergeants, and investigative agents may, by actions or words, manifest apparent authority)
  - -- Makes a representation that causes the accused to honestly and reasonably believe that he or she will be granted immunity if a certain condition is fulfilled and the accused relies on the representation to his or her detriment
- A finding of de facto ("in fact") immunity will operate the same as an actual grant of immunity

References:

Rule for Courts-Martial 704 (2008)

Mil. R. Evid. 301(c) (2008)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

Pretrial Agreements

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

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

- Procedures

  -- Either the government or the defense may initiate PTA negotiations. The defense however, must submit the actual written PTA offer to the staff judge advocate (SJA).

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

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

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

  -- Either party may void a PTA by withdrawing from it

  -- The convening authority may withdraw

    --- Anytime before the accused begins performance of promises contained in the agreement

    --- Upon the accused's failure to fulfill any material promise or condition of the agreement

    --- When the military judge's inquiry discloses a disagreement as to a material term of the PTA

    --- When the findings of guilty are set aside during the appellate review

--- If an accused has violated conditions of a PTA that involve post-trial misconduct, the convening authority may withdraw up to the time of his or her final action in the case

---- The convening authority may not withdraw from a PTA in any way that would be unfair to the accused

---- Any withdrawal must be in writing

-- The convening authority is no longer bound by the agreement if an accused withdraws from a PTA

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

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

-- The accused will get the benefit of the lesser sentence, regardless of whether it was adjudged or in the PTA

--- If the sentence adjudged by the military judge or members exceeds the limits of the PTA, the convening authority may only approve the lesser sentence agreed to in the PTA

--- If the adjudged sentence is less than the PTA cap, only the adjudged sentence may be approved

- <u>Permissible PTA conditions</u>

-- A promise to enter into a reasonable stipulation of fact concerning the facts and circumstances surrounding the offenses to which the accused pleads guilty

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

-- A promise to provide restitution

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

-- A promise to waive certain procedural requirements, such as:

--- An Article 32 investigation

--- The right to a trial before court members

--- The right to a trial before military judge sitting alone

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

References:

Rule for Courts-Martial 705 (2008)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

Trial Format

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

- Findings is the first part of the trial during which guilt or innocence is determined
  - -- Guilty Plea:
    - --- In guilty plea cases, a military judge, sitting alone, will question the accused to make sure he understands the meaning and effect of his plea, and that he is, in fact, guilty
    - --- If the military judge accepts the guilty plea, the accused will then be sentenced by the military judge, or a panel of members, whichever the accused elects
    - --- Guilty pleas are not allowed in capital cases when the death penalty is a permissible punishment
  - -- Not Guilty Plea:
    - --- Guilt or innocence is determined by the military judge alone, or a panel of members, whichever the accused elects
      - ---- An enlisted accused may elect to have at least one-third enlisted members included in the court-martial panel
      - ---- Trial by military judge alone is not allowed in capital cases
    - --- The accused is presumed innocent
      - ---- The prosecution must prove the accused's guilt beyond a reasonable doubt
      - ---- The accused has an absolute right to remain silent and present no evidence. The accused may also choose to testify or present other evidence in his defense.
    - --- In a trial with members, two-thirds of the members, voting by secret written ballot, must concur in any finding of guilty. In order to sentence the accused to death in a capital case, however, the vote of guilty on findings must be unanimous.
- Sentencing is the second part of the trial during which an appropriate punishment is determined

-- Unlike many civilian courts, sentencing normally occurs immediately after findings

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

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

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

--- Judge-alone sentencing is not permitted in capital cases

-- Sentencing is an adversarial process

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

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

-- In sentencing by members, two-thirds must concur, voting by secret written ballot, in any sentence except:

--- Three-fourths must concur in a sentence that includes confinement in excess of 10 years, or

--- Any sentence that includes the death penalty must be unanimous

Reference:

Rule for Courts-Martial 903, 910, 913, 918, 921, 1001, 1004, 1006 (2008)

Confidentiality and Privileged Communication

In the military, only certain relationships are recognized as involving privileged communication and therefore have confidentiality.

Chaplain–Penitent

- Absolute privilege for all information confided in chaplain or clergyman as a formal act of religion or matter of conscience
- Applies to civilians and service members; "clergyman" includes a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman
- The privilege extends to the chaplain's or clergyman's staff

Attorney–Client

- Absolute privilege for all information confided to an ADC or legal assistance attorney during representation, except with respect to some future crimes or frauds upon the court
- Communications between a commander and staff judge advocate are privileged only when the commander is acting as an agent or official of the Air Force and the commander's interests in no way conflict with those of the Air Force
- The privilege extends to non-lawyer members of the attorney's staff, i.e., paralegals, secretaries, etc.

Physician–Patient

- <u>The Military Rules of Evidence (M.R.E.) generally do not recognize a physician-patient privilege</u>
- No privilege for civilians treated in a military facility, but Privacy Act and other federal regulations protect any illegal third party disclosure

Medical Records

- Military medical records are the property of the Air Force
- Information in the health record is personal to the individual and will be properly safeguarded
- Commanders or commanders' designees may access members' military medical records when necessary to ensure mission accomplishment

Psychotherapist–Patient

- A limited privilege exists between persons subject to the UCMJ and psychotherapists
  - -- Generally, the limited privilege protects only confidential communications which are made to a psychotherapist (or assistant) for the purpose of diagnosis or treatment of the person's mental or emotional condition in cases arising under the UCMJ
  - -- Exceptions include, but are not limited to: when the patient is dead; the communication is evidence of spouse or child abuse or neglect and there is an allegation of such misconduct the communication contemplates future; when necessary to ensure safety and security of military personnel or property; or law or regulation imposes a duty to report the information
- Under AFI 44-109, communications between a patient and a psychotherapist (or assistant) made for purposes of facilitating diagnosis or treatment of the patient's mental or emotional condition are confidential and must be protected against unauthorized disclosure
  - -- A limited privilege also applies to active duty military members ordered to undergo a sanity board pursuant to R.C.M. 706 and M.R.E. 302
  - -- A limited privilege also exists under the Limited Privilege Suicide Prevention (LPSP) Program pursuant to AFI 44-109, which applies to confidences made after notification of an investigation or of suspicion of commission of a criminal act, and placement into the LPSP program

Drug/Alcohol Abuse Treatment Patients

- AFI 44-121, para 3.7.1, grants limited protections for Air Force members who voluntarily disclose personal drug use or possession. Those protections do not include any future drug abuse.
  - -- Such disclosure may not be used as the basis for UCMJ action or for the characterization of service in a discharge proceeding
  - -- Member must disclose before his or her drug abuse is discovered or the member is placed under investigation. Member may not disclose after he is ordered to give a urine sample as part of the drug testing program in which the results are pending or have been returned as positive.
- Federal law protects confidentiality of medical records pertaining to drug and alcohol abuse

Spousal Privilege

- Spouse may elect not to testify against the other spouse as long as a valid marriage exists at the time of the testimony
- A spouse may prevent testimony by the other spouse (or ex-spouse) regarding private communications made during the marriage even if the marriage has been dissolved at the time of testimony
- Neither privilege applies when one spouse is charged with a crime against the other spouse, the child or children of either spouse, if the marriage is a sham as determined by state law, or if the spouses are co-conspirators in crime

Medical Quality Assurance Privilege

- 10 U.S.C. § 1102 generally restricts access to information emanating from a medical quality assurance program activity. However, the statute specifically authorizes release of this information "[t]o an officer, employee, or contractor of the Department of Defense who has a need for such [information] to perform official duties."
- Information must only be used for official purposes and safeguarded in accordance with the Privacy Act

Family Support Center Program

- Family Support Center (FSC) staff should neither state nor imply that confidentiality exists
- Information collected from members and families must only be used for official purposes and must be safeguarded IAW the Privacy Act
- FSC Director will notify the appropriate authority when an Air Force member constitutes a potential danger to self, others, or could have an impact on Air Force mission

References:

42 U.S.C. § 290dd-2, Confidentiality of Substance Abuse and Mental Health Records

10 U.S.C. § 1102, Confidentiality of Medical Records

Rule for Courts-Martial 706 (2008)

Mil. R. Evid. 302, 501-513 (2008)

DOD 6025.18-R, *DOD Health Information Privacy Regulation* (24 January 2003)

AFI 33-332, *Privacy Act Program* (29 January 2004)

AFI 36-2706, *Military Equal Opportunity (MEO) Program* (29 July 2004), Certified Current (17 February 2009)

AFI 36-3009, *Airmen and Family Readiness Centers* (18 January 2008)

AFI 44-109, *Mental Health, Confidentiality, and Military Law* (1 March 2000)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 September 2001), AFGM1 (9 June 2010)

AFI 41-210, *Patient Administration Functions* (22 March 2006), AFGM1 (26 February 2010)

TJAG Policy Memorandum: TJAGC Standards-2, Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct (17 August 2005)

Use of Information in the PIF and Rehabilitation Testimony at Trial

- Information In The PIF

Documents in a personnel information file (PIF) such as letters of reprimand can be admitted into evidence by the prosecution during the sentencing phase of a court-martial if it is clear from the face of the document that the member received the document and had an opportunity to respond to the allegations. The document must also be complete and kept in accordance with AF Regulations, such as the example provided in chapter. Any response submitted by the member becomes part of the record and must be filed with the action. Otherwise, the record is incomplete and may not be admitted.

- Rehabilitation Evidence

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

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

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

    --- The witness cannot express an opinion as to whether the accused should receive a punitive discharge or any euphemism as to the appropriateness of a particular sentence

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

References:

Rule for Courts-Martial 1001(b)(2), 1001(b)(5) (2008)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

Post-Trial Matters, Convening Authority Action, and Appeals

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

  -- For courts-martial sentences adjudged

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

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

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

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

  -- Allegations of legal errors that affect the findings or sentence

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

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

  -- Clemency recommendations by any court member, the military judge, or any other person

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

  - Members are usually placed in mandatory excess leave (nonpay) status in cases where no confinement was adjudged or when all confinement is served, but before appellate review is completed
  - The convening authority, or successor, must take additional action to execute the punitive discharge after appellate review has been completed
- The type of appellate review depends upon the adjudged sentence and type of court-martial
- A judge advocate will conduct a review of all summary courts-martial, special courts-martial that do not include a punitive discharge or one year confinement and cases in which appellate review as described below has been waived
  - The Judge Advocate General is the review authority in general courts-martial where the sentence does not include death, punitive discharge, or confinement for one year or more. The Judge Advocate General may elect to certify any case he/she reviews to the Air Force Court of Criminal Appeals (AFCCA).
  - Unless appellate review is waived by an accused, the AFCCA automatically reviews all cases involving sentences of death, punitive discharge, or confinement of one year or more. The AFCCA reviews both legal and factual sufficiency.
  - After review by the AFCCA, the Court of Appeals for the Armed Forces (CAAF) may elect to review any case. Review is automatic in death penalty cases and cases certified to the court by The Judge Advocate General of each service. The CAAF reviews only questions of law and legal sufficiency.
  - Cases actually reviewed by the CAAF may be considered for review by the Supreme Court of the United States

References:

Rule for Courts-Martial 1101-07, 1201-05 (2008)

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

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1 (3 February 2010)

Air Force Return to Duty Program

The return to duty program (RTDP) is a rehabilitation program that offers selected enlisted personnel under a court-martial sentence to confinement an opportunity for a second chance at productive Air Force service. The program is managed by the Air Force Security Forces Center in a dormitory setting at Lackland Air Force Base, Texas.

- Participants, known as candidates, are involved in offense-specific treatment and education programs. Successful candidates return to active duty, and their remaining unserved sentences, including both confinement (if any) and punitive discharges, are suspended for a period of up to a year, after which they are remitted.

- Applicants can expect RTDP to take up to six months, during which time they will forego parole consideration. They may have to stay past what would be their minimum or even maximum release dates if they were serving their sentences in a confinement facility. If candidates are eliminated from the program and have more time to serve on a sentence, they will return to confinement; if not, then they will be released.

- The Air Force Clemency and Parole Board acts for the Secretary in either returning the candidate to duty or eliminating him or her from the program

- Successful graduates are assigned to a new CONUS Air Force base to serve at least one year or until their enlistment expires, whichever is later. (Further reenlistment is possible, but may require a waiver of high year of tenure.) The Air Force will attempt to assign the candidate in his original AFSC if requested, but a security clearance lost as a result of court-martial will not be restored simply as a consequence of a return to duty. That may limit AFSC choices. Lost grade, once approved by the convening authority, cannot be returned through the RTDP. Candidates may, however, petition the Air Force Board for Correction of Military Records to restore some or all of the rank lost by court-martial.

- The court-martial convening authority may direct entry into the RTDP in the action on a court-martial sentence. If entry is not so directed, the Air Force Clemency and Parole Board can consider a direct application (if the sentence is less than a year).

- RTDP applications include a simple letter, no particular format, indicating that an offender is a volunteer for the RTDP and attaching evidence that he meets the eligibility criteria set forth in Chapter 11 of AFI 31-205

References:

10 U.S.C. §§ 951(b), 953

AFI 31-205, *The Air Force Corrections System* (7 April 2004), Incorporating Change 1 (6 July 2007), Certified Current (17 May 2010)

CHAPTER SIX: PERSONNEL ISSUES FOR THE COMMANDER—GENERALLY

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Total Force: Reserve and National Guard Forces

Total Force Concept (Air Reserve Component, ARC)

- In 1973, Total Force policy was established, calling for a mix of active and reserve component forces to ensure maximum military capability is achieved at minimum cost. There are three overarching groups of reserve forces personnel.
  - -- Ready Reserve: Main component is the Selected Reserve
    - --- Can be units or individuals
    - --- Includes all Air National Guard personnel
  - -- Standby Reserve: Members maintain affiliation without being in Ready Reserve; not in units, not required to train
  - -- Retired Reserve: Subject to recall by SecAF. Retired Reserve over 60 years of age or who have served more than 30 years will not be recalled under any circumstances.

Air Force Reserve

- Mission: Deliver sovereign options for the defense of the United States of America and its global interests—to fly and fight in air, space, and cyberspace
- Primary reserve categories:
  - -- Category A: (assigned to a stand-alone reserve unit)
    - --- Assigned to and train on weekends as a reserve unit, such as an airlift group or fighter wing
    - --- Commanders and supervisors with questions about how to handle alleged misconduct involving Category A reservists should contact their unit staff judge advocate. In addition, they may contact HQ AFRC/JA at Robins AFB, Georgia.
  - -- Category B: (assigned/train as an individual; backfill active duty members)
    - --- Individual mobilization augmentees (IMAs)
    - --- Attached to active duty organizations worldwide
    - --- Commanders and supervisors with questions about how to handle alleged misconduct involving category B (IMA) reservists should contact their wing

staff judge advocate's JA. In addition, they may contact HQ AFRC/JA at Robins AFB, Georgia

- Annual membership requirements:
  - -- Category A Reservists
    - --- 48 unit training assembly (UTA) periods (also known as inactive duty for training (IDT) status); four periods per weekend for a total of twelve weekends per year
    - --- 15 ADT (active duty for training) days
  - -- Category B Reservists (IMAs)
  - -- 24 IDT periods per year (2 IDT periods per day for a total of 12 days per year)
  - -- 12-14 annual tour (AT) active duty days per year
- Fulltime management
  - -- Air reserve technicians (ARTs) or military technicians (MTs): Title 5 federal civilian employees with a "condition of employment" requiring they maintain active reserve membership in a reserve unit. If they lose reserve status, they usually lose Title 5 civilian employee status, usually removal for failing to meet a condition of employment.
  - -- Active duty personnel
    - -- AGRs (Active Guard/Reserve): Reserve personnel on extended active duty for more than 180 days (often four or six years) who provide full-time support to Air Force Reserve units
    - --- Air Force active duty personnel
  - -- Federal civil service employees
- <u>UCMJ jurisdiction</u>: Reserve personnel are subject to the UCMJ while in active status (ADT or full-time active duty) or inactive duty for training status (UTAs or IDTs)

Air National Guard

- Dual mission based upon Militia Clause of U.S. Constitution, Article 1, Section 8
  - -- <u>Federal status</u>: Title 10 of the United States Code
  - -- <u>State status</u>: Title 32 of the United States Code (e.g., disaster relief, riot control, etc.)
- Annual membership requirements: 48 UTAs (12 weekends) and 15 ADT days

- Full-time support
  - -- Active duty personnel
    - --- AGRs: ANG personnel on active duty; same as for Air Force Reserve
    - --- Active duty Air Force advisors
  - -- Air National Guard technicians or military technicians (MTs): Federal civilian employees who occupy technician positions. Must be members of both state guard and federal civil service. If they lose one status, they lose the other.
  - -- State civilian employees
- UCMJ jurisdiction: ANG personnel are only subject to the UCMJ when "in federal status" Art. 2(a)(3), UCMJ, which requires being on Title 10 orders (either ADT, full-time active duty, or called up for federal service). In any other status, such as Title 32 training or state service only the state has jurisdiction. Complex rules govern when ANG personnel are in which status.

References:

10 U.S.C. § 12301, *et seq*. (Reserve Components Generally)

10 U.S.C. § 10216-18 (Military Technicians)

32 U.S.C. § 709 (Air National Guard Technicians)

DODI 1205.18, *Full-Time Support (FTS) to the Reserve Components* (4 May 2007)

Return of Military Personnel, Employees, and Family Members from Overseas for Trial

Congress requires the Armed Services to have uniform regulations for delivering military members accused of a crime to civil authorities. The Department of Defense (DOD) regulations requires cooperation with federal and state officials who request assistance to enforce court orders, which are the subject of a felony charge, felony conviction, and contempt or show cause orders. Air Force policy is as follows:

- Air Force members, civilian employees, and family members are expected to comply with orders issued by a federal or state court of competent jurisdiction unless non-compliance is legally justified. Members and employees who persist in noncompliance are subject to adverse administrative action, including separation for cause.
- Air Force officials will ensure that members, employees, and family members, do not use assignments or officially sponsored residences outside the United States to avoid complying with valid court orders

Procedure: Request For Military Members Who Are Overseas

- When federal, state, or local authorities request delivery of an Air Force member who is stationed outside the United States and who is convicted of, or charged with, a felony or who is sought for the unlawful taking of a child, he or she will normally be expeditiously returned to the United States for delivery to the requesting authorities. The OPR for this process is the Air Force Legal Operations Agency (AFLOA/JAJM).
  - -- Requests for delivery of military members to state or local authorities must be accompanied by a warrant or a representation by a federal marshal or agent that such a warrant has been issued
  - -- Before taking action to return a member under these circumstances, the member must be afforded an opportunity to show legitimate cause for noncompliance
  - -- The Judge Advocate General may direct return for less serious offenses when deemed appropriate under the facts and circumstances of a particular case
  - -- Return is not required if the controversy can be resolved without returning the member to the United States
  - -- If approved, member receives PCS orders from AFPC with assignment to an installation as close to the requesting jurisdiction as possible
  - -- Requesting authorities will be notified of member's new assignment, port of entry, and estimated time of arrival

- A request for return of a member to the United States by civilian authorities may be denied if any of the following exist:
  - -- The member's return would have an adverse impact on operational readiness or mission requirements
  - -- An international agreement precludes the member's return
  - -- The member is subject to foreign judicial or court-martial proceedings or a military department investigation
  - -- The member shows satisfactory evidence of legal efforts to resist the request or other legitimate causes for noncompliance
  - -- Other unusual facts or circumstances warrant a denial
- Commanders send recommendations for denial through their legal office to AFLOA/JAJM, SAF/GC, and SAF/MI. The Under Secretary of Defense for Personnel and Readiness (USD/P&R) is the decision authority.
- Requests must be processed expeditiously. A delay of up to 90 days may be granted by The Judge Advocate General if any of the following apply:
  - -- Efforts are in progress to resolve the controversy without the member's return
  - -- Additional time is required to permit the member to provide satisfactory evidence of legal efforts to resist the request or show legitimate cause for noncompliance
  - -- Additional time is needed to determine the mission impact of the member's loss or impact on any international agreement, foreign judicial proceeding or ongoing military department investigation or court-martial
  - -- Other unusual facts or circumstances warrant delay

Procedure: Employees Or Family Members Who Are Overseas

- Upon receipt of a request for assistance from federal, state, or local authorities for custody involving noncompliance with a court order — such as arrest warrant, indictment, information, or contempt violation involving the unlawful removing of a child. After exhausting all reasonable efforts to resolve the matter without the employee or family member returning to the United States, the commanders shall strongly encourage the employee or family member to comply.
- If an employee does not comply, the commander shall consider imposing disciplinary action including removal against the employee. If a family member does not comply, the commander shall consider withdrawing command sponsorship of the family member.

References:

DODI 5525.09, *Compliance of DOD Members, Employees, and Family Members Outside the United States with Court Orders* (10 February 2006)

DODI 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* (3 March 2005)

AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial* (20 October 2006)

Drug Abuse

Air Force Policy

- Military and civilian personnel are expected to refrain from drug abuse and maintain standards of behavior, performance, and discipline consistent with the UCMJ, public law, and Air Force policy
- The illegal use of drugs by Air Force members is a serious breach of discipline that is incompatible with Air Force standards. This misconduct places the member's continued service in jeopardy and could lead to action resulting in a punitive discharge or an administrative discharge under other than honorable conditions.
- Civilian employee abusers are given the same consideration and help as employees with other health problems

Drug Abuse and Military Members

- Unit commanders and supervisor responsibilities
  - -- Observe and document the performance and conduct of subordinates, and direct immediate supervisors to do the same
  - -- Evaluate potential or identified abusers through the evaluation process of AFI 44-121
  - -- Provide appropriate incentives to encourage members to seek help for problems with drugs without fear of negative consequences
  - -- The commander is responsible for and has control of all personnel, administrative, and disciplinary actions pertaining to members involved in the Air Force Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program
  - -- Commander involvement in treatment is critical. The commander provides the authority for treatment when the member refuses to comply with treatment decisions.
- Abuser identification
  - -- <u>Self-identification</u>: Members who voluntarily disclose prior drug use or possession are granted limited protections. Such disclosure may not be used against the member in UCMJ actions or in characterizing an administrative discharge as long as he or she:
    - --- Is seeking treatment and <u>voluntarily</u> reveals nature and extent of drug involvement to Commander, First Sergeant, Military Equal Opportunity (MEO) personnel, or medical authority; and

--- Has not previously been apprehended for drug involvement; placed under investigation for drug abuse; ordered to give a urine sample; advised he or she was recommended for discharge for drug abuse; or entered into drug abuse treatment

--- The limited protection for self-identification also does not apply to disciplinary or other action based on independently derived evidence (other than commander-directed drug testing), including evidence of continued drug abuse after the member initially entered the treatment program

-- Commander referral: Commanders shall refer a member for assessment when drugs are thought to be a contributing factor in any incident, such as deteriorating duty performance, excessive tardiness or absenteeism, misconduct, unacceptable social behavior; or domestic disturbances/family violence

-- As a result of arrest, apprehension and investigation: Commanders who receive information of this nature must refer the member for a substance abuse assessment if substance abuse is, or is suspected to be, a contributing factor in any incident

-- Incident to medical care: Medical personnel must notify the commander and the ADAPT Program Manager (ADAPTPM) if their treatment of a patient reveals proof of drug use

-- Random drug testing: Positive results mandate a substance abuse evaluation

The Substance Abuse Assessment

- The ADAPT Program attempts to identify and provide assistance to military members with drug problems, but the focus of the ADAPT program is prevention and clinical treatment

  -- The ADAPT staff members evaluate all members suspected of drug abuse in order to help the commander understand the extent of the drug abuse problem and to determine the patient's need for treatment and the level of care required

  -- Except in cases of self-identification, personal information provided by the member in response to assessment questions may be used against the member in a court-martial or considered for characterizing service in an administrative discharge proceeding. AFI 44-121, para 3.11.2.

- Before the assessment, the patient is advised of the ADAPT program's nature, the limits of confidentiality, the relevant Privacy Act provisions, and the consequences of refusing treatment

- Upon completion of the assessment, the information gathered will form the basis for patient diagnosis, treatment planning, and delivery of substance abuse services

- The information is presented to the Treatment Team (TT) so that the TT may develop and guide the clinical course of treatment. The TT decides the proper course of action and treatment plan for the client after examining all the facts presented.

- The TT is generally comprised of:

  -- The commander, the first sergeant, or both who must be involved at program entry, termination, and any time there are problems treating the patient

  -- The patient's immediate supervisor

  -- The ADAPTPM

  -- A certified substance abuse counselor

  -- The therapist currently involved in patient care

- The treatment plan establishes a framework for the patient's treatment and recovery. The plan documents the treatment's nature, extent, and goals and is reviewed at least quarterly.

  -- The ADAPTPM makes the treatment decision after consulting with the TT. The decision must be made within 15 days after referral to the ADAPT Office.

  -- Although treatment is available for drug abusers and members' dependent family members on drugs, as a practical matter, military members will be processed for separation and treatment may not be completed

    --- Members being separated are entitled to appropriate medical care, but separation action will not be postponed because of participation in the ADAPT program

    --- For drug dependent members, at a minimum, the Air Force will provide medical care and treatment to detoxify them and refer them for continued treatment

  -- Substance abuse treatment falls into two categories:

    --- <u>Non-Clinical Services</u>: the first category of treatment, is for those patients not meeting the diagnostic criteria for drug abuse or dependence

      ---- At a minimum, they are provided 6 hours of awareness education and additional counseling can be prescribed. The length of involvement is flexible.

      ---- Substance abuse awareness training includes information on Air Force standards, individual responsibility, and the legal and administrative consequences of abuse

--- Clinical Services: the second category of treatment, is used for patients meeting the Diagnostic and Statistical Manual (DSM)-IV diagnostic criteria for drug abuse or dependence

---- The level and intensity of the treatment are determined by the ADAPTPM using criteria developed by the American Society of Addiction Medicine. The ADAPT program develops procedures to evaluate program effectiveness.

---- Patients are treated in the least restrictive setting possible and the length and duration of the treatment will vary according to the patient's needs. Program requirements will be tailored to the individual and will include awareness education. Family involvement is encouraged.

---- Patients must adhere to the treatment plan developed by the TT

---- In appropriate cases, patients may be referred for in-patient treatment to a Substance Abuse Recovery Center located on several installations. Patients who are drug dependent may be referred to private institutions.

---- Patients meeting these diagnostic criteria are put on a duty limiting profile for 6 months to give them an opportunity to adapt to the treatment program. The profile limits their ability to go TDY or PCS.

--- Patients successfully complete the program when they meet DSM-IV criteria for early full remission

---- The TT determines if the patient successfully completes the program or fails

---- Failure in the program is based on a demonstrated pattern of unacceptable behavior, inability, or unwillingness to comply with the treatment plan, or involvement in a substance abuse related incident after initial treatment

---- Individuals who fail the ADAPT program shall be separated from the service

Management of Drug Abusers

- Tools available to the unit commander to manage drug abusers include:

  -- Line of Duty Determinations, when appropriate (AFI 36-2910)

  -- Action involving security clearance, access to classified information, or access to restricted areas (AFI 31-501)

  -- Personnel Reliability Program (AFMAN 10-3902)

-- Duty assignment review to determine if member should continue in current duties

-- UIF or control roster action based on drug related misconduct or substandard duty performance (AFI 36-2907)

-- Separation under AFI 36-3206 and 36-3208 for documented failure to meet standards (members who fail the ADAPT program due to refusal to cooperate may be separated)

-- Administrative demotion, withholding of promotion, and denial of reenlistment

- Drug abuse is incompatible with military service and Airmen who abuse drugs one or more times are subject to discharge for misconduct under AFI 36-3208

  -- Drug abuse under AFI 36-3208 is the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug. This includes:

    --- Improper use of prescription medication

    --- Any controlled substance in schedules I, II, III, IV, and V of 21 U.S.C. § 812

    --- Any intoxicating substance, other than alcohol, introduced into the body in any manner to alter mood

  -- Evidence obtained through urinalysis or from the member in connection with initial entry in rehabilitation and treatment may be used to establish a basis for discharge

  -- Generally, a member found to have abused drugs will be discharged unless the member meets <u>all</u> seven of the following criteria:

    --- Drug abuse is a departure from the member's usual and customary behavior

    --- Drug abuse occurred as the result of drug experimentation

    --- Drug abuse does not involve recurring incidents, other than drug experimentation

    --- The member does not desire to engage in or intend to engage in drug abuse in the future

    --- Drug abuse under all the circumstances is not likely to recur

    --- Member's continued presence in the Air Force is consistent with the interest of the Air Force in maintaining good order and discipline

    --- Drug abuse did not involve drug distribution

-- It is the member's burden to prove retention is warranted under these limited criteria

Drug Abuse and Civilian Employees

- The civilian drug abuse prevention and control program is intended to prevent, reduce, and control substance abuse; refer employees to appropriate assistance resources; restore employees to full effectiveness; and train managers, supervisors and employees on how best to address substance abuse issues
- AFI 36-810 provides policy and procedures to identify and rehabilitate civilian drug abusers
- All supervisors and personnel must attend training sessions concerning drug abuse, be alert to the signs of abuse in subordinates, and report actual or suspected drug activity. Local unions and shop stewards are aware of the regulatory program.
- The unit commander consults the Civilian Personnel Office or the legal office regarding civilian employees whose poor performance, discipline, or conduct may be caused by drug abuse

References:

DODI 5210.42, *Nuclear Weapon Personnel Reliability Program (PRP)* (16 October 2006)

AFMAN 10-3902, *Nuclear Weapons Personnel Reliability Program (PRP)* (13 November 2006), Incorporating Change 1 (10 September 2008)

AFI 31-501, *Personnel Security Program Management* (27 January 2005)

AFI 36-810, *Substance Abuse Prevention and Control* (22 July 1994)

AFI 36-2907, *Unfavorable Information File (UIF) Program* (17 June 2005)

AFI 36-2910, *Line of Duty (Misconduct) Determinations* (4 October 2002), Incorporating Through Change 2 (5 April 2010)

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), AFGM1 (2 April 2010)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 September 2001), Certified Current (2 April 2010), Incorporating Change 5 (22 April 2010), AFGM1 (9 June 2010)

Alcohol Abuse

Introduction

- The Air Force recognizes alcoholism as a primary, chronic disease that affects the entire family. Alcoholism is both preventable and treatable. The Air Force further recognizes that alcohol abuse negatively affects public behavior, duty performance, and/or physical and mental health.
  - -- Treatment is available for alcohol abusers in an effort to minimize the negative consequences of such abuse to the individual, family, and the organization
  - -- The Air Force attempts to provide treatment and restoration to unrestricted duty status whenever possible. If restoration to duty is not appropriate, transitional counseling is offered pending separation.
  - -- In addition to treatment issues, there are a number of other issues surrounding the use of alcohol, including drunk driving, dramshop liability, and drinking age
- The Air Force Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program attempts to identify and provide assistance to military members with alcohol problems, but the focus of the ADAPT Program is prevention and clinical treatment. The ADAPT Program replaced the Substance Abuse Reorientation and Treatment (SART) Program.

Military Members

- Commanders and supervisors have primary responsibility for prevention, early identification, treatment, and discipline of substance abusers. The commander should do the following:
  - -- Observe and document the performance and conduct of subordinates, and direct the immediate supervisors to do the same
  - -- Evaluate all potential or identified abusers through the evaluation process of AFI 44-121
  - -- Provide appropriate incentives to encourage members to seek help for problems with alcohol without fear of negative consequences
  - -- Recognize their responsibility for all personnel including administrative and disciplinary actions pertaining to any of their members involved in the ADAPT program
  - -- Understand that their involvement in treatment is critical, and they provide the authority to implement treatment when the member refuses to comply with treatment decisions

- Alcohol abusers are identified through several channels, including:
  - -- Self-Identification: The Air Force provides nonpunitive assistance to members seeking help in dealing with alcohol abuse
  - -- Commander referral:
    - --- Commanders who suspect alcohol abuse shall refer members for evaluation. Commanders must refer the member for an evaluation if alcohol is, or is suspected to be, a contributing factor in any incident. Some instances which could lead to referral include the following:
      - ---- Deteriorating duty performance
      - ---- Errors in judgment
      - ---- Excessive absenteeism or lateness for duty
      - ---- Misconduct
      - ---- Unacceptable social behavior
      - ---- Incidents involving domestic violence or disturbances
      - ---- Incidents highlighted in DD Form 1569, Incident Complaint Record, involving alcohol
    - --- If a commander refers an individual for an evaluation, the member must be advised of:
      - ---- The reason for the evaluation
      - ---- The evaluation is not punitive in nature; and
      - ---- The member must report in uniform to the assessment appointment at the appointed date and time
    - --- Coordinate with the staff judge advocate (SJA) before directing required drug testing on members involved in an alcohol-related incident, exhibiting bizarre behavior, or who are reasonably suspected of drug use. Commanders must order the test within 24 hours of the incident and should attempt to get the individual's consent prior to directing the drug test. Blood alcohol tests are encouraged when alcohol is thought to be a factor in any incident.
    - --- The commander ensures the member is referred within 7 calendar days after notification of the suspected alcohol incident

-- Incident to medical care:

--- Health care providers should be alert for potential indicators of alcohol related problems

--- Medical personnel must notify the unit commander and the ADAPT program manager when a member:

---- Is observed, identified, or suspected to be under the influence of drugs or alcohol

---- Receives treatment for an injury or illness that may be the result of substance abuse

---- Is suspected of abusing substances; or

---- Is admitted as a patient for alcohol (or drug) detoxification

- Substance abuse assessment

-- ADAPT staff members evaluate all members suspected of alcohol abuse in order to help the commander understand the extent of the alcohol abuse problem and to determine the patient's need for treatment and the level of care required. Except in cases of self-identification, personal information provided by the member in response to assessment questions may be used against the member in a trial by court-martial or considered on the issue of service characterization in an administrative discharge proceeding. AFI 44-121, para 3.11.2.

-- Before the assessment, the patient is advised of, among other things, the nature of the ADAPT Program, the limits of confidentiality, the relevant Privacy Act provisions, and the consequences of refusing treatment

-- Upon completion of the assessment, the information gathered will form the basis for patient diagnosis, treatment planning, and delivery of substance abuse services

-- In cases of DUI/DWI, the ADAPT provider will give the assessment results to the patient's commander for consideration prior to any decisions by the commander regarding the disposition of such a case

-- The information is presented to the Treatment Team (TT) so that the TT may develop and guide the clinical course of treatment. The TT decides the proper course of action for the client after examining all of the facts presented. In particular, the TT develops the treatment plan.

--- The TT is made up of:

---- The commander, First Sergeant, or both, who must be involved at program entry, termination, and any time there are problems treating the patient

---- The patient's immediate supervisor

---- The ADAPT Program Manager (who chairs the TT meetings)

---- A certified substance abuse counselor

---- The therapist currently involved with the care of the patient

---- Any other individuals deemed necessary in some cases, the patient may also be on the TT

- The treatment plan, developed by the TT, is used to establish a framework for the patient's treatment and recovery. The plan is individual specific and it documents the nature and extent of the treatment and the goals of treatment. The plan is reviewed at least every quarter to ensure effectiveness.

-- The ADAPT Program Manager makes the treatment decision after consulting with the TT. The decision must be made within 15 days after referral to the ADAPT Office.

-- Substance abuse treatment falls into two categories:

--- Non-Clinical services: The first category of treatment, is for those patients not meeting the diagnostic criteria for alcohol abuse or dependence

---- At a minimum, they are provided 6 hours of awareness education and additional counseling can be prescribed. Length of involvement is flexible.

---- Substance abuse awareness education includes, among other things, information on individual responsibility, Air Force standards, and the legal and administrative consequences of abuse

---- Members being separated are entitled to appropriate medical care, but separation action will not be postponed because of participation in the ADAPT Program

--- Clinical services: The second category of treatment, is used for patients meeting the Diagnostic and Statistical Manual (DSM)-IV diagnostic criteria for alcohol abuse or alcohol dependence

---- The ADAPT Program Manager, using criteria developed by the American Society of Addiction Medicine (ASAM), determines the level and inten-

sity of the treatment. The local ADAPT Program develops procedures to evaluate the effectiveness of the program.

---- Patients are treated in the least restrictive setting possible and the length and duration of the treatment will vary according to the needs of the patient. Program requirements will be tailored to the individual and will include awareness education (minimum of 6 hours). Family involvement is encouraged.

---- Patients must adhere to the treatment plan developed by the TT

---- In appropriate cases, patients may be referred for in-patient treatment to one of several Substance Abuse Recovery Centers (SARC) which are located on several different installations

---- Total abstinence is a critical treatment goal, but relapses into drinking behavior are not uncommon and are to be anticipated. Drinking, by itself, is not grounds for program failure.

---- Patients meeting these diagnostic criteria are put on a duty-limiting profile for 6 months to give them an opportunity to adapt to the treatment program. The profile limits their ability to go TDY or PCS.

--- Patients successfully complete the program when they meet DSM-IV criteria for early full remission

---- The TT makes the determination whether the patient successfully completes the program or fails

---- Failure in the program is based on a demonstrated pattern of unacceptable behavior, inability or unwillingness to comply with the treatment plan, or involvement in an alcohol related incident after initial treatment. Individuals who fail the ADAPT Program shall be separated from the service.

-- Management of Alcohol Abusers

--- Commanders have a wide variety of tools available to assist in managing alcohol abusers. These include: Line of Duty (LOD) determination, if appropriate, action related to security clearances, access to classified information, and access to restricted areas, Personnel Reliability Program, Unfavorable Information File (UIF) or control roster action, separation from service, withholding of promotion, administrative demotion, and denial of reenlistment.

--- Orders not to consume alcohol will be valid <u>only</u> if there is a reasonable connection between the order and military duties. Therefore, such orders must be carefully tailored. Always consult with your SJA before issuing an order not to consume alcohol.

Civilian Employees

- The Air Force attempts to prevent, reduce, and control alcoholism and drinking problems through education and training of employees and supervisors. The Air Force assists employees in finding rehabilitative services and treatment in an effort to restore civilian employees to full effectiveness.

- AFI 36-810 and provides policy guidance and outline procedures to identify and rehabilitate civilian employees who abuse alcohol

- Indicators of possible alcohol related problems include: absenteeism, tardiness for work, extended lunch periods, unexcused absences, deteriorating job performance, marked changes in personal appearance, chronic lying, behavioral changes, and misconduct

- Under the Rehabilitation Act, alcohol abuse may be a physical handicap that entitles the employee to special protection. Consult with your SJA and Civilian Personnel Officer.

Legal Aspects of Alcohol Related Issues

- Drunk Driving

  -- Operation of a motor vehicle while under the influence of alcohol (DUI) or driving while intoxicated (DWI), on or off the installation, is a serious offense and is incompatible with Air Force standards

    --- Military members are subject to nonjudicial punishment under Article 15 or a court-martial for a violation of Article 111, UCMJ

    --- Civilian employees apprehended for DUI on exclusive or concurrent federal jurisdiction installations are subject to prosecution in U.S. Magistrate Court

    --- A DUI conviction, in either state or federal court, will subject the individual to revocation of on-base driving privileges

  -- Individuals identified as alcohol abusers as a result of a DUI/DWI will receive a minimum of 6 hours of awareness education before base driving privileges are reinstated

- Minimum Age

  -- The minimum age for purchasing, possessing, or consuming alcoholic beverages on Air Force installations will be consistent with the law of the state, territory, possession, or foreign country in which the installation is located. Adults may only furnish alcohol to minors in accordance with applicable state law.

--- Air Force members who violate these restrictions may be punished under Article 92, UCMJ, for a violation of AFI 34-219

--- At Air Force installations located within approximately 50 miles from a neighboring state that has a lower drinking age, the minimum base drinking age may be lowered to match that of the neighboring state to reduce the likelihood that members will drive while intoxicated

--- When an entire unit marks a unique or nonroutine military occasion on a military installation, the minimum drinking age for military attendees at a particular unit gathering may be lowered

-- Military personnel 18 years old or older may purchase, serve, sell, possess, and consume alcoholic beverages outside the United States, its territories, and possessions unless a higher drinking-age requirement exists in accordance with applicable status of forces agreement (SOFA) or country-to-country agreement. A higher drinking age requirement may also be imposed based on the local situation as determined by the installation commander or the senior on-site unit commander when there is no installation commander. Coordination with any host commander is required.

- Dramshop Liability

-- Under the dramshop theory of liability, which is generally a matter of state law, a server of alcoholic beverages, whether it is an individual, activity, or facility, has a duty to refuse to serve anyone who is or appears to be intoxicated

-- Liability may extend to damage the intoxicated person causes to property, others, and himself

-- Installations must, among other things:

--- Publish instructions prohibiting serving alcohol to intoxicated persons

--- Ensure each server annotates an AF IMT 971, *Supervisor's Employee Brief*, stating the server is aware of the Operating Instruction (OI) and agrees to enforce its provisions

--- Establish controls to protect intoxicated persons and Air Force assets

--- Report alcohol incidents that may lead to government claims to the SJA

--- Not permit personal supplies of alcohol in buildings or grounds that serve alcohol (i.e., golf course)

--- Not provide coupons for reduced prices on alcoholic beverages

--- May serve complimentary nonalcoholic beverages to designated drivers

- Private Organizations may not sell or serve alcoholic beverages on AF installations

References:

AFI 31-501, *Personnel Security Program Management* (27 January 2005)

AFI 34-219, *Alcoholic Beverage Program* (17 October 2007), Incorporating Change 1 (7 February 2008)

AFI 36-810, *Substance Abuse Prevention and Control* (22 July 1994)

AFMAN 10-3902, *Nuclear Weapons Personnel Reliability Program* (13 November 2006), Incorporating Change 1 (10 September 2008)

AFI 36-2502, *Airman Promotion/Demotion Programs* (31 December 2009)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 September 2001), Certified Current (2 April 2010), Incorporating Change 5 (22 April 2010), AFGM1 (9 June 2010)

Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA) is a disclosure statute that permits access to information maintained by government agencies. The basic goals of the FOIA are to ensure an informed citizenry, to serve as a check against corruption, and to help hold the government accountable. The Act applies to the Department of Defense, Air Force, and other federal executive agencies. Enacted in 1966, FOIA generally provides a right of access to federal executive agency information, except records (or portions) that are protected from disclosure by one of the FOIA exemptions listed below.

FOIA Exemptions

- There are seven exemptions under the FOIA that commonly apply to the Air Force, which provide a basis for withholding information
  - -- Classified information (confidential, secret, top secret). "For Official Use Only" is not a security classification.
  - -- Those matters relating solely to the internal personnel rules and practices of the agency. This exemption has two categories:
    - --- High 2: Release of these records would substantially hinder the effective performance of the agency's mission by allowing the requester to circumvent agency practices. For example, security forces' internal procedure memorandums.
    - --- Low 2: Trivial records of a housekeeping nature that serve no public interest. For example, the number of cars passing through the main gate each year.
  - -- Information exempted by another statute. For example, drug rehabilitation information.
  - -- Trade secrets or commercial or financial information submitted on a privileged or confidential basis. For example, bid contract proposals.
  - -- Interior intra-agency documents normally privileged in the civil court context. For example, attorney work-product and pre-decisional policy discussions.
  - -- Law enforcement information. For example, information that would disclose the identity of confidential informants.
  - -- Information in personnel, medical, and similar files which, if disclosed to the requester, would result in a clearly unwarranted invasion of personal privacy
    - --- Some examples of personal information which are releasable because there is no unwarranted invasion of personal privacy are: name, rank, date of rank,

gross pay, present and past duty assignments, future assignments which have been finalized, office/organizational address, and duty phone number. However, the names and addresses (postal and/or e-mail) of DOD military and civilian personnel in sensitive units, routinely deployable units, or assigned in foreign territories are normally not releasable.

-- Information not normally releasable as an unwarranted invasion of personal privacy includes home addresses, home phone numbers, and social security numbers

FOIA Requests

- If you receive a FOIA request, immediately take it to the base FOIA office for processing. By law, the agency must respond to the requester within 20 working days of receiving a perfected FOIA request.

- The FOIA request can be made by "any person," which has been broadly defined to include foreign citizens and governments, corporations, and state governments. To comply with the rules, the request must:

  -- Be in writing (includes requests sent by facsimile, or electronically)

  -- Explicitly or implicitly invoke the FOIA

  -- Reasonably describe the desired record

  -- Give assurances to pay any required fees or explain why a waiver is appropriate

FOIA Processing

- Written request received at base FOIA office is sent to the OPR for initial review

- After initial review, forwarded to JA for comment

  -- If JA recommends approval, local release authority can approve request and release information

  -- If JA recommends denial, then a legal review is attached and the case is forwarded immediately to the initial denial authority (IDA), typically the major command commander or designee

- The IDA takes appropriate action. If records are denied, wholly or in part, the IDA tells requester the reason for the denial and the appeal procedure to follow. The IDA must issue its decision within 20 working days of receipt of the request by the base FOIA office.

- Appeals are taken to SAF/GCA for resolution after being reassessed by the major command FOIA office

- Requester may file suit in federal district court for release of information if the appeal results in denial

- Agencies are not required to create, compile, or obtain records not in their possession, but must apply a reasonableness standard if extracting data from an existing record to comply with the request would be a "business as usual approach"

- Honoring form or format requests: In making any record available to a person, the agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Agencies are required to make reasonable efforts to maintain their records in forms or formats that are reproducible, and have an affirmative duty to search for records in electronic form or format.

- Multi-track processing is authorized if the number of pending requests or complexity of a request precludes response within the statutory 20 working day limit. All tracks operate on a first-in, first-out system. If the base FOIA office determines a request is not eligible for its fastest track, it must give the requester the opportunity to limit the scope of the request.

  -- Simple requests: Ones that clearly identify the requested records, have few responsive records, deal with only one installation and, generally, one OPR, and do not involve Privacy Act, classified, or deliberative process materials

  -- Complex requests: Ones that include massive responsive records, cause significant impact on units, require coordination from multiple offices, and include material that is classified or privileged, or originated from a non-government source

  -- Expedited track: Agencies are required to promulgate regulations providing for expedited processing of requests for records if the requester demonstrates a "compelling need." Agencies must notify expedited processing requesters whether the request has been granted within 10 calendar days. Denial of a request for expedited processing, whether initially or on appeal, is subject to judicial review. A "compelling need" means failure to receive the records in an expedited manner reasonably poses an imminent threat to the life or physical safety of an individual. Agencies may process "urgently needed" material in the expedited track after "compelling need" requests have been fulfilled.

Electronic Reading Rooms

- Installation commanders must establish electronic reading rooms on the installation web site and make frequently requested records—records requested three or more times per quarter, within reason—available through links in the reading room site

- Certain records, such as policy statements, created on or after 1 November 1996, must be made available electronically in a public reading room within one year of creation

REFERENCES:

5 U.S.C. § 552, Freedom of Information Act

DODD 5400.07, *DOD Freedom of Information Act (FOIA) Program* (2 January 2008)

DOD Regulation 5400.7/Air Force Supplement, *DOD Freedom of Information Act Program* (24 June 2002)

Privacy Act

The Privacy Act (PA) is designed to accomplish several purposes. Primarily, it limits the government's ability to collect information about an individual to those instances authorized by law or executive order and necessary for government business. The PA also authorizes individuals to access records maintained on them by the government and to correct factual errors in those records. The PA only governs activities of the federal executive branch of government.

Basic Structure of PA Systems

- Every system of records must be listed in the Federal Register before information may be collected
  - -- A system of records contains information on individuals that is retrieved by the individual's name or personal identifier, such as a Social Security Number. All systems of records must have a PA warning on them.
  - -- System of records developers and managers must perform privacy impact assessments before creating a system of records or modifying information contained in a system of records
  - -- Do not place PA information in areas where individuals without an official need to know will have access (including common drives on computer systems)
  - -- Personal notes maintained by a supervisor as memory aids at her own initiative are not considered a system of records, even if maintained by name or personal identifier, unless the records are required by command policy or regulation, or the supervisor shows the records to other agency personnel
- Contractors who maintain systems of records for an executive agency are bound by the PA
- Before being required to provide information for a system of records, an individual must be given the opportunity to read the privacy act statement (PAS) for the system of records; the PAS appears in the Federal Register listing for the system of records and can be posted as a sign or printed and handed to the individual. The PAS may also be verbally told to the individual. It includes the authority for collecting the information, whether disclosure is voluntary or mandatory, routines uses of the information, and the consequences of not providing the information, if any.

Disclosure Procedures

- To the individual subject of the record

-- Subjects of PA records and their designated representatives may request copies of their records

--- Individuals do not need to state a reason for requesting access

--- System managers must verify the requester's identity

-- Requesters must describe the records they are seeking—"all records on me" is not sufficient—system managers may ask for clarification

-- Requesters may not use government resources to create or send their request

-- If records will be released, system manager must notify sender within 10 work days and provide access to the record within 30 work days of receiving the request. The system manager may take up to 20 work days to determine whether release is authorized if he notifies the requester of the reason for the delay within 10 work days.

-- The requester may have to pay fees if the record exceeds 100 copied pages

-- Denials

--- For a record to be denied, it must be covered by an exemption

---- Only specific documents in the record covered by the exemption may be denied

---- Segregate non-exempt documents and release them

--- Third-party information contained in the record may be redacted depending on the nature of the information and its relevance to the record; always contact your servicing legal office for guidance on releasing third party information in a PA record

--- System managers send recommendations for denials to their servicing legal office and PA office for review within five days of receiving the request

--- Major command commanders take action on recommended denials

-- Commonly encountered limits on release to subject of record are as follows

-- Do not release information collected in anticipation of civil litigation or created as attorney work product

-- Have medical records reviewed by a doctor before release; if the doctor determines disclosing the records could cause mental harm or hardship to the requester, ask the requester for the name of a physician to whom the records can be sent. Include a letter to that physician with the records explaining the reviewing

doctor's basis for not disclosing the records directly to the requester. Consult AFI 41-210 and DOD 6025.18-R for additional guidance regarding medical records.

- To third parties
  - -- The PA requires written consent from the subject before releasing information unless an exception applies
  - -- Exceptions allowing disclosure to third parties without subject consent
    - --- To DOD employees with an official need to know
    - --- Disclosure is required by the Freedom of Information Act (FOIA)
    - --- To agencies outside DOD, if consistent with the routine uses listed in the Federal Register's system of records notice
    - --- To the Bureau of the Census
    - --- Compilations of statistical data where individual data is not identifiable
    - --- To the National Archives and Records Administration for permanent storage
    - --- To a federal, state, or local agency for civil or criminal law enforcement action
    - --- To an individual or agency requiring the information for compelling health or safety reasons
    - --- To the Congress
    - --- To the Comptroller General
    - --- To a court of competent jurisdiction in response to a court order from a judge
    - --- To a consumer reporting agency, if allowed by system of records notice

Special Handling Requirements

- Medical records of minors
  - -- If overseas and the minor is between ages 15 and 17 do not release a minor's medical records to the minor's parents or legal guardians without court order or consent from the minor, if regulation or statute provides for confidentiality of the records and the minor has asked for confidentiality
  - -- If within the territorial United States, state laws may limit parental access to medical records of their children. Consult with your servicing legal office for compliance requirements.

- When transmitting PA material using e-mail, the sender must include a warning that the e-mail contains PA material and is FOUO at the beginning of the message and include "FOUO" at the beginning of the subject line

- Do not place PA material on Internet sites accessible by individuals without an official need to know the information

- Violations

  -- Subjects may file suit in civil court to gain access to PA materials and correct errors in those materials. The court may award attorneys fees, court costs, and damages.

  -- Individuals may be criminally prosecuted for willful, unauthorized disclosures of PA information or maintenance of an unauthorized system of records. This is a misdemeanor offense carrying a maximum fine of $5,000.

References:

5 U.S.C. § 552a, Privacy Act

DOD 6025.18-R, *DOD Health Information Privacy Regulation* (24 January 2003)

AFI 33-332, *Privacy Act Program* (29 January 2004)

AFI 41-210, *Patient Administration Functions* (22 March 2006), AFGM1 (26 February 2010)

Army and Air Force Exchange Service and Commissary Benefits

Although Department of Defense directives and service regulations govern exchange and commissary benefits, commanders exercise some discretion in granting, suspending, or revoking privileges.

Exchange Privileges

- Army and Air Force Exchange Service (AAFES): The establishment of an exchange is authorized by the Departments of the Army and the Air Force at each installation where extended active duty military personnel are present and assigned to duty
- An exchange may be established at other locations, such as state-operated National Guard installations or Reserve Training Centers, provided it is cost-effective
- Exchange privileges
  - -- Unlimited exchange privileges extend to all uniformed personnel and their family members, retired personnel and their family members, and others, such as Medal of Honor recipients and their family members
  - -- Unlimited exchange privileges may be extended to government departments or agencies outside the Department of Defense (DOD) when:
    - --- The local commander determines the desired supplies or services cannot be conveniently obtained elsewhere, and
    - --- The supplies or services can be furnished without unduly impairing the service to exchange patrons
  - -- Limited exchange privileges extend to some government civilian employees and to others, such as members of foreign military services visiting a military installation
  - -- In non-foreign areas outside the Continental United States (CONUS), e.g., Alaska, Hawaii, and Puerto Rico, the responsible commander may extend limited or unlimited privileges to other personnel or organizations if it is in the best interest of the mission of the command concerned
  - -- Exceptions involving patron privileges are based on alleviating personal hardships and may only be granted by the Secretary of the department concerned upon request by the installation commander through command channels

Abuse of Exchange Privileges

- Exchange patrons are prohibited from abusing privileges, including:
  - -- Purchasing items for the purposes of resale, transfer or exchange to unauthorized persons
  - -- Using exchange merchandise or services in the conduct of any activity for the production of income
  - -- Theft, intentional or repeated presentation of dishonored checks, and other indebtedness

Commander Actions When Abuse Occurs

- When an abuse of privileges occurs, the commander will take prompt disciplinary and other appropriate action, such as revocation or suspension of exchange privileges
  - -- Commanders may revoke exchange privileges for any period deemed appropriate, except the minimum period of revocation is six months for shoplifting, employee pilferage and intentional presentation of dishonored checks
  - -- The individual concerned will be provided notice of the charges and the opportunity to offer rebutting evidence
  - -- On appeal, the commander who revoked the privileges, or the next higher commander, may reinstate exchange privileges for cogent and compelling reasons

Commissary Privileges

- The DOD operates commissaries as an integral element of the military pay and benefits system and as an institutional element to foster the sense of community among military personnel and their families. The intent of patronage is to provide an income effect benefit through savings on food and household items necessary to subsist and maintain the household of the military family.
- Authorized Patrons
  - -- Several classes of individuals are authorized commissary privileges by regulation, including active duty and their dependent family members, retired personnel and their dependent family members, reservists and others
  - -- At overseas locations, military commanders or Secretaries of military departments may extend commissary privileges to certain individuals and groups of individuals, provided it is without detriment to the ability to fulfill the military mission
- Restrictions on purchases

  - Authorized personnel may not sell or give away commissary purchases to individuals or groups not entitled to commissary privileges
  - Personnel are prohibited from using commissary purchases to support a private business
- Sanctions for violating restrictions on purchases
  - Violations of restrictions shall provide a basis for suspension of commissary privileges or permanent revocation of commissary privileges
  - Disciplinary action under the UCMJ, civil service, or other pertinent regulations or agreements should be taken against the individual if the violations warrant such action

Appointing Agents for Authorized Users

- The wing commander can extend use of the exchange and commissary to an agent of an authorized user, when the user is not capable of shopping

References:

DODI 1330.17, *Armed Services Commissary Operations* (8 October 2008)

AFI 34-211(I), *Army and Air Force Exchange Service Operations* (30 July 2008)

Driving Privileges

Driving on a military installation, whether in a government owned vehicle (GOV) or a privately owned vehicle (POV) is a privilege granted by the installation commander or designee. This authority may be delegate to the vice commander, mission support group commander, or other appropriate official not occupying a law enforcement, investigative, or other position raising the appearance of a conflict of interest.

Operating A POV On The Installation

- A person must do the following in order to drive on an Air Force installation:
  - -- Comply with all laws and regulations governing motor vehicle operations on base
  - -- Comply with installation vehicle registration requirements
  - -- Possess, produce on demand, and comply with restrictions contained in a valid state driver's license (or host nation/ SOFA license); possess and produce on demand proof of ownership or state registration; properly display vehicle safety inspection stickers, if required
  - -- Comply with the minimum requirements of the motor vehicle insurance laws and regulations in the state where the installation is located
- Operators of GOVs must have proof of authorization to operate the vehicle
- To operate a POV on many installations, an individual must register the vehicle with Security Forces. Typically, an individual must show proof of the following:
  - -- Valid driver's license
  - -- Valid state registration for the state in which the vehicle is registered
  - -- Compliance with the minimum vehicle insurance requirements for the state in which the installation is located
    - --- If the installation is located in a state not requiring insurance, the installation commander may set reasonable liability insurance requirements for registration and operation of POVs within the confines of the installation
  - -- Satisfactory completion of a vehicle safety inspection

Implied Consent

- When operating a motor vehicle on a military installation, a driver gives implied consent in a number of areas

- -- Consent to test for the presence of alcohol or drugs in their blood, on their breath, and in their urine, provided there is a lawful stop, apprehension, or citation for any impaired driving offense committed while driving or in physical control of a motor vehicle on a military installation

- -- Consent to the removal and temporary impoundment of their POVs if it is (1) illegally parked; (2) interfering with traffic operations; (3) creating a safety hazard; (4) disabled by accident or incident; (5) abandoned; or (6) left unattended in a restricted or controlled access area

SUSPENSION

- The installation commander can administratively suspend or revoke installation driving privileges. A suspension up to 12 months may be appropriate if a driver continually violates installation parking standards, or habitually violates other nonmoving standards. Installation commander will immediately suspend installation driving privileges pending resolution of an intoxicated driving incident under any of the circumstances outlined below:

  - -- Refusal to take or complete a lawfully requested chemical test for the presence of alcohol or other drugs in the driver's system

  - -- Operating a motor vehicle with blood alcohol content (BAC) or breath alcohol content (BRAC) of 0.10 percent by volume or higher, or in excess of the applicable BAC or BRAC level in the local civilian jurisdiction, whichever is applicable

  - -- Receipt of an arrest report or other official document reasonably showing an intoxicated driving incident occurred within a reasonable time period

REVOCATION

- The installation commander will immediately revoke driving privileges for a period of not less than one year in any of the following circumstance:

  - -- A person is lawfully detained for intoxicated driving and refuses to submit to or complete tests to measure blood alcohol or drug content

  - -- Conviction, nonjudicial punishment, or a military or civilian administrative action resulting in the suspension or revocation of a driver's license for intoxicated driving

  - -- The installation commander determines an immediate revocation is required to preserve public safety or the good order and discipline of military personnel

Procedures

- A point system is used on-base to provide a uniform administrative device to impartially supervise traffic offenses. Points are assessed for violations of motor vehicle traffic regulations for on-base and off-base traffic offenses. Certain procedural guidelines apply before an individual's driving privilege may be suspended or revoked.
  - -- The individual has the right to a hearing before a designated hearing officer. The individual must be notified of their right to a hearing, but it is only held if the individual requests it within the prescribed time period.
  - -- A suspension for a driving while intoxicated offense may be effective immediately if based on reliable evidence. Such evidence can include witness statements, a military or civilian police report, chemical test results, refusal to complete chemical testing, video tapes, written statements, field sobriety test results, or other evidence.
- Civilian offenders may be prosecuted in Federal Magistrate's Court for on-base traffic offenses. Installation commanders are authorized to prescribe installation traffic rules.

References:

AFI 31-101, *Integrated Defense* (FOUO) (8 October 2009)

AFI 31-204, *Air Force Motor Vehicle Traffic Supervision* (14 July 2000), Incorporating Change 1 (20 July 2007)

Debarment

Installation commanders have broad authority to control activities on their installations, including the authority to remove or exclude any person whose presence on the installation is unauthorized or disrupts good order and discipline. This authority enables a commander to fulfill their responsibilities to protect personnel and property, to maintain good order and discipline, and to ensure the successful, uninterrupted performance of the Air Force mission.

Commander's Responsibilities and Options

- An installation commander's decision to remove or exclude a person from the installation is subject to judicial review
  - -- However, the decision is given substantial deference and will not be overturned unless proven to be arbitrary or capricious
  - -- An illegal debarment could subject a commander to personal civil liability in a lawsuit
- An installation commander may not delegate to a subordinate the authority to debar an individual from an installation
- <u>Who is subject to debarment?</u>
  - -- Members of the armed forces are not normally debarred. Service members being involuntarily separated may, in conjunction with their discharge, be debarred for good cause.
  - -- Civilians may be debarred from a military installation
  - -- Dependent family members and retirees may be debarred, but they must be granted access for medical care (a statutory right – 10 U.S.C. §§ 1076, 1074)
  - -- Civilian employees may be debarred, but they should be removed from federal service before ordering debarment
    - --- Otherwise, the employee may still be entitled to collect a salary
    - --- Check with the Civilian Personnel Office to determine if the local collective bargaining agreement contains additional due process requirements
  - -- Salespersons and businesses may be debarred for misconduct. Misconduct may lead to debarment of a single agent or an entire firm.
  - -- Contractor employees may be debarred for misconduct. Contractor employees with security clearances are not entitled to greater protection from debarment.

--- Possession, distribution, or use of drugs is commonly used as a good cause for debarment, while exceeding weight standards, on the other hand, would not be a good reason

Procedural Requirements

- A person who is debarred from an installation should be notified, in writing, that he or she is prohibited from entering the installation. The notification (debarment letter) should state the reason for and period of the debarment.
- Determining the debarment period is a matter of discretion
  - -- The commander should consider the individual, the reason for the debarment, and the need for good order, discipline, and security. The bottom line is what is reasonable given all the circumstances.
  - -- The length of the debarment period should be stated on the notification letter. The commander may debar an individual for a specific length of time or, in appropriate cases, the debarment may be for an indefinite period of time.
- The individual can ask the installation commander to lift the debarment at any time, regardless of whether the debarment is for a set period or indefinite
- A copy of the debarment letter should be hand-delivered to the individual or sent by certified mail to ensure a record of receipt
- An individual who enters an installation after receiving notice of debarment from the installation commander is subject to federal criminal prosecution under 18 U.S.C. § 1382
  - -- Maximum penalty for violation of the law is six months confinement and a $500 fine

References:

18 U.S.C. § 1382

DODI 5200.08, *Security of DOD Installations and Resources and the DOD Physical Security Review Board (PSRB)* (10 December 2005), Incorporating Change 1 (19 May 2010)

Free Speech, Demonstrations, Open Houses and Hate Groups

Air Force commanders have the inherent authority and responsibility to execute the mission, protect resources, and maintain good order and discipline. This authority and responsibility includes placing lawful restrictions upon certain demonstration and protest activities.

Commander Responsibilities

- Commanders must preserve the service member's right of expression, consistent with good order, discipline and national security, to the maximum extent possible. To properly balance these interests, commanders must exercise prudent judgment and consult with their staff judge advocates (SJA).
  - -- Air Force members may not distribute or post any unofficial printed or written material within any Air Force installation without permission of the installation commander
  - -- Air Force members may not write for unofficial publications during duty hours
  - -- Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in an effort to deprive individuals of their civil rights
    - --- Members who actively participate in such groups or activities are subject to adverse administrative and disciplinary action, including separation and punishment under the UCMJ
    - --- Mere membership in these groups is not prohibited; however, membership must be considered in evaluating or assigning members, particularly supervisory positions
- Air Force members may complain and request redress of their grievances under Article 138, UCMJ, and through the inspector general complaint system. They may also petition any member of Congress without fear of reprisal.

Controlling Or Prohibiting Demonstrations and Protest Activities

- Commanders may also take measures to control or prevent demonstrations and protest activities within the installation

-- Demonstrations or related activities on an Air Force installation may be prohibited if:

--- They interfere with mission accomplishment, or

--- They present a clear danger to loyalty, discipline, or morale of service members

-- No one may enter a military installation for any purpose prohibited by law or regulation, or reenter an installation after having been barred by order of the installation commander

-- Air Force members are prohibited from participating in demonstrations when they are on duty, when they are in a foreign country, when they are in uniform, when their activities constitute a breach of law and order, or when violence is likely to result. Members who violate this provision are subject to disciplinary action under Article 92 of the UCMJ.

Political Activities By Members of The Air Force

- Air Force members may register to vote and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces

- For a list of prohibited and permitted political activities, see AFI 51-902, para 3 and 4

Open House Requirements and Responsibilities

- An open house where the general public is invited onto the installation does not, in and of itself, cause the installation to lose its status as "closed" for the purposes of preventing political or ideological speech. "Closed" means not a public forum for protests or demonstrations, such as community parks or sidewalks.

-- Open houses are for local community relations. Commanders retain the authority to prevent political or ideological speech or demonstrations on the installation during an open house.

-- Commanders can prevent or stop political or ideological speech because such speech creates a danger to loyalty, good order and discipline

--- Commanders need not wait until loyalty, good order or discipline are actually negatively affected before preventing or stopping the speech

--- Speech that presents such a danger can be prevented at the outset because it presents such a danger

-- If a person or group attempts to engage in political or ideological expression or demonstrations on an installation, the commander should escort the offending

party or parties off the installation and issue a barment letter, the violation of which can subject the offender to criminal penalties

  - An installation loses its status as "closed" for the purposes of preventing political or ideological speech or demonstrations only if the commander allows political or ideological speech or demonstrations to occur or by abandoning control over the installation or parts of it

- Installation commanders should be careful about whom they invite onto the installation and what they allow those people to do. It is important to work closely with the SJA to plan open houses so that potential problems can be prevented and to solve free speech issues should they arise.

References:

DODD 1344.10, *Political Activities by Members of the Armed Forces* (19 February 2008)

AFI 51-902, *Political Activities by Members of the U.S. Air Force* (1 January 1996)

AFI 51-903, *Dissident and Protest Activities* (1 February 1998)

AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice* (30 June 1994)

Private Organizations

Definition

- A private organization (PO) is a self sustaining special interest group, set up by people acting outside the scope of any official position they may have in the federal government
- Private organizations are not integral parts of the military service nor are they federal entities. They are not nonappropriated fund instrumentalities (NAFIs) nor are they entitled to the sovereign immunities and privileges given to NAFIs.
- When an unofficial activity's or organization's current monthly assets (which include cash inventories, receivables, and investments) exceed a monthly average of $1,000 over a three month period, the activity/organization must become a PO, discontinue on-base operations, or reduce its current assets

Operating Rules

- Each private organization must be approved in writing by the installation commander or his/her designee
- The force support squadron commander or director monitors and advises all private organizations and directs the resource management flight chief to keep a file on each PO
- The resources management flight chief reviews each PO annually to make sure documents, records and procedures are in order
- Private organizations must be self-sustaining and cannot receive direct financial assistance from a NAFI in the form of contributions, dividends or donations
- Logistical support to private organizations is also very limited. Consult the SJA before supporting POs in any way.
- Private organizations with gross revenues of $250,000 or more must have an annual audit done by a certified public accountant (CPA). Private organizations with gross revenues of $100,000 but less than $250,000 must have an annual financial review conducted by an accountant (CPA not required). Private organizations with gross revenues of less than $100,000 but more than $5,000 are not required to conduct independent audits or financial reviews, but must prepare an annual financial statement for review.
- The installation staff chaplain should coordinate on requests to establish religiously oriented private organizations

- Private organizations may not unlawfully discriminate on any proscribed basis, including race, color, sex, marital status, age, religion, national origin, political affiliation, or physical handicap

- Each PO has the responsibility of obtaining adequate insurance or waiver thereof by the installation commander or designee. A waiver of the insurance requirement will not protect the private organization or its members from valid claims or successful suits.

- Private organizations will not engage in activities that duplicate or compete with any base Services activity, NAFI, or the Army and Air Force Exchange Service

- Private organizations must comply with all applicable federal, state and local laws governing such activities. Private organizations desiring tax-exempt status must file an application with the IRS. To qualify as tax-exempt organizations for federal tax purposes, private organizations must be organized for one or more of the purposes specifically outlined in the Internal Revenue Code.

- Fundraising by POs is governed by AFI 36-3101 and the Joint Ethics Regulation (JER)

- Private organizations are prohibited from conducting games of chance, lotteries, or other gambling activities, except in very limited circumstances, e.g., certain types of raffles, as set forth in AFI 34-223, paragraph 10.16, and the JER

- Private organizations are not authorized to sell alcoholic beverages

- Private organizations will not engage in resale activities unless specific authorization is granted. The installation commander or designee may authorize occasional sales for fund raising purposes such as bake sales, dances, carnivals, and similar infrequent functions.

- "Occasional sales" for fund-raising purposes is specifically defined as not more than two fund-raising events per calendar quarter. This prohibition against frequent or continuous resale activities does not preclude collective purchasing and sharing of purchased items by members of POs or unofficial activities and organizations so long as there is no actual resale.

References:

AFI 34-223, *Private Organization (PO) Program* (8 March 2007), Certified Current (28 May 2009)

AFI 36-3101, *Fundraising within the Air Force* (12 July 2002)

Religious Issues in the Air Force

This paper does not create, implement, expand, or contract policy. It explores the fundamental legal underpinnings of existing policy(ies) so that commanders will have the knowledge necessary for analysis of and action on some of the religious issues they might encounter.

Issues in this area have inherent potential to quickly generate media, advocacy group, and political attention. Resolution of religious issues (particularly regarding accommodation and whether speech or practices in a duty context are permissible or not) is always ***highly*** fact and situation dependent and seldom amenable to simple bright line, "one-size-fits-all" rules. It is essential that commanders consult their staff judge advocates and staff chaplains.

Note: At the time of publication, DOD has announced that there will be significant fast-track changes to religious accommodation guidance as a result of DOD action on the Fort Hood Follow-On Review. Your SJA will be able to access the online update as soon as it is posted.

Basic Constitutional Underpinnings—First Amendment

- Free Exercise Clause
  - -- Constitutional protection for religious speech and practices (does <u>not</u> protect all religious speech under all circumstances)
  - -- There are Supreme Court cases your SJA will be familiar with establishing the standards for analysis of governmental restrictions on religious expression
- Establishment Clause
  - -- Essentially requires (in appearance and reality) government neutrality regarding religion and religious practices, e.g., generally prohibits mixing religion with governmental business and governmental endorsement of or involvement with religion and religious practices
  - -- This is the source of the "separation of church and state" slogan even though those words *per se* don't appear in the Constitution itself
- Many situations which might confront commanders involve reconciling the "inherent tension" between the two clauses

Accommodation

- Part Constitutional (Free Exercise) and Part Statutory (Religious Freedom Restoration Act, aka "RFRA;" 10 U.S.C. § 774); details below (pp. 224-226)

Related Basic Considerations—Military Realities

- Constitutional/Legal issues are only part of what a commander needs to be aware of. Commanders must be sensitive to the potential for some real-world military implications

of mixing religion and official business. For example, a commander inserting his or her personal religious views to his or her subordinates, particularly in a military setting (e.g., change of command ceremonies, commanders' calls, staff meetings, etc.) may undermine esprit de corps and unit cohesion. When it does, it is not protected religious speech. On the one hand, a statement that is clearly personal and cannot be reasonably regarded as an official pronouncement or as an implied suggestion that personnel might be wise to emulate him or her may be legally and militarily OK (the "may" qualification reflects the extreme importance of having to base definitive judgments on all the facts and circumstances of individual cases). Great caution should be exercised here. "I thank God for giving me the opportunity to assume command of this great organization is an example of such a "personal aside." On the other hand, "My personal priorities are first, my Lord and Savior Jesus Christ, second, my family, and third, everything else…" inherently generates the very problems commanders need to be attentive to avoiding.

  -- Not all members of the command will share the commander's beliefs; they may feel alienated or marginalized

  -- Some may be offended by the recitation of religious views

  -- Some may question whether they will be viewed with impartiality or with disfavor if they do not agree with the new commander's religious views

- Announcements of chapel activities

  -- Wing/Installation Chaplains can properly advertise and encourage attendance at their events via base-wide media (e.g., e-mails, electronic scoreboard-type visual displays). They can also highlight the religious component of the event in ways that others cannot.

    --- If, as is evidently the case at some wings/installations, chaplains do not have base-wide e-mail capabilities and their special events (e.g., religion-based marriage enrichment seminars, workshops conducted by a chaplain of one faith solely for people of that faith) are announced by other staff agencies, the appropriate commander needs to be sure the announcement is clearly understood to be distributed on behalf of the chaplain and as such as cannot reasonably be interpreted as an endorsement of the underlying religious viewpoint. The higher the organizational level of the announcement, the more important it is to be sensitive to this.

- Attendance at National Prayer Breakfast activities in uniform is neither prohibited nor encouraged (left to attendee's discretion)

Preliminary Caveat: Advocacy From Outsiders Might Sound Authoritative but It's Still Just Advocacy

- Outside advocates (including lawyers) for a particular resolution of a religious issue of which they have become aware might call you directly, advising you that the law "requires" you to adopt their position. If this happens, here are some suggestions based on experience:

  -- Avoid sounding sympathetic or agreeable to their pronouncements

-- Threats of adverse publicity or litigation are to be expected; just tell the caller that you'll let your PA and/or JAG know

-- Don't take unilateral action (i.e., without first consulting JA and/or HC) to do what the caller is requesting/demanding!

-- Inform the caller that you need to discuss the matter with the people you get your advice from, i.e., your SJA (and maybe staff chaplain)

-- If a follow-up response is required, it might be preferable to disengage yourself and ask your Vice, exec, SJA, HC, or PA to do it

Religious Expression in the Workplace

- General principles

  -- Broader than just prayer

  -- When evaluating religious expression issues be sensitive to:

    --- Whether attendance is mandatory (whether really so or perceived, e.g., "not mandatory but highly encouraged" and "not mandatory but expected" (as with "invitations") from a commander, rater, supervisor, or other senior person

    --- Seniority of the commander in grade and/or rank and/or position

  -- Pertinent extracts from the "Interim Guidelines" (none of which is intended to serve as a "loophole" to permit religious expression when it would be inappropriate)

    --- Leaders must ensure their words and actions cannot reasonably be construed to be officially endorsing or disapproving any faith belief or absence of belief

    --- In official circumstances, or when superior/subordinate relationships are involved, superiors need to be sensitive to the potential that personal expressions may appear to be official

    --- Voluntary participation in worship, prayer, study, and discussion is integral to the free exercise of religion. Voluntary discussions of religion are permissible, even if conducted in uniform, where it is reasonably clear that the discussions are personal, not official, and can be reasonably free of the potential for, or appearance of, coercion (example: Attendance at annual prayer breakfasts, even if in uniform)

    --- Public prayer must not imply government endorsement of religion; it should not be a part of routine official business (e.g., staff meetings)

    --- Mutual respect and common sense should always be applied, including consideration of unusual circumstances (recent death; imminent danger; etc.)

    --- Non-denominational, inclusive prayer or a moment of silence may be appropriate for military ceremonies or events of special importance when its primary purpose

and effect are not the advancement of religion or religious beliefs (examples: Leadership School graduation, promotion ceremonies)

---- This may be tough to do if challenged. The burden would be on the Air Force to prove with more than just conclusory assertions that prayer at such an official event served a legitimate, overriding governmental purpose.

-- More religious content/prayer is generally acceptable in ceremonies which are essentially personal (e.g., retirements) even though they occur during duty hours, in government facilities, and are attended by Air Force personnel in duty status. On the other hand, routine prayers at weekly staff meetings are inappropriate.

--- Retirements, formerly regarded as entirely personal in nature, recently became official events for purposes of justifying Air Force people traveling to them TDY to have a role in the event (e.g., officiate). The hybrid nature of the event makes it advisable for the "emcee" or narrator to be alert to the advisability of avoiding creating the perception that any religious components are official, as by announcing, "CMSgt Retiree has requested that Rabbi Katcoff lead an invocation."

- Workplace religious expression

-- Religious expression cannot be singled out for special restrictions not applicable to non-religious speech. Stated somewhat differently, expression cannot be restricted just because it involves religion. Any restriction would have to be based on generally applicable, content-neutral factors such as disruption to mission or adverse impact on good order and discipline. Religion-related restrictions would be appropriate if the expression could reasonably be regarded as suggesting Air Force endorsement of religion, superiors forcing subordinates to participate, listen, etc.

--- For example, if it is OK for an employee to put sports posters on his wall, cannot prohibit an employee from putting a picture of the Ten Commandments or a religious figure on his/her cubicle wall.

---- Note: placement of objects (as opposed to where religious discussions take place) can be the critical determining factor. For example, a Ten Commandments poster conspicuously posted over the main entrance, adjacent to the commander's office door, or behind the commander's desk for all to see, sends a strong message of Air Force endorsement of religion and particular religious beliefs not conveyed by the same poster on a SrA's cubicle wall.

--- Similarly, "evangelizing" (sharing one's faith) and "proselytizing" (inducing someone to convert to one's faith or cause) are free exercises of religion, and cannot be singled out for special restrictions not applicable to non-religious speech. For example, just as it is not wrong to share one's passion for sports there is nothing wrong with an Airman sharing his/her faith or inviting another co-worker to attend his/her place of worship. The active, interpersonal nature of evangelizing or proselytizing, however, makes it more likely (than display of religious items) to affect mission accomplishment and good order and discipline.

Emerging Area: Web Logs ("Blogs") (& Other Electronic Media)

- AFI 35-113 ("Internal Communications"), chapter 15 (curiously titled, "External Communications") encourages Air Force members to use these new media and contains some guidelines

- Military people have a right to use these sites for religious expression even if their identity as Air Force members is explicitly stated or can be easily determined

  -- Test as to whether the religious expression and/or military identity can/should be restricted must flow from something more than just status, e.g.,

    --- Express or inferential language suggesting Air Force endorsement of the expression and/or of religion

      ---- Could involve JER issues, e.g., indications of federal support of non-federal entities

  -- Stronger, more prominent disclaimer than the minimums suggested/required by AFIs can head off potential problems for the poster and the Air Force, and better inform the public

Accommodation of Religious Practices

- DOD policy provides that commanders should approve requests for religious accommodation when approval will not have an adverse impact on military readiness, unit cohesion, standards, or discipline. For guidance on handling religious accommodation requests regarding conscientious objectors, dress and personal appearance, or immunizations, refer to the AFIs specifically covering these areas. For all other religious accommodation requests, follow the guidance in DODI 1300.17, *Accommodation of Religious Practices Within the Military Services,* 11 February 2009*,* and in the *Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force* issued by the Secretary of the Air Force on 9 February 2006.

- The Religious Freedom Restoration Act (RFRA): Government cannot ***substantially burden*** an Airman's ***exercise of religion*** unless the burden is the ***least restrictive means*** of furthering a ***compelling governmental interest***. Each of the four emphasized items is deceptively complex and situation-dependent and virtually screams for the advice of your chaplain and SJA each time a potential RFRA issue arises. (You would be well-advised to keep a copy of DoDI 1300.17 among your desk references.)

  -- Two-part threshold issue: Whether there is a "substantial burden" on an "exercise of religion"

    --- Note: Not every passing action that tangentially *involves* religion constitutes an "*exercise of religion*"

-- If the threshold is met, then you have to do the additional two-part analysis, i.e., articulate whether a compelling government interest is being furthered and whether the action under contemplation is the least restrictive means of doing it.

- 10 U.S.C. § 774: This statute allows wear of religious apparel in uniform unless, as determined pursuant to regulation, the apparel would interfere with performance of duty or is not neat and conservative.

- The *Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force* implement RFRA, providing that the Air Force will accommodate the free exercise of religion and other personal beliefs except as must be limited by compelling military necessity (with any limitations being imposed in the least restrictive manner feasible)

  -- The military necessity must be real and not hypothetical

  -- Factors to consider in deciding whether to accommodate religious practices include

    --- The importance of the military requirement in terms of mission accomplishment, military readiness, unit cohesion, standards, and discipline

    --- The religious importance of the accommodation to the requester

    --- The cumulative impact of repeated accommodations of a similar nature

    --- Alternative means available to meet the requested accommodation; and

    --- Previous treatment of the same or similar requests, including requests made for other than religious reasons

  -- Encourages commanders to anticipate certain predictable kinds of accommodation rather than wait for a request, e.g., religious dietary restrictions

- Accommodation: Uniforms - Religious Apparel and Items

  -- Religious apparel is defined as articles of clothing worn as part of the doctrinal or traditional observance of the religious faith practiced by the member. Hair and grooming practices required or observed by religious groups are not included within the meaning of religious apparel. See also the next topic, below.

  -- Religious apparel covered by both 10 U.S.C. § 774 (allowed unless it interferes with performance of duty or is not neat and conservative) and RFRA (prohibition must be least restrictive means of furthering a compelling governmental interest)

  -- AFI 36-2903, Table 2.9 addresses religious apparel waivers. A completely revised AFI is in coordination and will reflect any new DOD religious accommodation policies. At the appropriate time, a revised edition of this paper will be uploaded to the online edition of this publication.

--- Commanders have discretion to limit approval for indoor wear to specific areas only (e.g., immediate workplace) depending on facts and circumstances of individual cases

-- Commanders should consider the following non-exclusive factors when deciding on a uniform accommodation request: Team identity, unit cohesion, morale, good order, discipline, symbolic impact on public perception of the military, safety, and others

-- Though not currently addressed by AFI 36-2903, Commanders must be able to articulate, as required by RFRA and DoDI 1300.17 what governmental interest is served by a rule or denial of request for accommodation, why that interest is compelling, and how it is the least restrictive means of furthering that compelling governmental interest.

References:

10 U.S.C. § 774, *Religious Apparel: Wearing While in Uniform*

42 U.S.C. § 2000bb *et seq.*, *"Religious Freedom Restoration Act"* (applicable to DOD per DOD/GC even though not mentioned in DODD 1300.17)

DODI 1300.17, *Accommodation of Religious Practices Within the Military Services* (10 February 2009)

AFI 35-113, *Internal Information,* Chapter 15 (11 March 2010)

AFI 36-2706, *Military Equal Opportunity Program* (29 July 2004)

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (2 August 2006, incorporating Change 1, 6 August 2007)

AFI 36-3204, *Procedures for Applying as a Conscientious Objector* (15 July 1994)

AFJI 48-110, *Immunizations and Chemoprophylaxis* (29 September 2006)

Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, The White House (1997) (not applicable to military personnel but useful as a general reference)

David Fitzkee and Linell Letendre, *Religion in the Military: Navigating the Channel Between Religion Clauses*, 59 A.F.L. Rev. 1 (2007)

Michael Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues In The Army,* Army Law., November, 1998, at 1

Paula Grant, *The Need for (More) New Guidance Regarding Religious Expression in the Air Force*, Attitudes Aren't Free 39 (James E. Parco and David Levy, eds. 2010)

Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force (February 2006)

CHAPTER SEVEN: PERSONNEL ISSUES FOR THE COMMANDER—MILITARY MEMBERS

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Humanitarian Reassignments/Deferments

When Air Force members incur substantial and continuing personal or family problems that can be relieved by reassigning them to a particular geographical area or allowing them to stay in a current assignment instead of being moved, the member may apply for a humanitarian reassignment or deferment under the provisions of AFI 36-2110. This instruction applies to both officer and enlisted members.

- A move may not be made at government expense when it is based solely on humanitarian reasons
- To be eligible for a humanitarian action, several conditions must be met, including:
  - -- A valid vacancy must exist at the new duty station and member must meet service retainability requirements for PCS
  - -- The problem must be more severe than those normally encountered by comparable Air Force members
  - -- The member's presence is absolutely essential to alleviate the problem
  - -- The problem can be resolved within a reasonable period of time (normally 12 months)
- While not inclusive, requests substantiating problems arising from any of the following circumstances usually warrant approval
  - -- Recent death (within 12 months) of member's spouse or child or stepchild under age 18, including miscarriage of 20 or more weeks gestation
  - -- Serious financial problems not the result of overextension of personal military income that cannot be resolved by leave, correspondence, power of attorney, or other person or means
  - -- Terminal illness of family member when death is imminent within two years
  - -- State law requires presence to complete adoption procedures
  - -- Successful establishment or operation of an effective family advocacy program
  - -- Spouse abandons dependents while the service member is serving an unaccompanied overseas tour
  - -- Sexual abuse or assault of a dependent when it would be detrimental to stay in the area where the incident occurred

- If the problem can be solved by the member taking ordinary or emergency leave, humanitarian deferment or reassignment will ordinarily not be granted
- Requests will normally be disapproved when it is likely the problem will exist for an indefinite period of time
- When the commander learns of a member with personal hardships who may be interested in applying for a humanitarian reassignment or deferment, he or she should first direct the member to AFI 36-2110. Following that, the member receives additional counseling from the local MPF assignments section, which will provide the member with the information needed to submit a formal application.
- Requests are submitted through the AFPC Contact Center via vMPF with supporting documentation. The burden is on the applicant to provide sufficient justification for the request.
- HQ AFPC/DPAPPH is the approval/denial authority

Reference:

AFI 36-2110, *Assignments* (22 September 2009)

The Air Force Urinalysis Program

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

- Other objectives of the program include:
  - -- Identifying individuals who use and abuse illegal drugs and other illicit substances
  - -- Providing a basis for action, adverse or otherwise, against a member based on a positive test result
- Close command coordination with legal, law enforcement, and other agencies is required for an effective urinalysis program
  - -- Carefully controlled and standardized collection, storage, and shipment procedures, supported by a legally defensible chain of custody, are required by directive and instruction to ensure the integrity of the program
  - -- By failing to follow proper procedures, use of urinalysis test results in Uniform Code of Military Justice (UCMJ) or administrative actions may be limited or, in some cases, prohibited
- With the exception of urine samples that are tested for steroids and other nonstandard drugs of abuse, all Air Force member urine samples are tested at the Air Force Drug Testing Laboratory (AFDTL), Brooks City-Base, Texas. Testing for all drugs is coordinated through the AFDTL.
  - -- The AFDTL can test for the presence of cocaine, marijuana, amphetamine/methamphetamine, designer or analog amphetamines (to include MDMA [Ecstasy], MDA and MDEA), 6-MAM (heroin metabolite), PCP, LSD, opiates (codeine, morphine), and opioids (oxycodone, oxymorphone)
- The AFDTL uses a DOD prescribed combination of analytic techniques to determine whether or not samples are positive for various drugs
  - -- Each sample must undergo <u>at least</u> three tests before it may be considered positive: screen, rescreen, and confirmation
  - -- The screen and rescreen tests are conducted using immunoassay testing
  - -- Gas chromatography/mass spectrometry (GC/MS) is used for all confirmation testing

-- The DOD prescribes a minimum level beyond which a test is reported as positive. Only samples that test positive above the DOD minimum level on every test are reported as positive. Samples not testing positive on any screen or on the confirmation test are discarded.

- In addition to unit administered random drug testing, there are five common situations that may require urinalysis testing. Each of these has its own legal considerations for when it can be taken and how it can be used. These include consent, probable cause, commander-directed, inspection, and medical care.

  -- Consent

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

    --- When practicable, consent should be given in writing, utilizing the AF IMT 1364

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

    --- Always coordinate with the SJA prior to obtaining a urine sample through consent

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

  -- Probable cause

    --- To have probable cause there must be a reasonable belief illegal drugs, or drug metabolites, will be present in the individual's urine

    --- Requires a search and seizure authorization from a military magistrate or a neutral and detached commander with authority over the person being searched to seize a urine specimen

    --- Always coordinate with the SJA prior to obtaining a urine sample through a probable cause search

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

  -- Commander-directed

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

--- Drug rehabilitation testing is commander-directed

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

--- Commander-directed test results cannot be used to take UCMJ action, such as court-martial or Article 15; or to adversely characterize administrative discharges

-- Inspection

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

--- The primary purpose of an inspection is to determine and ensure the security, military fitness, or good order and discipline of the unit. This may include an inspection to determine whether the command is functioning properly, if proper standards of readiness are maintained, and if personnel are present, fit and ready for duty.

--- An entire unit or a part of the unit may be inspected, or you may participate in a base-wide random selection process. This is also known as a unit sweep.

--- Individual members may not be singled out for inspection

--- Do not use an inspection when you suspect a specific individual of drug abuse. Consult with the staff judge advocate (SJA).

--- Coordinate inspections with the installation drug demand reduction program manager. Do not announce the inspection in advance to those being inspected.

--- Inspection testing is the best deterrent presently available against drug abuse

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

-- Medical care

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

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

- Positive results

  -- Upon receipt of a report of a positive test, regardless of the category of test used, immediately contact the SJA

  -- Upon notification of a positive urinalysis test, AFOSI or SFS will schedule an interview with the member. Do not advise the member in advance of the interview or of the positive test result.

Actions Authorized By Positive Drug Test Results

Basis for Test	UCMJ use	Affects Discharge Characterization	Administrative Actions (See Note 1)
Inspection – Military Rule of Evidence (Mil. R. Evid.) 313 (See Note 2)	Yes	Yes	Yes
Voluntary Consent – Mil. R. Evid. 314(e)	Yes	Yes	Yes
Probable Cause – Mil. R. Evid. 315 316 (See Note 3)	Yes	Yes	Yes
Commander Directed (See Note 4)	No	No	Yes
Self Identification, Initial Testing (See Note 5)	No	No	Yes
Valid Medical Purpose – Mil. R. Evid. 312(f) (See Note 6)	Yes	Yes	Yes

AFI 44-120, para 19, Table 1

NOTES:

1. Administrative actions include, but are not limited to, letters of admonishment, counseling and reprimand, denial of re-enlistment, removal from PRP, removal from duties involving firearms, removal from flying status or sensitive duties, suspension of security clearance, and removal of restricted area badges. If there are any questions regarding actions authorized for positive drug test results, consult the local servicing staff judge advocate.

2. Inspections under Mil. R. Evid. 313(b) include those under the installation's random urinalysis drug testing program and unit sweeps.

3. Probable cause tests are authorized searches and seizures ordered by a military magistrate or commander (See Mil. R. Evid. 315 and 316).

4. Absent probable cause, commander directed results may not be used for disciplinary action under the UCMJ or to characterize service under administrative separation. Excep-

tion: Commander directed results may be offered for impeachment purposes or in rebuttal when a member first introduces evidence to infer or support a claim of non use of drugs.

5. Members may not be disciplined under the UCMJ when they legitimately self-identify for drug abuse and enter the Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program. In the interests of safety and security, commanders may initiate non-adverse administrative actions such as removal from flying status- or, PRP, or terminating restricted area badges, etc. Urinalysis tests of individuals following entry into the ADAPT Program are for valid medical purposes. Individuals in the ADAPT Program may also be disciplined under the UCMJ when independent evidence of drug use is obtained.

6. Specimens from an exam for a valid medical purpose may be used for any lawful purpose.

References:

Mil. R. Evid. 312-16 (2008)

DOD Directive 1010.1, *Military Personnel Drug Abuse Testing Program* (9 December 1994), Incorporating Change 1 (11 January 1999)

DOD Instruction 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program* (9 December 1994)

AFI 44-120, *Drug Abuse Testing Program* (1 July 2000)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 September 2001), Certified Current (2 April 2010), Incorporating Change 5 (22 April 2010), AFGM1 (9 June 2010)

AF IMT 1364, *Consent for Search and Seizure* (1 September 2001)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

Urinalysis Checklist For Unit Commanders

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

Generally

- Do you brief the consequences of drug abuse at commander's calls? Do you consult the SJA before you do so? Do you invite a judge advocate to speak?
- Do you ensure that all military members, regardless of rank or status, are subject to inspection testing?
- Do you restrict knowledge of unit or random inspections only to those individuals with a "need-to-know"?

Personnel

- Are tests coordinated with the demand reduction program manager (DRPM)?
- Do you coordinate all inspections and searches (i.e., unit sweeps, consent, probable cause, and commander-directed testing) with the staff judge advocate (SJA)?
- Have you chosen credible people to serve as urinalysis observers in the program in accordance with AFI 44-120?
  - -- Have you reviewed the personnel information files (PIFs) of the observers and determined they have no UIF, history of conviction by prior courts-martial or civilian court, Article 15s, LORs, or similar administrative action for misconduct involving dishonesty, fraud or drug abuse?
  - -- Have you ensured no observer has any pending action, either UCMJ or administrative?
  - -- Do all observers have more than six months remaining time in service until either separation or retirement from active duty?
  - -- Have you ensured that observers have no medical profile that could prevent them from performing observer duties?
  - -- Are all observers commissioned officers or enlisted members in the grade of senior airman (SrA) or above? If SrA are selected, have you obtained the concurrence of the SJA?

- -- Are there enough observers, both male and female, to accommodate the number of individuals being tested? Have arrangements been made for additional observers to meet unexpected requirements?
- -- Have you ensured that no observer is assigned to work in any legal office?

- Have you appointed credible trusted agents to notify individuals for testing?
  - -- Have you reviewed the PIFs of the trusted agents and determined they have no UIF, history of conviction by prior courts-martial or civilian court, Article 15s, LORs, or similar administrative action for misconduct involving dishonesty, fraud or drug abuse?
  - -- Have you ensured no trusted agent has any pending action, either UCMJ or administrative?

NOTIFICATIONS

- Do you personally sign the written order to each member directing each inspection?
  - -- If not, are you personally aware of the identity of each member who has been randomly selected before a pre-signed letter (by you) is issued to the member by the Trusted Agent?
- Do you notify members no sooner than two hours prior to collection time?
  - -- Do you require each member to properly acknowledge (date, time and member signature), in writing, receipt of the order?
  - -- If a member refuses to acknowledge receipt of the order, does the person serving the order document the member's refusal?
- Do you ensure copies of such orders are maintained within the unit?
- Do you ensure that all members selected for testing report to the collection site within the designated collection time on the written order?
- Do you make sure shift workers or personnel on scheduled "days off" report for testing on their next duty day?

Other Considerations

- Do you make sure members who are in TDY or leave status, quarters, flying or on crew rest are tested upon return of the member to duty? Do you coordinate this with the DRPM?
- Do you seek advice and assistance from the SJA regarding members who fail or refuse to provide a sample?
- Do you immediately contact the SJA for advice and assistance regarding all positive test results?

Fraternization and Unprofessional Relationships

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

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

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

Unprofessional Relationships

- Unprofessional relationships, whether pursued on or off-duty, are those relationships that detract from the authority of superiors or result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests

- Unprofessional relationships can exist between officers, between enlisted members, between officers and enlisted members, and between military personnel and civilian employees or contractor personnel

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

  -- Familiar relationships in which one member exercises supervisory or command authority

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

- Tailored rules for unprofessional relationships exist in the recruiting, training, and education environments

Fraternization

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

- The following officer conduct is specifically prohibited by AFI 36-2909, and may be prosecuted under either Article 92, UCMJ, or Article 134, UCMJ, with reasonable accommodation of married members or members related by blood or marriage:
  - -- Officers will not gamble with enlisted members
  - -- Officers will not lend money to, borrow money from, or otherwise become indebted to enlisted members
    - --- An exception exists for infrequent, non-interest-bearing loans of small amounts to meet exigent circumstances (e.g., an individual who forgets his or her wallet or purse and can't pay for lunch at a unit function)
  - -- Officers will not engage in sexual relations with or date enlisted members. In dealing with officer/enlisted marriages, the evidence should be assessed. When evidence of fraternization exists, the fact that an officer and enlisted member subsequently marry does not preclude appropriate command action based on the prior fraternization.
  - -- Officers will not share living accommodations with enlisted members
  - -- Officers will not engage, on a personal basis, in business enterprises with enlisted members, or solicit or make solicited sales to enlisted members, except as permitted by the Joint Ethics Regulation

Command and Supervisory Responsibilities

- A commander or supervisor must take corrective action if a relationship is prohibited by AFI 36-2909 or is causing a degradation of morale, good order, discipline, or unit cohesion. Failure to take corrective action may lead to punishment of the commander or supervisor.
  - -- Action should normally be the least severe necessary to terminate the unprofessional aspects of the relationship
  - -- Counseling is often an effective first step in curtailing unprofessional relationships. However, the full spectrum of administrative actions should be considered. More serious cases may warrant nonjudicial punishment. Referral of charges to a court-martial is only appropriate in aggravated cases.
  - -- An order to cease the relationship, or the offensive portion of the relationship, can and should be given. Any order should be in writing, if possible.
  - -- Officers or enlisted members who violate orders are subject to UCMJ action

References:

UCMJ arts. 92, 134

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

AETCI 36-2909, *Professional and Unprofessional Relationships* (2 March 2007), Certified Current (8 September 2009)

Hazing

Department of Defense policy recognizing the potential adverse effects hazing can have on morale, operational readiness, and mission accomplishment. Hazing is prohibited and should never be tolerated.

Definition

- Hazing is defined as any conduct whereby a military member without proper authority causes another military member, regardless of service or rank, to suffer or be exposed to any activity which is cruel, abusive, humiliating, oppressive, demeaning, or harmful
  - -- Physical contact is not necessary – verbal or psychological abuse will suffice
  - -- Soliciting or encouraging another to engage in such activity is also considered hazing
  - -- Hazing is typically associated with "rites of passage" or initiations
- Some examples include hitting or striking, tattooing, branding, shaving, "blood pinning," and forcing alcohol consumption
- Hazing does not include authorized training of any sort, administrative corrective measures, or additional military instruction
- Actual or implied consent to hazing does not eliminate the perpetrator's culpability

Command Action

- Commanders and senior NCOs must promptly and thoroughly investigate all allegations of hazing and take appropriate action if hazing is substantiated
- A commander's options begin with counseling and reprimands and extend to court-martial for serious cases that involve assault, aggravated assault, maltreatment of subordinates, etc.
- Commanders must evaluate all activities that appear to be an initiation or "rite of passage" to ensure that the dignity and respect of all members is maintained

Punitive Regulations and the UCMJ

- Although the Secretary of Defense has authorized all services to incorporate this policy into a punitive regulation, the Air Force does not have such a regulation and there are no plans to incorporate the policy into such a regulation; however, the Air

Force may pursue disciplinary action under the UCMJ for dereliction of duty or for the underlying misconduct, such as assault, battery, maltreatment of subordinates, etc.

References:

Memorandum, The Secretary of Defense, *Hazing* (28 August 1997)

Memorandum, The Chief of Staff of the Air Force, *Air Force Policy on Hazing* (30 October 1997)

Personal Bankruptcy

- Air Force members are required to meet financial obligations in a timely manner. However, the Air Force maintains a policy of strict neutrality with respect to bankruptcy.
  - -- Filing for bankruptcy protection is a statutory right of all citizens and does not provide a basis for adverse action
  - -- However, underlying misconduct associated with the circumstances leading to bankruptcy may be a proper basis for discipline
- The base legal office assists in the following two ways:
  - -- Legal assistance attorneys assist Air Force members and eligible beneficiaries with advice regarding personal bankruptcy
  - -- Legal office staff advises commanders whether disciplinary action is appropriate in a particular case. The staff judge advocate will resolve any potential conflicts of interest.
- As with any question of financial responsibility, the commander must balance the personal interests and well-being of the individual against the needs of good order and discipline. Bankruptcy is one way of dealing with financial problems responsibly. Unfortunately, it is often accompanied by actionable financial irresponsibility.

References:

11 U.S.C. § 525, Protection Against Discriminatory Treatment

UCMJ art. 123a

UCMJ art. 134

AFI 36-2906, *Personal Financial Responsibility* (1 January 1998)

Financial Responsibility

Air Force personnel are expected to satisfy their financial obligations in a proper and timely manner. Failure to do so can result in administrative or disciplinary action and/or the debt being paid involuntarily via official Air Force channels.

- In all cases involving allegations of financial irresponsibility, the commander is responsible for the following:
  - -- Reviewing and assessing the basis of the complainant's allegation
  - -- Providing a copy of any pertinent "fact sheet," (AFI attachment) to the parties
  - -- Monitoring the processing of a complaint, attempting to respond within 15 days
  - -- Advising the military member and the complainant that the Air Force has no authority to arbitrate disputed cases of nonsupport or personal indebtedness
  - -- Ensuring information on contemplated or completed action is not disclosed to third parties
  - -- Referring members with demonstrated financial irresponsibility to the appropriate base agency for assistance, normally through the Airmen and Family Readiness Center.
  - -- Considering whether an administrative or a disciplinary action is appropriate
  - -- Coordinating the action with the appropriate base agencies (SJA, MPF, IG, etc.)
  - -- Responding to inquiries from HQ AFPC High Level Inquiries Division (MSH)
- Members are expected to provide adequate financial support to their dependants
  - -- The amount of support should be based on the family and the member's ability to pay
  - -- Support may be "in kind," such as paying mortgage, car payments, or joint debts
  - -- Members may not receive BAH at the "with dependent" rate if they do not provide financial support to their spouse or children
  - -- Commanders cannot force a member to provide support or act as intermediaries
  - -- The Air Force can terminate allowances and recoup "with dependant" rate allowances for those periods of nonsupport of dependants
  - -- Falsifying support documentation can result in disciplinary or administrative action

- Personal debts to the Air Force, federal agencies, or nonappropriated fund activities (including the BX, enlisted club, MWR, etc.) may be involuntarily deducted from a member's pay
- State courts with jurisdiction over dependent children or a state agency with the proper authority can order child support payments
  - -- Complainant obtains the garnishment order from a state court over the military member and serves it on the Defense Finance and Accounting Service (DFAS)
  - -- DFAS notifies the military member of the garnishment order
  - -- Military member may provide DFAS with additional information concerning their cases or status of arrearages
  - -- Air Force has no authority to dispute an order and, if it appears valid, normally must honor it
  - -- Alimony payments can also be satisfied through a garnishment order
- Child support can additionally be secured through a statutory allotment
  - -- Statutory allotments are initiated by a complainant or a state agency/attorney, who can establish a support obligation and arrearages greater or equal to two months
  - -- DFAS is responsible for notifying the commander or the military member
  - -- The commander should ensure the military member has access to legal assistance at the base legal office
  - -- Allotment goes into effect 30 days after the notice was sent to the military member
  - -- DFAS can decline to act if the member can demonstrate the request is inaccurate
- A third party can secure an involuntary allotment from a military member to satisfy a final judgment from a court with jurisdiction over the parties
  - -- DFAS notifies the commander, who provides a copy of the package to the member
  - -- The commander apprises the member on their rights and obligations, including the right to speak with an attorney
  - -- The military member is provided 90 days to respond, which can be extended by the commander for good cause (normally not to exceed 30 days)
  - -- If the military member consents to the allotment, the commander returns the completed forms to DFAS

-- If the allotment is contested, the member must fully explain and support the reasons contesting the allotment

-- In some cases a member may assert that military exigencies prevented them from adequately responding during the legal proceeding

--- The commander makes this determination and the decision is binding on DFAS

--- Before making this decision, the commander should contact the legal office

-- If the member contests the allotment on any basis other than military exigencies, DFAS will review the case and make a final decision

References:

50 U.S.C. App. §§ 501-596, Servicemembers Civil Relief Act (2003)

DODI 1344.09, *Indebtedness of Military Personnel* (8 December 2008)

AFI 36-2906, *Personal Financial Responsibility* (1 January 1998)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

Bad Checks

Every check, draft, or money order carries with it the promise of payment in full when presented. When a military member writes a check that fails to clear for payment, it may be necessary to take administrative or disciplinary action to correct the behavior.

- Consult with the legal office to determine if administrative or disciplinary action is appropriate
- Dishonored checks are evidence of personal indebtedness until redeemed
- If the incident is the first, or if it is relatively minor, counseling the member regarding Air Force policy and referral for professional counseling may be an appropriate first step to correct the behavior
  - -- Every base has programs in place that can help teach financial management to Air Force members experiencing difficulty in this area
  - -- Two such programs are the personal financial management program and the budget restructuring program (comptroller and/or Airman and Family Readiness Center)
- Repeated cases of dishonored checks, or a single instance involving a large amount of money, may be the basis for administrative action, such as letters of reprimand, UIF, control roster, administrative separation, and/or involuntary deductions by DFAS for personal indebtedness to the federal government
- Writing bad checks can also qualify as criminal conduct under some circumstances. Criminal conduct prohibited by Articles 123a and 134, UCMJ, may be evident if the individual was:
  - -- Procuring or making payment by check with intent to defraud
  - -- Dishonorably failing to maintain sufficient funds to cover checks
  - -- Making or delivering a check knowing that sufficient funds did not exist
  - -- Evidence of knowledge and intent can be shown by proof of notice of a dishonored check and failure to make payment within 5 days after such notice

Reference:

UCMJ arts. 123a, 134

Child Abuse, Child Neglect, and Spousal Abuse

It is Air Force policy to prevent or minimize the impact of child abuse, child neglect, and spousal abuse and their associated problems. To further this policy, the Air Force attempts to identify abuse and neglect, document such cases, assess the situation, and assist the family. Commanders should take administrative or judicial action in appropriate cases.

The family advocacy program (FAP) is responsible for implementing this policy. The FAP enhances Air Force readiness by promoting family and community health and resilience. The FAP consists of prevention services, maltreatment intervention, and research and evaluation.

Reporting Maltreatment

- Notice of suspected abuse cases come from many sources: security forces blotter, commanders, co-workers, medical care providers, childcare providers, and anonymous calls
- All Air Force personnel, military or civilian, have a duty to report all incidents of suspected family maltreatment to FAP. The identity of the person making the notification is kept confidential and is not released to the family allegedly involved.
- Report suspected cases to the family advocacy officer (FAO), who will notify AFOSI. AFOSI is responsible for investigating all but minor incidents of maltreatment.
  - -- AFOSI accesses the Defense Clearance Investigations Index (DCII), which serves as a register of substantiated and suspected cases of abuse
  - -- AFOSI investigation preserves command prerogatives to take appropriate administrative or judicial actions
- Adult victims of domestic abuse have two reporting options:
  - -- Unrestricted Reporting: Allows the victim to report an incident using the chain of command, law enforcement or AFOSI, and Family Advocacy for clinical intervention. Victims who choose to pursue an official command or criminal investigation of an incident should use these reporting channels.
  - -- Restricted Reporting: Allows the victim, who is eligible to receive military medical care, the option of reporting an incident of domestic abuse to specified individuals for the purpose of receiving medical care and other services without initiating the investigative process or notification to the victim's or alleged offender's commander

The Family Advocacy Committee (FAC)

- The ultimate responsibility to implement the FAP rests with the installation commander. The medical treatment facility (MTF) commander, is responsible for each of the three FAP components, chairs the FAC.
- Members of the FAC normally include: installation commander (or designee), MTF commander, family advocacy officer, family advocacy outreach manager, Airmen and Family Readiness director, staff judge advocate (or designee), chief of security forces, AFOSI detachment commander, chaplain, command chief master sergeant, Department of Defense Education Activity (DODEA), and representatives of local child protection agencies (optional)
- The family advocacy officer (FAO) is the action officer for the FAP. The FAO coordinates the Central Registry Board (CRB) and chairs the clinical case staffing (CCS), Outreach Management Prevention Council (OPMC), child sexual maltreatment response team (CSMRT), high risk for violence response team (HRVRT), and the new parent support program (NPSP) case-staffing.

The Central Registry Board (CRB)

- The CRB is a multidisciplinary team that makes administrative determinations for suspected family maltreatment. The Clinical Case Staffing (CSS) team manages clinical and safety issues.
- CRB meets at the call of the FAO, but at least monthly. Membership is determined by the FAC, but should include: AFOSI, JA, SFS, FAO, and other relevant agencies.
- Duties of the CRB include:
  - -- Make incident status determinations (ISD) on each allegation of maltreatment within 60 days of referral
  - -- Ensure involved adult family members receive notification of CRB ISDs
  - -- Ensure both the adult victim and adult offender are notified of the ISD
  - -- CRB discussions are confidential
- The unit commander of any member whose case will be discussed at the CRB should attend the CRB meeting

Child Sexual Maltreatment Response Team

- Membership includes the FAO, AFOSI representative, legal office representative, and other members appointed by the unit commander and approved by the FAC

- Goal of the team is to minimize the trauma to the victim and family and ensure no one individual agency makes decisions regarding these incidents independent of the concerns of other involved agencies

- The team coordinates a course of action by determining how organizations will proceed in making notifications, conducting interviews, scheduling exams, arranging for safety of family members, and conducting psycho-social assessments

High Risk for Violence Response Team

- Members include the FAO, FAP clinician working with the family, sponsor's squadron commander, SJA, security forces representative, mental health clinic provider, AFOSI, victim advocate, and other agencies as appropriate

- Team is activated when there is a threat of immediate and serious harm to family members or FAP staff. Team addresses safety issues, risk factors, and develops and implements a management and tracking mechanism for high-risk individuals.

Child Neglect and Abandonment

- Most Air Force installations will have several cases each year of alleged child abuse or neglect through parental abandonment (i.e., leaving children alone in military family housing without adult supervision)

- Some installations have addressed this issue by having the FAC draft guidelines to assist parents in assessing whether a child is mature enough to be left unattended

- The FAC only proposes guidelines. Situations must be evaluated individually.

References:

AFPD 40-3, *Family Advocacy Program* (10 March 2005)

AFI 40-301, *Family Advocacy* (30 November 2009)

Adoption Reimbursement

The Defense Authorization Act of 1993 authorizes a military member (including Coast Guard personnel) to be reimbursed for certain adoption expenses up to $2,000 per adoption with a maximum of $5,000 in any calendar year.

Requirements and Procedures

- Members should contact their local military personnel flight (MPF), customer service section, for guidance and copies of the application forms (DD Form 2675). Once the application is assembled, MPF forwards the package to DFAS for review, decision, and payment.
- At the time of application, the member must be on active duty and have served at least 180 consecutive days of active duty. In addition, the following criteria must be met:
  - -- The adoption must be final
  - -- The application must be filed no later than one year after the adoption
  - -- The member must be on active duty when the adoption becomes final and the application must be filed before the member is discharged
- The Act limits reimbursement to "qualifying" adoption expenses incurred by active duty military members
  - -- A "qualifying" adoption includes an adoption by either married couples or a single person, of a child (under 18 years of age and not the biological offspring of the member), through a U.S. or an inter-country adoption; and, an adoption of a child with special needs (as defined by 42 U.S.C. § 673(c)). Adoption of a stepchild by a military member finalized after 2 November 2007, also are qualifying adoptions.
  - -- The adoption must have been arranged through a state or local government agency or through a nonprofit, voluntary adoption agency, or other source authorized under state or local law
- The reimbursement is for "reasonable and necessary" adoption expenses, which include agency fees, placement fees, legal fees and court costs, certain medical expenses, and temporary foster care fees (when required by the adoption process). Travel costs are not reimbursed.

Commander's Role

- The unit commander certifies a claim's validity and sends it to the MPF

- The MPF is the primary coordinating activity. It is responsible for assisting the member in assembling expense receipts and providing additional information on the program as well as furnishing the necessary forms and the DFAS instructions.

- DFAS reviews completed claims packages, determines if the adoption and associated expenses are eligible for reimbursement, and issues payment to the member. If the claim is denied, a letter stating such will be sent to the member. The claim documents will not be returned to the member.

Tax Credit

- As of 2009, taxpayers are able to claim a tax credit of up to $12,150 per child for qualified expenses and exclude up to $12,150 from income for qualified expenses. However, both the credit and exclusion cannot be taken for the same expenses. See IRS Form 8839.

- The full tax credit is available for a taxpayer whose modified adjusted gross income (AGI) is less than $222,180, and meets other requirements

- Qualified adoption expenses consist of reasonable and necessary adoption fees, court costs, attorney fees, and other expenses which are directly related to the adoption of an eligible child

- The credit can be claimed even if the adoption is unsuccessful, except in the case of a foreign adoption. Expenses connected with a foreign adoption only qualify if the child is actually adopted.

References:

10 U.S.C. § 1052

14 U.S.C. § 514

DODI 1341.09, *DOD Adoption Reimbursement Policy* (3 November 2007), Incorporating Change 1 (23 April 2009)

DD Form 2675, *Reimbursement Request for Adoption Expenses* (September 2006)

DOD Financial Management Regulations, 7000.14-R, Vol 7A, Appendix A (May 2009)

IRS Form 8839, *Qualified Adoption Expenses* (2009)

Paternity Claims

- If an individual claims an active duty member is the father of their child, the commander should:
  - -- Counsel the member about the allegations, and
  - -- Advise the member about the entitlement to legal assistance on legal rights and obligations
    - --- If the member denies paternity, inform the claimant accordingly and advise them the Air Force does not have authority to adjudicate paternity claims
    - --- If the member acknowledges paternity, advise the member of financial support obligations. Also, refer the member to the MPF, Customer Service Element, for guidance about the child's eligibility for an ID card and to the finance office for guidance about "with dependent" rates.
- If the member does not establish paternity by his own admission, paternity can be established through a judicial order or a decree of paternity or child support order from a United States or foreign court of competent jurisdiction. If paternity is established, the commander should counsel the individual on his support obligations.

References:

DODD 1344.3, *Paternity Claims and Adoption Proceedings Involving Members and Former Members of the Armed Forces* (1 February 1978), Incorporating Change 1 (16 November 1994), Certified Current (1 December 2003)

AFI 36-2906, *Personal Financial Responsibility* (1 January 1998)

Civilian Jury Service by Military Members

- The commander determines whether the member should perform jury service pursuant to AFI 51-301. When an Air Force member on active duty receives a summons to state or local jury duty, the member should inform his or her immediate commander. Not every military member is exempt from jury service.

- For the purpose of jury service, "active duty" includes full-time duty in the active military service, full-time training duty, annual training duty, active duty for training, and attending a service school while on active military service

Exemption From Jury Service

- Categorical Exemption: All general officers, commanders, operating forces (forces whose primary missions are participating in and supporting combat), personnel in training, and personnel stationed outside the U.S. are categorically exempt from serving on a state or local jury

- General Exemption (Not Categorical): For all other personnel, the commander determines whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity. This authority to determine such exemptions is pursuant to 10 U.S.C. § 982 and delegated to the special court-martial convening authority (SPCMCA) by the SecAF.

Procedures

- If the member is categorically exempt, the immediate commander or designee notifies the issuing state or local official by written notice (complying with the format in AFI 51-301)

- If the member is generally (but not categorically) exempt, the immediate commander decides whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity

  -- If jury duty would not unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity, the member must perform jury duty

  -- If the immediate commander decides jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity, the immediate commander requests approval of the exemption from the SPCMCA using the criteria in AFI 51-301

  - The SPCMCA may then decide whether:
    - Exemption is inappropriate and instruct the member to comply with the jury summons
    - Exemption is appropriate, and direct the immediate commander to send a written notice of exemption to the issuing state or local official complying with AFI 51-301
  - The SPCMCA's determination is final
- Time spent by military members on jury duty service should not be charged against them as leave
- Pay or entitlements should not be deducted for the period of service
- Fees and reimbursement
  - Military members are not entitled to keep any fees for jury service; those fees should be made payable to the U.S. Treasury and turned in at Finance
  - Military members may receive and keep reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty, such as transportation costs or parking fees

References:

10 U.S.C. § 982

DODI 5525.08, *Service by Members of the Armed Forces on State and Local Juries* (3 January 2007)

AFI 51-301, *Civil Litigation* (1 July 2002)

Acquired Immune Deficiency Syndrome (AIDS)

Medical Background

- HIV (human immunodeficiency virus) infection is a viral disease involving the breakdown of the body's immune system
- AIDS is an advanced stage of HIV infection, where there is evidence of immune deficiency by illness or laboratory traits
- Medical experts believe the nonsexual person-to-person contact that occurs among workers in the workplace does not pose a risk for transmitting the virus

AIDS and Military Members

- Testing: The Air Force tests all members for antibodies to HIV, medically evaluates all infected members, and educates members on means of prevention
  - -- All applicants for the Air Force are screened for the HIV infection. Applicants infected with HIV are ineligible to join the Air Force, with no waiver authorized.
  - -- All active duty personnel are screened for HIV infection every two years (preferably during their Preventive Health Assessment), for clinically indicated reasons, and for newly diagnosed tuberculosis active duty personnel are also screened during pregnancy, when presenting for a sexually transmitted disease, upon entry to drug or alcohol rehabilitation programs, and prior to incarceration
  - -- Air Reserve Component (ARC) personnel are screened at intervals not to exceed five years and must be tested within two years of the date called to active duty for 30 days or more
  - -- An active duty member testing positive for HIV is referred to Wilford Hall Medical Center (WHMC) at Lackland AFB for definitive diagnosis, treatment, and disposition. A medical evaluation board (MEB) is convened at WHMC after the initial exam.
  - -- HIV-infected active duty members retained on active duty must be medically evaluated semiannually and are assigned within the United States, including Alaska, Hawaii and Puerto Rico. HIV-infected members shall not be assigned to mobility positions. HIV-infected members on flying status must be placed on Duty Not Involving Flying (DNIF) status pending medical evaluation.
    - --- Waivers are considered using normal procedures established for chronic diseases

- Testing Confidentiality: Air Force policy strictly safeguards results of positive HIV testing

  -- There is no release to persons outside the Air Force without the member's consent

  -- The Air Force will neither confirm nor deny testing results of specific service members

  -- Very limited release within Air Force on "need-to-know" basis only (i.e., unit commanders should not inform First Sergeants and/or supervisors unless a determination is made that those individuals truly need to know)

- Adverse Administrative Actions: Information obtained by DOD as a result of epidemiological assessment (EA) with member who has been identified as having been exposed to virus associated with AIDS may not be used to support any adverse personnel action against member. See AFI 48-135, Atch 11.

  -- "Adverse personnel actions" includes court-martial; nonjudicial punishment; line of duty determination; demotion; involuntary separation for other than medical reasons; denial of promotion or reenlistment; and unfavorable entry in a personnel record

  -- "Nonadverse personnel actions" in which limits on use of epidemiological assessment results do not apply include: reassignment; disqualification (temporary or permanent) from the Personal Reliability Program (PRP); denial, suspension, or revocation of security clearance; suspension or termination of access to classified information; transfer between Reserve components; removal (temporary or permanent) from flight status or other duties requiring high degree of stability or alertness; and removal of AFSC

  -- These nonadverse actions cannot be accompanied by unfavorable entries in service member's records

  -- Safe Sex Orders: "Order to Follow Preventive Medicine Requirements" is issued to all HIV-positive personnel who remain on active duty

    --- The health care provider will notify member that he or she has tested positive. The member's unit commander will also be notified through separate channels.

    --- The unit commander issues the order to follow preventive medicine requirements

    --- The order should be signed and dated by the commander and member

    --- The unit commander is responsible for safeguarding the order

--- Upon reassignment, unit commander forwards the order in a sealed envelope to the gaining commander marked "TO BE OPENED BY ADDRESSEE ONLY"

- Disability Evaluation and Medical Separation: HIV positive members who show no evidence of illness or impairment shall not be separated solely on basis of being infected with the AIDS virus. Medical retirement is, however, a strong possibility once member develops AIDS.

  -- A member subject to separation undergoes a Medical Evaluation Board (MEB), then an Informal Physical Evaluation Board (PEB) to determine whether he or she should be retained on active duty or separated from the service because he or she is "unfit" for continued service. The member has appeal rights to appear personally before a Formal PEB and also to appeal to the Air Force Personnel Council.

  -- The member may be simply separated with a medical severance lump sum payment or temporarily or permanently medically retired with monthly medical retirement pay depending on the Board's recommendations and the final action by SecAF

  -- Placement on the Temporary Disability Retirement List (TDRL) is termed a temporary retirement because the member is reevaluated every 18 months to determine if fit for return to active duty or unfit and to be separated or retired. Maximum time on TDRL is 5 years.

  -- The member may voluntarily separate upon request

Military Justice/Policy Issues

- A service member who knows he or she is HIV positive but engages in sexual intercourse with another can be punished under the UCMJ for:

  -- Engaging in unprotected sexual intercourse with another

  -- Violating a "safe sex" order

  -- Failing to warn sexual partner about HIV status, despite wearing a condom (merely taking "safe sex" precautions won't remove the duty to warn)

  -- Having unprotected sexual intercourse even though the partner is aware of the member's HIV status, and consents

AIDS and Air Force Civilian Employees

- The Air Force does not test Air Force civilian employees for AIDS. An exception is with those civilian employees (appropriated or nonappropriated) selected for assignment overseas who will be screened for HIV infection pursuant to host country

requirements. This screening does not apply to contractor personnel, family members or foreign nationals. Civilian employees are also tested for occupational exposures.

- AIDS is a disability under federal civil rights laws, and these laws prohibit discrimination on the basis of physical or mental disability. Under these laws, disabled employees could recover back pay, compensatory damages, attorney fees, costs, and expert fees against liable employers.

- In March 1988, the U.S. Office of Personnel Management issued the following guidelines for federal agencies on handling AIDS in the federal workplace (FPM Bulletin 792-42)

  -- Extensive AIDS Information and Education Programs must exist

  -- HIV-positive employees may not be denied employment or fired provided they are able to continue working (their privacy and confidentiality must be protected)

  -- Employees should be granted the same sick, annual leave, or leave without pay as other employees with medical conditions (accommodation of handicap)

  -- Employees are eligible to receive disability retirement if medical condition warrants and they have the required number of years

  -- If an employee refuses to work with infected employees, he will receive information and counseling, and if he still refuses may be disciplined

References:

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

AFI 44-102, *Medical Care Management* (1 May 2006), Incorporating Change 1 (23 May 2007), AFGM1.1 (24 December 2009)

AFI 48-135, *Human Immunodeficiency Virus Program* (12 May 2004), Incorporating Change 1 (7 August 2006), Certified Current (13 May 2010)

Anthrax Immunizations

In general, Air Force Joint Instruction (AFJI) 48-110 sets forth the requirements and procedures for the immunization program. Commanders are responsible for ensuring that all military and nonmilitary personnel under their jurisdiction receive all required immunizations. However, anthrax immunizations are controlled by the Department of Defense Anthrax Vaccine Immunization Program (AVIP).

Background

- Anthrax is 99% lethal to unprotected individuals; inhalation of the disease causes severe pneumonia and death within a week; at least 10 countries are believed to possess the biological agent
- 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 15 Dec 05, after reviewing extensive scientific evidence and carefully considering comments from the public, the FDA determined that anthrax vaccine absorbed is licensed for the prevention of anthrax infection
- On 12 Oct 06, the Deputy Secretary of Defense directed resumption of a mandatory AVIP program for military and civilian personnel in higher risk areas or with special mission roles

Air Force Implementation of Resumption of AVIP

- On 16 Feb 07, HQ USAF released the Air Force Plan for Implementation of mandatory AVIP
  - -- Uniformed personnel serving in the U.S. Central Command (USCENTCOM) Area of Responsibility (AOR) or the Korean Peninsula for 15 or more consecutive days
  - -- Uniformed DOD personnel designated as early deployers to the Korean Peninsula for 15 or more consecutive days
  - -- Emergency-essential and equivalent DOD civilian employees assigned for 15 or more consecutive days to the USCENTCOM AOR or to the Korean Peninsula
  - -- DOD contractor personnel carrying out mission-essential services and assigned for 15 or more consecutive day to the USCENTCOM AOR or Korea
  - -- Members of all special groups covered by previously approved exceptions to policy

    - Other personnel designated by the Assistant Secretary of Defense for Health Affairs, upon recommendation of the Chairman of the Joint Chiefs of Staff, the Secretary of a Military Department or the Commandant of the Coast Guard, based on critical mission assignments

- Individuals in the designated mandatory population cannot decline the vaccination

- Voluntary Anthrax vaccinations will be available for those who already started the vaccine series but are no longer deployed to a higher threat area or no longer assigned designated special mission roles

- Installation Commanders will ensure compliance with the AVIP

    - Maintain oversight and ownership of the installations AVIP implementation program

    - Develop and implement an installation AVIP implementation plan consistent with the Under Secretary of Defense and USAF plan for implementation

    - Designate, in writing, a senior line officer as the installation AVIP team chairperson to oversee continued operation of the installation AVIP team

    - Direct the Medical Treatment Facility Commander to designate, in writing, a medical officer-in-charge to coordinate the medical administrative and clinical functions of the AVIP

    - Ensure personnel receive education on the AVIP prior to receiving or administering Anthrax vaccinations

        - Provide a copy of the AVIP tri-fold brochure (dated 12 Oct 06, or later) to all personnel subject to mandatory vaccinations or those eligible for voluntary vaccinations

        - Recommend supplementing the tri-fold brochure with a briefing to unit personnel

- Vaccinations can begin up to 120 days prior to the scheduled departure date

Enforcement of AVIP

- Requirement for military members to take the anthrax vaccine is a lawful order

- If a member indicates they will refuse or has refused the vaccine

    - Determine why member is reluctant

    - Provide member with appropriate education

--- Concerns about vaccine safety should be referred to the supporting medical organization

--- Concerns about the threat should be addressed by intelligence personnel

--- If the member is still reluctant after additional education, send the member to the area defense counsel (ADC) for an explanation of the potential consequences of their refusal

-- Following appropriate counseling, commanders should again order the individual to take the vaccine

-- If the member continues to refuse, consult with the staff judge advocate for appropriate action

- Full information on AVIP can be found at www.anthrax.mil

References:

Memorandum, Deputy Secretary of Defense, *Anthrax Vaccine Immunization Program* (12 October 2006)

Memorandum, Under Secretary of Defense, *Implementation of the Anthrax Immunization Program (AVIP)* (6 December 2006)

Memorandum, Headquarters US Air Force, *Implementation of Mandatory Anthrax Vaccine Immunization Program (AVIP)* (16 February 2007)

Memorandum, Department of the Air Force, *Expanded Anthrax Vaccine Immunization Program (AVIP) Guidance* (4 April 2007)

Memorandum, Under Secretary of Defense, *Change in Policy for Pre-Deployment Administration of Anthrax and Smallpox Vaccines* (10 September 2007)

Department of the Air Force, *Plan for Implementing the Anthrax Vaccine Immunization Program (AVIP)* (18 January 2007)

Biological Products; Bacterial Vaccines and Toxoids; Implementation of Efficacy Review; Anthrax Vaccine Adsorbed; Final Order, 70 Fed. Reg. 75180 (19 December 2005)

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 August 2005)

AFJI 48-110, *Immunizations and Chemoprophylaxis* (29 September 2006)

DOD AVIP Website: http://www.anthrax.osd.mil

Commander Directed Mental Health Evaluations

Purpose

Commanders who have concerns that a member under their command may be suffering from a legitimate mental health problem that may affect that member's ability to carry out the mission, may refer the member to the mental health clinic for a mental health evaluation (MHE).

- DODI 6490.4 establishes the uses of and procedures for commander directed MHEs
  - -- Provides commanders guidance on making a referral
  - -- Establishes the rights of service members referred for mental health evaluations
  - -- Establishes procedures for outpatient and inpatient mental health evaluations
- AFI 44-109 also provides guidance on mental health issue
  - -- Establishes the limited privilege suicide prevention (LPSP) program for members facing potential disciplinary action under the UCMJ who may be at risk of suicide. The details of LPSP are contained in a separate article.

Commander's Responsibilities

- A commander who wishes to refer a member for a MHE must:
  - -- Refer a member only if he or she believes the individual has a legitimate mental health problem
    - --- A commander cannot refer a member simply to buy time or as a disciplinary tool
    - --- A commander cannot refer a member as a reprisal for the individual's attempt or intent to make a protected communication
  - -- Consult with a mental health provider (MHP) concerning the need for a MHE prior to referring the member for a MHE
  - -- Provide the member with written notice of the MHE at least two days prior to the referral. The notice must include:
    - --- The date and time of the MHE
    - --- A brief factual description of the behavior that gave rise to the need for a referral

--- The name of the MHP the commander consulted with prior to the referral

--- Contact information as to the authorities that can assist the member who wants to question the referral

--- A listing of the member's rights under DODD 6490.4

-- Consult the legal office for assistance in preparing the notification letter

-- In an emergency situation, refer the individual for a MHE as soon as possible without regard to waiting periods or other things that might delay the evaluation

Member's Rights

- When referred for a nonemergency MHE the member has the following rights:

  -- To consult an Air Force attorney (i.e., the area defense counsel) upon request

  -- To a waiting period of two workdays (i.e., the member's normal duty day) between the notification and the MHE. To the extent military necessity does not allow for the waiting period, the notification letter must explain the reasons why. The waiting period does not apply to emergency referrals.

  -- To complain to the inspector general (IG) that the referral violated the instruction. Such a complaint will not delay processing.

  -- To request a second MHE by another MHP

  -- To make a lawful communication to the IG, his/her attorney, or other appropriate authority, including the chaplain (as soon after admission as the servicemember's condition permits in emergency referrals)

- If the member is involuntarily hospitalized for treatment, that treatment must take place in a setting no more restrictive than necessary for effective treatment

Involuntary Inpatient Admissions

- A member should be admitted for inpatient treatment only when outpatient treatment and evaluation is not appropriate

  -- The member must be admitted by a qualified MHP

  -- A qualified reviewing official (normally a neutral and detached MHP) must review the admission within 72 hours to determine whether the referral and admission were appropriate

  -- The reviewing official will review the case file, interview the authorities involved and interview the member, if possible

- In addition, members involuntarily admitted for treatment are afforded the following rights:
  - To be informed of the reasons for the MHE and of the nature and consequences of the MHE and any treatment to the extent his/her condition permits
  - To contact a friend, relative, or anyone else the member wishes to the extent the member's condition permits such communication
- The MHP who conducts the initial MHE must:
  - Determine within two workdays (i.e., the MHP's normal duty day) whether continued treatment or hospitalization is necessary; and
  - Notify the member orally and in writing of the reasons for continued hospitalization or treatment

Prohibited Practices

- The commander may not:
  - Refer a member for a MHE as a reprisal for making a protected communication
  - Restrict the member from lawfully communicating with his/her attorney, the IG, or other authority about the referral
- Either act by the commander could constitute a violation of Article 92, UCMJ, and result in disciplinary action
- Commander directed MHEs should not be confused with referrals under the alcohol and drug abuse prevention and treatment program (AFI 44-121), the family advocacy program (AFI 40-301), or those referrals made pursuant to a ruling from a military judge concerning the administration of a sanity board

References:

Mil. R. Evid. 513

Rule for Courts-Martial 706 (2008)

DODD 6490.1, *Mental Health Evaluations of Members of the Armed Forces* (1 October 1997), Certified Current (24 November 2003)

DODI 6490.4, *Requirements for Mental Health Evaluations of Members of the Armed Forces* (28 August 1997)

AFI 44-109, *Mental Health, Confidentiality, and Military Law* (1 March 2000)

AFPD 44-1, *Medical Operations* (1 September 1999)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 September 2001), Certified Current (2 April 2010), Incorporating Change 5 (22 April 2010)

AFI 40-301, *Family Advocacy* (30 November 2009)

Limited Privilege Suicide Prevention Program

Purpose

- Commanders who have concerns that a member under their command who is facing disciplinary action may be at risk of suicide, can refer the member to the mental health clinic for a mental health evaluation (MHE). Under limited circumstances, confidences revealed during such consultations may be kept confidential between the patient and the mental health provider.
  - -- The objective of the program is to identify and treat those members who pose a genuine risk of suicide by providing limited confidentiality with respect to their discussions with a mental health provider (MHP)
  - -- The instruction governing the procedures for the program is AFI 44-109. This instruction
    - --- Provides guidance for commanders who wish to make a referral
    - --- Establishes the rights of Air Force members referred by their commanders for mental health evaluations
    - --- Establishes a limited confidential privilege between the MHP and the patient
- This program operates in conjunction with the guidance on commander directed MHEs

Application and Procedures

- Eligible Members: The Limited Privilege Suicide Prevention (LPSP) Program applies to those military members who have been officially notified (written or oral) that they are under investigation or suspected of violating the UCMJ
- Initiation
  - -- After official notification, if an individual involved in the processing of the disciplinary action has a good faith belief the member being disciplined may present a risk of suicide, the individual shall communicate that fact to the member's immediate commander along with a recommendation for a MHE and treatment in the LPSP program
  - -- Individuals involved in the processing of the disciplinary action who would be in a position to make this assessment include, but are not limited to, the defense counsel, the trial counsel, law enforcement officials, the staff judge advocate or any assistant staff judge advocate, the first sergeant, or the squadron executive officer

-- Based on the information provided by such an individual and upon any other relevant information and after consultation with an MHP, the commander may refer the member for an MHE

-- The procedures and rights associated with MHEs apply to such a referral

-- The MHP conducting the evaluation determines if the member poses a risk of suicide and, if so, initiates treatment

- Duration

  -- The limited protection offered by this program lasts only so long as the MHP believes there is a continuing risk of suicide

  -- The MHP must notify the commander when the member no longer poses a risk of suicide

    --- The limited protection offered under the program ends at that time

    --- Though the instruction does not make this clear, as a practical matter, it appears the initial evaluation would be subject to that privilege even if the MHP determines afterward that the member does not pose a risk of suicide

Limited Protection

- Members in the program are granted limited protection with respect to the information revealed during or generated by their clinical relationship with the MHP. Any such information may not be used in any existing or future UCMJ action or when weighing the characterization of the member's service in a separation.

- The limited protection does not apply to:

  -- The use of the information as evidence for impeachment or rebuttal purposes in any proceeding in which the information generated by and during the LPSP relationship was first introduced by the member concerned

  -- Disciplinary or other action based on independently derived evidence

  -- Any information gathered by the MHP or other provider prior to placement in the program or after release from the program (except for later created summaries/documents which pertain to treatment under the LPSP Program)

Related Issue

- Any confidential communication which a military member has with a psychotherapist may be privileged regardless of whether the member has been enrolled in the LPSP Program according to Military Rule of Evidence (M.R.E.) 513

-- M.R.E. 513 offers a limited privilege to persons subject to the UCMJ. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. M.R.E. 513(a).

-- However, "M.R.E. 513 has no application outside UCMJ proceedings." AFLOA/JAJM policy letter, 8 March 2000. See, also, M.R.E. 513 Analysis. However, disclosure should be limited to "persons or agencies with a proper and legitimate need for the information and authorized by law or regulation to receive them." SJA's resolve disputes and determine whether disclosure should be made.

-- Who may claim the privilege? The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary. M.R.E. 513(c).

-- Exceptions:

--- The patient is dead

--- Crimes of spouse/child abuse or a proceeding in which one spouse is charged with a crime against the other spouse or a child of either spouse

--- When federal or state law, or service regulation, imposes a duty to report

--- When the patient is a danger to any person, including the patient

--- If the communication contemplates, or the services of the psychotherapist are sought to commit, a future fraud/crime

--- When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission

--- When an accused offers evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by Rule for Courts-Martial (R.C.M.) 706 or M.R.E. 302

--- When admission or disclosure of a communication is constitutionally required

- Confidential communications will be disclosed to persons or agencies with a proper and legitimate need for the information who are authorized by law to receive it (except as provided by M.R.E. 513)
- In cases not arising under the UCMJ, psychotherapists may appeal requests for confidential information to the installation staff judge advocate (SJA)
- When applying M.R.E. 513, the installation SJA will resolve any questions of whether an exception to M.R.E. 513 requires or allows disclosure. Even so, admissibility at trial will be determined by the military judge.
- Before inquiring with care providers, commanders should consult with their servicing SJA

References:

Mil. R. Evid. 513

DODD 6490.1, *Mental Health Evaluations of Members of the Armed Forces* (1 October 1997), Certified Current (24 November 2003)

AFI 44-109, *Mental Health, Confidentiality, and Military Law* (1 March 2000)

Health Insurance Portability and Accountability Act (HIPAA)

Introduction

- In 1996, Congress enacted HIPAA to improve portability and continuity of health insurance coverage, to combat waste, fraud and abuse in health care delivery, and to improve access to long-term care services and coverage
- The statute has several components; one component, the Privacy Rule, specifically provides for increased privacy protection of protected health information (PHI). The HIPAA Security Rule addresses the use of technology and physical safeguards required to protect information.
- The DOD has implemented the Privacy Rule through the DOD Health Information Privacy Regulation, DOD 6025.18-R and the HIPAA Security Rule in the DOD Health Information Security Regulation, DOD 8580.02-R
- HIPAA's Privacy Rule applies to organizations that meet the definition of "covered entities." Covered entities include healthcare providers and healthcare facilities. This means that Air Force MTFs must comply with HIPAA whenever they use or disclose medical information. Commanders are not considered "covered entities," under HIPAA but medical information they receive from the covered entity is still subject to the Privacy Act.
- HIPAA does not create a private cause of action for violations, but the Department of Health and Human Services has authority to impose civil fines on covered entities and to pursue criminal actions for individual violations of the Privacy Rule; Air Force personnel in the covered entity are also subject to UCMJ or administrative actions for HIPAA violations

Privacy Rule

- The general prohibition under HIPAA is that the PHI of individuals, living or deceased, shall not be used or disclosed except for specifically permitted purposes
- PHI is information transmitted or maintained by electronic or any other form or medium, that tells someone about the past, present, or future health of an individual; the provision of healthcare to an individual; or the past, present or future payment for the provision of healthcare to an individual when the information identifies the individual or there is a reasonable basis to believe the information can be used to identify the individual. Health information is considered individually identifiable if it includes demographic information such as the patient's name, address, zip code, phone number, social security number, full face photographic image, finger or voice print, or other identifier.

- However, HIPAA allows PHI to be used freely for treatment, payment or routine healthcare operations. If the use of information is not for one of these purposes, the medical treatment facility (MTF) will either need the patient's written authorization, or the disclosure must fall into one of the "permissible disclosures" categories
  - -- "Treatment" generally means the provision, coordination, or management of health care and related services by or among health care providers
  - -- "Payment" generally refers to billing and collection activities. This would include Air Force third-party collections programs.
  - -- "Health care operations" are certain administrative, financial, legal, and quality improvement activities that are conducted by the covered entity. This would include, for example, our medical malpractice claims investigation process and the Surgeon General's Quality Assurance Program activities.
  - -- HIPAA also contains provisions for when providers and health plans give PHI to "business associates," who are not members of their workforce, but who act on behalf of an MTF, performing, or assisting in the performance of a function or activity on behalf of the MTF involving the use or disclosure of PHI. Business associates must give written assurance that they will comply with HIPAA (i.e., a business associate agreement or BAA). There is no need for BAAs within the DOD, as DOD 6025.18-R establishes the HIPAA requirements for all DOD components.
  - -- Certain records that you might expect to be subject to HIPAA are not. For example, the DOD drug testing program is not subject to HIPAA. DOD 6025.18-R, paragraph C2.2 contains a full list of health-related records and activities to which HIPAA does not apply.

Permissible Disclosures

- Under HIPAA, even without the individual's authorization, an MTF may still disclose information for certain purposes, as summarized below. Note that most of these purposes have specific requirements that must be met prior to disclosure of PHI, as outlined in Chapter 7 of DOD 6025.18-R.
  - -- As required by any law (includes requirements in Air Force and DOD Regulations)
  - -- To avert serious threats to health or safety
- For specialized governmental functions. This provision allows certain disclosures of the PHI of Armed Forces personnel for "activities deemed necessary" by appropriate military command authorities to assure the proper execution of the military mission. (See further discussion below). This provision also permits, among other things,

disclosure of PHI to DOD or other Federal officials as described in Section C7.11 of DOD 6025.18R.

  - For judicial and administrative proceedings
  - For law enforcement purposes (which includes AFOSI, SF, and Judge Advocates when acting as prosecutors)
  - For organ, eye, or tissue donation purposes
  - For certain research activities (subject to IRB approval of a waiver)
  - Regarding victims of abuse, neglect or domestic violence
  - Regarding inmates in correctional institutions or in custody
  - For workers' compensation cases
  - For public health activities
  - For health oversight activities
  - About decedents (to a coroner, medical examiner, or funeral director)

- Most of these disclosures are accountable, which meant the MTF must account for the use or release, so the MTF will have to keep track of who received the information, when, and for what purpose. Law enforcement personnel (to include JA) may request a temporary suspension of the accounting for law enforcement purposes if the MTF gets a written statement that the accounting would be "reasonably likely" to impede agency's activities and specifies the time that such a suspension would be required.. If the request is oral, the MTF will only temporarily suspend the individual's right to an accounting for 30 days unless, in that time, they receive a written request.

- Uses and disclosures incidental to a use or disclosure otherwise permitted under HIPAA are permissible as long as the covered entity has made reasonable efforts to limit the use or disclosure of the PHI to the minimum necessary and the covered entity has appropriate physical, administrative and technical safeguards in place to protect PHI. Some examples of incidental uses/disclosures are sign-in sheets in waiting rooms, calling patients by their name, and posting the patient's name outside the door of a hospital room.

Minimum Necessary Standard

- When HIPAA allows disclosure of information, MTFs must provide the minimum amount of information that will satisfy the intended purpose of the disclosure (similar to the Privacy Act's "need to know" standard). The minimum necessary rule does not apply to uses and disclosures for treatment purposes between providers, to the subject of the information, when the individual authorizes full release, and when other laws

require the use/disclosure. It is possible the entire medical record is the "minimum necessary," but the requester will have to articulate why the entire record is the "minimum necessary."

Commanders' Access To Information

- Under the "specialized government functions" rule described above, commanders can access PHI of Armed Forces personnel (this does not include dependants or civilian employees) for activities deemed necessary to assure the proper execution of the military mission. This rule generally permits disclosures for fitness for duty purposes.
  - For example, commanders may need PHI related to readiness (vaccination status; profile status; etc.). Commanders may also require information related to medical conditions impacting members' abilities to perform their duties (profile information, e.g.). Commanders may even need PHI to verify the whereabouts of subordinates.
- However, under the "minimum necessary" standard stated above, any release of PHI must be limited in scope to what the commander actually needs to accomplish his or her mission:
  - For example, if a member has a foot injury that precludes prolonged standing, the MTF may disclose PHI to the commander related to the foot injury because it impacts the type of day-to-day duties that the member can be assigned (i.e., it impacts mission accomplishment). The MTF would not necessarily disclose the member's dental records, mammograms, or other medical information unrelated to the foot injury, though, because that PHI may exceed the minimum necessary.
  - These disclosures are subject to accounting (these disclosures must be tracked; the member can find out what information the commander accessed)
- There is no "blanket rule" concerning release of PHI to commanders. In each case, the nature and extent of PHI released must be determined by evaluating the commander's need and applying the minimum necessary standard.
- Only commanders and their designees can access PHI under these rules. AFI 41-210 provides that a commander's designee includes Vice Commander, Deputy Commander, First Sergeant or commander's support staff. If the commander wishes to designate any other individual as an authorized recipient of PHI, the commander must do so in writing.
- Also, note that a commander's access to information may be further limited by DOD policy such as confidentiality for sexual assault victims; DOD "Don't Ask, Don't Tell" policy; DOD policies on reducing the stigma of mental health treatment, or other applicable policy.

MISCELLANEOUS

All Tricare beneficiaries receive a Notice of Privacy Practice (NOPP), created by DOD for use by all the services. The NOPP puts patients on notice of how their PHI will be used or disclosed, and provides information on how to request certain actions such as restrictions and amendments to PHI, as well as the process to file complaints under HIPAA.

Any time a patient signs an authorization to release PHI, the authorization must be HIPAA compliant by containing certain elements described in DOD 6025.18R. DD Form 2870 was created for that purpose and is considered a HIPAA compliant authorization.

Certain provisions of the American Reinvestment and Recovery Act of 2009 will dictate changes to HIPAA pertaining to business associates, accounting for disclosure, actions required for breaches and level of penalties. These changes will soon be implemented by DOD for all services.

References:

DOD 6025.18-R, *DOD Health Information Privacy Regulation* (24 January 2003)

DOD 8580.02-R, *DOD Health Information Security Regulation* (12 July 2007)

Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996)

Personnel Reliability Program

The Personnel Reliability Program (PRP) is a program designed to ensure the highest possible standards of individual reliability in personnel performing duties associated with nuclear weapons systems and critical components. It is intended to prevent the unauthorized launch of a missile or aircraft armed with a nuclear weapon, or the unauthorized detonation of a nuclear weapon. Personnel in the PRP must be certified.

Responsibilities

- Wing commanders are responsible for the wing PRP. They serve as the reviewing official for all permanent decertification case files started by subordinate units. They also ensure base PRP meetings are conducted quarterly at the wing level.

- Group and unit commanders who control or have access to nuclear weapons, weapon systems, or critical components, and perform the actual PRP certification are certifying officials (COs) who certify and initiate decertification for their personnel. They may delegate this duty to a deputy or assistant. Certifying officials and their delegees must be certified in a PRP category equal to, or higher than the personnel they are certifying.

- Individuals in the PRP are subject to continuous evaluation of their reliability and are responsible for complying with the intent of PRP while away from their duty station (leave, TDY, etc.). Responsibility for ensuring continuous eligibility rests with each individual involved with PRP. Individuals in the PRP must monitor their own reliability. They must also notify the CO immediately of any potentially disqualifying information (PDI), either their own or that of co-workers.

Categories of PRP Positions

- Critical position: a position in which an individual is assigned nuclear duties where he or she has access and technical knowledge or can either directly or indirectly cause the launch or use of a nuclear weapon

- Controlled position: a position where an individual is assigned nuclear duties, which has access but no technical knowledge; controls access into areas containing nuclear weapons, but does not have access or technical knowledge; or is armed and assigned duties to protect and/or guard nuclear weapons

PRP Mandatory Selection Criteria

- Individuals selected and certified for the PRP must meet the following minimum criteria at all times:

  -- Physical competence and mental alertness

- -- Dependability, flexibility in adjusting to changes in working environment, good social adjustment, emotional stability, sound judgment
- -- Have the required security investigation and security clearance
- -- Have a positive attitude toward nuclear weapons duty and the PRP objectives
- -- Are U.S. citizens or U.S. nationals
- -- Favorable personnel security investigation, medical evaluation, personnel records review, and personal interview with CO
- -- Demonstrated and certified technical proficiency commensurate with nuclear-related duty position

Potential Disqualifying Information (PDI)

- Any of the following traits or conduct is PDI:
  - -- Alcohol abuse, or dependency alcohol-related incident
  - -- Drug abuse or dependency
  - -- Negligence or delinquency in performance of duty
  - -- Conviction or involvement in a serious incident
  - -- Medical condition prejudicial to reliable performance of duties
  - -- Poor attitude or lack of motivation
  - -- Suicide attempt and/or threats
  - -- Loss of confidence

Certifications

- A formal certification validates that an individual has been screened, evaluated, and meets the standards for assignment to PRP duties
- An interim certification limits access when an individual is placed in PRP and does not currently possess the required security investigation for formal certification but does have a security investigation adequate for interim clearance
- An administrative certification is granted when an individual does not currently hold a formal or interim certification for PRP duties and is identified for an assignment to a PRP position

Removal From PRP

- Members may be removed from PRP duties in one of three ways: suspension, temporary decertification, or permanent decertification

- Suspension

  -- Suspension is used to immediately remove an individual from PRP related duties (initially up to 30 days) without starting decertification action

  -- The individual is still considered reliable with regard to the PRP, but because of the circumstances, is not authorized to perform the nuclear related duties requiring PRP certification. The CO can use this time to research the facts to determine if an individual's reliability is impaired. However, a suspension should not be used in place of decertification when the facts and circumstances indicate unreliable behavior.

  -- The CO makes the final decision

  -- If the cause of the suspension lasts longer than 120 days, temporary or permanent decertification is required

- Temporary Decertification

  -- Temporary decertification is used to keep an individual from performing nuclear-related duties for up to 180 days when an individual's job performance or reliability is in question or impaired and suspension is not appropriate. The temporary decertification shall not normally exceed 270 days. However, the CO may extend period in 30-day increments up to 365 days.

  -- Any of the following four conditions shall result in temporary decertification: diagnosis as alcohol abuser/dependent; establishment of security information file; withdrawn access to classified information; withdrawn security clearance eligibility

  -- A temporary decertification shall not be used if the facts indicate permanent decertification is appropriate

- Permanent Decertification

  -- Permanent decertification is a result of a member having a disqualifying factor indicating the individual has questionable integrity or long-term impaired capability

  -- Any of the following conditions shall result in permanent decertification:

    --- The individual is diagnosed as a drug abuser or drug dependent

--- The individual is diagnosed as alcohol dependent and subsequently fails required aftercare program

--- The individual is being involuntarily discharged or removed for cause

--- The individual no longer meets the mandatory selection criteria (see list of criteria above)

--- The individual's security clearance eligibility has been revoked

--- The individual has used a drug that could cause flashbacks

--- The individual has been involved in drug trafficking, cultivating, processing, manufacturing, or sale of illegal or controlled drugs

-- A permanent decertification or disqualification may be reinstated provided there is documented evidence which clearly demonstrates that the disqualifying problem no longer exists and the individual concerned is otherwise qualified

References:

DOD 5210.42-R, *Nuclear Weapons Personnel Reliability Program (PRP)* (30 June 2006), Incorporating Change 1 (10 November 2009)

AFMAN 10-3902, *Nuclear Weapons Personnel Reliability (PRP)* (13 November 2006), Incorporating Change 1 (10 September 2008)

AFI 31-501, *Personnel Security Program Management* (27 January 2005)

AFI 91-101, *Air Force Nuclear Weapons Surety Program* (19 December 2005), AFGM1 (3 February 2010)

Lautenberg Amendment

The 1996 Domestic Violence Amendment to the Gun Control Act (referred to as the Lautenberg Amendment) makes it a federal offense for anyone convicted of a misdemeanor crime of domestic violence to ship, transport, possess, or receive firearms or ammunition. The DOD established policy for implementing this law to military personnel in a memorandum dated 27 November 2002. The Air Force established further implementation in a subsequent policy memorandum.

Definition Of Crime Of Domestic Violence

- An offense that has as its factual basis, the use or attempted use of physical force, or threatened use of a deadly weapon committed by:
  - -- A current or former spouse of the victim,
  - -- A parent or guardian of the victim,
  - -- Someone who has a child in common with the victim,
  - -- Someone who is cohabitating with the victim or who has cohabitated with the victim as a spouse, parent or guardian, or
  - -- Someone similarly situated as a spouse, parent, or guardian (such as a girlfriend/boyfriend relationship)
- The title of the crime does not have to be "domestic violence" if the underlying facts fit within the DOD definition

Qualifying Convictions

- Any state or federal conviction for a crime of domestic violence (misdemeanor or felony) qualifying as a conviction prohibiting the possession of a firearm under the Lautenberg Amendment
- Charges that are reduced or negotiated to a crime not entitled "domestic violence" may still qualify if the factual basis fits within the DOD definition
- A general or special court-martial conviction for a UCMJ offense meeting the DOD definition
- To qualify, the person convicted must have been represented by an attorney or affirmatively waived such right
- The following do not qualify as a conviction:
  - -- Convictions that are expunged or set aside

  - Convictions that are pardoned
  - Summary court-martial convictions
  - Nonjudicial punishment
  - Deferred prosecutions or similar alternate dispositions in civilian courts
- Local SJA will assist commanders in determining if there is a qualifying conviction

Air Force Implementation

- Annual briefings regarding the Lautenberg Amendment are required to be given by commanders
- Notices regarding the Lautenberg Amendment must be posted at all facilities where government firearms are stored, issued, disposed of, or transported
- Air Force members must complete a DD Form 2760, *Qualification to Possess Firearms or Ammunition*, under the following circumstances:
  - Annually for all personnel who work with or are required to qualify on firearm, destructive device, or ammunition
  - At the time of PCS, PCA, TDY, or other change in assignment
  - Prior to any weapons training
- Members with a qualifying conviction
  - Must lawfully dispose of all privately owned firearms and ammunition
  - Have 30 days to dispose of all firearms stored in the armory
  - Must immediately be denied access to all government firearms and ammunition, including MWR facilities (i.e. trap/skeet). Commanders must immediately retrieve any government-issued firearms and ammunition.
  - Are ineligible for all weapons training
  - May be subject to discharge for the underlying act of domestic violence or the underlying conviction but not simply because he/she is unable to possess a firearm
  - Members in career fields requiring firearms may be cross-flowed or retrained into an AFSC not requiring firearms

REFERENCES:

18 U.S.C. § 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 Military Personnel* (27 November 2002)

Memorandum, Under Secretary of Defense for Personnel and Readiness, Dep*artment of Defense* **(***DOD) Policy for Implementation of Domestic Violence Misdemeanor Amendment to the Gun Control Act for DOD Civilian Personnel* (27 November 2002)

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 February 2004)

Conscientious Objection to Military Service

Although military service is an obligation of citizenship, Congress recognized early that certain individuals and groups hold convictions against the use of force in any form.

General Policies

- A conscientious objector (CO) is a person who is opposed to participation in war in any form or the bearing of arms, by virtue of a firm, fixed and sincere belief as a result of religious training or similar belief system. Moral or ethical beliefs, even if not characterized by the holder as "religious," may provide sufficient grounds for CO status.
- The objection to war must be all-inclusive, not to specific wars or conflicts
- COs are classified as either Class 1-0 (a person who sincerely objects to participation in war in any form), or as Class 1-A-0 (a person who sincerely objects to participation as a combatant in war in any form, but whose convictions will permit him/her to serve in noncombatant status)
- Administrative discharge by the Secretary of the Air Force (SecAF) prior to completion of term of service is discretionary based on the facts of each case
- Applicants for CO status who are awaiting disposition of their case should be assigned to duties that conflict as little as possible with their beliefs
    - -- Applicants must comply with the normal requirements of military service and perform duties they are assigned
    - -- Applicants must comply with active duty or transfer orders in effect at the time of the application or subsequently issued
    - -- Those awaiting promotion after selection are put on withhold status, and once their application is approved, they become ineligible for promotion

Application Procedures

- Applicant has the burden of proof to show he/she is a CO
- He/she must establish by clear and convincing evidence the following:
    - -- He/she objects to participation in war in any form or the bearing of arms
    - -- The applicant's belief is honest, sincere, and deeply held
    - -- The applicant's belief is by virtue of religious training or other belief system akin to religion

  - The nature or basis of the claim falls under the definition of conscientious objection in AFI 36-3204, Attachment 1

- Clear and convincing evidence is a standard of proof that does not require proof beyond a reasonable doubt but does require proof more substantial than a mere preponderance of the evidence

- The applicant submits the application to the servicing military personnel flight (MPF)/ personnel relocation element, or to the immediate commander if serving in USAFR or ANG and not serving on extended active duty

- The application contains personal information required by AFI 36-3204, Attachment 2, and any other information deemed relevant by the applicant

- The information includes an extensive description of the individual's personal background, a thorough description of the individual's beliefs, and a listing of the private organizations to which the individual belongs

- MPF notifies the unit commander, reviews the personnel records of the applicant for pertinent information, and counsels the member about the effect of a CO determination on VA entitlements. MPF also schedules a chaplain and psychiatrist interview.

  - The chaplain personally interviews the applicant to determine sincerity and depth of conviction against war

  - The chaplain must submit a written report detailing conclusions and the reasons therefore, but does not make any recommendation concerning the application

  - A psychiatrist interviews the applicant to determine the presence of any mental disorder warranting medical or administrative disposition. Again, no recommendation on the application is made.

- The commander appoints a judge advocate as an investigating officer (IO) to interview the applicant under oath, assemble all the relevant material and interview other witnesses

  - The instruction contains procedures that permit the IO to hold a hearing on the matter, which the applicant may attend with an attorney

  - The IO prepares a report that states his/her conclusions concerning the applicant's beliefs and the reasons therefore, and recommendations concerning disposition of the case

  - The IO must give the applicant a copy of the final report and allow the applicant to submit rebuttal material within 15 calendar days after receiving the report

- Guidelines for approving or disapproving applications are found in Chapter 4 of AFI 36-3204

- -- Generally, the reviewing authorities must find that an applicant's moral and ethical beliefs oppose participation in war in any form and that the applicant holds these beliefs with the strength of traditional religious convictions
- -- Conscientious objection must be the primary controlling factor in the applicant's life
- -- A primary factor is the sincerity with which the applicant holds this belief. In evaluating applications, carefully examine and weigh the conduct of applicants, in particular their outward manifestation of their beliefs.

- The commander who appoints the IO makes a recommendation before forwarding the file up the chain
- SecAF or a designated representative makes the decision regarding CO status for officer applicants
- The final approval decision for enlisted personnel is by HQ AFMPC/DPMARS2 (active duty Airmen), ANGRC/DPM (ANG Airmen), HQ AFRES/CV (reserve unit Airmen), or HQ ARPC/CC (all other reserve Airmen)

References:

AFI 36-3204, *Procedures for Applying as a Conscientious Objector* (15 July 1994)

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), AFGM1 (13 April 2010)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

Homosexual Conduct

Department of Defense Policy

- Congress has determined homosexual conduct is incompatible with military service
- Homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct
- Homosexual conduct is the focus of the DOD policy, not homosexual orientation

Definitions

- Homosexual conduct is engaging in, attempting to engage in, or soliciting another to engage in a homosexual act or acts; a statement by the member that he or she is a homosexual or bisexual, or words to that effect; or marriage or attempted marriage to a person known to be of the same biological sex.
  - -- Homosexual act
    - --- Bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires
    - --- Bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts
  - -- Homosexual statements
    - --- Language or behavior that a reasonable person would believe was intended to convey a statement that the member is a person who engages in, attempts to engage in, has the propensity to engage in or intends to engage in homosexual acts.
    - --- Includes statements such as “I am homosexual,” “I am gay,” “I am lesbian,” or “I have a homosexual orientation”
  - -- Homosexual marriage or attempted homosexual marriage
- Propensity means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts

Inquiries

- Only a General Court-Martial Convening Authority (GCMCA) who is also a general officer can initiate a fact-finding inquiry into alleged homosexual conduct by an Air Force member. First sergeants, supervisors, and administrative officers do not have

the authority to conduct an inquiry except at the direction of a GCMCA who is also a general officer.

- Commanders authorized to initiate inquiries may personally perform an inquiry or appoint an inquiry officer (IO), but the appointee must be in the grade of O-5 or higher, or civilian equivalent

- Before recommending an inquiry, the commander must have credible information that a basis for discharge exists, i.e., the member has engaged in homosexual conduct. The commander must have his servicing staff judge advocate forward a report to AF/JAA and will keep the SAF and CSAF informed of the status of pending and completed cases.

  -- Credible information exists when the information supports a reasonable belief that a member has engaged in homosexual conduct. Credible information is analogous to "probable cause" in a search situation.

    --- It must be based on a credible source and be sufficiently specific so that a commander can make a reasonable determination that the member engaged in homosexual conduct

    --- The motives of the person making the report to the commander and the surrounding circumstances are relevant to the determination

  -- A commander makes the determination based on facts, not just a belief or suspicion

  -- If a member reports being threatened or harassed because he or she is labeled or perceived to be a homosexual, such information alone does not justify an inquiry into alleged homosexual conduct by the member reporting the threats or harassment

  -- Associational activities, such as frequenting gay bars, gay parades, and gay websites, do not support that the member has engaged in homosexual conduct and cannot be the basis for an inquiry

- Certain information cannot be considered in determining whether credible evidence exists to initiate an inquiry, including:

  -- Information protected by a privilege (attorney-client, clergy communications or psychotherapist-patient);

  -- Information provided to a medical professional in furtherance of medical treatment;

  -- Information provided to a public health official in the course of a public health inquiry;

  - Information provided by a member in the course of seeking professional assistance for domestic or physical abuse;
  - Information obtained during a security clearance investigation
- Inquiries solely to determine a member's sexual orientation are prohibited
- Inquiries are not required in every case and may be unnecessary
- Commanders are responsible for ensuring that inquiries are conducted properly
- Before interviewing the member whose conduct is in question, the member must be advised of the DOD policy on homosexual conduct and of Article 31, UCMJ, rights in appropriate cases
- The scope of any inquiry cannot be expanded by the commander or appointed IO beyond the specific conduct and individual or individuals about whom the IO is specifically tasked to inquire. Conduct forming the basis for separation of other members that comes to the attention of an IO cannot be used to expand the scope of an inquiry, but must be referred to the appropriate commander for consideration of initiation of a separate inquiry.
- A commander authorized to initiate an inquiry may do so upon belief that the member has engaged in homosexual conduct to avoid a military service obligation (service commitment, reassignment, deployment, etc.). The focus of the inquiry is the motivation for the conduct.
- Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. An informal fact-finding inquiry is limited to interviewing the member, persons reporting homosexual conduct by the member, individuals suggested by the member to be interviewed, and the member's immediate supervisory chain of command.
- Substantial fact-finding inquiries
  - Are broader than informal fact-finding inquiries
  - Are only initiated, if required, after informal fact-finding
  - Are rarely necessary
  - A commander can only initiate a substantial inquiry to determine whether a statement of homosexuality was made for the purpose of seeking separation from military service after a request, through the chain of command and the Vice Chief of Staff of the Air Force, has been approved by the Under Secretary of the Air Force

--- The request must include the following:

---- An explanation of why it is expected that the expanded inquiry will result in additional relevant evidence

---- Why the Air Force benefit in expanding the inquiry outweighs any foreseeable disadvantage of expanding the inquiry

Investigations

- Criminal investigations cannot be initiated solely to determine sexual orientation
- A prerequisite to initiation of an investigation is that a violation of the UCMJ has been committed. A statement of homosexuality does not violate the UCMJ nor do all homosexual acts (consensual holding hands, touching, caressing, etc.).
- Upon determining that there is credible information that a violation of the UCMJ has occurred, commanders may request an AFOSI or SFS investigation. DODI 5505.8 states that OSI commanders may decline to open an investigation if they determine the request lacks credible information that a violation has occurred or is not in keeping with established policy.

Separations

- When a commander determines that a member has engaged in homosexual conduct, the commander <u>must</u> either forward the case to a general officer GCMCA or make written findings that demonstrate how each of the statutory retention criteria (see below) are met. Such written findings must be forwarded to AF/JAA.
- If a commander authorized to initiate inquiries and/or separation action determines that a member has engaged in homosexual conduct, the commander may refuse to initiate separation action for homosexual conduct only if the commander further determines and makes written findings that (1) each of the statutory retention criteria (see below) are met or (2) the member engaged in homosexual conduct for the purpose of avoiding or terminating military service <u>and</u> separation is not in the best interest of the Air Force.

  -- The latter exception is generally limited to situations where the commander does not believe the member is a homosexual, but instead has engaged in a homosexual act to avoid or terminate service

  -- Determinations that result in retention of a member believed or known to have engaged in homosexual conduct must be immediately reported to AF/JAA.

- <u>Any</u> member processed for separation for homosexual conduct is entitled to present his or her case to an administrative discharge board or to waive a board hearing and leave the determination to the separation authority

- -- The board has an independent obligation to review the evidence presented by both the government and the member
- -- The board uses a "preponderance of the evidence" standard to arrive at its conclusions and make its recommendations
- -- The member is entitled to representation by a military defense counsel at no expense and/or to representation by a civilian attorney at his or her own expense
- -- The member can present evidence and call witnesses to show that he or she did not engage in homosexual conduct, or even if he or she did, to establish that he or she should be retained
- -- The separation authority makes the final decision

- A member will be separated for homosexual acts unless he or she can demonstrate by a preponderance of the evidence <u>all</u> of the following:
  - -- Such acts are a departure from the member's usual and customary behavior
  - -- Such acts under all the circumstances are unlikely to recur
  - -- Such acts were not accompanied by use of force, coercion, or intimidation
  - -- Under the particular circumstances, the member's continued presence in the Air Force is consistent with the interests of the Air Force
  - -- The member does not have a propensity or intent to engage in homosexual acts
- A statement of homosexuality creates a rebuttable presumption that the member engages in, attempts to engage in, or intends to or has a propensity to engage in homosexual acts. To avoid separation, the member must rebut by a preponderance of the evidence the presumption. Some or all of the following may be considered:
  - -- A statement under oath by the member that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts
  - -- Whether the member has engaged in homosexual acts
  - -- 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

- Only a GCMCA who is also a general officer is authorized to initiate an officer or enlisted discharge for homosexual conduct
- Only a GCMCA who is also a general officer is authorized to approve an enlisted discharge for homosexual conduct

Characterization of Discharge/Service

- The discharge will be deemed an entry-level separation if the member is in entry-level status (i.e. has less than 180 days of active duty service) and an under other than honorable conditions (UOTHC) characterization is not warranted
- The member's service will be characterized as honorable or as under honorable conditions (general) if the member is not in entry-level status and a UOTHC is not warranted
- UOTHC is authorized <u>only</u> when the homosexual act was performed:
  - -- By using force, coercion, or intimidation
  - -- With a person under 16 years of age
  - -- With a subordinate in circumstances that violate customary military superior-subordinate relationships
  - -- Openly in public view
  - -- For compensation
  - -- Aboard a military vessel or aircraft
  - -- In another location subject to military control under aggravating circumstances

Recoupment

- For monies the Government became obligated to pay before 1 April 2006,
  - -- A member separated for homosexual conduct may be subject to a recoupment of special pay, bonuses, and educational assistance if either
    - --- A UOTHC characterization is authorized or the conduct is punishable under the UCMJ, or
    - --- The member made a homosexual statement, engaged in a homosexual act, or married/attempted to marry someone of the same sex for the purpose of avoiding service

- For monies the Government became obligated to pay on or after 1 April 2006, the member will be subject to recoupment of any "unearned" special pay, bonuses, or educational assistance absent Secretarial waiver

- The administrative discharge board, or the separation authority when the board is waived, must make a specific written finding that recoupment is authorized under the facts of the case and then a separate written recommendation that recoupment should be effected

Security Clearance

- Sexual orientation alone is not a security concern

- Sexual behavior may be a security concern if it involves criminal offenses, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion (blackmail), or reflects lack of judgment or discretion (DOD 5200.2-R, *Personnel Security Program* (C3, 23 February 1996))

- Information regarding homosexual acts disclosed during a security background investigation may not be provided to military authorities for administrative or judicial actions, unless such acts were performed:

  -- By force, coercion, or intimidation

  -- With a person under 17 years of age

  -- Openly in public view

  -- For compensation or with an offer of compensation to another

  -- While on active duty or in a reserve component aboard a military aircraft or vessel or with a subordinate in violation of the customary military superior-subordinate relationship

Reporting Requirements

- When a commander receives information that may give rise to a homosexual conduct inquiry, his servicing staff judge advocate shall send a report to AF/JAA and will keep the SAF and CSAF informed of the status of pending and completed cases

Harassment

- All individuals must be treated with dignity and respect, free of threats and harassment

- Even though homosexual conduct is a bar to military service, harassment or threats are not acceptable responses to homosexual conduct

- Commanders must promptly investigate allegations of harassment or threats
- If a member reports being threatened or harassed because he or she is labeled or perceived to be a homosexual, such information alone does not justify an inquiry into alleged homosexual conduct by the member reporting the threats or harassment
- If a commander initiates an investigation into harassment or threats and information concerning homosexual conduct surfaces, the commander must carefully consider the source of information and the surrounding circumstances prior to recommending that an authorized commander initiate an inquiry into the homosexual conduct (i.e., credible information must exist)

References:

10 U.S.C. § 654

DODI 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction* (20 September 2005), Incorporating Change 1 (11 July 2007)

DOD 5200.2-R, *Personnel Security Program* (January 1987), Incorporating Through Change 3 (23 February 1996)

DODI 5505.8, *Defense Criminal Investigative Organizations and Other DOD Law Enforcement Organizations Investigations of Sexual Misconduct* (24 January 2005)

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), AFGM1 (2 April 2010)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), Incorporating Through Change 2 (31 July 2008), Certified Current (7 June 2010)

AFI 51-602, *Boards of Officers* (2 March 1994), Certified Current (5 May 2009)

AFPAM 36-3210, *Procedural Guide for Enlisted Administrative Discharge Boards* (1 November 1995)

Fitness Program

The goal of the Fitness Program is to motivate all members to participate in a year-round physical conditioning program that emphasizes total fitness, to include proper aerobic conditioning, strength/flexibility training, and healthy eating. As of 1 July 2010, AFI 36-2905, *Fitness Program* supersedes all guidance provided in AFI 10-248*, Air Force Fitness Program.* The Fitness Program applies to all Active Duty, Air Force Reserve and Air National Guard members.

Unit/Squadron Commander's Duties

- The unit/squadron commander's duties include, but are not limited to, the following:
  - -- Executing and enforcing the unit's fitness program and ensures appropriate administrative action is taken cases of non-compliance
  - -- Implementing and maintaining a unit/squadron physical training (PT) program, in accordance with applicable guidelines
  - -- Encourage members to participate in physical training of up to 90 minutes three to five times weekly
  - -- Prepare a written policy that describes the unit's fitness program and provide a copy of the written policy to the exercise physiologists or fitness program manager

Physical Fitness Standard

- Members will receive a composite score on a 0 to 100 scale based on the following maximum component scores:
  - -- 60 points for aerobic fitness assessment
  - -- 20 points for body composition
  - -- 10 points for push-ups
  - -- 10 points for crunches
- The following fitness levels are determined by a member's composite score:
  - -- Excellent (90 or above) and all component minimums met
  - -- Good (75 to 89.99) and all component minimums met
  - -- Unsatisfactory (under 75) and/or one or more component minimums not met

- Members will usually complete their fitness testing according to the following timelines:
  - -- Excellent: member must test within 12 months
  - -- Good score: Members are mandated to complete an official Fitness Assessment at a minimum of twice yearly
  - -- Unsatisfactory score must test within 90 days. Retesting is not recommended during the first 42 days after an unsatisfactory test.
  - -- Commanders may direct unofficial practice tests

Administrative and Personnel Actions

- Members are expected to be in compliance with Air Force fitness standards at all times. When members fail to comply with those standards (receive an Unsatisfactory Fitness Assessment (FA) score), they render themselves potentially subject to adverse action. Commanders should consult with their servicing Staff Judge Advocate before taking such action.
- Prohibited Actions: Commanders may not impose nonjudicial punishment (Article 15, UCMJ) solely for failing to achieve a Satisfactory fitness score
  - -- Upon receipt of a Medical Evaluation Board (MEB) permanent exemption, a member is not subject to adverse personnel action for inability to take the FA
  - -- While units may perform unofficial practice tests for diagnostic purposes, commanders will refrain from taking adverse action based solely on the results of these tests
- Authorized Actions: Unit CCs may take adverse administrative action upon a member's Unsatisfactory fitness score on an official FA
  - -- As appropriate, unit CCs will document and take corrective action for members' unexcused failures to participate in the FP such as failing to accomplish a scheduled FA, failing to attend a scheduled fitness appointment, failing to complete mandatory educational intervention or failing to maintain the required documentation of exercise while on the FIP
  - -- If adverse administrative action is not taken in response to an Unsatisfactory fitness score on an official FA, unit CCs will document in the member's fitness case file as to why no action is being taken. The lack of such CC documentation does not discount the testing failure as a basis in support of administrative discharge action.

-- A unit CC may initiate (enlisted members) or recommend (officers) administrative discharge of a member when:

--- The member has received an Unsatisfactory FA score following a conditioning period of at least 42 days after a previous Unsatisfactory FA score, i.e. the member has accrued the second of two consecutive Unsatisfactory FA scores; and;

--- The CC finds that the member failed to demonstrate significant improvement (as determined by the CC) despite the conditioning period; and;

--- Evaluation by a military health care provider (e.g., a physician, physician's assistant or nurse practitioner) has ruled out medical conditions precluding the member from achieving a passing score

-- Unit CCs shall make a discharge or retention recommendation to the Installation CC (or special/general court-martial convening authority in the member's chain of command) when an individual remains in the Unsatisfactory fitness category for a continuous 12-month period or receives four Unsatisfactory FA scores in a 24-month period. Prior to initiation of discharge action, a military medical provider must have ruled out medical conditions precluding the member from achieving a passing score.

Failing To Present A Professional Military Image

- Commanders must ensure members present a professional military image while in uniform
- Commanders may
  - -- Require individuals who do not present a professional military appearance (regardless of overall fitness assessment composite score) to enter the FIP
  - -- Schedule members for fitness education/intervention

References:

AFI 36-2905, *Fitness Program* (1 July 2010)

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), AFGM1 (2 April 2010)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), Incorporating Through Change 4 (18 March 2010)

Attachment:

Administrative and Personnel actions for failing to attain physical fitness standards

Administrative and Personnel Actions for Failing to Attain Physical Fitness Standards

This table is only illustrative and is not binding. Unit CCs exercise complete discretion in selecting responsive action(s). Commanders may use more than one action per failure. Recommend commanders consult with their local Staff Judge Advocate (SJA). Refer to the governing instructions to determine the correct form and procedures for each action.

Unsatisfactory Fitness Score Options	**1st Fail**	**2nd Fail**	**3rd Fail**	**4th+ Fail**
Verbal Counseling	Use anytime and as often as needed and in conjunction with other options below			
Letter of Counseling	X	X		
Letter of Admonition	X	X		
Defer Promotion (Enlisted)	X	X	X	X
Delay Promotion (Officer)	X	X	X	X
Limit Supervisory Responsibilities	X	X	X	X
Letter of Reprimand	X	X	X	X
Establish Unfavorable Information File (UIF)		X	X	X
Reenlistment Ineligibility		X	X	X
No Recommend for Promotion (Enlisted)		X	X	X
Remove Supervisory Responsibilities			X	X
Deny Voluntary Retraining			X	X
Deny Formal Training			X	X
Placement on Control Roster			X	X
Reenlistment Non-selection			X	X
Withhold Promotion (Enlisted)			X	X
Remove Promotion (Officer)			X	X
Administrative Demotion (Enlisted)				X
Administrative Separation				X
(ARC only) Transfer to Obligated Reserve Section or Non-obligated, Non-participating Ready Personnel Section				X

UNAUTHORIZED ABSENCE

Most forms of unauthorized absence, from simply being late for work ("failure to go"), to an extended absence without leave, are punishable under Article 86, Uniform Code of Military Justice (UCMJ). Airmen who intend to permanently abandon their military duties are deserters and are subject to prosecution under Article 85, UCMJ. There are certain requirements and considerations the unit must satisfy in handling cases involving an unauthorized absence.

- When an unauthorized absence is discovered, it is important to note the date and time
  - -- An absence of less than 24 hours is classified as a failure to go
  - -- When the absence continues longer than 24 hours, the member's unit must change the member's administrative status to "AWOL"
  - -- On the 31st day of continuous absence, the member's unit must change the member's status to "deserter"
  - -- Except as noted below, these actions must normally be taken even if the commander suspects that the absence may be legally excused. Consult AFI 36-2911, Table 1.1, for a comprehensive list of actions to be taken upon realization of an unauthorized absence.
  - -- Taking these administrative steps will not standing alone prove that the member has committed an unauthorized absence. The administrative steps will affect pay and allowances and put the servicemember's name on a database civilian law enforcement can access during routine stops.
- Regardless of the reason for the absence, if the commander's initial investigation reveals any indication that the absence results from an involuntary casualty rather than desertion or unauthorized absence, a status of Duty Status Whereabouts Unknown (DUSTWUN) may be appropriate. Consult AFI 36-3002, *Casualty Services*, the Military Personnel Flight (MPF), and the staff judge advocate (SJA) for advice in such cases.
- Under AFI 36-2911, Chapter 2 and Table 1.1, if the member reasonably appears to be absent without authority, the commander must:
  - -- Immediate Actions:
    - --- Immediately contact the MPF and inform them of the member's status
    - --- Immediately determine if the member meets any of the criteria under AFI 36-2911, para 1.5. Criteria include duty or travel restrictions, access to classified documents, request for asylum or residence in a foreign country,

uncompleted action for a previous AWOL, escaped prisoner, wanted for a serious UCMJ violation, or evidence of intent to remain away permanently.

---- If so, immediately change the member's status to "Deserter"

---- In cases involving national security, take all appropriate actions under para 2.2.7

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

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

-- After 24 hours of absence: Prepare an AF Form 2098, changing the absentee's status to either "AWOL" or "Deserter" as appropriate, and forward it to the MPF, with a copy to the local Finance Office. Consult your SJA.

-- On the third day of absence: Prepare and forward a 72 hour inquiry (IAW AFI 36-2911, para 2.2.3) to SFS and MPF and re-evaluate whether AFI 36-3002, *Casualty Services*, applies

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

-- On the 31st day of absence:

--- Notify MPF of the member's continued absence; retrieve dependent ID cards as required by AFI 36-3026(I), paras. 1.4.1.9 and 4.1

--- Ensure processing of DD Form 553 (MPF will assist in preparation) and decide (with SF and MPF help) to whom DD Form 553 should be sent

--- Initiate AF IMT 2098 changing status from "AWOL" to "Deserter"

--- Consult with SJA about filing court-martial charges

--- Prepare 31st day status report IAW AFI 36-2911, para 2.2.5

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

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

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

- United States authorities may apprehend absentees and deserters in foreign countries only when an international agreement with the country authorizes it or under an agreement with proper local authorities that does not violate an existing international agreement. See AFI 36-2911, para 3.2.3. Always consult the SJA in these cases.

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

References:

AFI 36-2911, *Desertion and Unauthorized Absence* (15 October 2009)

AFI 36-3002, *Casualty Services* (22 February 2010)

AFI 36-3026(I), *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (17 June 2009)

AFI 51-201, *Administration of Military Justice* (21 December 2007), Incorporating Change 1(3 February 2010)

Line of Duty Determinations

A Line of Duty (LOD) determination is an administrative tool for determining a member's duty status at the time an injury, illness, disability, or death is incurred. On the basis of the LOD determination, the member may be entitled to benefits administered by the Air Force, or exposed to liabilities. The key is the nexus between the injury, illness, disability, or death and the member's duty status.

Limits On Use of LOD Determination

- An LOD determination shall not be used as disciplinary action against a member
- An active duty member cannot be denied medical treatment based on an LOD determination. Moreover, an LOD determination does not authorize the United States to recoup the cost of medical care from the active duty member.
- An LOD determination may impact the following:
  - -- Disability retirement and severance pay
  - -- Forfeiture of pay
  - -- Extension of enlistment
  - -- Veteran benefits
  - -- Survivor Benefit Plan
  - -- Medical benefits and incapacitation pay for members of the Air Reserve Component (ARC)
  - -- Basic Educational Assistance Death Benefit

When LOD Determinations Are Required

- The LOD process must be initiated when a member, whether hospitalized or not, has an illness, injury, or disease that results in:
  - -- Inability to perform military duties for more than 24 hours
  - -- Likelihood of permanent disability
  - -- Death of a member. In every case where a member dies on active duty, at a minimum, an AF IMT 348 must be completed; an administrative determination is not sufficient in a case of death.

- -- Medical treatment of an ARC member regardless of the member's ability to perform military duties
- -- The likelihood of an ARC member applying for incapacitation pay

Possible LOD Determinations

- Existed Prior to Service (EPTS), LOD Not Applicable: Medical diagnosis determined that the death, illness, injury or disease, or the underlying condition causing it, existed before the member's entry into military service or between periods of service and was not aggravated by service
- In Line of Duty: Presumed unless disease, death, illness, or injury occurred while member was absent without authority (AWOA) or as a result of member's misconduct
- Not In Line of Duty, Due to Own Misconduct: A formal investigation determined that the member's illness, injury, disease, or death was proximately caused by the member's own misconduct (regardless of whether member was absent without authority)
- Not In Line of Duty, Not Due To Own Misconduct: A formal investigation determined that the member's illness, injury, disease, or death occurred while the member was absent from duty

Presumption of LOD Status

- An illness, injury, disease or death sustained by a member in an active duty status or in inactive duty training (IDT) status is presumed to have occurred in the line of duty. However, this presumption can be rebutted.

Types of LOD Determinations

- Administrative determinations are made by a medical officer. If the medical officer determines that the condition existed prior to service, the medical officer simply annotates the member's medical record with an entry of "EPTS, LOD Not Applicable." If the illness, injury, disease or death falls into one of the following conditions, the medical officer makes an administrative determination by finding the member's condition to be "in the line of duty:" incurred as a passenger in a common carrier or military aircraft; characterized as a hostile casualty; an illness or disease clearly not involving misconduct or caused by abuse of drugs or alcohol; or a simple injury which is not likely to result in permanent disability.
- Informal determinations are processed on an AF IMT 348 and initiated when an administrative determination is not appropriate. The commander investigates the circumstances of the case to determine if the member's illness, injury, disease, or death occurred while the member was absent without authority, or is due to the member's own misconduct.

- Formal determinations are initiated with an AF IMT 348, but also include an investigation report and a DD Form 261
  - -- Required to support a determination of "Not in Line of Duty"
  - -- Immediate commander will recommend a formal determination when the illness, injury, disease, or death occurred
    - --- Under strange or doubtful circumstances, or due to member's misconduct or willful negligence
    - --- While the member was absent without authority
    - --- Under circumstances the commander believes should be fully investigated
  - -- The commander forwards AF IMT 348 to the SJA for review for legal sufficiency

LOD and Misconduct Determinations For Various Situations

- See Attachment 5, AFI 36-2910, for appropriate guidance and rules. Some of these rules are based on historic precedents. For more in-depth research, check the Digest of Opinions of The Judge Advocate Generals of the Armed Forces.

References:

AFI 36-2910, *Line of Duty (Misconduct) Determination* (4 October 2002), Incorporating Through Change 2 (5 April 2010)

AFI 36-3002, *Casualty Services* (22 February 2010)

Disability Evaluation System

Commanders must constantly balance their concern for mission accomplishment with their concern for servicemembers' health and safety. Challenges can arise when servicemembers develop injuries, illnesses, and/or physical disabilities/limitations that impact their ability to perform their duties and/or deploy. To resolve these cases, the DOD has developed the Disability Evaluation System (DES) to ensure maximum utilization of personnel with injuries, illnesses, and/or disabilities/limitations while preserving and promoting the servicemember's health and well-being.

Profiles And Duty Limitations

- Servicemembers may develop health problems that degrade their ability to perform military duties without jeopardizing their health and safety. In such cases, health care providers must communicate appropriate medical recommendations regarding fitness for duty and/or duty limitations to commanders so that commanders are able to determine the optimum yet safe utilization of members in their charge.

- When a servicemember's health and/or ability to accomplish the mission are at risk due to health problems, health care providers must promptly convey this information to the commander. The AF IMT 469, *Duty Limiting Condition Report,* is the means of accomplishing this task. The AF IMT 469 includes, among other things, information concerning the health care provider's recommendations regarding specific duty limitations for servicemembers.

  -- Because commanders are ultimately responsible for their personnel, profiles must be timely, accurate, and unambiguous to help commanders make the best decisions for their personnel and their mission

  -- When a health care provider determines that a physical condition warrants a profile, one copy of the AF IMT 469 should be given to the member when he/she leaves the medical treatment facility, and another copy must be sent to the individual's unit commander

  -- Because commanders must know the fitness for duty status of their members, the HIPAA Privacy Rule allows for disclosures of health information to commanders. Information pertaining to fitness for duty may be released to commanders even without the servicemember's authorization; however, when the patient has not authorized the release, the release must be properly tracked by medical personnel.

Conflict Resolution

- In some situations, a commander may disagree with a health care provider regarding a servicemember's profile and/or recommended duty limitations

- The senior profile officer appointed by the Medical Group Commander (MDG/CC) consults with MAJCOM/SGPA when conflicts between patient interest and commander interest cannot be resolved locally. If there is a risk to the patient that the senior profile officer believes may not be fully realized by the unit commander, the wing commander will have the final authority to resolve the issue.

- Where a servicemember's profile renders him/her ineligible for deployment ("4T"), if the commander believes the benefit to the mission outweighs the potential risk to the member, the commander may consult with the MDG/SGP prior to deploying the member. High risk cases where there is an obvious or high degree of threat to a member's personal safety or health will require HQ AFPC/DPAMM consultation and approval.

Evaluation Boards

- The Medical Evaluation Board (MEB) is the first step in the Air Force for assessing members whose retainability is questionable due to health concerns/reasons

  -- The MEB is made up of three physicians appointed by the MTF/CC to determine whether the member should be returned to duty or whether the case should be referred to a Physical Evaluation Board (PEB)

  -- AFI 48-123V2, Attachment 2 lists numerous conditions that require MEB processing

- If a case is referred to a PEB, the servicemember's immediate commander must provide a statement describing the impact of the medical condition upon the member's ability to perform his or her normal military duties and/or deploy. In many cases, the commander's letter is considered to be very persuasive evidence and is accorded great weight by the PEB.

- The PEB may reach the following conclusions:

  -- Return to duty (with or without assignment limiting code)

  -- Separation/retirement (with or without benefits)

Relationship To Line Of Duty Determinations

- DES procedures should not be confused with Line of Duty (LOD) determinations

- Whereas DES procedures are used to determine whether health problems limit a servicemember's ability to perform his or her duties (and, ultimately, to remain in the Air Force), an LOD determination is an administrative tool for determining a servicemember's duty status at the time an injury, illness, disability, or death is incurred. On the basis of the LOD determination, the member may be entitled to benefits administered by the Air Force, or exposed to liabilities.

-- LOD determinations are discussed in depth elsewhere in this chapter

-- In many cases, LOD *and* DES procedures are warranted. For example, if a service-member sustains a serious neck injury during an off-duty sporting event, a LOD determination may be required to determine whether the servicemember was in the line of duty at the time of the injury (the results will impact the servicemember's benefits and/or obligations). Similarly, a profile may be required restricting the servicemember from deploying and/or participating in the physical fitness program (PEB/MEB may be warranted as well).

References:

DODD 1332.18, *Separation or Retirement for Physical Disability* (4 November 1996), Certified Current (1 December 2003)

DODI 1332.38, *Physical Disability Evaluation* (14 November 1996), Incorporating Change 1 (10 July 2006)

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

AFI 41-210, *Patient Administration Functions* (22 March 2006), AFGM1 (26 February 2010)

AFI 48-123, *Medical Examinations and Standards* (24 September 2009), Incorporating Change 1 (1 June 2010)

Officer Grade Determinations

While the grade at which an officer retires after serving at least twenty years is normally the highest grade held, federal law permits the Secretary of the Air Force to retire both active and reserve officers in a lower grade if their service has not been "satisfactory." This authority has been delegated to the Director, Air Force Review Boards Agency. In those cases where an officer's conduct or record raises questions as to the quality of his/her service in a particular grade, an officer grade determination (OGD) is required.

- When an officer applies for retirement, any commander in the officer's chain may initiate an OGD if there is evidence the officer's service in the higher grade has been less than satisfactory
- A commander must submit an OGD request through the MAJCOM if the officer has had a
  - -- Conviction by court-martial
  - -- Conviction by a civilian court for a crime involving moral turpitude or was sentenced to confinement for one year or more
  - -- Nonjudicial Punishment within two years of the application for retirement
- A commander may submit an OGD request through MAJCOM in other cases if he or she believes an OGD is appropriate. Factors to consider include, but are not limited to, the following:
  - -- Misconduct which has fallen short of a criminal conviction or Article 15 punishment
  - -- Letters of Reprimand
  - -- Unfavorable Information File
  - -- Control Roster Actions
  - -- Referral Officer Performance Report
- At the time an officer applies for retirement, the commander will review the officer's record to determine if any of the above conditions exist. If based on that review, the commander initiates an OGD.
  - -- The commander must notify the officer the OGD is being initiated and why
  - -- The officer is given ten calendar days to respond

- The commander then will make a recommendation regarding the officer's retirement grade. That recommendation must accompany the retirement application as it is forwarded to the MPF.
- For retirement in lieu of administrative or punitive action, notification must indicate that retirement in a lower grade may result
- OGD packages, including matters and documents submitted by the member, are forwarded through command channels to AFPC who sends the case file to the Air Force Review Boards Agency. It is reviewed by the Air Force Personnel Board (AFPB) at Andrews AFB, MD with a recommendation given to the Air Force Review Boards Agency Director.
- Any questions concerning officer misconduct, reporting requirements, or the appropriate administrative or judicial response to misconduct should be addressed through the servicing staff judge advocate or the military personnel flight

References:

10 U.S.C. § 1370

10 U.S.C. § 12771

AFI 36-3203, *Service Retirements* (8 September 2006), Incorporating Through Change 4 (1 March 2010)

AFI 36-2023, *The Secretary of the Air Force Personnel Council and the Air Force Personnel Board* (8 March 2007)

Tattoos/Brands, Body Piercing, and Body Alteration

The Air Force policy on tattoos/brands, body piercing, and body alteration is found in AFI 36-2903, Table 2.5. Failure to comply with the standards concerning tattoos/brands, body piercing, and body alteration is punishable under Article 92, UCMJ. Members not complying with these provisions are subject to disciplinary action and may be involuntarily separated.

Tattoos/Brands

- The following tattoos/brands are prohibited:
  - -- Unauthorized
    - --- Tattoos/brands that are any of the following:
      - ---- Obscene or advocate sexual, racial, ethnic, or religious discrimination
      - ---- Prejudicial to good order and discipline
      - ---- Of a nature to bring discredit upon the Air Force
    - --- Unauthorized tattoos are prohibited anywhere on the body, in or out of uniform, regardless of whether they can be covered by uniform items or not
  - -- Inappropriate
    - --- Tattoos/brands that
      - ---- Exceed one-fourth of the exposed body part; or
      - ---- Are above the collarbone and readily visible when wearing an open-collar uniform
    - --- Inappropriate tattoos/brands must be covered using current uniform items (e.g., long-sleeved shirt/blouse, pants/slacks, dark hosiery, etc.) or removed
- Tattoo removal
  - -- Members with an unauthorized tattoo/brand will have the tattoo removed at the member's expense. Covering the tattoo is not an option.
  - -- Members with an inappropriate tattoo/brand will cover it with a current uniform item or remove it
  - -- Depending on the circumstances, commanders may seek Air Force medical support for voluntary removal of inappropriate tattoos

- The member's commander determines on a case-by-case basis whether or not a tattoo/brand is unauthorized or inappropriate
  - -- Installation or higher commanders may impose more restrictive standards for tattoos/brands and body ornaments, on or off duty, in those locations where Air Force-wide standards may not be adequate because of cultural sensitivities or mission requirements
  - -- For example, in a foreign country where tattoos/brands or body ornaments are objectionable to host country citizens or at installations where members are undergoing basic military training, a commander may impose more restrictive rules for military members, even off duty and off the installation

Body Piercing

- Members are prohibited from attaching, affixing, or displaying objects, articles, jewelry, or ornamentation through the ear, nose, tongue, or other exposed body part (which includes visible through the clothing), when:
  - -- Wearing a military uniform
  - -- Performing official duty in civilian attire
  - -- Wearing civilian attire on a military installation
- Females in uniform or in civilian clothes while on duty may wear one small spherical, conservative diamond, gold, white pearl, silver pierced or clip earring per earlobe; the earrings in both earlobes must match and the earrings must fit tightly without extending below the earlobes
- In civilian clothes while off duty but on a military installation, females may wear conservative earrings within sensible limits
- By implication, the policy allows males to wear earrings when in civilian clothes while off duty and off the military installation, but <u>not</u> on the military installation
- Installation or higher commanders may impose more restrictive standards for tattoos/brands and body ornaments, on or off duty, in those locations where Air Force-wide standards may not be adequate because of cultural sensitivities or mission requirements
  - -- For example, in a foreign country where tattoos/brands or body ornaments are objectionable to host country citizens or at installations where members are undergoing basic military training, a commander may impose more restrictive rules for military members, even off duty and off the installation

- Situations may arise where a commander may restrict the wear of even nonvisible body ornaments
  - These situations include any ornamentation that may interfere with the performance of the member's military duties
  - The factors to consider when making this determination include (but are not limited to) impairing the safe and effective operation of weapons, military equipment or machinery; posing a health or safety hazard to the wearer or others; and interfering with the proper wear of special or protective clothing or equipment
- Commanders should consult with their servicing staff judge advocate prior to taking action

Body Alteration/Modification

- Members are prohibited from altering or modifying their bodies if the alteration or alteration
  - Is intentional; and
  - Results in a visible, physical effect that detracts from a professional military image
- Examples include, but are not limited to, tongue splitting or forking; tooth filing; and acquiring visible, disfiguring skin implants

References:

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (2 August 2006) Incorporating Change 1 (6 August 2007), AFGM1 (17 November 2009)

AFI 36-2002, *Regular Air Force and Special Category Accessions*, Attachment 2 (7 April 1999), Certified Current (17 February 2009)

CHAPTER EIGHT: PERSONNEL ISSUES FOR THE COMMANDER—FAMILY AND NEXT OF KIN

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Family Member Misconduct

Installation commanders must constantly try to resolve difficult problems arising from family member misconduct. The installation commander is responsible for maintaining good order and discipline and protecting Air Force resources, yet has little authority when it comes to punishing civilians in general, and family members in particular. Nonetheless, there are certain actions available to address family member misconduct.

Commander Responsibilities and Options

- Administrative Actions
  - -- Suspend or revoke privileges
    - --- Driving suspension may be mandatory in certain circumstances (e.g., drunk driving)
    - --- BX/Commissary
    - --- MWR facilities
    - --- Commercial solicitation
  - -- Terminate military family housing
    - --- Requires 30-days written notice
    - --- Air Force pays for the move
  - -- Debarment
    - --- 18 U.S.C. § 1382 makes it a crime to enter the installation after previously being debarred
    - --- Debarment should be in writing, setting forth the specific reasons for debarment. Debarment may be indefinite, but set time limits are recommended.
    - --- Must still provide access to medical treatment if authorized and available
- Criminal actions
  - -- Criminal actions depend upon the jurisdiction of the base
  - -- If the base is under exclusive federal jurisdiction, family members may be prosecuted in federal magistrate court. This is a federal prosecution and potentially conviction.

-- If the base has concurrent jurisdiction, either federal court or state court may be the proper forum for prosecuting family members. Several states are very possessive of their jurisdiction over juveniles. Refer this issue to your staff judge advocate. Some bases have negotiated memoranda of understanding with state juvenile authorities to determine prosecution of such cases.

-- If the base has only proprietary jurisdiction, the state retains the authority to prosecute family member misconduct (involving only state crimes) occurring on the installation. Any family member misconduct should be referred to the local authorities for prosecution.

-- Some installations have established programs for handling juvenile misconduct. Often called Juvenile Correction Boards, these boards consider juvenile cases and recommend to the commander how to handle the matter.

References:

18 U.S.C. § 1382

DODI 6055.04, *DOD Traffic Safety Program* (20 April 2009), Incorporating Change 1 (2 April 2010)

AFI 31-204, *Air Force Motor Vehicle Traffic Supervision* (14 July 2000), Incorporating Change 1 (20 July 2007)

AFI 32-6001, *Family Housing Management* (21 August 2006), Incorporating Change 3 (24 October 2008)

AFI 36-3026(I), *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (17 June 2009)

AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (1 June 1998)

Removal from Base Housing

- The Air Force prefers that military personnel retain their assigned family housing for the duration of their tour at the installation unless there are reasons that justify termination
- Military personnel may be required to terminate occupancy of family housing when:
  - -- The conduct or behavior of the member or dependent family member is contrary to accepted standards or is adverse to military discipline
  - -- The member or dependent family members are responsible for willful, malicious, or negligent abuse or destruction of property
  - -- The member fails to comply with the Air Force family child care program
- Cases involving early termination must be fully documented and should be retained on file for a minimum of one year. An involuntary move from military family housing is at government expense; however, partial dislocation allowance is not payable. Commanders are authorized to terminate housing for the above reasons with 30-days written notice to the member. Basic due process probably requires allowing the member the right to respond (orally/in writing) before the commander makes his or her decision.

References:

AFI 32-6001, *Family Housing Management* (21 August 2006), Incorporating Through Change 3 (24 October 2008)

AFI 34-276, *Family Child Care Programs* (1 November 1999)

Spouses' Clubs

The Role of Spouses' Clubs

Officer or NCO Spouses' Clubs are private organizations that the installation commander may authorize to operate on base when he or she concludes the organization will make a positive contribution to the lives of base personnel.

Sources of Authority

- Because spouses' clubs are private organizations, it is important to remember these organizations are composed of people "acting outside the scope of any official position they may have in the federal government"
  - -- Unlike the Air Force and other instrumentalities of the federal government, which have distinct legal and regulatory systems of command, spouses' clubs have no formal lines of authority interconnecting the various base clubs
  - -- Many of the activities that spouses' clubs engage in are subject to state and federal laws and regulations
  - -- They are bound by the terms of their constitutions and bylaws
- To operate on Air Force installations, spouses' clubs, like other private organizations, must comply with AFI 34-223, governing the basic responsibilities, policies, and practices of private organizations. Further, AFI 34-223 defines and classifies private organizations.
  - -- It provides policy for their establishment and gives guidance on how they may operate
  - -- It sets out responsibilities for commanders, their staffs, and members of private organizations located on Air Force installations

Restrictions On Spouses' Clubs

- Private organizations are prohibited from using in its title or letterhead the name or seal of the Department of Defense, including the acronym "DOD." They are also prohibited from using the name, abbreviation, or seal of any military department or service. Furthermore, private organizations may not use the seal, insignia, or other identifying device of the local installation.
- Private organizations are prohibited from engaging in discrimination in membership or hiring based on age, race, religion, color, national origin, disability, ethnic group, or gender

- Spouses' clubs must not engage in activities that duplicate or compete with any activities of the Army and Air Force Exchange Service or any other nonappropriated fund instrumentality

- With the exception of thrift shop sales of used clothing and other used merchandise, private organizations are generally prohibited from engaging in frequent or continuous resale activities and may not operate amusement or slot machines

  -- Continuous operation of a thrift shop requires specific approval of the installation commander (or designee)

  -- Clubs must get specific permission from the installation commander (or designee) to conduct bake sales, carnivals, and other occasional sales for fundraising purposes

  -- If a club is planning any such fundraising activity, it should first get written permission from the installation commander (or designee)

- Private organizations are prohibited from soliciting funds for their organization on base

- The instruction specifically prohibits games of chance, lotteries, raffles, or other gambling activities except under limited circumstances. Raffles that comply with city, county, state, federal (and/or international) law and that are conducted infrequently for the benefit of DOD personnel and their family members as a community are permitted when such requests have been reviewed by the staff judge advocate and have been authorized in advance by the installation commander (or designee).

References:

AFI 34-223, *Private Organizations (PO) Program* (8 March 2007), Certified Current (28 May 2009)

AFI 36-3101, *Fundraising within the Air Force* (12 July 2002)

Family Day Care Homes

The purpose of establishing a family child care program on an Air Force installation is to make child care available to military members so that they can more successfully perform their military mission, secure in the knowledge that their children's safety, health, and well-being are protected.

Licensing Requirements

- Any individuals caring for other families' children a total of more than 10 hours a week on a regular basis must be licensed to provide care in on-base quarters
  - -- The requirement to be licensed is computed by multiplying the number of hours the provider offers care on a regular basis by the number of children in care
  - -- This requirement does not apply to:
    - --- Individuals who occasionally provide care for a friend or neighbor
    - --- Individuals providing babysitting on an occasional basis for other families
    - --- Teenagers doing evening or weekend babysitting for families
    - --- Child care provided in the parents' own home
    - --- Parent day care cooperatives
    - --- Temporary full-time care of a child during a parent's absence for temporary duty or deployment by the person listed on the AF IMT 357, *Family Care Certification*
- Those who wish to be licensed do so must submit a completed AF IMT 1928, *Family Day Care License Application*
- If the county, state, or country in which the family day care home is located requires individuals that provide care in their home to be licensed, certified, or registered, family day care providers must have these approvals
- Applicants' homes must be inspected prior to receiving a license

Requirements to Become A Provider

- Applicants must:
  - -- Be at least 18 years of age
  - -- Have the ability to read, speak, and write English

- -- Be physically and mentally capable of providing care
- -- Be willing and able to complete the training required of family child care providers
- -- Be willing to agree in writing to the requirements for family child care providers
- -- Be able to obtain the required insurance coverage

Prohibitions Against Licensing

- Applicants will not be licensed if:
  - -- They have had their family child care license revoked on another military installation or by a county, state, or country unless there is evidence to suggest the reasons why their license was revoked would not be a factor in future home child care operations
  - -- They or any of their household members have been arrested for or convicted of child abuse or neglect, a criminal act involving violence, or other acts which would make them unsuitable for caring for children
  - -- They or any of their household members have a history of domestic violence or mental or physical illness that would suggest they are not suitable for caring for children
  - -- They or any of their household members have been the perpetrator in a substantiated case of child abuse or neglect
  - -- They are active duty members
- A provider can care for no more than six children including the provider's own children under the age of eight at one time
- A provider may not care for more than two children under two years of age including the provider's own children

Suspensions and Revocations

- <u>The license of a family child care provider will be suspended if:</u>
  - -- They are under investigation for child abuse or neglect
  - -- They have a household member who is under investigation for child abuse or neglect
  - -- They are under investigation for a criminal act or have a household member under investigation for a criminal act

- They have life-threatening deficiencies in their homes
- They do not correct deficiencies identified in monthly inspections
- They have a long-term communicable illness that could affect the health of children
- They are experiencing extreme stress as a result of some unexpected personal or family situation

- The license of a family child care provider will be revoked if:
  - They have committed substantiated child abuse or neglect
  - They have a household member who has committed substantiated child abuse or neglect
  - They have been found to have a history of substantiated child abuse or neglect
  - They exhibit a pattern of using inappropriate guidance techniques
  - They exhibit a pattern of non-compliance with Air Force requirements for family child care homes
  - They have committed a criminal act or have a household member who has committed a criminal act that impacts their ability to provide in-home child care
  - They do not correct life-threatening deficiencies
- The support group commander or wing commander has the final authority and responsibility for suspending and revoking family child care licenses

General Program Rules

- After a provider is approved, they will be subject to monthly, unannounced home visits
- Providers are required to report any suspected abuse or neglect to the family advocacy office and family child care coordinator
- Providers are not permitted to use negative punishments such as harsh verbal direction, shaming, belittling, spanking, hitting, arm-twisting, or withholding food or drink
- Each family day care provider must have at least $300,000 personal liability insurance before accepting children for care and automobile liability insurance if children are transported in a vehicle

Reference:

AFI 34-276, *Family Child Care Programs* (1 November 1999)

Child Development Programs

Installation Commander Responsibilities

- Installation commanders are charged with (1) establishing child development programs on the installation to provide child care for employed active duty and DOD civilian parents of children from six weeks to six years of age; (2) making resources available to make child care services affordable; and (3) ensuring children's health, safety, and well-being is protected while they are in child development programs

- The administration of child development programs is highly regulated. For example, AFI 34-248, *Child Development Centers*, establishes very detailed rules governing, among others, the following topics: facilities and equipment, fire protection, curriculum, staff-to-child ratios, nutrition and food service, child abuse protection, health, and safety.

- Short-term hourly care, extending no longer than one hour before the start and one hour after the end of the function for which the care is being offered, can be made available if family child care providers or another Services program, such as the youth program, are otherwise unavailable

- As an alternative to the child development center (CDC), each installation with military family housing must have a procedure for approving individuals to provide family child care in on-base quarters on the installation. These providers often offer child care for extended hours for military members who work a swing shift or night shift and for special needs children.

  -- Program oversight is provided by the family child care panel

  -- Rigid requirements are in place to ensure providers are qualified, licensed, and insured

  -- Strict guidelines are maintained to ensure protection of children's health, safety, and well-being are protected

AIDS & HIV Issues

- HIV-positive children may be enrolled when it is appropriate for their health, neurological development, behavior, and immune status. Do not require routine screening of children for HIV prior to program entry.

- The CDC director must inform only those with a need to know about the HIV-positive child's condition. This does not usually include other staff in the center or the parents of the other children enrolled.

- HIV-positive individuals may be employed in child care programs and HIV-positive individuals may be approved as family child care providers unless their care would endanger their health or that of others
- Persons with AIDS (acquired immune deficiency syndrome), or persons with family members exhibiting symptoms of AIDS, may not be employed in child care or approved as family child care providers

References:

AFI 34-248, *Child Development Centers* (1 October 1999)

AFI 34-276, *Family Child Care Programs* (1 November 1999)

Summary Court Officers

For deceased active duty Air Force members (and other entitled individuals), the Air Force collects, safeguards, and promptly disposes of their personal property and personal effects. The installation commander appoints a summary court officer (SCO) to perform these duties in accordance with AFI 34-244, *Disposition of Personal Property and Effects*. For deceased DOD civilians, see AFI 34-244, para 4.4, and AFI 36-809, *Civilian Survivor Assistance*.

- Personal effects: Any personal item, organizational clothing, or equipment physically located on or with the remains. Some examples of personal effects include eyeglasses, jewelry, wallets, insignia, and clothing.
- Personal property: All of the other personal possessions of the decedent. Some examples of personal property include household goods, mail, personal papers, and privately owned vehicles. Personal property does not include real property except for any debts associated with real property.
- Prioritized list of recipients to receive personal property and personal effects
  - -- Surviving spouse or person designated by spouse
  - -- Children in order of age. If the recipient is a minor, forward the property as instructed by the minor's surviving parent or guardian.
  - -- Parents in order of age. If parents divorced or legally separated while the deceased was a minor, then the recipient is the custodial parent.
  - -- Siblings in order of age
  - -- Next of kin of the deceased
  - -- A beneficiary named in the will of the deceased
- Handling and disposing of personal effects
  - -- The mortuary officer (MO) inventories, cleans, and secures the personal effects
  - -- The SCO collects and disposes of any organizational clothing and equipment
  - -- Once the MO ensures the authorized recipient has been officially notified of the death, the MO asks the authorized recipient to provide instructions for disposing of the personal effects
  - -- The MO may only destroy personal effects after receiving written authorization by the authorized recipient

- Handling and disposing of personal property. The SCO:
  - -- Obtains property disposition instructions and the name and contact information of the authorized recipient from the MO
  - -- Corresponds with the authorized recipient
  - -- Places at least two death announcements in the base bulletin and/or newspaper asking anyone with a claim for or against the estate to step forward
  - -- Inventories all property on AF IMTs 1122 and 1122A
  - -- Promptly gathers the uniform/clothes needed for burial and gives to the MO
  - -- Removes any questionable items and determines the disposition of this property based on criteria in AFI 34-244
  - -- Properly disposes of military ID cards, documents, mail, and personal papers
  - -- Properly disposes of funds and negotiable instruments
  - -- Properly ships and stores items
  - -- Properly disposes of property in situations when an authorized recipient is not found
  - -- Closes the summary court file

References:

AFI 34-244, *Disposition of Personal Property and Effects* (2 March 2001)
AFI 36-809, *Civilian Survivor Assistance* (1 July 2003)
AFI 36-3002, *Casualty Services* (22 February 2010)

Disposal of Personal Property

Personal property of Air Force members and employees, as well as residents and visitors on Air Force installations, can come into the custody or control of the Air Force for a variety of reasons: death, capture, missing in action, incompetency, absence without leave, desertion, medical evacuation, loss, abandonment, or a failure to claim. The Secretary of the Air Force is authorized to dispose of such property pursuant to 10 U.S.C. §§ 2575 and 9712.

Special procedures are established in AFI 34-242, *Mortuary Affairs Program*, and AFI 34-244, *Disposition of Personal Property*, for disposition of property of deceased, missing, captured, or detained members, including a detailed method for determining the next of kin entitled to receive the property.

For Deceased Members

- A base mortuary officer (MO) is responsible for collecting, cleaning, inventorying, and safeguarding property until the appointment of the summary court officer (SCO)
- A SCO is normally appointed by the installation commander to continue to collect, inventory, and safeguard the property. The SCO will also dispose of the property.

For Missing, Detained, and Captured Persons

- The MO secures and holds the property for 30 days or until the member's status is changed from missing to detained or captured
- If either (1) the missing member's status is changed to detained or captured, or (2) there is no change in status after 30 days, then the property is released to the SCO
- If the missing member returns, the property is released to the member
- The SCO secures, inventories, and disposes of the property to those authorized to receive it in the event of the member's death

References:

10 U.S.C. §§ 2575 and 9712

AFI 34-242, *Mortuary Affairs Program* (2 April 2008), Incorporating Change 1 (30 April 2008)

AFI 34-244, *Disposition of Personal Property and Effects* (2 March 2001)

AFI 34-1101, *Assistance to Survivors of Persons Killed in Air Force Aviation Mishaps and Other Incidents* (1 October 2001)

CHAPTER NINE: THE AIR FORCE LEGAL ASSISTANCE PROGRAM

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Overview of Legal Assistance Program

Under 10 U.S.C. § 1044, the armed services may provide legal assistance to eligible beneficiaries concerning personal, civil legal problems subject to the availability of legal staff resources. Legal assistance in the Air Force is provided in accordance with AFI 51-504.

Legal Assistance Program Structure

- Staff judge advocates (SJA) make every effort to satisfy all legal assistance needs. However, the legal assistance is contingent upon SJAs local legal resources and expertise. The Air Force has two categories of service, with priority given to mobility and deployment related legal assistance.
    - -- Mobility/deployment-related legal assistance: ensures the legal difficulties of military members do not adversely affect command effectiveness or mission readiness. Not determined solely by the subject matter, but by the relationship between command readiness and solving the member's specific legal issue.
    - -- Non-mobility/deployment-related legal assistance: not specifically defined in the instruction; however, it is limited to personal, civil legal problems. Base legal offices will provide non-mobility-related legal assistance as resources and expertise permit, as determined by the SJA.
- Eligibility for Legal Assistance
    - -- Active duty members, including reservists and guardsmen on federal active duty under Title 10 of the U.S. Code, and their dependents who are entitled to an ID card
    - -- This includes Air Reserve component members performing Active Guard/Reserve (AGR) tours
    - -- Members of reserve components not otherwise covered following release from active duty under a call or order to active duty for more than 30 days for a period of time equal to twice the length of order to active duty. Dependents entitled to an ID card are eligible during the same time period.
    - -- Retirees and their dependents entitled to an ID card
    - -- Civilian employees stationed outside the U.S. and its territories and their family members who are entitled to an ID card and reside with them
    - -- Reservists and National Guard not on Title 10 status, but subject to federal mobilization in an inactive status, are eligible for legal assistance for mobility/deployment-related legal assistance

- -- DOD civilian employees and contractors deploying to or in a theater of operations for contingencies or emergencies shall be furnished assistance with wills and powers of attorney IAW DODI 1400.32 or DODI 3020.37
- -- Foreign military personnel may be provided legal assistance in limited circumstances for specific matters

- Legal Assistance Provided
  - -- Wills, living wills, powers of attorney, and notary service
  - -- Adoptions
  - -- Domestic relations
  - -- Servicemembers Civil Relief Act (SCRA) and veterans' reemployment rights issues
  - -- Casualty affairs
  - -- Dependent care issues, including family care plans
  - -- Financial responsibilities
  - -- Landlord-tenant and lease issues, including privatized housing
  - -- Consumer affairs
  - -- Tax assistance
  - -- Other issues deemed connected with personal civil legal affairs by The Judge Advocate General, the major command staff judge advocate (SJA), the numbered air force SJA, the base SJA, or the commander

Matters Outside The Scope of The Program

- The following are specifically considered outside the scope of legal assistance:
  - -- Business or commercial enterprises, except in relation to the SCRA
  - -- Criminal issues
  - -- Standards of ethical conduct issues
  - -- Law of armed conflict issues
  - -- Official matters in which the Air Force has an interest, such as the Reports of Survey program
  - -- Legal concerns or issues raised on behalf of another person

- -- Private organizations
- -- Representation of a client in a civilian court or administrative proceeding
- -- Drafting or reviewing real estate sales or closing documents, separation agreements, divorce decrees, or inter vivos trusts unless the SJA determines an individual attorney within the office has the expertise to do so

Ethical Responsibilities

- Information received from a client during legal assistance, and documents relating to the client are legally confidential and privileged
  - -- Privileged information may be released only with the client's express permission, pursuant to a court order, or as otherwise permitted by the Air Force Rules of Professional Responsibility
  - -- Disclosure may not be lawfully ordered by any superior military authority
- If a commander is contacted by a legal assistance attorney on behalf of a client, e.g., regarding a member's failure to provide financial support to family members, the commander should understand the legal assistance officer is representing the interests of that particular client
  - -- If the commander needs advice concerning the matter, he or she should contact the SJA
  - -- The SJA represents the interests of the Air Force, unlike the individual legal assistance officer who primarily represents the interests of the particular legal assistance client
- Referral: Due to the scope and limitations of the program, as well as the particular needs of the client, it is often necessary to refer clients to other sources, such as a civilian attorney (through the local bar referral service), the area defense counsel, chaplain, EO counselor, military personnel flight, family advocacy or the family support center

References:

10 U.S.C. § 1044

DODI 1400.32, *DOD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures* (24 April 1995)

AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs* (27 October 2003), Interim Change 1 (21 October 2008)

AFPD 51-5, *Military Legal Affairs* (27 September 1993)

TJAG Special Subject Letter 2003-3, *Legal Assistance for Foreign Military Personnel and Dependents* (4 September 2003)

TJAG Special Subject Letter 2004-6, *Legal Assistance for Privatized Housing Tenants* (4 August 2004)

Notaries

Many important documents should be or are required by law to be notarized. Notarization demonstrates that the person who signed the document is in fact the person who is required to sign the document, and can also confirm that the person made an oath as a part of executing the document.

Eligibility For Air Force Notary Service

- Personnel eligible for notary service executed under Title 10 of the U.S. Code are:
  - -- Members of the armed forces
  - -- Other persons eligible for legal assistance under 10 U.S.C. § 1044 or other regulations of the DOD, to include AFI 51-504
  - -- 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 UCMJ outside the United States

Persons with notary authority

- Under 10 U.S.C. § 1044a and Air Force instructions, the following individuals have the general powers of a notary public and of a consul of the United States in the performance of all notary acts:
  - -- Judge advocates on active duty
  - -- Reserve judge advocates at <u>all</u> times, not just when on active duty or performing inactive duty training
  - -- Civilian attorneys serving as legal assistance attorneys
  - -- Adjutants, assistant adjutants, and personnel adjutants, including Reserve members on active duty or performing inactive duty training
  - -- Enlisted paralegals, E-3 or higher, on active duty, or those Reserve component members performing inactive duty training
  - -- Commissioned officers or master sergeant and above stationed at geographically separated units (GSUs) or remote locations where no judge advocate or paralegal notary is assigned, who have been designated in writing by the GSU's servicing general court-martial convening authority staff judge advocate

Special Rules For Certain Military Instruments

- 10 U.S.C. §§ 1044b, 1044c, and 1044d, provide for the execution of military powers of attorney, military advance medical directives (commonly referred to as a "living will") and military testamentary instruments (commonly referred to as a "will"). These documents:
  - -- Are exempt from any requirement of form, formality, or recording that is required under the laws of a state
  - -- Military powers of attorney and advance medical directives, but not wills, are also exempt from any state requirements of substance
  - -- Shall be given the same legal effect as powers of attorney, living wills, and wills prepared and executed in accordance with the laws of the state concerned. Military advance medical directives are not enforceable in states that otherwise do not recognize living wills.
- All other documents, notarized under the authority of 10 U.S.C. § 1044a, are subject to state law as to form, substance, formality or recording

Notary Procedures and Guidelines

- Notary procedures and guidelines include:
  - -- Personnel signing documents as a notary under 10 U.S.C. § 1044a must:
    - --- Specify date and location and list title and office
    - --- Use an inked stamp or a raised seal that contains a cite to 10 U.S.C. Section 1044a, and the identifiers "U.S. Air Force" and "Judge Advocate"
    - --- Verify the identity of each person whose signature is to be notarized, usually with an ID card
    - --- Administer an oath for any "sworn" document
    - --- Maintain a personal notary log that remains with the individual notary and which includes each signer's name and signature, type of document, date, and location
  - -- Personnel signing documents as a notary under 10 U.S.C. § 1044a must <u>not</u>:
    - --- Accept any fees for the performance of a notarial act
    - --- Certify a document as a true and accurate copy unless they are the custodian of the original. Only the custodian of the original document can create "certified" copies.

References:

10 U.S.C. § 1044

10 U.S.C. § 1044a

10 U.S.C. § 1044b

10 U.S.C. § 1044c

10 U.S.C. § 1044d

AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs*, Chapter 2 (27 October 2003), Interim Change 1 (21 October 2008)

Preventive Law Program

The Air Force preventive law program's purpose is to educate military members and their families on legal issues in order to allow them to focus upon mission requirements, to prevent legal problems from occurring, and to reduce the time and resources needed to correct legal problems when they do occur. The program includes information on all legal matters, not just legal assistance issues.

Program Emphasis and Content

- Every base must have a preventive law program that includes, as a minimum:
  - -- Mobilization and Deployment Preparation: Educating members on personal legal needs for mobility readiness, such as the importance of preparing wills and powers of attorney
  - -- Commander and First Sergeant Awareness: Educating commanders and staff agencies on the full range of legal services provided by the legal office and on all legal matters affecting command
  - -- Promote Service Member Awareness: Educate base populace on the importance of considering the legal consequences of their actions
  - -- Identify Common Legal Problems and Novel Legal Concerns: Maintaining vigilance to identify new legal concerns such as local consumer scams

How The Preventive Law Program Works

- The program is administered through JA functional channels and its scope at a given base depends on the available resources of the base staff judge advocate and the judge advocate appointed as the base preventive law officer. Rather than focusing on individual legal assistance clients, the program consists of an aggressive base-wide education program. Examples of activities that are part of the preventive law program include:
  - -- Conducting oral presentations at commander and first sergeant seminars, commanders' calls, staff meetings, base committee meetings, and newcomers' orientations
  - -- Submitting articles for base newspapers, daily bulletin notices, or unit bulletin boards; preparing handouts or pamphlets on topics of interest for distribution at the legal office or other appropriate offices, such as the family support center
  - -- Base radio, intranet, or television programs
  - -- Presenting legal training workshops for law enforcement personnel

References:

AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs*, Chapter 3 (27 October 2003), Interim Change 1 (21 October 2008)

AFPD 51-5, *Military Legal Affairs* (27 September 1993)

Wills and Powers of Attorney

To ensure mission readiness, members must effectively manage their personal and financial affairs. Wills and powers of attorney (POAs) can be very useful, especially for members with mobility responsibilities. A will is an instrument by which a person, known as a "testator," makes a disposition of their property to take effect after their death. A POA is a document by which a person conveys the authority to handle specified affairs. Commanders should emphasize the importance of preparing wills, POAs, and other necessary documents prior to deployment, preferably upon initial assignment to a unit or to a mobility position.

Wills

- Though it must be a free and voluntary act by the service member, most Airmen should have a will, especially the following:
  - -- Personnel with minor children
    - --- Without a will, a court has little valid guidance to help determine where to place minor children
    - --- The court will normally follow the designation of a guardian for the children in a will. More importantly, such designation normally prevents indecision and family disputes concerning who will care for orphaned children.
  - -- Personnel with extensive or certain valuable property
- Even between husband and wife with little property other than a house, a surviving spouse may find settling affairs easier with a will. Many states have "family probate" laws which allow a spouse to probate a valid will without a lawyer and with minimal expense.
- Without a will, property is distributed according to state law
  - -- Generally, state laws leave all property in the following order of precedence: surviving spouse, children, parents, then siblings
  - -- Each state's scheme varies, but generally the property will only pass to blood relatives, not to in-laws or stepchildren
  - -- A common misconception is that without a will, all of a person's property goes to the state. Normally, a state will not receive the property unless there are no surviving relatives.
  - -- If a member does not want state law to determine what happens to his estate, the member must make a valid will

- A will is normally written in general language and will be effective until changed or revoked by the testator. However, events may impact specific provisions in the will. Therefore, a will should be reviewed periodically and whenever any of the following occur:

  -- The birth or death of any person affected by the will

  -- The marriage or divorce of the testator

  -- A substantial change in the testator's estate

- The requirements for making a valid will vary widely from state to state. The base legal office ensures each member's will is validly executed under applicable law. For this reason, members should avoid "do-it-yourself" wills.

Powers of Attorney

- A Power of Attorney (POA) is a document that allows someone else to act as your legal agent. Though the agent may not be an attorney-at-law, he or she becomes an "attorney-in-fact", or agent, when granted authority under a POA. POAs are available at all base legal offices and should be tailored to a given situation.

- Although a POA can be very useful, it can be abused as well. Personnel should be careful choosing to whom they grant authority. Third parties, e.g., businesses or banks, may or may not accept a POA, at their discretion. To revoke a POA before its expiration, personnel may execute a revocation of POA and give a copy to any person that might deal with the person who has the original POA.

  -- <u>Special POA</u>

    --- Grants limited authority to accomplish specific transactions

    --- Duration is limited by the person giving the POA or to a reasonable time within which to accomplish the transaction, usually not more than one year

    --- Examples include buying/selling real estate, purchasing/selling a car, or shipping/storing household goods

  -- <u>General POA</u>

    --- Gives comprehensive authority over virtually all legal and some non-legal affairs. Basically, the person named can do any and all things the grantor could do.

    --- Because the authority granted is so expansive, this type of POA should only be used if a special POA will not suffice and if the agent is <u>completely trustworthy</u>

--- A person with a general POA, who is not trustworthy, has the ability to cause very serious problems of all kinds, i.e., financial or legal, for the grantor

--- Many banks and realtors will not accept a general POA for the purchase or sale of real estate, and require a special POA containing the legal description of the property and the actions authorized

-- Durable POA

--- Takes effect upon, or is still effective notwithstanding, a person's medical incapacity and designates another person to make decisions on behalf of the incapacitated person. A general or special POA may be made "durable" with appropriate language.

--- Allows the attorney-in-fact to make decisions or manage affairs on behalf of the incapacitated person for the duration of the incapacity

--- The authority may extend to decisions for medical purposes, including a decision regarding terminating or limiting medical care in appropriate cases

--- It generally eliminates the need for a court to establish a guardian and conservator for the incapacitated person

- Military Powers of Attorney and Wills

-- 10 U.S.C. §§ 1044b, 1044c, and 1044d, respectively provide for the execution of military powers of attorney, military advance medical directives, known as "living wills," and military testamentary instruments, commonly referred to as a will. These documents:

--- Are exempt from any requirement of form, formality, or recording that is required under the laws of a state

--- Military powers of attorney and advance medical directives are also exempt from any state requirements of substance

--- Shall be given the same legal effect as powers of attorney, living wills, and wills prepared and executed in accordance with the laws of the state concerned. Military advance medical directives are not enforceable in states that otherwise do not recognize living wills.

References:

10 U.S.C. § 1044b

10 U.S.C. § 1044c

10 U.S.C. § 1044d

DODD 1350.4, *Legal Assistance Matters* (28 April 2001), Incorporating Change 1 (13 June 2001), Certified Current (1 December 2003)

AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs* (27 October 2003), Interim Change 1 (21 October 2008)

CHAPTER TEN: CIVIL LAW RIGHTS AND PROTECTIONS OF MILITARY PERSONNEL

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Equal Opportunity and Treatment

Introduction

Many statutes have been enacted by the federal government to ensure equal opportunity and treatment (EOT). Almost all of these apply to civilian employees as victims. They do not cover military members as victims, but DOD and Air Force anti-discriminatory policies protect both military members and civilian employees through a bifurcated system. The primary difference in this bifurcated system is that military members are limited to presenting their complaints to forums within the executive department. Civilian employees, on the other hand, have the right to file a complaint before an independent federal court after exhausting administrative remedies within the executive department.

- The following are key EOT statutes:
  - -- Title VII of the Civil Rights Act of 1964
  - -- Equal Employment Opportunity Act of 1972
  - -- The Rehabilitation Act of 1973
  - -- The Age Discrimination Act of 1978
  - -- The Civil Rights Act of 1991

Civil Rights Act of 1964

- The Civil Rights Act of 1964 is the most important single source of anti-discrimination law in this country
- Title VII of the act forbids illegal employment discrimination on the basis of race, creed, color, religion, national origin, and gender

Equal Employment Opportunity Act of 1972

- The Equal Employment Opportunity Act of 1972 made Title VII of the Civil Rights Act of 1964 applicable to the federal work force; however, the term “employee” only applies to federal civilian employees as victims
- The law does not apply to military members as victims

Rehabilitation Act of 1973

- The Rehabilitation Act of 1973 prohibits employment discrimination against handicapped individuals within the federal government
- The law does not apply to military members as victims

- The Americans With Disabilities Act (ADA) of 1990 is the private sector counterpart to the Rehabilitation Act, but it does not apply to the federal government

Age Discrimination Act of 1978

- The Age Discrimination Act of 1978 forbids illegal discrimination on the basis of age for people over 40 years old
- The law applies to civilian employees as victims
- The law does not apply to military members as victims

Civil Rights Act of 1991

- The Civil Rights Act of 1991 amended Title VII of the Civil Rights Act of 1964 to expand remedies available to victims of discrimination
- Compensatory damages (e.g., pain and suffering, emotional distress) awards up to $300,000 are allowed for a violation of Title VII
- The law does not apply to military members as victims
- Monetary judgments or settlements made during the "administrative phase" are payable from the local base O&M funds

Air Force Policy

- Air Force policy is to conduct its affairs free from unlawful, arbitrary discrimination or sexual harassment, and to provide equal opportunity and treatment irrespective of race, color, religion, national origin, or sex
- Commanders must take appropriate administrative or disciplinary action to eliminate or neutralize discrimination and its effects

Air Force Equal Opportunity and Treatment Program

- AFI 36-2706, Chapters 4 & 5, set out the Air Force EOT program for processing both informal and formal discrimination complaints made by military members
  - -- Military members are limited to presenting administrative complaints of discrimination, which when substantiated are addressed through command action; they cannot bring a civil action against the government for employment discrimination and they cannot receive any kind of monetary damages normally available for civilians in the same situation

-- Air Force policy is clear: "Zero tolerance" of any kind of unlawful discrimination against military members on the basis of race, creed, color, religion, national origin or gender

-- Discrimination can be generally defined as any action that unlawfully or unjustly results in unequal treatment on the basis of race, creed, color, religion, national origin or gender, and the distinctions are not supported by legal or rational considerations

-- Such discrimination includes, but is not limited to:

--- Insults, printed materials, visual materials, signs, symbols, posters, or insignias that infer negative statements pertaining to protected status (e.g., race, religion)

--- Personal discrimination to bar or deprive a person of a right or benefit

--- Sexual harassment

--- Institutional practices that deprive a person or group of a right or benefit

-- The military equal opportunity (MEO) office is the OPR for the Air Force EOT program and handles almost all informal and formal complaints of discrimination brought by military members

-- Exceptions include instances involving criminal misconduct investigated by base law enforcement authorities instances concerning homosexual conduct, which will generally involve an inquiry by the commander, and complaints against senior officials, colonels and colonel selects which are investigated by the inspector general (IG)

Installation Commander's Responsibilities

- Provide an environment free from unlawful discrimination and sexual harassment
- Develop policies to prevent unlawful discrimination and sexual harassment and ensure those policies are prominently posted in locations and areas frequented by the base population
- Communicates the importance of the relationship of unlawful discrimination and sexual harassment prevention to readiness and a professional climate
- Ensure military and civilian personnel attend human relations education as required
- Direct the assessment of the installation human relations climate through the installation climate assessment committee

- Ensure appropriate disciplinary and corrective actions are taken if unlawful discrimination or reprisal is substantiated
- Review all closed EOT cases on a monthly basis
- Ensure rating and reviewing officials evaluate compliance with directives prohibiting unlawful discrimination and sexual harassment and document serious or repeated deviations
- Decide first-level appeals of formal complaints of discrimination

Unit Commander's Responsibilities

- Inform unit members of the right to file EOT complaints without fear of reprisal
- Inform members through briefings and EOT policy memoranda that unlawful discrimination and sexual harassment will not be tolerated and that appropriate disciplinary and corrective action will be taken if unlawful discrimination or reprisal is substantiated
- At a minimum, provide MEO the demographics of participants and action taken on all EOT allegations investigated within the unit
- Investigate allegations of unlawful discrimination or sexual harassment when the complainant has elected not to file with the MEO office
- Take action to end unlawful discrimination or sexual harassment when a formal MEO complaint/incident is substantiated
- Enforce EOT policy in a fair, impartial, and prompt manner
- Ensure rating and evaluating officials evaluate compliance with EOT directives and document repeated or serious violations
- Inform alleged offender(s) they are the subject of a formal MEO complaint, ensure they are cautioned against taking reprisal or other retaliatory actions, and ensure they are briefed on the outcome of the MEO case when it is closed and advise on their right to appeal
- Accomplish unit climate assessments

Complaint Processing Procedures

- MEO serves as the focal point for complaints of discrimination brought by military members, but the nature of the complaint will determine which agency conducts the investigation

-- Complaints against senior officials, colonels, and colonel selects must be immediately referred to SAF/IGS; commanders must notify MAJCOM IGQs and DP SAF/IGQ of EOT complaints involving colonels or colonel selects

-- Complaints involving allegations of homosexual conduct must be immediately referred to the subject's military commander

-- Complaints involving criminal activity such as assault, rape, or child abuse must be immediately coordinated with the staff judge advocate (SJA) for a determination of whether the matter should be referred for criminal investigation

-- Complainants may elect to use informal complaint process, which may include alternate dispute resolution (ADR)

-- When MEO investigates a complaint of discrimination, it is called a clarification and the allegation is documented on AF IMT 1587

-- Base-level MEO personnel conduct clarifications of formal complaints

--- The purpose of clarification is to determine whether a formal complaint is supported by a preponderance of the credible evidence

--- A preponderance of the credible evidence means more likely than not

--- If a clarification results in a determination that an alleged violation has occurred, the case <u>must</u> be forwarded through the servicing SJA to the offender's and the complainant's commander for appropriate action

-- Both the complainant and the subject of a formal EOT complaint may appeal the findings upon completion of complaint clarification. Only the finding that resulted from the clarification, whether it is a finding of discrimination or of no discrimination, can be appealed.

-- All appeals must be in writing

-- There is no right to a personal hearing

-- Commanders are not required to withhold command action pending an appeal

-- Installation commanders, MAJCOM/CVs, and SAF/MRB are authorized to decide appeals of formal complaints of discrimination

--- First level of appeal is to the lowest level of command authorized to decide the appeal, usually the installation commander

--- The appellate authorities may sustain or overrule any finding rendered below or remand the matter for further fact finding

--- SAF/MRB is the final review and appeal level for findings of formal complaints of unlawful discrimination

- Findings rendered pursuant to command action under the UCMJ are not subject to appeal through MEO channels

Performance Evaluation Reports

- Rating and reviewing officials must consider membership in groups espousing supremacist causes or advocating unlawful discrimination in evaluating and assigning military members

- While mere membership in such groups is not prohibited, members who join groups espousing supremacist causes or advocating unlawful discrimination may not be suited to hold supervisory or other responsible positions if their personal views would be in conflict with EOT guidelines they are required to support

- Rating and reviewing officials must document serious or repeated deviations from DOD and Air Force directives prohibiting discrimination

Reprisal/Whistleblower

- Air Force members are protected from reprisal for making, preparing, or attempting to make, a complaint of unlawful discrimination or sexual harassment to EOT personnel (MEO), an IG, members of Congress, DOD law enforcement organizations, or any other person or organization in the member's chain of command designated pursuant to AFI 90-301 or other established administrative procedures to receive such communications

- Reprisal complaints are referred by MEO to the installation IG for investigation

References:

AFI 36-1201, *Equal Employment Opportunity Complaints* (12 February 2007)

AFI 36-2706, *Military Equal Opportunity Program* (29 July 2004), Certified Current (17 February 2009)

AFI 90-301, *Inspector General Complaints Resolution* (15 May 2008)

Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e et seq.

EEO Act of 1972 (P.L. 92-261), amended 42 U.S.C. § 2000e

The Rehabilitation Act of 1973 (P.L. 93-112)

The Age Discrimination Act of 1978, 29 C.F.R. 1625

The Civil Rights Act of 1991 (P.L. 102-166), amended 42 U.S.C. § 2000e

The Inspector General Complaints Resolution Process

Overview

The inspector general (IG) is the "eyes and ears" of the commander. The IG complaints resolution program is a leadership tool to resolve problems affecting the Air Force mission promptly and objectively.

- The IG will encourage complainants to try to resolve their problem(s) at the lowest level first—this usually means the chain of command
- The IG has authority to process a variety of complaints related to violations of law, policy, procedures or regulations, abuse of authority, etc.
- Only the IG has the authority to process allegations of the "big three": reprisal, restricted access, and improper mental health evaluation referrals, discussed below
- The IG may not be used for:
  - -- Matters normally addressed through other channels unless there is evidence those channels mishandled the matter or process
  - -- Inappropriate matters, listed in AFI 90-301, Table 2.9 (e.g., EEO, UCMJ)
  - -- The Inspector General (TIG) may use SAF/IGS (Senior Official Inquiries Directorate) to investigate any potential problems or wrongdoing O-7 selects and above

IG Personal Complaints Investigations

- IG investigations are distinct from other investigations, such as commander-directed investigations (CDIs)
- The IG investigates pursuant to AFI 90-301 when properly authorized, in writing, by the appointing authority (i.e., wing commander)
- The IG does not investigate all complaints. A complaint analysis may result in a referral, including to a commander to consider a CDI, or dismissal of the allegations.
- The standard of proof to substantiate an allegation during an IG investigation is a preponderance of the evidence
  - -- The investigating officer (IO) must be satisfied that the greater weight of the credible evidence supports the findings and conclusions
  - -- This means that it is more likely than not that the events occurred

Reprisal ("Whistleblower" Protection) Complaints

- Reprisal is a violation of federal law, 10 U.S.C. § 1034, DODD 7050.6, and may result in disciplinary action under the UCMJ or applicable civilian directives or instructions

- Reprisal occurs when a responsible management official (RMO) takes (or threatens to take) an unfavorable personnel action, or withholds (or threatens to withhold) a favorable personnel action, to retaliate against a government employee who made or prepared to make a protected communication

  -- RMOs include three categories: (1) deciding officials; (2) those who influenced/recommended the action; (3) reviewers/indorsers

  -- Personnel actions include actions that affect <u>or</u> have the potential to affect a military member's current position or career (e.g., a LOR, referral EPR)

  -- It is a protected communication when a member who reasonably believes he/she has evidence of a violation of law or regulation (regardless of whether he/she is the victim), discloses this to an authorized recipient in the form of a lawful communication

    --- Unlawful communications include: (1) those that convey an admission of misconduct, violation of the UCMJ, or violation of other applicable criminal statutes <u>and</u> (2) communications that, in themselves, constitute misconduct, a violation of the UCMJ, or violation of other applicable criminal statutes (e.g., threats, false statements)

    --- Besides the IG, the military equal opportunity (MEO) office, and family advocacy, authorized recipients of protected communications include, but are not limited to, first sergeants, command chief master sergeants, flight commanders, squadron commanders and higher, as well as others appointed IAW AFI 51-604 and AFI 38-101

- Reprisal example: Female staff sergeant files MEO complaint against her male supervisor for sexual harassment. Supervisor rates her EPR as a "3," while her previous EPRs were "5's." Supervisor has no documentation to justify the downgraded performance rating.

- To analyze allegations of reprisal, IGs use a four-part reprisal "acid test":

  -- Did the employee make or prepare to make 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 RMOs 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? To answer this question, IGs will consider five factors:

--- Reasons stated by the RMO for the action

--- Reasonableness given complainant's performance/conduct

--- Consistency with the RMO's past practice

--- Motive of the RMO for the action

--- Procedural correctness of the action

- Reprisal is a subset of abuse of authority. As such, even if the facts do not constitute reprisal, they may rise to the level of abuse of authority.

  -- Abuse of authority means an arbitrary or capricious exercise of power that adversely affects the rights of any person <u>or</u> results in personal gain or advantage to the abuser

  -- Black's Law Dictionary defines arbitrary and capricious as willful and unreasonable action without consideration of, or in disregard of, facts or determining principles

- All reprisal investigations undergo IG and legal reviews at the major command, SAF, and DOD levels

- IG, DOD renders final review/approval

Restricted Access Complaints

- 10 U.S.C. § 1034 and AFI 90-301, also state that a military member may not be restricted or prohibited from making a protected communication to authorized recipients

- The definitions of RMO, protected communication, unlawful communication, and authorized recipients above, apply to restricted access

- Restriction can result from either private or public statements that may reasonably discourage Air Force members from going to MEO, IG, etc. For example:

  -- During a commander's call, a squadron commander tells his unit that <u>all</u> problems will always go through him first.

  -- Squadron commander gives a subordinate a letter of reprimand (LOR) for filing a complaint against supervisor with civilian personnel office. LOR states, "In the

future, you will utilize the chain of command. Any further misconduct of this nature will result in more severe action."

- Such an unlawful restriction is a violation of federal law, 10 U.S.C. § 1034, and may result in disciplinary action under the UCMJ or applicable civilian directives or instructions

- There is no "acid test" for restricted access. However, proper analysis of these complaints requires an in-depth review of both of the following issues:

  -- RMO intent: what was the intent of the RMO who allegedly restricted the member?

  -- Reasonable complainant's belief (objective standard): would a reasonable person, under similar circumstances, believe he/she was actually restricted from making a protected communication based on the RMO's actions?

- All restricted access investigations undergo IG and legal reviews at the major command, SAF, and DOD levels

Improper Mental Health Evaluation (MHE) Referral Complaints

- Commanders and other supervisory personnel may encourage an individual to seek a MHE on his/her own, but they may not coerce the member to do so (AFI 44-109, para 4.1)

  -- Strong "encouragement" is not appropriate

  -- Improper MHE example: Airman Jones has been acting strangely. He recently told his commander that he was "losing it," and going to "go postal on someone." The commander meets with Airman Jones at 1600 on a Friday before a three-day weekend. He tells Airman Jones that he's not getting released for the weekend until Mental Health (MH) clears him. Airman Jones, feeling he has no choice in the matter, "volunteers" to go to MH, escorted by his two supervisors.

- Only a commander can "direct" a member to undergo a mental health evaluation (MHE)

  -- In all MHE referral cases, the commander is required to notify the member in writing, of his/her rights

  -- DODI 6490.4, para 6.1.1.4.1. outlines the minimum requirements for MHE rights notification. It includes the right to consult with counsel and the IG.

  -- The timing of the notice will depend on whether the case was emergent or not

- "Safety checks" are not authorized! A "safety check" occurs when a commander sends a subordinate to mental health and receives feedback, without the required paperwork.
- If the commander has a legitimate concern about the need for a non-emergency or emergency MHE, the commander must get involved by:
  - -- Gaining firsthand knowledge of the member's condition
  - -- Personally seeking the guidance of a MH care provider to determine whether a MHE is appropriate
- Unless the complainant alleges the MHE referral was done in reprisal, an MHE referral case will ordinarily not involve an in-depth review of the commander's intent or motives. Good intentions do not negate technical violations of procedural requirements; however, they may mitigate any command action that is eventually taken as a result of the violation.

Reporting Requirements

- All reprisal, restricted access, and MHE referral complaints have unique reporting requirements
- All complaints, regardless of the nature of the allegation, alleging O-6 misconduct (even if handled by a CDI) must be reported to SAF/IGQ
- Only SAF/IGS handles complaints against O-7 selects and above, and civilian equivalents (Para. 3.2.1.). If there is an allegation against an O-7 select or above, do not investigate—immediately report allegations to SAF/IGS.

Confidentiality

- Communications made to the IG are not privileged or confidential
- However, disclosure of these communications, and the identity of the communicant, will be strictly limited to an official need-to-know

Bottom Line

- The potential for an IG complaint should not ever dissuade a commander from taking timely and appropriate corrective or preventive actions for legitimate reasons
- Commanders should coordinate with their staff judge advocates for effective legal guidance on these issues

References:

10 U.S.C. § 1034, Military Members Whistleblower Protection Act

5 U.S.C. § 2302, DAF Civilian Employees Complaints

10 U.S.C. §1587, NAF Civilian Employees Complaints

10 U.S.C. § 2409, Defense Contract Employees Complaints

DODD 6490.1, *Mental Health Evaluations of Members of the Armed Forces* (1 October 1997), Certified Current (24 November 2003)

DODI 6490.4, *Requirements for Mental Health Evaluations of Members of the Armed Forces* (28 August 1997)

DODD 7050.06, *Military Whistleblower Protection* (23 July 2007)

IGDG 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations* (6 February 1996)

AFI 38-101, *Air Force Organizations* (4 April 2006) Incorporating Change 2 (20 July 2006)

AFI 51-604, *Appointment To and Assumption Of Command* (4 April 2006)

AFI 44-109, *Mental Health, Confidentiality, and Military Law* (1 March 2000)

AFI 90-301, *Inspector General Complaints Resolution* (15 May 2008) 36-2706

AFPD 90-3, *Inspector General—The Complaints Resolution Program* (18 August 2009)

SAF/IGQ Website: https://www.ig.hq.af.mil/igq/

SAF/IGQ *Investigating Officer's Guide* (April 2007)

SAF/IGQ *Commander-Directed Investigation Guide* (7 July 2006)

SAF/IGQ *JAG Guide to IG Investigations* (24 March 2008)

Prohibition on Sexual Harassment

Historical Background

- No federal statute explicitly defines or outlaws sexual harassment in the workplace; however, several federal court decisions in the 1970s established sexual harassment as illegal sex discrimination in violation of Title VII of the Civil Rights Act of 1964
  - -- Title VII's prohibitions were made applicable to federal civilian employees as victims through the Equal Employment Opportunity Act of 1972
  - -- The protections of Title VII do not specifically apply to military members as victims
  - -- The Department of Defense's response to the issue of sexual harassment was the promulgation of DODD 1350.2, *Department of Defense Military Equal Opportunity (MEO) Program*, which establishes policy for DOD and provides guidance to the military services for the implementation of their own equal opportunity and treatment programs to combat sexual harassment
  - -- The Air Force's equal opportunity and treatment program is set forth in AFI 36-2706, *Military Equal Opportunity (MEO) Program*
- The Civil Rights Act of 1991 allows for recovery against an employer, which can include the Air Force, of compensatory damages (pain and suffering, emotional harm, etc.) up to $300,000 per individual in cases of intentional discrimination brought by civilian employees. <u>Such damages would likely have to be paid out of local base O&M funds</u>.

Definitions

- The Air Force defines sexual harassment as a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
  - -- Submission of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career
  - -- Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person
  - -- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment

- Workplace conduct may be actionable as "abusive work environment" harassment even if it does not result in concrete psychological harm to the victim; rather, it need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. "Workplace" is an expansive term in the military context and may include conduct on or off duty, 24 hours a day.

- Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment

- Any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature in the workplace is also engaging in sexual harassment

- Although sexual harassment is generally perpetrated by men against women, any form of unwelcome sexual advance against employees of either gender may constitute unlawful sexual harassment

Types of Sexual Harassment

- Judicial decisions have recognized two basic kinds of sexual harassment, both of which are reflected in the Air Force's definition, quid pro quo sexual harassment and hostile environment sexual harassment

- Quid pro quo (meaning "this for that") sexual harassment occurs when an employee suffers or is threatened with some kind of employment injury for refusing to grant sexual favors or is promised some sort of tangible job benefit in exchange for sexual favors

  -- Generally, it involves a supervisor/subordinate relationship where the victim is told to submit to sexual requests or be fired, demoted, or denied a promotion, an award, training opportunity, objective appraisal, etc.

  -- A single incident may be enough to qualify as quid pro quo sexual harassment

  -- A threat to take action that changes a victim's employment situation in exchange for sexual favors without an actual job benefit or detriment is sufficient to constitute quid pro quo sexual harassment under Air Force regulations

- Hostile environment occurs when a supervisor, co-worker, or someone else with whom the victim comes in contact on the job creates an abusive work environment or interferes with the employee's work performance through words, actions, or conduct that is perceived as sexual in nature

-- Some examples include:

--- Discussing sexual activities

--- Unnecessary touching

--- Commenting on physical attributes

--- Displaying sexually suggestive pictures or pornography

--- Using demeaning or inappropriate terms, such as “babe”

--- Using unseemly or profane gestures

--- Granting job favors to those who participate in consensual sexual activity

--- Using sexually crude, profane, or offensive language

-- A single act, if severe enough, may support a cause of action for hostile environment sexual harassment

-- The nature, severity, frequency, and duration of the conduct are some factors the courts consider when evaluating whether certain conduct constitutes sexual harassment

-- How severe or pervasive the harassment must be to constitute sexual harassment depends upon the specific facts

--- Conduct that constitutes harassment in one situation may not in another; however, the commander who demands professional, civil conduct from members of the organization will prevent most of the problems that arise in this area

--- An isolated epithet does not usually support a cause of action for hostile environment discrimination

---- That does not mean that commanders are in any way restricted from taking disciplinary action based upon a single incident

---- In fact, commanders are required to act to stop sexual harassment no matter how minor the conduct may be

--- Because the legal boundaries involved in this type of sexual harassment are so foggy, supervisors and subordinates alike should avoid ANY sexual conduct in the workplace or any behavior that is in any way demeaning to members of the opposite sex

--- All complaints, regardless of whether they appear to meet the legal test of hostile environment sexual harassment, should be quickly investigated and appropriate action taken to stop offensive conduct

--- Hostile environment sexual harassment is the most difficult type to recognize, and the particular facts of each situation determine whether offensive conduct has crossed the line from simply inappropriate behavior to sexual harassment

- Under Title VII of the Civil Rights Act, civilian victims may sue the Air Force for monetary damages for sexual harassment in either form

  -- An employer (i.e., the Air Force) will almost always have no defense in a case of sexual harassment if the facts show conduct that resulted in an actual tangible employment action (firing, demotion, etc.)

  -- Provided no tangible employment action occurred, an employer (i.e., the Air Force) may be able to establish a defense to either limit or avoid liability if the employer has a formal, published policy against sexual harassment; provides training to its employees and supervisors about sexual harassment (and how to stop it); has a grievance and complaint system in place; and takes prompt effective corrective action to remedy a complaint of sexual harassment

  -- If a commander finds out about an incident of sexual harassment (or an incident that could be sexual harassment), the commander should not wait for a complaint to be filed; rather, the commander should use his or her inherent authority to begin an inquiry into the matter in an effort to determine whether the conduct constituted sexual harassment and to remedy the problem

- Command attention to sexual harassment must include the following actions:

  -- Publish clearly the Air Force's policy on sexual harassment, i.e., zero tolerance

  -- Ensure that civilian employee/military member avenues of communication and complaint are well publicized throughout the unit

  -- Provide appropriate training on sexual harassment

  -- Act quickly to investigate all complaints of sexual harassment in a fair and impartial manner

  -- Seek advice from the MEO office, the staff judge advocate (SJA), and the civilian personnel office, as appropriate, before taking action against offenders

Commander's Inquiry Under 10 U.S.C. § 1561 (Sexual Harassment Investigations and Reports)—Military or Civilian Complainant

- 10 U.S.C. § 1561 was passed in 1998 by Congress to ensure that complainants in sexual harassment cases receive a timely investigation and response to their complaints

- It is important to remember that a complainant (either military or civilian) may elect the commander's inquiry and/or the equal opportunity and treatment (EOT) process for military complainant/equal employment opportunity (EEO) process for civilian complainant

- The process is dual-tracked in that the commander's inquiry, if elected by the complainant, is conducted even if the EOT/EEO process has not been completed

- When the commander receives a complaint, 10 U.S.C. § 1561 requires several actions (commanders should consult the local SJA office for assistance). Within 72 hours after receipt of the complaint, the commander must:

  -- Forward the complaint or a detailed description of the allegation to the general court-martial convening authority (GCMCA)

  -- Begin the investigation

  -- Advise the complainant of the beginning of the investigation

- The commander is responsible for ensuring the investigation is completed no later than 14 days after it was commenced

- The commander shall also submit a report on the progress made in completing the investigation to the GCMCA within 20 days after the investigation began and every 14 days thereafter until the investigation is completed, and upon completion of the investigation, then submit a final report on the results of the investigation, including any action taken as a result of the investigation

Complaint Processing—Military Complainant

- The MEO Office is the OPR for the Air Force EOT program and has primary responsibility for the maintenance of the program and for handling complaints of sexual harassment

  -- If a complaint (formal or informal) is filed with MEO, it will be handled by the EOT officer and the alleged occurrence of harassment will be called an EOT incident

  -- Generally, a formal complaint filed with MEO will generate an investigation by MEO personnel called a clarification

  -- The clarification is designed to determine the facts and cause of the EOT incident, assess the severity of the incident and the effect on morale and good order and discipline, and develop recommendations concerning the classification of the incident and appropriate corrective action

--- A clarification will include witness interviews, taking statements, reviewing records and documents, and will ultimately conclude with a report by an investigating officer

--- The standard of proof used in a clarification is a preponderance of the credible evidence (i.e., more likely than not)

--- At the conclusion of the investigation, the EOT incident will be either unsubstantiated or substantiated and therefore a recommendation will be made

--- Strict time standards exist for completion of the clarification

-- If the EOT incident is substantiated, a legal review is required before the report is forwarded to the concerned commander for appropriate action

-- The complaint process allows for an appeal of the findings of the clarification of formal complaints of sexual harassment

--- Findings concerning an informal complaint may be appealed by filing a formal complaint

--- Either the complainant or the subject may appeal to the next higher commander

--- Command action may continue regardless of the existence of an appeal

--- The appropriate legal office will conduct a legal review if the matter is appealed to the next level of command

--- The Air Force Review Boards Agency is the final review and appeal level

- MEO will not investigate a complaint that involves criminal or homosexual conduct

  -- Criminal conduct will be handled by the base law enforcement community

  -- Homosexual conduct must be handled by the commander consistent with the guidance for enforcing the military's homosexual conduct policy

  -- Complaints against senior officials, colonels and colonel selects are investigated by the IG

  If the result of a clarification is inconclusive, the IG may institute an investigation

- MEO will not investigate a complaint filed by a civil service employee, but rather will document the complaint and refer it to the EEO office regardless of the status of the alleged offender

Complaint Processing—Civilian Employee Complainant

- The EEO counselor is the OPR for complaints of sexual harassment brought by civilian employees

- Pre-Complaint: After a complainant has made initial contact with the EEO Office, an EEO counselor will advise the complainant of certain rights and obligations, place all allegations in the pre-complaint process regardless of merit or timeliness, and attempt to resolve the situation between the parties. The EEO counselor has 30 days to complete this process (60 days upon agreement by the complainant).

- If the EEO counselor is unable to resolve the situation during pre-complaint processing, the complainant is advised that he/she may file a formal complaint of discrimination

- Formal Complaint: The chief EEO counselor (CCD) will, among other things, advise the complainant of further rights

  -- During this time, the complaint is evaluated by civilian personnel and the legal office for soundness and possible settlement

  -- The CCD requests a complaint investigator from the investigations and resolutions division (IRD) within 30 days of the date the formal complaint was filed

  -- IRD will investigate the complaint and send a copy of the report of investigation and complaint file to the CCD, Air Force Civilian Appellate Review Office (AFCARO), and the complainant or complainant's designated representative

  -- The complainant must then elect whether an EEOC hearing is desired or whether he or she prefers the Air Force to issue a final decision

  -- The complainant and the commander can meet and discuss possible resolution of the complaint during the period of time the complainant is deciding which route to pursue

  -- The complainant has 30 days from receipt of the report of investigation to request an EEOC hearing

- After the formal complaint process, it is possible for the complainant to make various appeals and eventually file suit in federal court; consult the legal office and see AFI 36-1201, *Equal Employment Opportunity Complaints*, for further information

Command Options to Address Substantiated Complaints of Sexual Harassment

- Commanders who find military personnel to have engaged in sexual harassment have the usual disciplinary and administrative options, including counseling, admonishment, reprimand, nonjudicial punishment, administrative discharge, and court-martial

- Commanders who find civilian personnel to have engaged in sexual harassment should normally focus any disciplinary action on the offensive act or acts involved (e.g., unwelcome touching, offensive comments) rather than alleging sexual harassment, and may deal with the misconduct pursuant to AFI 36-704, *Discipline and Adverse Actions,* in the following manner:

  -- Any disciplinary action which includes punishment greater than suspension for more than fourteen days can be appealed to the U.S. Merit Systems Protection Board (MSPB)

  -- At an MSPB proceeding, the Air Force must prove by a preponderance of the evidence that the misconduct (e.g., offensive touching, offensive comments) took place and that the punishment imposed serves to promote the efficiency of the service

References:

10 U.S.C. § 1561

DODD 1350.2, *Department of Defense Military Equal Opportunity (MEO) Program* (18 August 1995), Incorporating Change 1 (7 May 1997)

AFI 36-701, *Labor Management Relations* (27 July 1994)

AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)

AFI 36-1201, *Equal Employment Opportunity Complaints* (12 February 2007)

AFI 36-2706, *Military Equal Opportunity (MEO)* (29 July 2004), Certified Current (17 February 2009)

AFI 90-301, *Inspector General Complaints Resolution* (15 May 2008)

Political Activities by Air Force Members

Political activities by Air Force members may be restricted in order to reach the goal of a politically neutral military establishment through avoidance of partisan politics. The Air Force provides guidance on permissible and impermissible political activities in AFI 51-902, *Political Activities by Members of the U.S. Air Force*. Violations of AFI 51-902 are punishable under Article 92, UCMJ, Failure to Obey a Lawful Regulation.

Permitted Political Activities

- Air Force members <u>may</u>:
  - -- Register to vote, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Air Force
  - -- Make monetary contributions to a political organization or political committee favoring a particular candidate or slate of candidates, subject to limitations under federal election laws
  - -- Attend political meetings or rallies as a spectator when not in uniform
  - -- Join a political club and attend its meetings when not in uniform
  - -- Serve as an election official, if such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while out of uniform, and has the prior approval of the major command commander or equivalent authority (approval authority may be delegated to the installation commander)
  - -- Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot if the signing does not obligate the member to engage in partisan political activity and is done as a private citizen
  - -- Write a letter to the editor of a newspaper expressing the member's personal views concerning public issues, if those views do not attempt to promote a partisan political cause
  - -- Display a political sticker on the member's private vehicle or wear a political button when not in uniform and not on duty
  - -- Write a personal letter, not for publication, expressing preference for a specific political candidate or cause, if the action is not part of an organized letter-writing campaign on behalf of a partisan political cause or candidate

Prohibited Political Activities

- Air Force members may not:
  - -- Use official authority or influence to interfere with an election, to affect its course or outcome, to solicit votes for a particular candidate or issue, or to require or solicit political contributions from others
  - -- Be a candidate for civil office or hold civil office, except as authorized by DODD 1344.10, paragraphs 4.2 and 4.3, and AFI 51-902, paragraphs 5 and 6
  - -- Participate in partisan political management, campaigns, or conventions, or make public speeches in the course of such activity
  - -- Allow, or cause to be published, partisan political articles signed or authorized by the member for soliciting votes for or against a partisan political party or candidate
  - -- Serve in any official capacity or be listed as a sponsor of a partisan political club
  - -- Speak before a partisan political gathering of any kind for promoting a partisan political party, candidate, or cause
  - -- Participate in any radio, television, or other program or group discussion as an advocate of a partisan political party, candidate, or cause
  - -- Conduct a political opinion survey under the auspices of a partisan political group or distribute partisan political literature
  - -- Perform clerical or other duties for a partisan political committee during a campaign, on election day, or after an election during the process of closing a campaign
  - -- Solicit or otherwise engage in fund-raising activities in federal offices or facilities, including military reservations, for any political cause or candidate
  - -- March or ride in a partisan political parade
  - -- Participate in any organized effort to provide voters with transportation to the polls if the effort is organized by or associated with a partisan political party or candidate
  - -- Attend, as an official representative of the Armed Forces, partisan political events, even without actively participating
  - -- Engage in the public or organized recruitment of others to become partisan candidates for nomination or election to a civil office

- -- Make campaign contributions to a partisan political candidate
- -- Make campaign contributions to another member of the armed forces or an officer or employee of the federal government for promoting a political objective or cause
- -- Solicit or receive a campaign contribution from another member of the armed forces or from a civilian officer or employee of the United States for promoting a political objective or cause
- -- Use contemptuous words against the office holders described in Article 88, UCMJ (for officers) and AFI 51-902 (for officers and enlisted members)
- -- Display a large political sign, banner, or poster on the top or side of a member's private vehicle (as distinguished from a political sticker)
- -- Display a partisan political sign, poster, banner, or similar device visible to the public at one's residence on a military installation, even if that residence is part of a privatized housing development
- -- Sell tickets for, or otherwise actively promote, partisan political dinners and other such fund-raising events

Campaigning and Holding Public Office

- Air Force members may not campaign as a candidate for nomination or as a nominee for civil office except:
  - -- With proper approval, a member may be permitted to file evidence of nomination or candidacy for nomination as required by law
  - -- Such a request will normally not be approved unless the member is likely to separate from active duty/active duty training at least 30 days before the scheduled election
- Air Force members may not become a candidate for any civil office while serving an initial tour of extended active duty or a tour of extended active duty that the member agreed to perform as a condition to receiving schooling or training wholly or partly at U.S. expense
- Except as authorized by law, regular officers on the active duty list, and members on active or full-time National Guard duty under a call or order for a period of more than 270 days, may not hold or exercise the functions of a civil office, including:
  - -- Federal elective, appointed, or senior executive service offices

  - Any office in the government of a state; the District of Columbia; a territory, possession, or commonwealth of the United States; or in any political subdivision of the foregoing
  - Such members may hold or exercise the functions of other federal civil offices when assigned or detailed to that office to perform those functions

- Enlisted members may seek and hold nonpartisan civil office on a local school board, neighborhood planning commission, and similar agencies
- Officers on active duty may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation, but such offices must be held in a private capacity and may not interfere with military duties
- Air Force members may serve as a regular or reserve civilian law enforcement officer or member of a civilian fire or rescue squad when such service:
  - Is approved by the member's commander
  - Is in the member's personal capacity
  - Does not involve the exercise of military authority; and
  - Does not interfere with performance of military duties

References:

DODD 1344.10, *Political Activities by Members of the Armed Forces on Active Duty* (19 February 2008)

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

AFI 51-902, *Political Activities by Members of the U.S. Air Force* (1 January 1996)

AFI 51-903, *Dissident and Protest Activities* (1 February 1998)

Membership and Participation In Hate Groups

- Air Force members must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in the effort to deprive individuals of their civil rights
  - -- Active participation in these organizations, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations, or otherwise engaging in activities or acting in the furtherance of the objectives of such organizations that the commander finds to be detrimental to good order, discipline, or mission accomplishment, is prohibited
    - --- Members who violate this prohibition are subject to disciplinary action under Article 92 of the UCMJ
    - --- Commanders are authorized the full range of administrative and disciplinary actions, including separation, against those who actively participate in these organizations
  - -- Mere membership in these organizations is not prohibited, but must be considered in evaluating and assigning military members
- The military equal opportunity office (MEO) is responsible for assisting commanders in ensuring that the Air Force equal opportunity policy against discrimination and sexual harassment is fulfilled through the equal opportunity and treatment (EOT) program
- An EOT incident (EOTI) is an overt, adverse act, occurring on or off base, directed at an individual, group or institution, which is motivated by, or has overtones based on race, color, national origin, religion or sex, which has the potential to have a negative impact on the installation human relation climate
  - -- Incidents may include slurs, vandalism, graffiti, discriminatory epithets, signs, or symbols
  - -- MEO will classify the incident as minor, serious, or major depending upon the number of participants involved, the degree of any property damage, and the nature and extent of any physical injuries sustained as a result of the incident

References:

AFI 36-2706, *Military Equal Opportunity Program* (29 July 2004)

AFI 51-903, *Dissident and Protest Activities* (1 February 1998)

Servicemembers Civil Relief Act

Overview

The Servicemembers Civil Relief Act (SCRA) provides a wide range of protection for individuals in the military service. The SCRA is intended to postpone or suspend certain civil obligations to enable service members to devote full attention to duty. The SCRA was enacted in 2003 and replaced the Soldiers' and Sailors' Civil Relief Act.

- The Act applies to active duty members in civil matters, not criminal matters
  - -- Certain provisions of the SCRA are more relevant to new accessions into the military, Reservists, and members of the National Guard, because they apply to pre-service obligations. Other provisions are more generally applicable to servicemembers.
  - -- The protections generally begin on the date of entering active duty and generally terminate on the date of the person's release from active duty. However, exceptions may apply, depending on which provision of the Act is sought. Members who face problems in the areas listed below should be referred to the base legal office.

Most Common and Relevant Provisions

- Eviction: The SCRA prohibits eviction, without a court order, of a service member and dependents from rented housing where the rent does not exceed $2,958.53 per month, as of 2010. This amount is adjusted upward yearly using a cost-of-living formula found in the Act. Unless, in the opinion of the court, the ability of the tenant to pay the agreed rent is not materially affected by the tenant's military service, the court may delay eviction proceedings for up to three months.

- Lease Termination: A military member may unilaterally cancel a lease of premises if they receive orders (PCS or deployment for more than 90 days). In addition, a military member may cancel a pre-service lease for a motor vehicle if they receive orders bringing them onto active duty. A military member may cancel any motor vehicle lease (pre-service or signed during service) for deployment orders for more than 180 days, or PCS orders to a location outside of CONUS, or PCS orders from Alaska or Hawaii to any location outside of those states.

- Installment Contracts: A servicemember who enters into an installment contract before entering active duty is protected if his or her ability to make payments is materially affected by military service. Here, the courts will compare the servicemember's preservice income and military income to determine his or her financial condition. The creditor cannot exercise rights of rescission, termination, or repossession without a court order.

- Cellular Phones: A servicemember may request the termination or suspension of any cellular phone service contract if they received orders for PCS within the United States or deployment for more than 90 days, and the PCS or deployment will materially affect their ability to utilize the services. The request for termination or suspension must be made before the PCS or deployment occurs. While counterintuitive, the current language of the legislation would not apply to PCS overseas.

- Maximum Rates of Interest: The interest rate on a member's pre-service obligation must be capped at 6% unless the creditor shows that the ability of the servicemember to pay interest above 6% is not materially affected by reason of their military service. This relief applies during the entire period of active duty service and must be applied retroactively if the member does not request the cap at the outset of military service.

- Stay of Proceedings: Courts have the discretion to delay a civil court proceeding when the requirements of military service prevent the member from either asserting or protecting a legal right. The courts will look to whether military service materially affected the servicemember's ability to take or defend an action in court.

- Default Judgments: Before a court can enter a default judgment (for failure to respond to a lawsuit or failure to appear at trial) against a military member, the person suing the member must provide the court with an affidavit stating the defendant is not in the military. If the defendant is in the military, the court will appoint an attorney to represent the defendant's interests (usually by seeking a delay of proceedings). If a default judgment is entered against a servicemember, the judgment may be reopened if the member makes an application within 90 days after leaving active duty, shows he/she was prejudiced, and shows he/she had a legal defense.

- Insurance: A servicemember's private life insurance policy is protected against lapse, termination, or forfeiture for nonpayment of premiums for a period of military service plus two years. The insured or beneficiary must apply to the Veterans' Administration for protection. In addition, professional liability (malpractice) insurance must "freeze" when the member enters military service and then resume (exactly where it left off) after release from military service.

- Taxation: A servicemember's state of legal residence may tax military income. A member does not lose legal residence solely because of a transfer pursuant to military orders. For example, if a member is a Virginia resident and is moved to a base in California, the member does not lose Virginia residency nor will he or she be subject to pay California state income tax on his or her military pay. Also, a non-resident service member's pay may not be used to "lift" a spouse's pay into a higher tax bracket (the so-called "Kansas rule").

- Military Spouse's Residency Relief Act: In 2009, Congress substantially changed the legal framework regarding spouse residency for tax purposes. The MSRRA revised the SCRA to provide that military spouses do not lose nor acquire a residence for tax purposes solely because of a military move. Furthermore, while only military income

is protected from non-resident income tax for the servicemember, the MSRRA exempts all income for the non-resident spouse. In order to receive this protection, the statute's language requires that the spouse's residence be the same as the servicemember, although some states do not appear to be enforcing this requirement.

- Adverse Actions: Creditors and insurers may not use a servicemember's exercise of rights under the SCRA as the sole basis for taking an adverse action (e.g., denial of credit, refusal of insurance) against the servicemember.

REFERENCE:

50 App. U.S.C. §§ 501-596 (2003), Servicemembers Civil Relief Act

Uniformed Services Employment and Reemployment Rights Act (USERRA)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) encourages non-career military service by minimizing civilian employment problems resulting from such service. USERRA prohibits discrimination and acts of reprisal against members who serve in the uniformed services.

Overview

- An employer including any government or private entity, regardless of size, may not deny a person initial employment, promotion, or any benefit of employment because the person performed or is obliged to perform service in a uniformed service
  - -- Uniformed services means the Air Force, Army, Navy, Coast Guard, Marine Corps, and the commissioned corps of the Public Health Service
  - -- Service in the uniformed services means performing duty on a voluntary or involuntary basis in a uniformed service. It includes active duty, active and inactive duty for training, initial active duty for training, full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty.

Eligibility Criteria

- To have reemployment rights following a period of uniformed service, a person must meet all of the following eligibility criteria:
  - -- Must have held a civilian job, which may include temporary jobs
  - -- Must have given advance notice to the employer that they were leaving the job for service in a uniformed service, unless such notice is impossible or unreasonable
  - -- The period of service does not exceed five years
    - --- The period of service is cumulative as long as the person is employed by or seeking reemployment with the same employer. A person starting a new job with a new employer receives a new five-year entitlement.
    - --- Some categories of military service do not count toward the five-year limit such as most periodic and special Reserve and National Guard training, most service in time of war or emergency, and involuntary extensions on active duty
  - -- Must have been released from service under honorable conditions

-- Must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment

Entitlements

- People who meet the eligibility criteria under USERRA have seven basic entitlements:
  - -- Prompt reinstatement
  - -- Accrued seniority, as if the person had been continuously employed
    - --- This is the "escalator principle," meaning the returning veteran does not step back on the seniority escalator at the point he stepped off, but at the point he would have occupied had he kept his position continuously during his military service
    - --- The "status" the person would have attained if continuously employed includes, for example, location, opportunity to work during the day instead of at night, and the opportunity to work in a department or at such times when there are better opportunities to earn commissions or to be promoted
  - -- Immediate reinstatement of civilian health insurance coverage, if the member does not elect to continue it during service
  - -- Other non-seniority benefits, as if the person had been on a furlough or leave of absence, such as holiday pay or bonuses
  - -- Training or retraining and other accommodations
    - --- USERRA requires an employer to make reasonable efforts to qualify the returning person for work, including training on new equipment or methods
    - --- An employer must also make a reasonable effort to accommodate a returning disabled service member otherwise entitled to reemployment
      - ---- Disability need not be permanent in order to confer rights (e.g., a broken leg)
      - ---- If disability is such that it cannot be accommodated and disqualifies the person from their pre-service job, the employer is required to reemploy the person in some other position which is most similar to the position to which they are otherwise entitled in terms of seniority, status, and pay
  - -- A person reemployed by an employer shall not be discharged, except for cause
    - --- Within one year from being reemployed, if continuous service in the uniformed services was more than 180 days

--- Within 180 days from being reemployed, if continuous service was 31-180 days

--- No special protection exists for service of 30 days or less

-- Prohibition of discrimination or reprisal

--- An employer cannot deny initial employment, reemployment, retention, promotion, or any benefit of employment because of a person's service or application to serve in the uniformed services

--- An employer also may not take adverse employment action against a person because they either take enforcement action under USERRA, testify or assist in an USERRA investigation, or exercise any right under USERRA

Assistance and Enforcement

- The Veterans' Employment and Training Service within the United States Department of Labor will assist persons claiming rights under USERRA, including persons claiming rights with respect to the federal government as a civilian employer

- The Office of Employer Support for the Guard and Reserve (ESGR) will also assist service members in enforcing USERRA, 1-800-336-4590

References:

38 U.S.C. §§ 4301-4333

32 C.F.R. Part 104

20 C.F.R. Part 1002

DODI 1205.12, *Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services* (4 April 1996), Incorporating Change 1 (16 April 1997)

Uniformed Services Former Spouses' Protection Act

In 1982, Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA) to provide certain benefits to the former spouses of military members.

What USFSPA Does

- Under USFSPA:
  - -- State courts are allowed to divide disposable military retired pay between the member and spouse if the state court desires
  - -- Former spouses, in some circumstances, are able to receive a portion of the member's retired pay directly from the government
  - -- Some former spouses are entitled to care at military medical facilities and access to military exchanges and commissaries
  - -- Former spouses may be beneficiaries under the survivor benefit plan (SBP)
  - -- Some victims of spousal or child abuse are also eligible for benefits

What USFSPA Does Not Do

- USFSPA does not:
  - -- Require courts to divide military retired pay
  - -- Establish a formula or award a predetermined share of military retired pay to former spouses
  - -- Place a ceiling on the percentage of disposable retired pay that may be awarded to a former spouse
  - -- Require an overlap of military service and marriage as a prerequisite to division of military retired pay as property

Division of Retired Pay

- If a court apportions retired pay between member and spouse, only "disposable retired pay" (DRP) may be divided
- DRP is defined as the member's monthly retired pay minus certain deductions, such as income tax withholdings, survivor benefit plan premiums, and, if the member is entitled to disability pay, the product of the member's monthly retired pay multiplied by the percentage of his disability

- Compensation not included in DRP, including disability compensation, is not subject to division by state courts
- Amounts paid directly to a former spouse cannot exceed 50 percent of member's DRP

Jurisdiction Under USFSPA

- USFSPA precludes a court from treating retired pay as the property of the member and their spouse unless the court has jurisdiction over the member based upon either
  - -- The member's residence, other than because of military assignment
  - -- The member's domicile
  - -- The member's consent to the court's jurisdiction

Direct Payment of Retired Pay

- Direct payment of retired pay may be made to a former spouse from the military pay centers if
  - -- There is a court order or a property settlement that has been ordered, ratified or approved by the court
  - -- The final order specifically provides that payment is to be made from disposable retired pay and is for either
    - --- Child support
    - --- Alimony
    - --- Division of retired pay as property, <u>if</u>
      - ---- The former spouse was married to the member for ten years or more, during which the member performed ten years or more of creditable service, and
      - ---- The order expresses payment in dollars or a percentage of the member's DRP
- Direct payments terminate upon the earliest of three events
  - -- Terms of court order satisfied
  - -- Death of the retired member
  - -- Death of the former spouse

- Procedure for request for direct pay. The former spouse must send the designated agent of the member's uniformed service (for Air Force members, DFAS-CL) the following items:
  - -- A signed DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, and
  - -- A copy of the court order and other accompanying documents that provide for payment of child support, alimony, or division of property. Any accompanying documents must be certified by an official of the issuing court within 90 days immediately preceding service on DFAS.
- Notification to DFAS can be by regular mail, e-mail, fax or certified mail
- No later than 30 days after effective service, DFAS shall send written notice to the affected member at the last known address
- DFAS may reject any request for direct pay that does not satisfy the statutory requirements
- If the member responds to the notification, DFAS will consider the response and will not honor the court order whenever it is shown to be defective, modified, superseded, or set aside
- No later than 90 days after effective service, DFAS shall make payment to the former spouse and inform him or her of the amount to be paid. If the court order will not be honored, an explanation shall be sent as to why the court order was not honored.

Eligibility For Military Benefits

- An unremarried former spouse receives medical, commissary, base exchange, and theater privileges under morale, welfare, and recreation (MWR) if:
  - -- He or she was married to the military member for at least 20 years at the time of the divorce, dissolution or annulment
  - -- The military member has performed at least 20 years of service that is creditable in determining eligibility for retired pay (the member does not have to actually be retired from active duty); and
  - -- The former spouse was married to the member during at least 20 years of member's retirement-creditable service
- An unremarried former spouse may be eligible for limited medical benefits (but not BX or commissary privileges) if:
  - -- He or she was married to the military member for at least 20 years at the time of the divorce, dissolution or annulment

- -- The military member has performed at least 20 years of service that is creditable in determining eligibility for retired pay (the member does not have to actually be retired from active duty); and
- -- The former spouse was married to the member during at least 15 years of member's retirement-creditable service

- Qualifying former spouses who have remarried may receive a restoration of some benefits upon the termination of that marriage by divorce or death. Medical benefits, however, are lost forever upon remarriage, unless the marriage is annulled.

REFERENCES:

10 U.S.C. § 1072

10 U.S.C. § 1076

10 U.S.C. § 1086a

10 U.S.C. § 1408

32 C.F.R. Part 63.6

AFI 36-3026(I), *Identification Cards for Members of the Uniformed Services, their Family Members, and Other Eligible Personnel* (17 June 2009)

Right to Financial Privacy Act (RFPA)

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

Means For Obtaining Records For A Law Enforcement Inquiry

- A DOD law enforcement office may request basic identifying information relevant to a legitimate law enforcement inquiry without consent or notice. Such information includes:
  - -- Name
  - -- Address
  - -- Account number
- Consent: Preferred method is with the customer's consent. DOD and Air Force policy is to attempt to obtain consent, if feasible, before using other methods to obtain financial records.
  - -- Consent must be in writing in the prescribed form
  - -- The consent form must include a number of disclosures, to include the records being disclosed, the purpose for disclosure, the agency to which they may be disclosed, and the fact that consent ends after three months unless terminated earlier by the person. A "statement of customer rights" is used for this purpose.
- Search warrant: Issued by either a federal magistrate or a state judge within the applicable federal district
  - -- A military search authorization is only valid for records maintained at on-base banking institutions at overseas installations. Records must be maintained at the on-base location, not merely accessible from the on-base location.
  - -- AFOSI should coordinate with the SJA before obtaining warrants or search authorizations

  - Within 90 days of executing a search warrant, the customer must be notified that the records were seized

- Judicial subpoena: Once the convening authority refers a case to trial by court-martial, the trial counsel has authority to issue subpoenas under Article 46, UCMJ. See also R.C.M. 703(e). Accordingly, trial counsel may subpoena the financial records of an accused or of witnesses. Subpoenas for an accused's records are exempt from the requirements of the RFPA. For witnesses, trial counsel must provide notification and an opportunity to challenge the subpoena.

- Administrative subpoena: DOD/IG is authorized in circumstances to issue administrative subpoenas

- Formal written request: RFPA allows this procedure only if no administrative subpoena authority "reasonably appears to be available" to the government

  - Investigators must follow RFPA, DOD, and AFOSI requirements exactly

  - Notify the customer that if he wishes to prevent disclosure, he must complete a fill-in-the blank form and sworn statement attached to the notice and file the forms with the court within ten days IAW RFPA. DOD Instruction 5400.15 gives the customer 14 days from service and 18 days from the initial mailing.

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

  - At other installations, DOD Instruction 5400.15 allows use of a military search authorization to obtain records maintained at on-base military banking facilities and credit unions

  - Follow host nation procedures for off-base local national financial institutions

References:

12 U.S.C. § 3401, *et seq*.

UCMJ, art. 46

Rule for Courts-Martial 703(e) (2008)

DODI 5400.15, *Guidance On Obtaining Information From Financial Institutions* (2 December 2004), Incorporating Change 1 (3 July 2007)

AFI 71-101 (Volume 1), *Criminal Investigations* (1 December 1999), Incorporating Change 1 (17 March 2009)

CHAPTER ELEVEN:
CIVIL LAW ISSUES FOR THE COMMANDER

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Media Relations During Aircraft Accidents

Within one hour after notification of an accident, Public Affairs (PA) should provide an initial news release with all available, releasable, commander-approved information to the news media, SAF/PA, and Air Force News Service. The initial release should include information as indicated in AFI 35-101, *Public Affairs Policies and Procedures*, para 7.13.

Accidents On Military Installations

- If no classified material is exposed, the commander will permit news media photography
- If classified information or materials are exposed and cannot be covered or removed, media or visitors will not be allowed to photograph or videotape in the area
  - -- Notify media or visitors of any restrictions on what can be filmed
  - -- Bar or restrict media or visitors from sensitive sites or activities
  - -- Immediately notify security forces of suspected filming of classified information or activities by media personnel or visitors. Security forces will confiscate film and videotape and provide a receipt for any film or videotape seized. Do not detain the media or visitors.
  - -- Review seized film or videotape with security forces to see if classified information is contained on the film or videotape, then return all portions that do not contain classified information
- Immediately notify the local Air Force Office of Special Investigations (AFOSI) if:
  - -- The film contains classified information
  - -- It appears there was intent to deliberately film or videotape classified information for purposes of profit, espionage, or to have any other significant adverse impact on national security

Accidents At Off-Base Locations

- Unless an off-base accident site is declared a National Defense Area (NDA), on-scene commanders, PA, accident boards, and security forces have limited authority to deal with or manage media activity
- <u>If no classified information is exposed</u>, the senior Air Force representative will permit news media photography

- If it is undetermined whether classified information is exposed, explain that fact to any media photographers at the scene and advise them that no photography is authorized. Warn them that taking pictures without permission may violate federal law and subject them to future investigation.

- If classified information is exposed and cannot be covered or removed

  -- Explain that federal law prohibits photography when official permission is expressly withheld and ask the news media to cooperate

  -- Do not use force if news media representatives refuse to cooperate unless the area has been declared an NDA. If photographs are taken after a warning is issued, Air Force officials must ask civilian law enforcement authorities to stop further photography of the exposed classified information and to collect all photographs.

  -- If no civilian law enforcement authorities are present and news media representatives take unauthorized pictures, do not seize the videotapes or film or detain the photographers

  -- Immediately contact the managing editor or news director of the medium employing each photographer

  -- Explain the situation and request the return of videotape or film having suspected classified information

  -- Explain failure to return the material to military authorities violates federal law, i.e., 18 U.S.C. §§ 793(e), 795, 797

Releasing Names of Accident Victims

- Deceased: Generally, the responsible installation PA office releases the names of people killed in Air Force accidents only after the next-of-kin have been notified. Wing commanders may release the names before notifying next-of-kin when a military accident in a civilian community causes significant property damage or loss of life, only to reassure the community the Air Force members were well qualified or experienced.

- Survivors: Generally, release the names of all survivors immediately. Report survivors who are believed to be in immediate danger of dying as survived but in critical condition. If, in the commander's opinion, releasing the survivors' names will reveal the identity of deceased personnel prior to next-of-kin notification, withhold the names.

- Missing or Presumed Lost: PA office at departure base will release the names of passengers and crew to news media individually, as the next-of-kin are notified; this should not delay the announcement that the aircraft is missing

- When key U.S. or foreign government officials are killed, injured, or missing while on an Air Force installation or in an Air Force vehicle or aircraft, notify OASD/PA press desk for public announcement by the White House Press Secretary

Accident Investigations

- Commanders and PA representatives must not speculate about the causes of the accident, even if the cause seems obvious. Explain that only a safety investigation board (SIB) or accident investigation board (AIB) is qualified to determine the causes.

- Do not lead the reporter to believe that all SIB findings will be made available. Explain the purpose of the safety board is to prevent accidents, not to fix blame. The safety board's conclusions are privileged, as are statements given to the board under the promise of confidentiality, and must be protected.

- If a reporter requests the AIB or SIB report, direct him or her to the convening authority of the AIB. For more detailed information on accident report releases, refer to AFI 51-503, *Aerospace Accident Investigations*.

References:

18 U.S.C. §§ 793(e), 795, 797

AFI 34-1101, *Assistance to Survivors of Persons Killed in Air Force Aviation Mishaps and Other Incidents* (1 October 2001)

AFI 35-101, *Public Affairs Policies and Procedures* (29 November 2005), Interim Change 3 (5 March 2010)

AFI 51-503, *Aerospace Accident Investigations* (26 May 2010)

AFI 91-204, *Safety Investigations and Reports* (28 September 2008)

National Defense Areas

Air Force commanders are charged with responsibility for protecting DOD resources under their control. The responsibility is not limited to resources located on federal land under DOD jurisdiction, but applies to such resources wherever they are located, whether on or off a military installation. For the most part, commanders rely on federal, state, and local civil authorities to protect off-base assets. However, when civil authorities are unavailable, unable, or unwilling to provide protection, it may be necessary to establish a National Defense Area (NDA), thereby enabling direct military protection of the assets concerned. The installation commander is ultimately responsible for the protection of military equipment, property, information, or personnel in the United States and its territories. If they are at risk off a military installation, the installation commander may declare an NDA to contain and secure the federal government resources.

- Definition: An NDA is an area established on non-federal lands located within the United States, its territories, or possessions for the purpose of safeguarding classified defense information or protecting DOD equipment or material. Establishment of an NDA temporarily places the land concerned under the effective control of the DOD. An NDA can also be established on federal lands under the control of other federal agencies.

- Commanders of major commands, numbered air forces, wings, groups, installations, and designated on-scene commanders for major accident responses, all have authority to establish NDAs. Once established, the commander has authority/responsibility to define the boundary, mark it with an appropriate barrier, and post warning signs.

- Rules for establishing an NDA

  -- NDAs may only be established within the United States, its possessions, or territories. They are not applicable in overseas areas.

  -- NDAs may only be established under emergency situations such as aircraft crashes, emergency landings by aircraft carrying nuclear weapons; emergency diversions of military aircraft to civilian airports, and accidents involving or temporary immobilization of nuclear weapons ground convoys. Planned rest stops are not emergencies.

  -- The size, shape and location of the NDA must be reasonably related to what is needed to protect the resource concerned. The boundaries should be clearly defined, preferably by some form of temporary barrier, such as rope or wire. Warning signs should be posted at each entry control point and along the boundary.

  -- To the extent possible, the consent and cooperation of the landowner should be sought when establishing an NDA. However, military necessity ultimately drives

the location, size, and shape of an NDA, and it may be established with or without the owner's consent.

  - Because the NDA effectively deprives the landowner of the use of the property during the period the NDA is in existence, the Air Force may have to compensate the landowner for the temporary "taking" of the property

  - Commanders should consult with their servicing staff judge advocate when deciding to establish, disestablish, or modify an NDA

- Enforcement

  - Commanders have the authority to prohibit entry into NDAs and to remove those who enter without authority, using the minimum force reasonably necessary to prevent violation of the NDA and to protect the DOD resources concerned

  - Apprehension or detention of civilian personnel who violate the security requirements of the NDA should normally be done by civilian law enforcement authorities

  - If civil authorities cannot or will not provide assistance, on-scene military personnel may detain civilian violators or trespassers and escort them from the NDA

  - Civilian offenders detained by military personnel should be released to proper civil authorities as quickly as possible; coordinate with the servicing staff judge advocate

  - Military action to detain civilian violators is limited to the NDA and the immediate boundary area. Pursuit of civilian offenders by military authorities beyond the immediate area should be left to the responsibility of civil law enforcement authorities.

- Media Relations

  - On-scene commanders should be sensitive to interests of the media, and should limit photography only as much as necessary to protect classified information. If the off-base site is designated as an NDA, support news media representatives as on a military installation. Media representatives should be briefed on appropriate disclosable information during a nuclear accident or incident and the procedures to be followed, such as escort requirements.

  - For example, rather than prohibiting all photography, it may be sufficient to simply limit photography to those angles or distances which would not result in exposure of classified information

  - If an NDA has been established, military authorities may use reasonable force to prevent photography by anyone within the NDA, to apprehend or detain

offenders, and to seize film and equipment. If photography is done from outside the NDA, civilian authorities should handle the matter.

-- If an NDA has not been established, military authorities at off-base locations may not use force, but should ask civilian law enforcement officials to stop further filming of exposed classified information, and to collect all photographs already taken

-- If civil authorities are unwilling or unable to assist, the commander concerned should contact the managing editor or director of the news agency employing the photographer, request return of the film suspected of containing classified information, and explain that failure to return the film may constitute a violation of federal law

- The attached form letter may be used to communicate establishment of an NDA to local governments, citizens, media, and others

References:

18 U.S.C. § 1382

50 U.S.C. § 797

DODI 5200.08, *Security of DOD Installations and Resources* (10 December 2005), Incorporating Through Change 1 (19 May 2010)

AFI 10-2501, *Air Force Emergency Management (EM) Program Planning and Operations* (24 January 2007), Incorporating Through Change 2 (6 April 2009), AFGM1 (26 February 2010)

AFI 31-101, *Integrated Defense* (FOUO) (8 October 2009)

AFI 31-201, *Security Police Standards and Procedures* (30 March 2009)

AFI 35-101, *Public Affairs Policies and Procedures*, (29 November 2005), Interim Change 3 (5 March 2010)

AFMAN 32-4004, *Emergency Response Operations* (1 December 1995)

Attachment:

Sample letter establishing an NDA

MEMORANDUM FOR WHOM IT MAY CONCERN

FROM: (Commander or On-Scene Commander)

SUBJECT: Establishment of National Defense Area

1. In accordance with Section 797 of Title 50 of the United States Code and AFI 31-101, I (as the on-scene commander) (as the commander responsible for the resources), (am) (have been directed by, name and rank of the commander responsible for the resources to) establishing a National Defense Area as described in paragraph 4 of this letter. This action is being taken for the purpose of protecting and securing priority military resources.

2. Entry into this National Defense Area is subject to my approval. The protection of priority military resources is the primary consideration. Also, I wish to ensure the protection of human life and civilian property in the National Defense Area and ensure the integrity of the site pending investigation and recovery operations. Therefore, all requests to enter the National Defense Area must be addressed to my attention.

3. Entering a National Defense Area without authority is a federal offense; upon conviction, a violator shall be liable for a fine, not to exceed $5,000 or imprisonment for not more than one year, or both.

4. The National Defense Area is described as follows:
[Describe NDA by coordinates, landmarks, boundary markings, or other certain fixed points.]

SIGNATURE BLOCK FOR COMMANDER OR
ON-SCENE COMMANDER

Note: Use the appropriate wording. If the on-scene commander is also the commander responsible for the resource involved, he/she may authorize the establishment of the National Defense Area. In all other cases, the on-scene commander may only establish a National Defense Area after being directed to do so by the commander responsible for the resource involved.

Posse Comitatus

The Posse Comitatus Act states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

Punishment For Violations

- Possible sanctions for violating the Posse Comitatus Act
  - -- Fine and/or two years imprisonment
  - -- Suppression of evidence illegally obtained
    - --- The court may let the accused go free
    - --- So far, the courts have been reluctant to grant this remedy. However, in recent cases, some courts have warned that repeated violations of the Posse Comitatus Act could lead to application of the exclusionary rule in some cases.

What Posse Comitatus Prohibits

- Prohibitions: The armed services are precluded from assisting local law enforcement officials in enforcing civilian laws, except where authorized by the Constitution or act of Congress
  - -- By its terms, the Act applies only to the Army and Air Force
  - -- The Navy and Marine Corps follow the Act by DOD policy
  - -- The Act applies to the Reserves and to the National Guard while in Title 10 (federal) service, but not to the Guard while in Title 32 (state) status
  - -- The Act does <u>not</u> apply to the Coast Guard
- Does not apply to off-duty conduct, unless induced, required, or ordered by military officials
- The act does not apply to civilian employees, unless acting under the direct command and control of a military officer

Exceptions to Posse Comitatus

- Statutory exceptions: By its terms, the Act does not preclude support "expressly authorized by the Constitution or Act of Congress." Congress has enacted a number of statutory provisions falling into this category.

- Several statutes authorize the military to engage in actions that would otherwise violate the Posse Comitatus Act

  -- 10 U.S.C. § 371 allows the military to provide to local law enforcement officials any law enforcement information collected "during the normal course of military training or operations." It requires the military to consider the needs of local law enforcement when planning training missions. Moreover, it mandates turning over information relevant to drug operations unless doing so would threaten national security.

  -- 10 U.S.C. § 372 allows the military to loan any equipment, base facility, or research facility to local law enforcement, although the military may charge for its use (See § 377). Loan of "arms, ammunition, tactical-automotive equipment, vessels and aircraft" requires proper coordination.

  -- 10 U.S.C. § 373 makes military personnel available to train federal, state, and local civilian law enforcement officials on operation and maintenance of equipment properly loaned under § 372, and to provide expert advice to such officials

  -- 10 U.S.C. § 374 allows the Secretary of Defense to make military personnel available to operate and maintain loaned equipment under § 372

- <u>The military is still prohibited from enforcing civilian laws. The military may not participate in a search, seizure, arrest, or similar activity in support of local law enforcement</u> (10 U.S.C. § 375).

  -- The military can execute the civilian laws on the installation for a military purpose

  -- Even on the installation, the military "detains" civilians before turning them over to civil authorities. The military does not arrest or apprehend civilians. This is a <u>critical</u> distinction.

- The military may engage in <u>humanitarian acts</u> such as looking for a lost child or rescuing civilians from a destroyed building. However, the courts will examine humanitarian acts to ensure the military is not engaging in a subterfuge to disguise a Posse Comitatus Act violation.

- <u>Posse Comitatus is still a modern problem</u>: Despite the fact that the law's origins go back to the Civil War, Posse Comitatus is still an issue that surfaces fairly frequently. For example, in the immediate aftermath of the Oklahoma City bombing, the Posse

Comitatus Act was determinative in responding to civilian law enforcement agency requests for assistance from the military.

References:

10 U.S.C. § 375

18 U.S.C. § 1385

DODD 5525.5, *DOD Cooperation with Civilian Law Enforcement Officials* (15 January 1986), Incorporating Change 1 (20 December 1989)

AFI 10-801, *Assistance to Civilian Law Enforcement Agencies* (15 April 1994)

AFI 10-802, *Military Support to Civil Authorities* (19 April 2002)

AFMAN 32-4004, *Emergency Response Operations* (1 December 1995)

Air Force Safety and Accident Investigations

Introduction

- AFI 91-204, *Safety Investigations and Reports*, and AFI 51-503, *Aerospace Accident Investigations*, are the two most important instructions dealing with investigating accidents involving aircraft, missiles, or nuclear resources. AFI 51-507, *Ground Accident Investigations*, deals with investigating accidents occurring on land and on water, not involving aircraft, missiles or other aerospace assets.
- Safety investigations, conducted by a safety investigation board (SIB), determine cause to prevent future mishaps
- The deliberations, opinions, and conclusions of investigators and any evidence from witnesses and contractors given under a promise of confidentiality are in Part II of the safety mishap report. Part II is privileged and not releasable outside safety channels.
- Aircraft accident investigations, conducted by an accident investigation board (AIB), and ground accident investigations, conducted by a ground accident investigation board (GAIB), provide fully releasable reports, which include the non-privileged Part I of the safety mishap report, and preserve evidence for claims, litigation, disciplinary and administrative actions, and all other purposes
- By providing an alternate source of non-privileged information for use outside safety and operational channels, the integrity of the safety privilege is protected

Safety Investigations

- Safety investigations under AFI 91-204
  - -- An SIB is composed of a board of officers or an investigating officer
    - --- <u>Not</u> for disciplinary actions, line-of-duty determinations, flying evaluation boards, litigation, claims, or assessing pecuniary liability (for or against the government)
    - --- Witnesses are not sworn
    - --- An SIB may offer promise of confidentiality to witnesses or contractors if necessary and authorized
    - --- A safety report is barred from use in claims and litigation for or against the United States even if it favors the Air Force
    - --- In *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), the Supreme Court upheld the privileged nature of safety reports (Part II)

- Potential problems with safety investigations
  - -- Misunderstanding the purpose and use of information
  - -- Interface with accident investigators
    - --- Part I of the safety report consists of non-privileged factual information and is releasable to the accident investigators
    - --- The safety investigation has priority over the accident investigation on wreckage, witnesses, and documents
  - -- Talking to next-of-kin (NOK) of mishap victims
    - --- Relatives should speak with the family liaison officer appointed by the commander
    - --- Do not discuss mishap responsibility, legal liability, classified information, or cause factors. The AIB president or GAIB president will brief the AIB or GAIB report to NOK and discuss any causal findings at that time.
    - --- Provide non-privileged information only
    - --- Use caution: it is easy to invite claims and lawsuits
  - -- Requests for information
    - --- Determine whether the requester is asking for the SIB report or a GAIB or AIB report
    - --- For SIB reports, the disclosure authority is the Commander, Air Force Safety Agency (AFSA). The OPR is HQ AFSC/JAR.
    - --- For AIB and GAIB reports, direct requests to the major command responsible for initiating the investigation
  - -- Creating the appearance of improper use of privileged safety information for disciplinary actions, flying evaluation boards, etc.
    - --- Imperative that commanders have “clean hands”
    - --- Document where you got the information to take action
  - -- Safety investigations and potential courts-martial
    - --- Obtaining a conviction is extremely difficult if a safety investigation precedes the court-martial. The defense often requests the privileged portion of the report, resulting in potential litigation over its release.

--- If substantial evidence of criminal misconduct is present and the mishap cause is readily apparent, the convening authority should delay the SIB and proceed with the AIB or GAIB

Aerospace Accident Investigations

- Accident investigations under AFI 51-503 are required in:
  - -- All Class A mishaps as defined by AFI 91-204, except where the aircraft is not destroyed and the mishap results solely in damage to government property
  - -- Cases with a probability of high public interest
  - -- All suspected cases of friendly fire
- Accident investigations otherwise not required may be convened at the convening authority's discretion when:
  - -- There is a likelihood of public, media, or Congressional interest in the mishap
  - -- There is anticipated litigation for or against the government or a government contractor
  - -- There is anticipated disciplinary action under the UCMJ against any individual
- Accident investigation responsibilities
  - -- Convening authority (the major command commander who convened or would have convened the preceding safety investigation under AFI 91-204, delegable to the major command vice commander)
    - --- Convenes investigation
    - --- Ensures appropriate condolence letters are sent to NOK. Also, sends letter to the NOK of deceased and seriously injured personnel explaining process and status of ongoing investigations and of any planned NOK briefings.
    - --- Funds costs associated with conducting AIB
    - --- Determines what accident information may be released to the public prior to completion of the AIB Report
    - --- Approves the AIB report and PA notification and release plan
    - --- High-interest mishaps must be coordinated and staffed by the convening authority's staff judge advocate through AFLOA/JACC and HQ USAF/JA for review by the Secretary of the Air Force and Chief of Staff at least two duty days prior to public release and NOK briefing

- -- Installation Commander
  - --- Appoints a host installation liaison officer to assist the AIB in obtaining accommodations and administrative support, as well as arranging witness interviews
  - --- Provides in-house facility, communications, supply, photography, and billeting support for the AIB
  - --- Removes and stores wreckage from the mishap site at the direction of the convening authority until AFLOA/JACC releases it from legal hold
  - --- Assists the convening authority with initial cleanup of the mishap site

Ground Accident Investigations

- Ground accident investigations under AFI 51-507 must be convened for on-duty, Class A accidents involving aircraft ground operations where there is no intent for flight; motor vehicle, ground, or industrial mishaps; radioactive materials; explosives; chemical agents; or a directed energy weapon, device, or equipment
- Ground accident investigations are not legally required under circumstances listed in AFI 51-507, to include those instances where:
  - -- Mishaps are investigated by another military service or agency of the federal or state government if the investigation includes a publicly releasable report (e.g., a police traffic accident report)
  - -- Mishaps are not connected to the duties of the involved Air Force personnel (e.g. off-duty, outside scope of employment)
- Ground accident investigations can be convened at the convening authority's discretion when:
  - -- There is anticipated litigation for or against the government or a government contractor, or
  - -- There is anticipated disciplinary action under the UCMJ against any individual, or
  - -- There is a probability of high public interest
- AFI 51-507 does not preclude a base legal office or commander from initiating other types of investigations, (e.g. potential claims investigation, commander-directed investigation, report of survey) as appropriate, in cases where a GAIB is not mandatory

- Accident investigation responsibilities
  - -- Convening authority (the major command commander of the organization that experienced the damage, fatality, or disability, delegable to the major command vice commander)
    - --- Convenes investigation
    - --- Ensures appropriate condolence letters are sent to NOK. Also, sends letter to the NOK of deceased and seriously injured personnel explaining process and status of ongoing investigations and of any planned NOK briefings
    - --- Funds costs associated with conducting GAIB
    - --- Determines what accident information may be released to the public prior to completion of the GAIB report
    - --- Approves the GAIB report and PA notification and release plan
      - ---- High-interest mishaps must be coordinated and staffed by convening authority's staff judge advocate through AFLOA/JACC for HQ USAF/JA review at least two duty days prior to public release and NOK briefing
      - ---- GAIB reports do not usually contain a statement of opinion, unless specifically required by convening authority
        - ----- Statements of the GAIB board president's opinion as to the cause of the accident should only be required in rare circumstances
        - ----- Unlike AIBs, opinions of GAIB board presidents are not statutorily protected and may affect the United States in litigation
        - ----- A well-documented, thorough GAIB report should allow facts to speak for themselves in most instances
  - -- Installation commander
    - --- Appoints a host installation liaison officer to assist the GAIB in obtaining accommodations and administrative support, as well as arranging witness interviews
    - --- Provides in-house facility, communications, supply, photography, and billeting support for the GAIB
    - --- Removes and stores wreckage and other evidence from the mishap site at the direction of the convening authority until AFLOA/JACC releases it from legal hold
    - --- Assists the convening authority with initial cleanup of the mishap site

References:

AFI 51-503, *Aerospace Accident Investigations* (26 May 2010)

AFI 51-507, *Ground Accident Investigations* (28 May 2010)

AFI 91-204, *Safety Investigations and Reports* (24 September 2008)

Administrative Inquiries and Investigations

Commanders may be involved in or supervise several different types of investigative procedures.

Inherent Authority to Investigate

- All commanders possess inherent authority to investigate matters or incidents under their jurisdiction
- Authority to investigate is incident to command
- Air Force policy is that inquiries and investigations will be conducted by the echelon of command capable of conducting a complete, impartial, and unbiased investigation
- Reprisal against an individual for making a complaint is prohibited
- Many investigations and inquiries, such as reports of survey, line of duty, homosexual conduct, accident investigations, etc., are conducted pursuant to a specific regulation
- When a specific regulation does not apply, the investigation is conducted under the commander's inherent authority. AFI 90-301 provides guidance on how to conduct a commander investigation or inquiry <u>but should not be cited as the authority</u> for the investigation or inquiry.

Investigations Governed By Air Force Instructions

- Types of administrative inquiries and investigations
  - -- AFI 90-301, *Inspector General Complaints*, provides authority for investigations and inquiries:
    - --- Resulting from IG complaints
    - --- Directed or initiated within IG channels
    - --- Conducted by an inspector or inspector general
  - -- Those governed by other instructions
    - --- AFI 31-206, *Security Forces Investigations Program*
    - --- AFI 36-2910, *Line of Duty (Misconduct) Determination*
    - --- AFI 36-1201, *Equal Employment Opportunity Complaints*
    - --- AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*

--- AFI 51-503, *Aerospace Accident Investigations*

--- AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*

--- AFI 71-101, Vol. 1, *Criminal Investigations* (investigations conducted by Air Force Office of Special Investigations (OSI))

--- AFI 90-301 (IG) and AFI 36-2706, *Military Equal Opportunity (MEO) Program*

--- AFI 91-204, *Safety Investigations and Reports*

--- Other investigations directed by specific instructions

-- Virtually all other investigations fall within the inherent authority of the commander. AFI 90-301 may be used for guidance (i.e., procedures and format), but may not be used as authority for such investigations.

Investigation Procedures

- Often conducted by a single investigating officer (IO)
- Inquiry versus investigation
  - -- An inquiry is a determination of facts on matters not usually complex or serious. Inquiries may be handled through routine channels, and reports may be summarized.
  - -- An investigation is appropriate for serious, complex matters requiring a determination of extensive facts. Investigations conducted under the commander's inherent authority should include a written report. Normally, exhibits and sworn witness testimony support the facts that are determined.
- AFI 90-301 inquiries or investigations may be privileged documents
  - -- The Inspector General controls release in accordance with FOIA and Privacy Act requirements
  - -- Ensure that privileged information is kept to a minimum
- Witnesses
  - -- Must be advised of the nature of the investigation and, if applicable, their right to counsel
  - -- May refuse to answer questions only by invoking Article 31 of the UCMJ (military members) or Fifth Amendment (civilians) rights

- -- IOs have no authority to grant express promises of confidentiality to subjects, suspects, complainants, or witnesses

- Additional guidance

  - -- If the matter is more properly the domain of security forces or AFOSI (suspected criminal activity, etc.), have them conduct the investigation

  - -- Always consult with the servicing staff judge advocate before directing any inquiry or investigation

  - -- Following initial interviews with Air Force personnel who are the subject of an investigation or inquiry, IOs will refer the individual to his/her first sergeant, commander, or supervisor. The command representative must be physically present immediately following the interview and receive the subject/suspect, and this hand-off must be documented at the end of the testimony.

References:

DOD Regulation 5400.7/Air Force Supplement, *DOD Freedom of Information Act Program* (24 June 2002)

AFI 31-206, *Security Forces Investigations Program* (16 September 2009)

AFI 33-332, *Privacy Act Program* (29 January 2004)

AFI 36-1201, *Equal Employment Opportunity Complaints* (12 February 2007)

AFI 36-2706, *Military Equal Opportunity (MEO) Program* (29 July 2004), Certified Current (17 February 2009)

AFI 36-2910, *Line of Duty (Misconduct) Determination* (4 October 2002), Incorporating Through Change 2 (5 April 2010)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (26 September 2001), Incorporating Change 5 (22 April 2010), Certified Current (2 April 2010), AFGM1 (9 June 2010)

AFI 51-503, *Aerospace Accident Investigations* (26 May 2010)

AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice* (30 June 1994)

AFI 71-101, V-1, *Criminal Investigations* (1 December 1999), Incorporating Change 1 (17 March 2009)

AFI 71-101, V-2, *Protective Service Matters* (18 November 2002)

AFI 91-204, *Safety Investigations and Reports* (28 September 2008)

AFI 90-301, *Inspector General Complaints Resolution* (15 May 2008)

Allegations Against Senior Officials and Colonels (or Equivalents)

AFI 90-301, Chapters 3 and 4, establish strict standards for reporting and investigating allegations against senior officials and colonels (or equivalents).

Senior Officials

- Senior officials are active duty, retired, Reserve, and Air National Guard officers in the grade of 0-7 select and above; current and former members of the Senior Executive Service (SES) or equivalent; and current and former Air Force civilian Presidential appointees

- Investigative policy: Unless otherwise specified by SAF/IG, all investigations into non-criminal allegations against senior officials will be conducted by SAF/IGS

- Reporting policy: When a commander or an inspector general (IG) official receives an allegation or adverse information involving a senior official, it must be reported to SAF/IGS immediately

  -- Adverse information is a violation of criminal law, the UCMJ, the Joint Ethics Regulation, the Anti-Deficiency Act, or military or civilian personnel policies; an abuse of authority; fraud, waste, and abuse or mismanagement; reprisal; misconduct by a medical provider requiring an evaluation of clinical privileges; prohibited discrimination or sexual harassment; or any other matter which may reflect adversely on the individual's judgment or exercise of authority

  -- IG officials who receive allegations against an Air Force senior official may inform their commanders only of the general nature of the allegations and the identity of the person against whom the allegations were made. They must not reveal the source of the allegations or the specific nature of the allegations.

Colonels (Or Equivalents)

- A colonel (or equivalent) is any Air Force active duty, Reserve, or Air National Guard officer in the grade of O-6; an officer who has been selected for promotion to the grade of O-6, but has not yet assumed that grade; or an Air Force civilian employee in the grade of GS-15

- Reporting policy: IG officials who become aware of any adverse information (see definition above) or allegations of wrongdoing against a colonel (or equivalent) that are not obviously frivolous and that, if true, would constitute misconduct or improper or inappropriate conduct as defined in AFI 90-301 must notify SAF/IGQ immediately through their major command, field operating agency, or direct reporting unit channels

- Investigative policy: IGs at all levels must immediately conduct a complaint analysis when allegations against a colonel (or equivalent) are received. If, after the complaint analysis, it is determined that an IG investigation is not warranted, the IG will notify SAF/IGQ through MAJCOM, FOA, or DRU channels.

- All military equal opportunity (MEO) or equal opportunity treatment (EOT) complaints against senior officials and colonels (or civilian equivalents) will be handled through IG channels. Complaints against senior officials must be immediately referred to SAF/IGS, and complaints against colonels (or civilian equivalents) must be referred to the local IG (or SAF/IGQ if there is no local IG).

References:

AFI 36-2706, *Military Equal Opportunity (MEO) Program* (29 July 2004), Certified Current (17 February 2009)

AFI 90-301, *Inspector General Complaints Resolution* (15 May 2008)

Flying Evaluation Boards

The Air Force has stringent requirements that must be met and maintained to perform rated flying duties.

Policy

- Aircrew members have an obligation to maintain professional standards. When performance of rated duty becomes suspect, a flying evaluation board (FEB) may be convened.
- FEBs are administrative, fact-finding proceedings conducted to ensure information relevant to an aircrew member's aviation and professional qualification is reviewed and discussed in a fair and impartial manner. The proceedings are not adversarial and are closed to the public.
- FEBs are not a substitute for disciplinary or other administrative action

Reasons to Convene A Flying Evaluation Board

- Suspension or disqualification from aviation service for more than eight years
- Lack of proficiency (unless enrolled in a formal flying training program)
- Failure to meet training standards while enrolled in a USAF formal flying training course
- Lack of judgment in performing rated duties
- Failure to meet ground/flying training or annual physical exam requirements
- Intentional violation of aviation instructions or procedures
- Aircrew member exhibits habits, traits of character, or personality characteristics that make it undesirable to continue using the aircrew member in flying duties

Composition of A Flying Evaluation Board

- A flying unit commander (wing or comparable level) normally convenes an FEB
- Three rated voting members, qualified for aviation service in an active aviation service code (ASC) and senior in rank to the respondent, will be appointed and will constitute a quorum. Voting members should be in the same aircrew specialty (e.g., pilot, navigator, or flight engineer) as the respondent.
- One additional aircrew member is appointed to act as a nonvoting recorder

- A judge advocate may be appointed as a nonvoting legal advisor to advise on procedural matters and ensure a fair hearing. A judge advocate shall not be appointed as an assistant recorder and may not be present at board sessions.
- A flight surgeon may be appointed as a nonvoting member when a medical problem may be a significant contributing factor

Flying Evaluation Board Procedures and Guidelines

- Notify the respondent in writing. The notification letter contains the reasons for the FEB, when and where the board will meet, witnesses to be called, and rights of the respondent.
- Respondent may submit a request for voluntary disqualification from aviation service in lieu of FEB (VILO). FEB action is suspended until the major command acts on the VILO request.
- Rights of the respondent:
  - -- Assigned military counsel of his or her own choosing (if available) or civilian counsel (at respondent's expense)
  - -- Informed in writing of the specific reasons for convening the board
  - -- Review all evidence and documents to be submitted to the board by the recorder (before convening the board)
  - -- Challenge voting members for cause
  - -- Cross-examine witnesses called by the board and call witnesses and present evidence (recorder arranges for military witnesses)
  - -- Testify personally and submit a written brief (respondent may not be compelled to testify)
- Rules of evidence:
  - -- An FEB is not bound by formal rules of evidence prescribed for courts-martial; however, observing these rules promotes orderly procedures and a thorough investigation
  - -- The decision about the authenticity of documents rests with the senior board member
- Findings and recommendations:
  - -- Made in closed session (voting members only)
  - -- Each finding must be supported by specific evidence

- -- Findings must include comment on each allegation or point in question
- -- Recommendations must be consistent with the findings and generally only address qualification for aviation service (i.e., remain qualified or be disqualified)
  - --- If the officer holds more than one aviation qualification, the FEB must make a recommendation as to both qualifications
  - --- If the FEB recommends disqualification, it may also recommend whether the officer should be prohibited from wearing the associated aviation badge
- -- A minority report is appropriate if there is a disagreement among the voting members

- Review process:
  - -- The convening authority's staff judge advocate reviews for legal sufficiency; review is limited to sufficiency of the evidence and compliance with procedural requirements
  - -- The convening authority adds comments and recommendations and must explain any recommendations that are contrary to those of the FEB
  - -- The convening authority or higher reviewer may reconvene the FEB or order a new board
  - -- The major command commander makes the final determination in all FEB cases convened at the major command level or lower

Reference:

AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Badges* (25 September 2007), Incorporating Change 1 (10 July 2009)

Commercial Activities

Private organizations (PO) and unofficial activities/organizations must not engage in activities that duplicate or compete with AAFES, Services activities, or Nonappropriated Funds Instrumentalities (NAFIs). This means POs and unofficial activities/organizations may not engage in frequent or continuous resale activities. However, the installation commander may authorize such things as continuous thrift-shop sales operations, museum shop sales of items related to museum activities, and occasional sales for fund-raising purposes like bake sales, dances, carnivals, or similar occasional functions.

DOD Commercial Sponsorship Program

- Commercial sponsorship is a DOD program that allows commercial enterprises to provide support to morale, welfare or recreation (MWR) programs in exchange for promotional recognition. Such sponsorship helps finance enhancements for MWR elements of Services events, activities, and programs.
- There must be one or more bona fide MWR program events for sponsorship to apply
- Membership drives over extended periods can be treated as events for sponsor support and recognition purposes; however, sponsor displays can only be authorized at specific events during the drive
- MWR events appropriate for commercial sponsorship do not include normal day-to-day MWR management and overhead
- Only Services MWR programs may use the commercial sponsorship program. Other Air Force organizations, private organizations, or unofficial activities are not authorized to use commercial sponsorship to offset program or activity expenses.
- Installation commanders control the commercial sponsorship program at base level and approve/disapprove sponsorships worth $5000 or less (or other values as delegated by the major command)

Unsolicited Commercial Sponsorship

- Unsolicited commercial sponsorship must be entirely initiated by the prospective sponsors or their representatives
- Services activities may generate sponsor awareness and interest by publishing brochures and leaflets, placing ads in newspapers and magazines, or issuing public affairs-like news releases about the existence and availability of the program. They may also send nonspecific letters as follow-ups to general advertisements.
- Air Force personnel may not provide information about specific needs of the Services MWR program to “encourage” offers of unsolicited sponsorship

Solicited Commercial Sponsorship

- The solicited commercial sponsorship program is the only authorized process for soliciting commercial sponsors for MWR elements of Services programs
- Commercial sponsorship managers announce all sponsorship solicitations to the maximum number of potential sponsors feasible in one or more of the following: *The Commerce Business Daily* (CBD) per AFMAN 34-416, local newspapers, chamber of commerce newsletters, or other appropriate business community publications, and then evaluate prospective sponsors' proposals on a best-offer basis
  - -- MWR elements of Services programs may not solicit sponsorship from alcohol or tobacco companies under any circumstances
  - -- Military systems divisions of defense contractors will not be solicited; however, solicitations may be sent to any domestic consumer products division of defense contractors. Unsolicited offers may be accepted from any segment of a defense contractor.

On-Base Commercial Solicitation

- On-base solicitation is a privilege, not a right, granted at the discretion of the installation commander
- Personal commercial solicitation on an installation will be permitted only if the following requirements are met:
  - -- The solicitor is duly licensed under applicable laws
  - -- The installation commander permits it
  - -- A specific appointment has been made with the individual concerned and conducted in family quarters or in other areas designated by the installation commander
- Certain solicitation practices are prohibited on military bases, including, but not limited to:
  - -- Soliciting personnel who are on-duty
  - -- Soliciting any kind of mass audience, i.e., commander's call or guard mount
  - -- Soliciting in housing areas without an appointment
  - -- Soliciting door-to-door
  - -- Implying DOD sponsorship or sanction

- -- Soliciting members junior in grade
- -- Procuring or supplying roster listings of DOD personnel
- -- Using official ID cards by retirees or reservists to gain access for soliciting

- Housing occupants may operate limited business enterprises while living in base housing limited to the sale of products, minor repair service on small items, limited manufacturing of items or tutoring. Child care in family quarters is governed by AFI 34-276.
  - -- Members must request permission in writing to conduct the commercial activity from the housing office
  - -- Occupants must meet local government licensing requirements, agreements, and host country business practices before requesting approval to operate a private business

Related Issues

- Games of chance
  - -- Bingo and Monte Carlo (Las Vegas) events are controlled by the Air Force Club Program. Games of chance must not otherwise violate local civilian laws.
  - -- Cash prizes may be awarded for bingo in accordance with AFI 34-272, para 3.17
  - -- Play in bingo programs should be limited to eligible patrons, their family members, and guests
  - -- Only non-monetary prizes may be awarded for Monte Carlo events, in accordance with AFI 34-272, para 3.18
  - -- Play in Monte Carlo events should be limited to club members and their adult family members, members of other clubs exercising reciprocal privileges and their adult family members, and adult guests
  - -- Once a participant purchases a money substitute for a Monte Carlo event, no reimbursement can be made for any unused portion, and money substitutes can't be used to buy resale items, including food and beverages
- Raffles:
  - -- Occasional and infrequent raffles must be approved in advance by the installation commander, with the staff judge advocate's advice. Raffles must not otherwise violate local civilian laws.

- The funds raised must benefit DOD personnel or their families and must be conducted for a charitable, civic, or other community welfare purpose within the DOD community
- Raffle requests to raise funds for purely social, recreational, or entertainment purposes which benefit only individual PO members and/or family members, such as to underwrite the costs of a sight-seeing tour, will not be approved
- Raffles must not be conducted at the workplace and Air Force members or civilians must not conduct raffles during duty time
- Air Force officials may not officially endorse a raffle

References:

DODI 1344.07, *Personal Commercial Solicitation on DOD Installations* (30 March 2006)

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

AFI 32-6001, *Family Housing Management* (21 August 2006), Incorporating Change 3 (24 October 2008)

AFI 34-219, *Alcoholic Beverage Program* (17 October 2007), Incorporating Change 1 (7 February 2008)

AFI 34-223, *Private Organizations (PO) Program* (8 March 2007), Certified Current (28 May 2009)

AFI 34-262, *Services Programs and Use Eligibility* (27 June 2002)

AFI 34-272, *Air Force Club Program* (1 April 2002), Incorporating Change 3 (6 April 2010)

AFI 34-276, *Family Child Care Programs* (1 November 1999)

AFI 34-407, *Air Force Commercial Sponsorship Program* (19 July 2005)

AFI 36-3101, *Fundraising Within the Air Force* (12 July 2002)

AFMAN 34-228, *Air Force Club Program Procedures* (1 April 2002), Incorporating Change 2 (25 March 2010)

AFMAN 34-416, *Air Force Commercial Sponsorship and Sale of NAFI Advertising Procedures* (5 October 2004)

MWR and Nonappropriated Fund Instrumentalities

Morale, Welfare, and Recreation (MWR) activities are those activities that provide for the comfort, pleasure and mental and physical improvement of authorized users. The activities include recreational and free-time programs, resale merchandise and services, and activities to promote the general interest.

Nonappropriated Funds (NAF) are funds that are not appropriated by Congress and are not furnished from revenue derived from taxation. NAF funds are self-generated by Nonappropriated Fund Instrumentalities (NAFIs).

- NAFIs are DOD fiscal and organizational entities that exercise control over NAFs and furnish or assist other DOD organizations in providing MWR services
- NAFIs are instrumentalities of the federal government created by Air Force instructions. NAFI employees are federal employees, not civil servants.
- NAFIs are not incorporated under the laws of any state, but enjoy the legal status of an instrumentality of the United States, i.e., a lawsuit against a NAFI is a suit against the United States. NAFIs are not private organizations established under AFI 34-223.
- The resource management flight chief (RMFC) is the appointed funds custodian responsible for protecting, accounting for and using NAFs. The RMFC is the single custodian for all base level NAFIs, except base restaurants, civilian welfare funds, and some NAFIs at remote or isolated sites. No individual or group has any right to ownership in NAFI assets.
- Benefits accrue to persons through participation in NAFI activities and programs
- NAFIs may not generally show movies; sponsor, conduct, or allow gambling; provide or sell alcoholic beverages; hoard or dissipate NAFI assets
- AAFES is the primary source of resale merchandise and services for military personnel, dependents, and other authorized patrons
- NAFIs may engage in resale activities when commander determines AAFES cannot meet the requirement in a responsive manner and the goods or services provided are directly related to the purpose and function of the NAFI involved

References:

AFI 34-201, *Use of Nonappropriated Funds (NAFS)* (17 June 2002)

AFI 34-223, *Private Organizations (PO) Program* (8 March 2007), Certified Current (28 May 2009)

Off-Limits Establishments

The establishment of off-limits areas is a function of command. It may be used by installation commanders to help maintain discipline, health, morale, safety, and welfare of service members. Off-limits action is also intended to prevent service members from being exposed to or victimized by crime-conducive conditions. Armed forces disciplinary control boards (AFDCBs) advise and make recommendations to commanders on matters including establishment of off-limits areas.

Armed Forces Disciplinary Control Boards

- AFDCBs are established under the provisions of Air Force Joint Instruction (AFJI) 31-213
  - They may be local or regional; boards must meet quarterly
  - Boards may recommend the installation commander place a civilian establishment or area off-limits to military members
  - The AFDCB is usually composed of a president and voting members, appointed by the commander, and representatives from various base functional areas, such as law enforcement; legal counsel; equal opportunity; public affairs; chaplains; consumer affairs; and medical, health, or environmental protection
- To place an establishment off-limits the AFDCB normally must:
  - Notify the proprietor of the offending establishment, in writing, of the alleged condition or situation requiring corrective action
  - Specify in the notice a reasonable time for the condition or situation to be corrected
  - Provide the proprietor the opportunity to present any relevant information to the board
- If the AFDCB recommends an establishment be placed off-limits, the installation commander makes the final decision. A decision to place an establishment off-limits may be appealed to the next higher commander after exhausting any local appeal rights. The establishment remains off-limits until the decision is overturned or the commander determines adequate corrective action has been taken.

Emergency Situations

- In emergency situations, commanders may declare establishments or areas temporarily off-limits to personnel of their respective commands. Follow-up action must be taken by AFDCBs as a first priority.

Commander Disciplinary Options

- Members who enter off-limits areas or establishments are subject to UCMJ action. Family members of service members and others associated with the Service or installation should be made aware of off-limits restrictions.
- Do not post off limits signs or notices in the United States on private property
- In areas outside of the continental United States, off-limits and other AFDCB procedures must be consistent with existing status of forces agreements (SOFAs)

Reference:

AFJI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations* (27 July 2006)

Unofficial Activities/Squadron Snack Bars

- Unit coffee funds, flower funds, or other small operations commonly known as "snack bar" funds are permitted when classified as unofficial activities with limited assets
  - -- Assets may not exceed a monthly average of $1000 over a three-month period
  - -- When assets exceed the above figure, the snack bar must either become a private organization, discontinue its operations, or reduce its assets below the $1000 threshold
- Installation and unit commanders must carefully review the status of all such unofficial activities operating on their installation and ensure their compliance with all applicable rules and regulations
- No such fund can duplicate or compete with any Services, nonappropriated fund instrumentalities (NAFI), or AAFES activity
- Unofficial activities may not engage in frequent or continuous resale activities
  - -- AFI 34-223 permits occasional sales for fund-raising purposes when approved in advance by the installation commander or designee. "Occasional" is defined as not more than two (2) fund-raising events per calendar quarter.
  - -- Unit snack bars are subject to lawsuits and installation commanders may require private organizations to purchase liability insurance in an amount adequate to cover potential liability arising from their activities. Individual members of the unit/squadron could incur personal liability if not insured.
  - -- Snack bars must comply with all federal, state and local laws governing such activities, including federal tax laws. Interest from an interest bearing bank account must be reported to the IRS by the financial institution. Accordingly, it might be wise for the fund to utilize only a noninterest bearing account.
- Unofficial activities/private organizations may not sell alcoholic beverages, solicit funds, operate amusement or slot machines, or conduct games of chance, lotteries, raffles, or other gambling-type activities

References:

AFI 34-223, *Private Organizations (PO) Program* (8 March 2007), Certified Current (28 May 2009)

AFI 36-3101, *Fundraising within the Air Force* (12 July 2002)

Acceptance of Volunteer Services

Officers and employees of the federal government may not accept voluntary services exceeding that authorized by law except in emergencies involving the safety of human life or the protection of property.

When Volunteer Services May Be Accepted

- Acceptance of gratuitous services (when the provider agrees in writing and in advance to waive any right to compensation) is permissible
- Acceptance of gratuitous services may pose other issues, such as conflict of interest, liability for damages or injuries both to and by the provider, or the illegal augmentation of another appropriation
- Government employees may not waive their rights to statutory entitlements. This issue may arise in connection with civilian employees and uncompensated overtime.
- Seek a staff judge advocate opinion any time free services are offered, unless you know they are specifically authorized by law

Types of Permissible Volunteer Service

- The military services are specifically authorized by law to accept certain voluntary services, including medical, dental, legal, religious, family support, library, and MWR services
- Volunteers providing services under these authorized programs are considered federal employees only for purposes of compensation for work-related injuries, tort claims for damages or loss, maintenance of records, and conflicts of interest
  - -- The volunteer must have been acting within the scope of the accepted services
  - -- The volunteer will most likely be entitled to Department of Justice representation should he or she be named in an action filed under the Federal Tort Claims Act (FTCA)
  - -- A volunteer may not be placed in a policy-making position
  - -- Volunteers may be provided training to ensure they can appropriately provide the necessary services
- Federal agencies are specifically authorized by law to accept voluntary services provided by student interns as part of an established educational program
- The military services are specifically authorized by law to accept the services of Red Cross volunteers

- Volunteers are not employees of the United States, but under a memorandum of understanding between the Departments of Justice and Defense, they are generally considered government employees for purposes of the protections of the FTCA

References:

10 U.S.C. § 1588

31 U.S.C. § 1342

AFI 51-502, *Personnel and Government Recovery Claims* (1 March 1997), Incorporating Change 1 (31 July 2008), Interim Change 2 (10 November 2008)

CHAPTER TWELVE: THE AIR FORCE CLAIMS PROGRAM

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Introduction to Claims

- A claim is a demand made on or by the Air Force for the payment of a specified amount of money
- It does not include any obligations incurred in the regular procurement of services, supplies, equipment, or real estate

Air Force Claims Policy

- Establish and administer a vigorous Air Force claims program to investigate and process all claims on behalf of or against the Air Force
- Pay meritorious claims in the amount necessary to restore the claimant, as nearly as possible, to his or her position before the incident on which the claim is based
- The personnel claims process is not an adversarial one
  - -- The purpose of the Military Personnel and Civilian Employees' Claims Act is to pay meritorious personnel claims fairly and promptly to maintain claimants' morale and avoid their financial hardship
  - -- Claimants who have suffered loss or damage are entitled to helpful, friendly, and courteous service

Claims Jurisdiction and Settlement Authority

- Personnel claims are centrally adjudicated by the Air Force Claims Service Center (AFCSC), located in Dayton, Ohio
  - -- The Department of Defense assigns single-service claims responsibility to each military department for processing and settling of tort claims for and against the United States. For example, the Army provides single service claims responsibility for all claims in South Korea.

References:

AFI 51-501, *Tort Claims* (15 December 2005)

AFI 51-502, *Personnel and Government Recovery Claims* (1 March 1997), Incorporating Change 1 (31 July 2008), Interim Change 2 (10 November 2008)

Air Force Claims Service Center, https://claims.jag.af.mil/

Personal Property Claims

The Personnel Claims Act, 31 U.S.C. § 3721, is a gratuitous payment statute. It does not provide insurance coverage and is not designed to make the United States a total insurer of the personal property of claimants. Payment does not depend on tort liability or government fault. Congress instead determined to lessen the hardships of military life by providing prompt and fair payment for certain types of property loss or damage, especially those caused by frequent moves. The Air Force aims, within approved guidelines, to compensate active duty members and civilian employees for property loss or damage to the maximum extent possible.

Introduction

- The Air Force Claims Service Center (AFCSC), located in Dayton, Ohio, centrally adjudicates all personnel claims
- Under The Personnel Claims Act (PCA), the Air Force may settle and pay claims for loss and damage of members' personal property when such loss or damage is "incident to service"
- Not all property claims are covered
- Covered claims generally fall into three categories:
  - -- Household goods (PT) claims
  - -- Vehicle shipment (POV) claims
  - -- Other tangible personal property (P) claims
- Requirements under the statute:
  - -- The loss or damage must be incident to the member's service
  - -- The loss or damage cannot be recoverable through private insurance (limited exceptions apply)
  - -- The claim must be substantiated
  - -- The Air Force must determine that the member's possession of the property was "reasonable or useful" under the circumstances
  - -- The loss or damage must not have resulted from negligence of the claimant
  - -- Other than household goods claims paid under the full replacement value program described below, maximum payment is $40,000, unless the claim arises

from emergency evacuations or extraordinary circumstances in which cases the maximum payment is $100,000

Processing Guidelines

- Full replacement value (FRV) program:

  -- FRV applies to household good shipments picked during a phase period between 1 October 2007 and 1 March 2008. Under this program, members may first claim full replacement value for damaged or lost household goods directly with the carrier.

  -- If a member cannot reach an acceptable settlement with the carrier on certain items, the member can file a claim with the AFCSC for the disputed items only. Standard depreciation rules will apply unless the AFCSC recovers full replacement value from the carrier.

  -- If a member has a significant loss under FRV they should be aware that the mover's maximum liability is $50,000 and the AFCSC can pay an additional $40,000 at depreciated value

    --- FRV program filing deadlines (from date of delivery)

    --- The claimant sends the DD Form 1840/1840R directly to the carrier within 75 days or to the AFCSC within 70 days, even if the carrier says otherwise

    --- The claimant must file a claim directly with the carrier within nine months. If the claimant fails to file during this time, they may file the claim with the carrier or the AFCSC within two years, but standard depreciation rules will then apply.

- <u>Defense Personal Property System (DPS)</u>

  -- The DPS system phased in for household goods moves between November 2008 and summer 2010. Under this program, members will file a claim on the new web-based moving system which will handle every aspect of the move.

  -- A claimant will file a "Loss/Damage Report After Delivery" within 75 days (this takes the place of the DD Form 1840R) online within the DPS claims module

  -- Similar to FRV, the claimant must file a claim against the carrier in DPS within nine months. If the claimant is dissatisfied with the carrier's offer, he or she can transfer the items/file the claim with the AFCSC.

- <u>Statute of Limitations and Other Important Time Periods</u>

  -- A claim for a sum certain must be presented by the member (or authorized agent with a power of attorney) within two years from the incident date or date of

delivery IAW 31 U.S.C. 3701, 3721, the Military Personnel and Civilian Employees Claims Act (PCA). FRV is only available if filed within nine months.

-- The requirement to file the DD Form 1840/1840R with the claims office or AFCSC within a 70-day period is separate from the requirement to file the claim within two years

-- Damage for privately owned vehicles (POVs) is noted on DD Form 788 at the port. If additional damage is discovered after leaving the port, members should proceed to their local legal office as soon as possible to complete an inspection and have photos taken.

- Proper Claimants:

  -- Active duty Air Force military personnel

  -- Retired or separated Air Force military personnel who suffer loss or damage resulting from the last entitled storage or movement of their personal property

  -- Civilian employees of the Air Force paid from appropriated and nonappropriated funds. Claims filed by nonappropriated funds civilian employees are paid from nonappropriated funds

  -- Civilian employees of the Defense Commissary Agency (DeCA) who work on an Air Force installation

  -- DOD Dependent School teachers and administrative personnel serviced by an Air Force installation

  -- AFRES and ANG personnel when performing federally-funded active duty, full-time Guard duty, inactive duty for training, and ANG technicians serving under 32 U.S.C. § 709

  -- AFROTC cadets traveling at government expense or on active duty summer training

  -- USAF Academy cadets

  -- Survivor of a deceased proper claimant or authorized agent or legal representative of a proper claimant

- Payable Claims: For loss or damage in the following general categories:

  -- From government-sponsored transportation or storage under orders. Examples include household goods and unaccompanied baggage shipments, shipped vehicles, mobile homes and contents in shipment, and, in some circumstances, do-it-yourself (DITY) moves, luggage and hand-carried property.

-- At quarters and other authorized places. Examples include fire, explosion, hurricane, theft, and vandalism in CONUS base housing or at overseas quarters either on or off base.

-- To privately owned vehicles. Examples include damage in shipment, theft or vandalism to parked cars, damage or loss during TDY where POV is authorized, and paint oversprays. Members should proceed to their local legal office as soon as possible to complete an inspection and have photos taken.

-- Other categories as described in AFI 51-502

-- Uniform items damaged while performing normal duties are not payable

--- Claims for damaged or missing uniforms are not paid automatically. All claims must be investigated and any payment must be supported by the facts contained in the claim file. There should be no negligence or lack of due care on the claimant's part, claimant must have done everything possible to "protect" the clothing items, and the damage cannot be a result of normal risks associated with daily work duties.

- Claims for uniforms will be considered for payment under AFMAN 23-110 and CANNOT be paid under the PCA in the following situations:

  1) Off base – overseas, not at an authorized location, not incident to service
  2) Off base – stateside, not incident to service
  3) POW return (applies to both enlisted and officer personnel)
  4) Excessive weight change while under treatment of medical personnel
  5) Items that are lost due to medical treatment or hospitalization

THE ABOVE FIVE SITUATIONS ARE THE ONLY INSTANCES IN WHICH A SQUADRON COMMANDER CAN APPROVE PAYMENT UNDER AFMAN 23-110

- To contact the AFCSC's customer service, call DSN 986-8044 or commercial toll free 1-877-754-1212. To file a claim on the world wide web, visit: https://claims.jag.af.mil/.

References:

31 U.S.C. § 3701, 3721, Military Personnel and Civilian Employees' Claims Act (Personnel Claims Act)

32 U.S.C. § 709

DODD 5515.10, *Settlement and Payment of Claims Under 31 U.S.C. 3701 and 3721, "The Military Personnel and Civilian Employees' Claims Act of 1964"* (24 September 2004)

AFI 51-502, *Personnel and Government Recovery Claims* (1 March 1997), Incorporating Change 1 (31 July 2008), Interim Change 2 (10 November 2008)

AFMAN 23-110, *USAF Supply Manual* (1 April 2009), Incorporating Through Interim Change 5 (1 July 2010)

Air Force Claims Service Center, https://claims.jag.af.mil/

Tort Claims

Introduction

- Under certain circumstances, federal law subjects the United States to liability for property damage, personal injuries, and death that result directly from the negligent or wrongful acts/omissions of government personnel acting within the scope of their employment
- Federal law authorizes the United States to pay for property damage, personal injuries, and death that directly result from noncombat activities of United States armed forces
- Normally, to receive compensation, an injured person or entity must present a written request for payment of a specific amount of money (claim) within two years of the accident or incident to the agency that created the loss, personal injury, or death
- In some cases, denial of a claim or failure to resolve a claim within six months after it is presented to the Air Force creates a right to sue the United States in federal district court
- Installation legal offices work with the Tort Claims Field Support Center (TCFSC) to receive and process claims against the Air Force and help defend the Air Force when claims are litigated

Claims and Claimants

- Claims arising from alleged negligent or wrongful acts of government personnel are tort claims
- Common tort claims include GOV-POV accidents, slip and falls on base, barrier or bollard accidents, medical malpractice, aircraft accidents, or mishaps with rental cars while TDY
- Claimants may be individuals, organizations, or companies that have suffered loss because of alleged negligent or wrongful act or omission by government personnel
- Claimants may also be agents, legal representatives, or persons with subrogation rights of the injured party

Payable Claims

- Claim must demand a specific amount of money
- Claim must allege damage to real or personal property, personal injury, or death

- Damage must be direct result of negligent or wrongful act or omission of government personnel acting within the scope of employment
- A negligent act occurs when a person's failure to exercise the degree of care considered reasonable under the circumstances, results in an unintended injury to another party
- Government personnel include Air Force military and civilian employees, Civil Air Patrol members performing Air Force authorized missions, and Air National Guard military members in federal status
- JA determines (preliminarily) whether an employee acted within scope of employment after reviewing relevant facts, circumstances, and applicable law
  - -- Ordinarily, a person is within the scope of employment if the actions in question were serving some governmental purpose when the negligent act or omission allegedly occurred
  - -- Not a line of duty question
- Generally, the extent of government liability is about the same as that of a private person
  - -- For claims arising in the United States and its territories, liability is determined based on the law of the place (state) where the alleged negligent act or omission occurred
  - -- For claims arising in foreign countries, liability is based on general principles of American tort law. Foreign rules and regulations are relevant but not controlling unless made controlling by international agreement or United States military regulation or policy.
  - -- The principles of absolute or strict liability do not apply
- If the loss, injury or death is the direct result of "noncombat activity," the claim may be paid without regard to negligence or other fault
  - -- "Noncombat activity" is a term of art that means any activity, other than combat, war or armed conflict that is particularly military in character, has little parallel in civilian pursuits, and has been historically considered as furnishing the proper basis for claims. However, "noncombat activity" should not be interpreted as simply meaning, "not combat."
  - -- Common "noncombat activities" include operation of military aircraft/spacecraft/missiles, practice bombing or firing of heavy guns and missiles, movement of tanks

Claims Not Payable

- Claims specifically excluded by statute
- Examples of excluded claims
  - -- Damages, injuries, or death that stem from the performance of or failure to perform a discretionary function by a federal agency or government employee
  - -- Intentional torts (acts that the person intends to commit) such as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights
  - -- Government taking of air space over land
  - -- Personal injury, death or property damage of a military member incurred incident to service
  - -- Personal injury or death of a civilian employee of the United States sustained while in performance of his or her duty
  - -- Punitive damages

Processing and Payment

- Installation legal office accepts, investigates, and adjudicates most tort claims alleging $5,000 or less in losses. Claims above $5,000 at CONUS locations are forwarded immediately to the TCFSC.
  - -- All installation level claims, other than those settled under the Federal Tort Claims Act (FTCA) for more than $2,500, are paid from Air Force claims funds
    - --- If JA approves an FTCA claim for more than $2,500, payment comes from the Judgment Fund Group of the Department of the Treasury
  - -- Installation legal office consults with the TCFSC prior to adjudicating claims alleging:
    - --- Personal injury
    - --- Legal malpractice
    - --- Property damage caused by an Air Force member driving a rental vehicle
    - --- Property damage that occurred in a navigable waterway (admiralty and maritime claims)
    - --- Property damage caused by activities of the Civil Air Patrol

    - --- Property damage or personal injury to Wing Commander, Vice Wing Commander or their immediate family members

  - -- Installation legal office accepts medical malpractice claims but forwards them to the TCFSC for investigation and final action

- If installation legal office denies a claim, claimant may appeal or request reconsideration, depending on which statute dictates processing of the claim

  - -- Installation legal office can grant appeal or reconsideration request

  - -- Installation legal office must forward any appeal or reconsideration request it does not grant to the TCFSC for final action

- CONUS Installation legal offices accept claims alleging more than $5000, but immediately forwards them to the TCFSC for adjudication

  - -- Installation legal office will appoint a POC (attorney or paralegal) within the installation legal office to work with the TCFSC to investigate the claim

  - -- In some cases, installation POC will take a more proactive role in the adjudication process, to include legal research, drafting memorandums, and negotiating settlements, to provide training and increase experience for both attorneys and paralegals

- OCONUS installation legal offices accept and investigate claims of all amounts, except medical malpractice claims, and adjudicates and settles claims up to $25,000. OCONUS claims that are not settled for less than $25,000 are forwarded to the TCFSC with the full investigation and recommendation for final adjudication.

- In certain cases, claimant may sue the Air Force within six months after final action is taken on the claim

  - -- Final action is taken by mailing the denial of claim or, when applicable, denial of a reconsideration request. Six months of no action may be deemed a denial by the claimant and he/she can file suit.

  - -- Suit is in federal district court. Department of Justice (DOJ) defends Air Force in litigation. Installation legal office works with the TCFSC to help DOJ defend litigation.

- Special procedures apply to claims arising in a foreign country. Installation legal offices coordinate with the International Torts Branch of the TCFSC when handling foreign and international claims.

References:

Tort Claims FSC Action Officer Handbook

10 U.S.C. § 2733, Military Claims Act

10 U.S.C. § 2734, Foreign Claims Act

10 U.S.C. § 2734(a) and (b), International Agreement Claims Act

32 U.S.C. § 715, National Guard Claims Act

28 U.S.C. §§ 1346(b), 2401, 2671-2680, Federal Tort Claims Act

AFI 51-501, *Tort Claims* (15 December 2005)

Aviation Claims

- Aviation claims occur in a variety of ways, including claims arising from low overflights and sonic booms, and accidents involving active duty, Air Force Reserve (AFRES), Air National Guard (ANG), Aero Club, and Civil Air Patrol aircraft
- If the claim arose from military flight activity, it may be payable under the "noncombat activity" provisions of the Military Claims Act (MCA) or the National Guard Claims Act (NGCA)
  - -- No requirement to show negligence in noncombat activity claims. Causation and damages are the only issues.
  - -- MCA/NGCA claimants may receive advance payments under certain circumstances, primarily for damage mitigation purposes
  - -- If the claim cannot be settled, the claimant may bring a lawsuit under the FTCA, but must prove negligence, causation, and damages

Sonic Boom and Low Overflight Claims

- Sonic boom damage
  - -- Overpressures based upon speed, altitude and location of aircraft relative to a claimant's property, in pounds per square feet (psf), will determine whether claimed damage could have been caused by sonic boom
  - -- Sonic booms are not selective and may encompass an entire area. A sonic boom is unlikely to cause damage to a claimant's home while having no effect on nearby properties.
  - -- Window glass and bric-a-brac are generally the first items to be damaged. A sonic boom will not cause significant structural damage, such as cracked foundations or sidewalks, without also breaking windows or shaking bric-a-brac from shelves.
- Low overflight damage
  - -- Noise alone generally does not cause damage to property
  - -- Noise may harm animals, such as by stampeding cattle and horses; startling chickens, silver foxes, and minks; cracking exotic bird eggs; or injuring ostriches
  - -- Claims alleging loss of property value due to noise from repeated low overflights are not payable under any tort claims statute. The property owner's remedy is a "takings" claim under the Fifth Amendment's due process clause.

- ANG Claims

  -- Settlement authorities may settle claims for death, personal injury, or property damage arising out of the authorized noncombat activities of the ANG under the NGCA, 32 U.S.C. § 715

  -- Determine status of crewmembers or ANG personnel involved in mishap

    --- Title 10 – federal active duty orders

    --- Title 32 – federally funded training orders (e.g., IDT or AT training)

    --- State duty – disaster response, riot control, emergency situations

  -- The United States is only liable for negligence of ANG members performing federal duties under Title 10 or Title 32 at time of incident. The provisions do not apply when a member is performing duty for the state.

  -- ANG aviation claims are adjudicated under the noncombat activity provisions of the MCA if the member was in Title 10 status or the NGCA if the member was in Title 32 status

- AFRES Claims

  -- Crewmembers have same status as active duty personnel

  -- AFRES aviation claims are adjudicated under the noncombat activity provisions of the MCA

- Aero Club Claims

  -- Aero Club participation is a recreational activity, and the United States is not liable for the negligence of Aero Club members or participants while engaged in Aero Club activities because such activities are outside the scope of their employment

  -- All Aero Club members and participants are covered under NAFI liability insurance for their negligence in causing a mishap

    --- Look to NAFI insurance to pay third party claims caused by the negligence of Aero Club members or participants engaged in Aero Club activities

    --- Not cognizable under Air Force claims statutes

  -- Third-party claims arising from the negligence of Aero Club employees or military members working at the Aero Club in their official capacity are cogni-

zable under the FTCA. Aero Club claims settled under the FTCA are paid from nonappropriated funds administered by AFSV.

-- The *Feres* doctrine bars active duty, guard and reserve military members from receiving compensation under federal claims statutes for death or injuries arising out of their participation in Aero Club activities. Such participation is deemed incident to their military service.

-- Similarly, the Federal Employees Compensation Act (FECA) bars Air Force civilian employees from receiving compensation under federal claims statutes for death or injuries arising from their participation in Aero Club activities

- Civil Air Patrol (CAP) Claims

  -- CAP is a federally chartered, nonprofit civilian corporation, which has been designated as a voluntary civilian auxiliary of the Air Force. Its mission is to provide aerospace education and training to its senior and cadet members, provide volunteer emergency services, and promote civil aviation in the public sector.

  -- Air Force is authorized to use the services of the CAP in fulfilling certain non-combat missions of the Air Force that have been officially designated as Air Force Assigned Missions (AFAMs)

    --- Typical AFAMs include search and rescue, disaster relief, and counter-narcotics reconnaissance flights

    --- CAP is an instrumentality of the United States when performing an AFAM

    --- Third-party claims arising out of activities of CAP while performing AFAMs are cognizable under FTCA

    --- Senior CAP members or CAP cadets (18 years or older) are covered under FECA for their death or injuries incurred while in the performance of an AFAM

  -- The United States is not liable for third party claims arising out of CAP corporate activities or for claims for the use of privately owned property that CAP or its members use during AFAMs

References:

Tort Claims FSC Action Officer Handbook

10 U.S.C. §§ 2731, 2733, 2735, Military Claims Act

28 U.S.C. §§ 1346(b), 2671-2680, Federal Tort Claims Act

32 U.S.C. § 715, National Guard Claims Act

AFI 51-501, *Tort Claims* (15 December 2005)

Foreign and International Claims

Single Service Claims Responsibility

- DOD Instruction 5515.08 assigns certain countries to each military department (Army, Navy, and Air Force) and makes the military departments responsible for final action on tort claims arising within their assigned countries. This instruction applies to numerous claims statutes, including the Foreign Claims Act (FCA), International Agreement Claims Act (IACA), Military Claims Act (MCA), Use of Government Property Claims Act (UGPCA), and the Advance Payments Act (APA).
- Naval forces afloat exception: Naval forces afloat visiting foreign ports may settle claims arising outside the scope of duty for under $2,500 without regard to single service assignment
- Not all countries are assigned under DODI 5515.08. Claims arising in unassigned countries will be adjudicated by the command responsible for generating the claim. If the command is joint, the claim should be adjudicated by the service component command whose personnel allegedly cause the claim.
- Claims in foreign countries are settled under the regulations of the service having single service claims responsibility (DOD Directive 5515.3)
- DOD/GC can change assignments by updating DOD 5515.08 or by interim letter, see JACC's (Claims and Tort Litigation) webpage for any changes issued by letter

International Agreement Claims Act (IACA)–U.S. Military in Foreign Countries

- 10 U.S.C. § 2734a applies to acts of U.S. forces in foreign countries when the U.S. has a status of forces agreement (SOFA) with a foreign government and the SOFA explicitly provides for both governments to share the cost of any claim payout
  - -- Under the North Atlantic Treaty Organization (NATO) SOFA, the "receiving state" is the state receiving visiting forces and the "sending state" is the state sending forces.
  - -- For NATO SOFA claims against the U.S. arising in foreign countries, the U.S. would be the sending state
- Claims are adjudicated and paid by the host nation (receiving state), which sends the U.S. a bill for its pro rata share of any claim payout
  - -- Host nation must adjudicate the claim applying the same statutes it would apply if its own military had caused the damage
  - -- Host nation statute of limitations applies to these claims

- -- If the host nation pays attorney fees as part of the settlement, the U.S. is obligated to pay its percentage of those fees
- -- Claims caused by U.S. enemy actions or actions of U.S. forces in combat are not payable

- The U.S. currently has cost-sharing SOFAs with NATO members, Partnership for Peace (PfP) countries (those which have ratified the *Agreement among the States Parties to the North Atlantic Treaty and other States participating in the Partnership for Peace regarding the status of their forces*), Portugal (for the Azores), Iceland, Japan, Korea, Australia, Singapore
  - -- NATO SOFA and PfP SOFA (which incorporates the NATO Sofa by reference) are reciprocal, which means they apply to tortious incidents in the territories of all parties to the agreement
  - -- SOFAs with Iceland, Japan, Korea, Australia, as well as the Lajes Technical Agreement (for the Azores), are not reciprocal. They apply only to tortious incidents by U.S. personnel in these foreign countries.
  - -- Singapore Counter Agreement is also not reciprocal. However, it applies solely to tortious incidents by Singaporean personnel in the U.S. (see below "Foreign Personnel in the United States").
  - -- U.S. reimbursement percentage is usually 75%, but this percentage can vary if more than one nation is responsible for the damage, injury, or death, or if a different cost-sharing arrangement has been negotiated

- U.S. can object to a bill for reimbursement on two grounds: (1) host nation paid a claim not cognizable under the SOFA; or (2) host nation did not adjudicate the claim under the statutes that would apply to its own military

International Agreement Claims Act (IACA)–Foreign Personnel in the United States

- 10 U.S.C. § 2734b applies to acts of foreign forces in the U.S. when the foreign country has a SOFA with the U.S. and the SOFA explicitly provides for both governments to share the cost of any claim payout
  - -- For NATO SOFA claims against foreign personnel in the U.S., the U.S. would be the receiving state

- Claims are adjudicated and paid by the U.S. as the host nation, which sends the responsible foreign country a bill for its pro rata share of any claim payout. The Air Force will investigate these claims to the extent they involve foreign military personnel or property on or from an Air Force installation, but only the Army is authorized under DODI 5515.08 to settle (pay or deny) these claims.

  - U.S. will adjudicate the claim applying the same statutes it would apply if its own military had caused the damage
  - U.S. statute of limitations applies to these claims
  - If U.S. pays attorney fees as part of the settlement, the foreign country is obligated to pay its percentage of those fees
  - Claims caused by U.S. enemy actions are not payable
- Cost-sharing agreements with applicability in the U.S. include the NATO SOFA, PfP SOFA, and Singapore Counterpart Agreement
  - SOFAs with Japan, Korea, Australia, and the Azores are not reciprocal and apply only to tortious incidents arising in those countries
  - According to the U.S. State Department, NATO SOFA applies to Alaska, but not Hawaii
  - Foreign government reimbursement percentage is usually 75%, but this percentage can vary if more than one nation is responsible for the damage, injury, or death, or if a different cost-sharing arrangement has been negotiated
- Responsible foreign government can object to a bill for reimbursement on two grounds: (1) U.S. paid a claim not cognizable under the SOFA; or (2) U.S. did not adjudicate the claim under the statutes that would apply to its own military
- Immediately notify JACC of any on-base or off-base incident involving foreign military personnel or property in the United States

Foreign Claims Act (FCA)

- 10 U.S.C. § 2734 applies only to claims arising abroad where the IACA is not applicable (IACA takes precedence over FCA). The Secretary of the Air Force has promulgated AFI 51-501, as authorized by 10 U.S.C. § 2734, to implement AF policy under the FCA.
  - Use IACA where SOFA cost-sharing exists and damages, injury, or death are caused in the performance of official duty (as understood by the U.S. and the foreign government)
  - Use FCA where no SOFA cost-sharing exists or where damages, injury, or death arise outside the scope of employment
- Claimant must be a foreign inhabitant
  - U.S. citizens may be foreign inhabitants if they reside in a foreign country, they are not employed by the U.S., their travel abroad was not funded by the U.S.,

and their claim does not arise from any benefit, privilege, service, or DOD status provided to them by the U.S. government

  -- U.S. military members, federal civilian employees, and dependents thereof are not foreign inhabitants

- Claims personnel must be appointed a Foreign Claims Commission (FCC) in order to act on an FCA claim. SJAs of installations in foreign countries are FCCs per AFI 51-501, Ch. 4.

- Two-year statute of limitations applies to FCA claims

- Damage, injury, or death must be either incident to a noncombat activity or caused (negligently or wrongfully) by a DOD military member or civilian employee

- Statutory exceptions to payment include claims by subrogees and acts of the U.S. in combat. However, a claim may be allowed if it arises from an accident or malfunction incident to operation of an aircraft of the armed forces of the U.S., including its airborne ordnance, indirectly related to combat and occurring while preparing for, going to, or returning from a combat mission.

- Apply the law of the country where the incident occurs to the extent it does not conflict with AFI 51-501. If conditions for payment exist, and no basis under AFI 51-501 prohibits payment, payment may occur. All payments are *ex gratia* and remain within the discretion of SecAF.

- Claimants are paid in the currency of the country where the incident occurred unless JACC receives a compelling justification why payment should occur in some other foreign currency

Solatia (Rarely Justified):

- Solatium payment is a nominal payment made immediately to a victim or victim's family to express sympathy. Paid with personal funds or command (O&M) funds, it is not compensation (thus, not deducted from the claim award) and is not subject to single service claims responsibility. Immediately report to JACC any actual or attempted solatium payments outside Afghanistan, Japan, Korea, and Thailand, as proof of clear custom must be established to justify such payment.

References:

10 U.S.C. § 2734, Foreign Claims Act

10 U.S.C. § 2734(a) and (b), International Agreement Claims Act

DODD 5515.3, *Settlement of Claims Under Sections 2733, 2734, 2734a, and 2734b of Title 10, United States Code* (27 September 2004)

DODI 5515.08, *Assignment of Claims Responsibility* (11 November 2006)

AFI 51-501, *Tort Claims* (15 December 2005)

Carrier Recovery Claims

Basis For Carrier Recovery (CR) Claims

- The basis for a CR claim is the failure of a carrier, warehouse, or contractor to adequately protect goods entrusted to them for shipment
  - -- A carrier must deliver goods in the same amount and condition as when it took possession of them
  - -- A carrier's liability will, however, be limited by its contract with the government
- The Air Force is entitled to collect up to the carrier's or warehouse's contracted liability depending on the type of shipment or method of transportation, less any amount already paid by the carrier to settle or partially settle a claim
- The claimant assigns to the United States all claim rights against the carrier or contractor which creates a right of recovery on behalf of the United States by signing a DD Form 1842 or by filing a claim using the Air Force Claims Service Center's (AFCSC) web site.

Principles of Recovery

- Carrier is generally liable for loss or damage occurring while goods are in its possession
- Government must prove a transit or storage loss through written exceptions to damage taken at the time of delivery (on DD Form 1840) or within 75 days of delivery (on DD Form 1840R)
  - -- USTRANSCOM has fielded a system called the Defense Personal Property System (DPS). When it is in full use, the DD forms 1840/R will be obsolete and replaced by forms called the Notice of Loss/Damage AT Delivery and the Notice of Loss/Damage AFTER Delivery.
  - -- A claimant may be required to file his notice of loss or damage after delivery using DPS, if his move originated in DPS
- If using the DD Form 1840R, the claimant must submit it to the claims office or AFCSC within 70 days of delivery so that the claims office or AFCSC can review the form and mail it to the carrier within 75 days of delivery
  - -- This time limit may be extended for certain causes such as the member being TDY or hospitalized
  - -- The AFCSC will evaluate the cause and extend the deadline as appropriate

- Failure to note loss or damage on DD Form 1840/1840R within the prescribed time limit creates a presumption that the loss or damage was not shipment-related and the carrier is no longer liable

- If a claim is adjudicated by the AFCSC, the AFCSC will make an appropriate demand on the carrier for that claim in an amount based on the type of shipment or method of transportation

- In the event the AFCSC collects more from the carrier than it paid out to the claimant, the AFCSC will pay the difference to the claimant. If the AFCSC does not collect more from the carrier than it paid out to the claimant, the money collected can be applied against the claims payments for the fiscal year in which the money was collected.

- The government must file a claim against the carrier within six years of delivery of the household goods unless the shipment was moved under a Full Replacement Value (FRV) contract. The government must file a recovery action within four years of delivery on an FRV move.

References:

31 U.S.C. §3701, 3721, Military Personnel and Civilian Employees' Claims Act (Personnel Claims Act)

DODD 5515.10, *Settlement and Payment of Claims Under 31 U.S.C. 3701 and 3721, "The Military Personnel and Civilian Employees' Claims Act of 1964"* (24 September 2004)

AFI 51-502, *Personnel and Government Recovery Claims* (1 March 1997), Incorporating Change 1 (31 July 2008), Interim Change 2 (10 November 2008)

Reports of Survey (ROS)

The report of survey (ROS) is an official report of the facts and circumstances supporting the assessment of financial liability for the loss, damage, or destruction of Air Force property and serves as the basis for the government's claim for restitution.

Reports of Survey Generally

- Air Force members and employees can be held liable for the loss, damage or destruction of government property proximately caused by their negligence, willful misconduct, or deliberate unauthorized use
- With respect to government owned motor vehicles, however, Air Force members and employees may be held financially liable only if the damage resulted from their gross negligence, willful misconduct, or deliberate unauthorized use
  - The purpose of the gross negligence standard is to more equitably distribute the risk of liability associated with government vehicle damage
  - As with any ROS, the commander is not precluded from taking other administrative or disciplinary action against individuals who damage government vehicles through simple negligence not amounting to gross negligence

Purposes of The Report of Survey

- Authorizes adjustment of property accountability records
- Establishes pecuniary liability
- Prescribes corrective action to prevent recurrence of loss, damage, or destruction of Air Force property
- Serves as authority for effecting collection of an indebtedness

When Reports of Survey Are Not Used

- Damage occurring during combat operations
- Most loss or damage to major weapons systems used in authorized operations or occurring during aircraft accidents
- Property owned by another DOD component or nonappropriated fund instrumentality (NAFI)
- Property that becomes unserviceable due to fair wear and tear

When Reports of Survey Are Required

- The requirement for a ROS is controlled by the type of property involved and the circumstances of the loss, damage, or destruction
- A ROS is required for unresolved discrepancies with supply system stocks involving:
  - -- Sensitive or classified items, regardless of dollar value
  - -- Pilferable items, when a discrepancy is $100 or more
  - -- An indication or suspicion of fraud, negligence, theft, or abuse
  - -- Personal arms
  - -- An amount greater than $50,000
- A ROS is normally required for property record items lost, damaged or destroyed. It is mandatory for:
  - -- Controlled or sensitive items
  - -- All types of weapons
  - -- Property having a security classification

Liability of Air Force Members

- Liability is usually limited to one month's base pay, with the following exceptions:
  - -- Accountable officers, whose negligence, willful misconduct, or deliberate unauthorized use of government property proximately caused the loss of, or damage to, property under their accountability, are liable for the entire amount of the loss to the government
  - -- Individuals are liable for the full amount of loss or damage to personal arms and equipment proximately caused by their own negligence, willful misconduct, or deliberate unauthorized use
  - -- Family housing occupants may be fully liable for damage if:
    - --- The loss or damage was caused by gross negligence or willful misconduct of the member; or
    - --- The loss or damage was caused by gross negligence or willful misconduct of a dependent or guest when the member was on notice of the particular risk involved and failed to take preventive action

The Report of Survey Process

- Initiating a ROS
  - -- Normally the organization that maintains accountability records for the lost or damaged property is responsible to initiate a ROS by appointing an initial investigating officer (IO)
    - --- Unit commanders appoint the IO for property record items
    - --- The accountable officer will appoint the IO for supply system stocks
  - -- IO should be appointed as soon as possible after loss or damage is discovered
    - --- IO must be an officer, NCO (E-7 or above), or civilian (WG-9, WL-5, WS-1 or GS-7 or above) and should be senior to individual facing potential liability
    - --- IO determines and documents facts surrounding the loss or damage and recommends whether or not an individual should be held financially liable
    - --- IO forwards report to appointing authority
- <u>Appointing Authority</u>
  - -- Designated in writing by the approving authority
  - -- Appoints financial liability officer when
    - --- The initial investigation results are insufficient to make a determination of whether or not negligence or abuse was the proximate cause of the loss, damage or destruction of government property
    - --- The value of the property, or the circumstances of the case, warrant further investigation
  - -- Reviews all ROSs, appeals, and requests for waiver or reconsideration and makes recommendations to the approving authority
- <u>Financial Liability Officer</u>
- Must be an officer, NCO (E-7 or above), or civilian (GS-7, WG-9, WL-5, WS-1 or above) and should be senior to the individual subject to possible financial liability
- Conducts investigation by examining physical evidence and interviewing witnesses to determine proximate cause of loss or damage, responsibility for the loss or damage, and cost or estimate of repairs
- Forwards findings and recommendations to appointing authority

- Approving Authority
  - -- Usually the wing commander. Authority may be delegated in writing to the immediate subordinate.
  - -- May authorize appointing authority to take final action on all ROSs involving less than $2,000 where there is no evidence of negligence or other misconduct
  - -- Takes final action on ROSs in cases where appointing authority does not take final action, including:
    - --- Cases, for any dollar amount, where there is no evidence of negligence, willful misconduct, or deliberate unauthorized use; and
    - --- Cases where the amount to be assessed is equal to or less than $10,000 and the senior host-base commander is not personally involved
  - -- Approves or disapproves investigation findings and recommendations and ensures individuals are notified
  - -- Ensures all persons found financially liable are informed of their appeal rights and given an opportunity to review the file
  - -- Considers appeals and requests for reconsideration or for waiver of liability
  - -- Authorizes or delegates approval of repairs or replacement in kind
- Intermediate commander (e.g., numbered air force) takes action on reports when amount of financial liability to be assessed exceeds $10,000 but does not exceed $25,000, or when the senior host-base commander is personally involved
- Major command commander takes action on reports not approved at base or intermediate command level, or when intermediate commander is personally involved
- If the major command commander is personally involved and negligence is evident, the report is forwarded to HQ USAF/LGS
- Individual rights:
  - -- Consult counsel
  - -- Review the ROS file and evidence
  - -- Request waiver, or request permission to provide repair or replacement in kind
  - -- Request reconsideration
  - -- Appeal

Avoiding Report of Survey Liability

- Waiver
  - -- Member specifically requests waiver of liability in writing, supplying supporting evidence for the request. If the case involves assigned family housing the approving authority must consider a waiver, even if the member does not specifically request it.
  - -- Factors to consider include degree of abuse or negligence involved, extent to which collection would cause substantial financial hardship or adversely impact unit morale, prior instances of negligent conduct toward government property, and available government remedies against other culpable persons
  - -- Approving authority may waive all or part of an individual's liability, if:
    - --- The waiver is determined to be in the best interest of the Air Force; and
    - --- The waiver is not specifically prohibited (as in the case of accountable officers and personal arms and equipment)
  - -- If denied, the member may appeal the determination of liability and request further waiver consideration by the major command commander
- Reconsideration
  - -- Member may request reconsideration based on minor corrections, new evidence, or because the property thought to be missing is later found
  - -- Minor corrections that do not involve important changes to the findings or recommendations should be made to the original and to any copies of the ROS
  - -- Based on new evidence, the approving authority may reopen the investigation, if necessary, or may take corrective action without further investigation
  - -- If property believed to be lost is later found but is damaged, the original ROS should be canceled and a new ROS initiated
- Appeal
  - -- Must be submitted in writing, and
  - -- Must specifically state the alleged errors or injustices in the report of survey process
    - --- Unless precluded by AFMAN 23-220, the approving authority may grant the appeal

--- If denied, the ROS is forwarded to the MAJCOM commander for final action, or HQ USAF/LGS if the MAJCOM commander is the approving authority

-- Collection is suspended until all appeals are complete unless the individual is scheduled for impending separation

- Financial Liability Board

-- A team of investigators consisting of officers, enlisted members, or civilian employees who are qualified to investigate an accident, incident, or occurrence within their area of expertise. May consist of two or more persons, one who will be the base claims officer.

-- Consolidates functions of the appointing authority and financial liability officer (one of the members is appointed in the orders to serve as appointing authority); its objective is to relieve commanders of the administrative burdens involved in the ROS process

--- Makes a preliminary review to determine whether a financial liability officer is required

--- Acts as financial liability officer by investigating cases as necessary

--- Inspects the destruction or abandonment of unserviceable property

References:

AFI 34-202, *Protecting Nonappropriated Fund Assets*, Chapter 6 (Losses and Collection Actions) (27 August 2004), Certified Current (24 November 2008)

AFMAN 23-220, *Reports of Survey for Air Force Property* (1 July 1996)

Property Damage Tort Claims in Favor of the United States

The United States may assert and collect claims for damage to its property through someone's negligence or wrongful act. As a property owner, the Air Force is often the victim of a tort and has the right under the Federal Claims Collection Act, 31 U.S.C. § 3701, 3711-3719, to collect for tort damages. Claims on behalf of the United States for property damage by a tortfeasor require the base to be pro-active and aggressively look for these claims, which are known as "G" claims or government claims. This does not include medical cost reimbursement claims.

Assertable Claims

- Claims personnel may assert claims against a tortfeasor for loss or damage to government property when:
  - -- The loss or damage to government property is for $100 or more. If the loss or damage is less than $100, assert the claim if it can be collected easily.
  - -- The loss or damage is based on a contract and the contracting officer does not intend to assert a claim under the contract. Document the contracting officer's decision not to assert a claim for the file.
  - -- The claim arises from the same incident as a medical cost reimbursement claim
    - --- Process the two claims separately
    - --- Coordinate the investigations
  - -- The tortfeasor or his insurer presents a claim against the government arising from the same incident, i.e., counterclaims. Coordinate the processing of both the pro-government and anti-government tort claims together.
  - -- The claim is based on products liability theory of recovery. Due to the unique nature of product liability issues and claims litigation, obtain approval from AFLOA/JACC before asserting.

Nonassertable Claims

- Claims personnel do not assert a claim for loss or damage of government property in these instances. Do not assert a claim:
  - -- For reimbursement against military or civilian employees for claims paid by the United States due to that employee's negligence
  - -- For loss or damage that a nonappropriated fund instrumentality (NAFI) employee causes to government property while on the job

-- If the loss or damage was caused by a government employee with accountability for the property under the Report of Survey system

--- Under the report of survey system, military members and civilian employees may be held pecuniarily liable for the loss, damage or destruction of government property caused by their negligence. With some exceptions, the usual limit of liability is one month's pay.

--- However, the report of survey manual, AFMAN 23-220, *Reports of Survey for Air Force Property,* para 3.2.4 and 3.3.6, indicates assertion of a tort property damage claim instead of a report of survey is appropriate if the military member or civilian employee damages government property with his or her private automobile

Statute of Limitations

- The United States must file a lawsuit for loss or damage of government property, based in tort, within three years after the date when a responsible official of the United States knew or reasonably should have known the material facts that resulted in the claimed loss

- Suits based in contract or upon some other theory or upon state law may have a different statute of limitations period

Collecting Claims

- Claims personnel collect tort claims in favor of the government

- The settlement authority may accept a third party's offer to repair or replace the damaged property to the satisfaction of the accountable property officer

- The Air Force may offset a tort claim against an amount that it owes to the claimant

- When two or more tortfeasors are jointly and severally liable, settlement authorities may divide the payment between the tortfeasors

- A settlement authority may waive prejudgment interest (where statute, contract, or regulation do not require it) to encourage payment

Depositing Collections

- Claims personnel deposit collections

-- Deposit collections for loss, damage, or destruction to Air Force family housing, caused by abuse or negligence, to the DOD Military Family Housing Management Account

- -- Deposit collections for loss, damage, or destruction to other real property to the appropriate funds account of the organization responsible for the repair, maintenance, or replacement of the real property. These funds may not be reused without their appropriation by Congress.
- -- Deposit collections for loss, damage, or destruction to property of an Air Force Industrial Fund or other revolving funds account to that account
- -- Pay or deposit recoveries involving NAFI property to the appropriate NAFI
- -- Deposit all other collections for which there is no statutory exception to the United States Treasury Miscellaneous Receipts Account

References:

10 U.S.C. § 2782, Damage to real property: disposition of amounts recovered

10 U.S.C. § 2831, Military Family Housing Management Account

31 U.S.C. § 3302, Custodians of money

31 U.S.C. §§ 3701, 3711-3719, Federal Claims Collection Act

AFI 51-502, *Personnel and Government Recovery Claims* (1 March 1997), Incorporating Change 1 (31 July 2008), Interim Change 2 (10 November 2008)

AFMAN 23-220, *Reports of Survey for Air Force Property* (1 July 1996)

Medical Cost Reimbursement Claims

The Air Force may recover the cost of providing medical care to military members or other authorized recipients who are injured as a result of tortious conduct of third parties under the Federal Medical Care Recovery Act (FMCRA) and for all care covered by a third party payer under the Coordination of Benefits statute (COB). The Air Force may also recover pay given to an active duty member during a period of disability caused by tort under the FMCRA.

Federal Medical Care Recovery Act (FMCRA)

- Under this statute, the government's recovery is predicated on "circumstances creating tort liability"
  - -- Usually, the four common law elements of tortious conduct (duty, breach, causation, damages) must be present before considering the assertion of a Medical Cost Reimbursement claim (MCR) under the FMCRA
  - -- The FMCRA applies even in no-fault jurisdictions. Where a system of tort liability has been replaced by a no-fault system, the government may pursue an FMCRA claim as a third party beneficiary.
  - -- At the same time, any defenses available under state law that may negate tort liability, such as contributory negligence, may be interposed to defeat the government's claim. However, state procedural defenses cannot be interposed to defeat the claim.
  - -- In general, a federal statute of limitation of three years applies
  - -- Since the United States has an independent statutory right of recovery, a release signed by the injured party is usually not effective in extinguishing the government's claim
- All successful collections for treatment provided by a military treatment facility (MTF) are deposited into the Operations and Maintenance (O&M) account of the MTF rendering treatment. Collections for active duty pay are deposited to the O&M account of the unit to which the disabled member was assigned at the time of the injury. Recoveries for Tricare paid treatment is returned to the Tricare Management Activity.

Coordination of Benefits (COB) Claims

- Under this law, Congress allows MTFs to pursue recoveries from statutorily defined plans

  - These include health insurance policies/plans, auto insurance providing for medical treatment, workers' compensation coverage, and similar plans, policies, and programs
  - The COB statute makes the United States a third-party beneficiary under such plans
- Successful recoveries of medical expenses are deposited directly into the treating MTF's O&M account
- Claims offices use COB as the primary statutory basis of recovery against various types of automobile insurance
- COB has been extended to allow recovery of payments made through TRICARE. Medical expenses paid for by TRICARE are deposited into a TRICARE Management Activity.

Collection of Medical Cost Reimbursement Claims

- These claims are collected either by overseas base legal offices or one of eight regional offices within the US
- Collections are generated from reports of injuries to covered personnel from medical treatment facilities, medical treatment providers, Security Forces blotters, and notice from the injured party's chain-of-command. If commanders become aware of an injury to a covered party caused by a tortious act, they should promptly notify the base legal office for guidance on how to process this information.

References:

10 U.S.C. § 1095, Coordination of Benefits

10 U.S.C. § 1095b

42 U.S.C. §§ 2651-2653, Federal Medical Care Recovery Act

AFI 51-502, *Personnel and Government Recovery Claims* (1 March 1997), Incorporating Change 1 (31 July 2008), Interim Change 2 (10 November 2008)

AFLOA/JACC, *Claims Handbook*, Chapter 5 (30 September 1997)

Article 139 Claims

Under Article 139, Uniform Code of Military Justice (UCMJ), commanders may direct collection and pay a claim for property that military personnel willfully damage or wrongfully take, if the claim results from riotous, violent, or disorderly conduct.

Scope of Article 139 Claims

- Assertable claims:
  - -- Property claims only; not personal injury or wrongful death
  - -- Must involve willful misconduct; not performance of legally authorized duties; and must arise from riotous, violent, or disorderly conduct; not conduct involving simple negligence or, for example, bad checks or private indebtedness
- Article 139 claims are entirely separate and distinct from disciplinary action taken under any other article of the UCMJ, or any other administrative action that may be appropriate

Procedures

- The claim must be submitted to an appropriate commander within 90 days of the date of the incident, unless the commander determines good cause for a delay
  - -- The claim should be submitted to the commander of the military organization or unit of the alleged offending member or members. However, it may be presented to the commander of the nearest military installation.
  - -- Initially, the claim may be presented orally, but it must be written and state a sum certain before final action may be taken
- The claim is sent directly, or through channels, to the appointing commander, who is the officer exercising special court-martial convening authority over the offender. The appointing commander appoints a board of officers to investigate the claim.
  - -- After evaluating all available evidence, which may include interviewing the individual against whom the claim was asserted (in accordance with Article 31, UCMJ, rights and the right to counsel), the board:
    - --- Determines if the claim falls under Article 139, UCMJ
    - --- Identifies the offender(s)
    - --- Determines liability and damages
  - -- The board may recommend:

--- Assessing damages against the identified service member (deducting from the assessment any voluntary or partial payments already made)

--- Assessing damages against members who were present during the incident, if authorities cannot individually identify the offenders

--- Disapproving the claim

- After the board completes its review, it forwards the claim to the staff judge advocate for a legal review prior to action by the appointing commander

Action By The Appointing Commander

- Determine if the claim falls under Article 139, UCMJ
- Assess an amount against each offender, but not more than the board's amount
- Forward the board's report to the appropriate commander if it is determined that one or more offenders are in a different command, since only the commander of an offender may order payment of the claim under Article 139
- Direct the Accounting and Finance Office to withhold the specified amount from each offender's pay and to pay the claimant
- Notify the offender and claimant of the action taken

Appeal and Reconsideration

- The commander's action may not be appealed by the claimant or the offender
- The commander who originally ordered the assessment may reconsider and change the decision if the findings later prove to be wrong, even if offender is no longer a member of that command
- A successor in command may change or cancel the assessment only on the basis of newly discovered evidence, fraud, or obvious error of law or fact

References:

UCMJ art. 139

AFI 51-502, *Personnel and Government Recovery Claims* (1 March 1997), Incorporating Change 1 (31 July 2008), Interim Change 2 (10 November 2008)

Liability For Damage to Rental Vehicles

Introduction

- Vehicles rented on government orders are for official use only
- "Use of a special conveyance is limited to official purposes, including transportation to and from duty sites, lodgings, dining facilities, drugstores, barber shops, places of worship, cleaning establishments, and similar places required for the traveler's subsistence, health or comfort." JFTR, para U3415G and JTR, para C2102.
- The use of a rental vehicle for other than official purposes places a member at risk of personal liability for damages.
- "Official Purposes" is a different standard than "scope of employment"
  - -- "Official purposes" is a standard in the JFTR/JTR, and is used to determine whether or not a renter will be reimbursed for damage to a rental vehicle
  - -- "Scope of employment" is a legal standard under the claims statutes, and will be used to determine whether or not the United States will defend a renter in a lawsuit
  - -- Within North Atlantic Treaty Organization (NATO) Status of Forces countries, there is yet a third standard, "in the performance of official duty," which bears on both claims and foreign criminal jurisdiction questions
- Use must be reasonable, but even if reasonable, may still not be in scope of employment
- Case interpreting Hawaii law held that a Navy civilian, TDY to Pearl Harbor, who was returning to his off-base quarters at the end of the duty day, was not in the scope of his employment when he had an accident while still on the naval station. *Clamor v. United States*, 240 F.3d 1215 (9th Cir. 2001).
  - -- The Navy considered the employee to be using the vehicle for official purposes, so the damage to the rental car could be paid by the government
  - -- Because the Navy civilian was found not to be within the scope of employment, he had to rely upon his private insurance to cover the injuries to the person in the other car
  - -- Some question now whether members are in the scope of employment if government meals are directed on orders and the purpose of trip is to go off-base for meals

- It is important for commanders to factor into rental car authorizations whether or not the member/employee has private automobile liability insurance that could be relied upon in the event the member/employee were in an accident and found to be outside the scope of employment

- When renting a vehicle pursuant to an authorization on orders, it is mandatory to obtain rental vehicle through the commercial travel office (CTO). JFTR, para U3415B and JTR, para C2102.

  -- Generally, CTO will reserve a vehicle from a company participating in the Defense Travel Management Office (DTMO) negotiated agreement

  -- It is TRANSCOM policy for CTOs to reserve a rental vehicle from a company that subscribes to the DTMO-negotiated agreement

    --- Use of companies and rental car/truck locations participating in the DTMO agreement is encouraged because their government rate includes full liability and vehicle loss and damage insurance coverage for the traveler and the government

    --- Rental companies having a negotiated agreement with DTMO will be used, unless another rental company can provide better service at a lower cost and abides by the same rules/guidance contained in the DTMO-negotiated car/truck rental agreement

    --- Government Administrative Rate Supplement (GARS). The GARS is a fee added on a daily basis by rental car/truck companies that are party to the DTMO Car Rental Agreement. GARS is a reimbursable expense as specified in the JFTR, para U1410-B9, *Miscellaneous Expenses*; and JTR, para C1410-B8, *Miscellaneous Expenses*.

DTMO Rental Vehicles Agreement

- Major rental car companies subscribe to a memorandum of understanding (MOU) with DTMO. The MOU sets rates and conditions of the rental.

- Names of companies participating in the rental car program, current maximum rates offered and terms and conditions of the U.S. Government Car Rental Agreement, effective 1 October 2002, are published on the DTMO web site: https://www.defense-travel.dod.mil/Sections/Rent.cfm

- Travel orders must reflect that a rental vehicle is authorized

- Agreement is not valid when using an IMPAC card

- Must rent from a participating company and location. While most rental car companies subscribe to the agreement, a particular location may opt out.

- Rental agency should be notified of all persons who are going to be driving vehicle
  - While not mandatory under the DTMO agreement, it might relieve the renter of personal liability if another driver uses the vehicle on other than official business
  - Rental agency cannot charge for the addition of other drivers. A contractor is not your "fellow employee" and may not drive a car you rent on official business.
- DTMO car rental agreement, which applies to cars and mini-vans, available at http://www.defensetravel.dod.mil/Docs/CarRentalAgreement_050508.pdf
- DTMO truck rental agreement available at http://www.defensetravel.dod.mil/Docs/TruckRentalAgreement_050508.pdf
  - Applies to cargo vans, pick-ups, and utility and straight trucks. Gross weight must not require a Class C driver's license.
  - Trucks are not necessarily listed with the commercial travel office (CTO). Must call company or go to DTMO Web page: http://www.defensetravel.dod.mil/Docs/TRAgreementPOCs.pdf
  - Driver must be 21 years old
  - Unlike cars, if a driver rents a different truck than one with DTMO rate, DTMO agreement does not apply
  - May apply to do-it-yourself (DITY) moves, but coverage under the agreement does not extend to spouse driving vehicle, nor to detour, i.e. driving out of the way to see parents. Some states do not consider PCS moves to be in scope of employment, so government would not defend member for negligence causing damage or injury to another.

Liability For Damages to The Rental Vehicle and to Others: Four Different Situations

- Rented on orders pursuant to DTMO agreement
- Rented on orders not under DTMO agreement
- Personal rental vehicle on official TDY
- Rented pursuant to umbrella contract
- Claims personnel do not pay claims for damage to rental vehicles. Follow guidance below for each situation.

Rented On Orders Pursuant to SDDC Agreement

- The rental company assumes and bears the entire risk of loss of or damage to the rented vehicles; full comprehensive and collision coverage is in effect

- Renter may be personally liable for loss or damage caused by a fellow employee who operates the vehicle for other than official purposes

  -- Example: A unit sends five people TDY and authorizes one rental car. One member rents the vehicle and charges the rental on the member's government travel card (not IMPAC card). Any of the five members are authorized drivers while acting within the scope of their employment duties. But if one of the members takes the vehicle to a bar late at night, gets drunk, and crashes the car, that member would not be considered an authorized driver at the time of the accident.

- Negligence claims for personal injury or property damage against the driver by third parties are covered under the liability insurance provided by the rental car company, up to the policy limits. So long as the driver was in the scope of employment, the government will defend the driver. Within the United States, the exclusive remedy is against the government – the driver cannot be held personally liable.
  28 U.S.C. § 2679.

Rented On Orders, Not Under The DTMO Agreement

- For damage to rental vehicle, the government travel card currently carries collision coverage

  -- The traveler must decline the rental car company's collision damage waiver insurance

  -- Damage must be reported to the government travel card company immediately

  -- Covers collision or rollover, theft and theft-related charges, malicious vandalism, windshield damage due to road debris, and loss of use and towing charges due to covered damage

  -- Does not apply if the vehicle is rented for more than 31 days; if used off-road; if driver is DUI; if damage results from hail, lightning, flood or other weather-related causes; or if damage is from failure to protect the car, i.e. leaving the car running and unattended

  -- Does not apply to expensive, exotic, and antique autos; vans over eight passenger; trucks; motorcycles; limos; or recreational vehicles

  -- If no travel charge card coverage, member usually pays rental company and claims reimbursement on the travel voucher under JFTR, para U3415.C2b (for military members) and JTR, para C2102.D.2 (for DOD civilians)

--- DFAS can also pay rental company directly

--- Travel claim comes to the legal office for review

--- Payment for damage is from unit travel funds

- For damage to another vehicle, property, or personal injury, the claims office adjudicates. So long as the driver was in the scope of employment, the United States will defend the driver. Within the United States, the driver cannot be held personally liable.

Personal Rental Vehicle On Official TDY

- For damage to rental vehicle, the driver is usually personally responsible
- For damage to another vehicle, property, or personal injury, the United States will defend the driver if driver is in the scope of employment. Within the United States, the driver cannot be held personally liable.

Rented Pursuant to Contract

- DTMO Agreement not applicable unless made a part of the contract
- Will be subject to specific contractual provisions under Federal Acquisition Regulations (FAR 52.228-8; clause is required within the United States); generally, United States liable for any damages to rental vehicle except fair wear and tear
- Along with typical contracts for fleet rentals, rental with an IMPAC card is a government contract, and not a rental between the traveler and the company
- Claims for damage to rental vehicles under contract are settled under contractual provisions as claims against the contract
- Unlike vehicles rented on a personal charge card, a report of survey may be required for damage to a vehicle rented under a government contract
- For damages to another vehicle or property, claims office adjudicates as a tort claim. Again, so long as the driver is in the scope of employment, the government will defend the driver. Within the United States, the driver cannot be held personally liable.

If There Is An Accident

- Call the rental company and report. If rented on a government travel card, call travel card company and report immediately.
- If the police respond, try to get a copy of the accident report. If you cannot get a copy of the report, find out how to get a copy later.

- If someone else is injured in the accident and you are TDY at or near a base, let the base legal office know of the accident. If not near a base, contact your base legal office upon return.

- Inform the staff judge advocate immediately if you become aware litigation is filed regarding a vehicle rented by an Air Force member/employee, even if the United States is not a named party in the suit

References:

28 U.S.C. § 2679

Joint Federal Travel Regulations, Volume 1, Chapter 3, para U3415, *Special Conveyance Use* (available at http://perdiem.hqda.pentagon.mil/perdiem/)

Joint Travel Regulation, Volume 2, Chapter 2, para C2102, *Special Conveyance Use* (available at http://perdiem.hqda.pentagon.mil/perdiem/)

Federal Acquisition Regulation (FAR) § 28.312, *Contract clause for insurance of leased motor vehicles*; § 52.228-8, *Liability and Insurance – Leased Motor Vehicles*

Defense Transportation Regulation (DTR) DOD Regulation 4500.9-R-Part I, *Passenger Movement* (June 2005)

AFMAN 23-220, *Reports of Survey for Air Force Property* (1 July 1996)

AFI 51-501, *Tort Claims* (15 December 2005)

Defense Travel Management Office, http://www.defensetravel.dod.mil/index.cfm

CHAPTER THIRTEEN: CONTRACTING ISSUES FOR THE COMMANDER

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Procurement Integrity

The current Procurement Integrity Act is found in the National Defense Authorization Act for Fiscal Year 1996 and at 41 U.S.C. § 423 (implemented at FAR 3.104). The Procurement Integrity Act and its amendments regulate the conduct of federal employees who are involved in procurements and the administration of contracts.

- Warning: This is a complex and constantly changing area of the law, and you should contact your local ethics counselor if you have any questions!
- Employees involved in procurements in excess of the Simplified Acquisitions Threshold must report contacts with bidders or offerors regarding future employment to their supervisors and ethics counselors, and must disqualify themselves from further participation if they do not immediately reject the contact
  - -- When a contact is made, two actions must be taken: prompt reporting of the contact *in writing* and either rejection of the offer or disqualification from participation
  - -- For purposes of the Procurement Integrity provisions, "contact" is defined as any of the actions included as "seeking employment" in 5 C.F.R. 2635.603(b). In addition, unsolicited communications from offerors regarding possible employment are considered contacts.
    - --- An Employee has begun seeking employment if he has directly or indirectly:
      - ---- Engaged in negotiations for employment with any person. Negotiations means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position.
      - ---- Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was for the sole purpose of requesting a job application or for the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other direct class.
      - ---- The employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions or made a response other than rejection to an unsolicited communi-

cation from any person, or such person's agent or intermediary, regarding possible employment with that person

--- An employee is no longer seeking employment when:

---- The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

---- Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer

--- A response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility

- Certain employees (e.g., program managers) who are involved in procurements or the administration of contracts, either of which is valued at $10 million or greater, are prohibited from working for the contractor for a period of one year following their involvement

  -- This compensation ban extends only to the prime contractor. That is, a former official is not prohibited from accepting compensation "from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract."

- The Procurement Integrity Act also prohibits:

  -- Disclosure of contractor bid or proposal information and source selection information

  -- Individuals from knowingly obtaining contractor bid or proposal information or source selection information

- Government personnel may request an advisory opinion from their ethics counselor and/or the staff judge advocate as to whether specific conduct would violate the JER or the Procurement Integrity Act, or regarding their status as a procurement official. One who relies in good faith on such an opinion cannot be found to have knowingly violated the applicable restriction. Procurement personnel should obtain advisory opinions.

References:

41 U.S.C. § 423, Procurement Integrity Act

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

Minor Military Construction Funding

The installation commander, assisted by the base civil engineer, is responsible and accountable to ensure all work accomplished for the Air Force on Air Force owned and controlled real property is properly authorized and funded in accordance with laws, policies, and regulations. "Construction" is a term of art when it comes to funding. The lay definition of construction would include most any work on a physical structure, in one or multiple phases. However, the definition of "construction" for funding purposes is more restrictive and often more difficult to determine. In a nutshell, construction projects having a funded cost of $750,000 or less may be funded with Operation and Maintenance Funds, however, construction projects having a funded cost exceeding $750,000 must be funded with Military Construction Funds. Military Construction Funds may be used for two types of construction projects—Specified and Unspecified. Because the laws governing Military Construction Funds are always subject to change by Congress, these dollar threshold amounts should be verified prior to commencing work.

Construction Funding

- Specified Military Construction Projects (MILCON)
  - -- Congress typically specifically authorizes only those military construction projects expected to exceed $2 million. This threshold was raised from $1.5 million to $2 million by the fiscal year (FY) 2008 DOD Authorization Act. Congress' specific authorization is located in the conference report accompanying the yearly Military Construction Appropriation Act.
  - -- Congressional line-item authorization required
- Unspecified Minor Military Construction Projects (UMC)
  - -- Available for any project with a cost between $750,000 and $2 million (up to $3 million if intended solely to correct life, health, or safety deficiencies)
  - -- Requirements should be unforeseen and so urgent it cannot wait for the next MILCON program submittal
  - -- Includes constructing, erecting, or installing a new facility or system; work that expands the current size of an existing building by constructing additional functional space (e.g., by constructing a building addition or adding an additional level); converting a building from one primary function to another; and repair-type work that exceeds 70 percent of a building's replacement cost
  - -- Combining UMC funds with other fund types to accomplish a single requirement is prohibited
  - -- Each military department receives an appropriation for minor construction

-- The Secretary of the Air Force controls expenditure of these funds and the Secretary of the Air Force must approve the obligation and expenditure of UMC funds

--- MAJCOMs submit project requests under the UMC authority to HQ USAF/ILEC using a DD Form 1391

--- HQ USAF/ILEC validates UMC projects and submits validated projects to SAF/IEI for approval

--- SAF/IEI (together with the OSD Comptroller) approves the projects and notifies the House and Senate Armed Services and Appropriations Committees of the intent to accomplish the project

--- Congress must object within 30 days or work begins

- Unspecified Minor Military Construction, using Operation and Maintenance Appropriation (O&M)

  -- Congress permits the use of O&M funds for unspecified minor construction up to $750,000 per project ($1.5 million if intended solely to correct life, health, or safety deficiencies). Projects solely to correct existing force protection deficiencies are considered in the life/health/safety category.

  -- MAJCOMs are responsible for promoting timely obligation of funds, project approval within delegated approval authorities and execution of projects

  -- With limited exceptions, these funds may not be used to finance projects related to exercises outside the United States that are coordinated or directed by the Joint Chiefs of Staff

Funding Pitfalls

- Projects may not be split into separate segments (commonly called "project splitting") to avoid funding limitations. For instance, it is improper to split a proposed $800,000 building into two $400,000 projects funded with O&M funds to avoid the $750,000 limitation.

- Projects may not be completed in phases (commonly called "phasing") in order to avoid funding limits. For instance, it is improper to build a project for $450,000 in one fiscal year and another project for $350,000 in the next FY, resulting in an $800,000 building, in order to avoid the $750,000 O&M limit.

- Defining exactly what is a "project" can be difficult. A project is generally all work necessary, including land acquisition, excavation, building, installation of equipment, landscaping, etc., to produce a complete and useable facility. It can also include a complete and usable improvement to an existing facility such as an extension, addi-

tion, expansion, alteration, or conversion, or the replacement of an existing facility damaged beyond economical repair.

- For funding purposes, maintenance and repair are not considered construction; therefore, the $750,000 limit on the use of O&M funds does not apply. The primary limitation is the dollar amount the installation has available in its O&M account. Repairs in excess of $5 million must be approved by SAF/IEI. Repairs costing more than $7.5 million must also be reported to Congress.

  -- Maintenance is defined as work necessary to preserve or maintain a facility so it can be used for its designated purpose. In other words, work necessary to prevent deterioration.

  -- Repair means to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated purpose

  -- Caution: maintenance and Repair projects that include an upgrade to a facility's systems or components are deemed construction projects and are subject to MILCON rules when the upgrade is not required by current building codes. Examples: replacing a building's failing HVAC system with one that includes A/C: or, preparing a natural turf athletic field with synthetic turf.

- Only funded costs count toward the dollar limitations. Funded costs include such things as materials, supplies, labor, lodging (TDY), and the maintenance and operation of government-owned equipment. Unfunded costs generally include military salaries (if military labor is used), planning and design costs, depreciation of government-owned equipment, and items received on a nonreimbursable basis as excess distribution from another department or agency. While unfunded costs do not count toward the funding limitation, they must still be calculated and reported.

References:

10 U.S.C. § 2805, Unspecified Minor Construction

10 U.S.C. § 2811, Repair of Facilities

DOD 7000.14-R, *Department of Defense Financial Management Regulations (FMRS), Volume 2B, Budget Formulation and Presentation*, Chapter 8 (June 2007)

AFI 32-1021, *Planning and Programming of Military Construction (MILCON) Projects* (14 June 2010)

AFI 32-1032, *Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects* (15 October 2003)

Unauthorized Procurement

Commanders are routinely faced with the need to acquire supplies, services, and construction necessary for the operation of the installation or unit. Often it is necessary to turn to the private sector to furnish these supplies, services, and construction. Commanders must understand that only those persons who possess specific contracting authority may make such purchases–with rare exceptions, commanders have no contracting authority.

Procurement Authority

- Authority to bind the government to a contract or an obligation to pay a debt is limited to individuals that have been granted express authorization to do so
- The head of each federal agency is authorized to enter into contracts on behalf of the agency
- Contracting authority may be delegated, and in most instances it is a contracting officer (CO) that is responsible for entering into government contracts. Each CO has a "Certificate of Appointment," often called a warrant, which states the limitations on the CO's contracting authority. In most cases, the limitation is based on a set dollar value (e.g., authority to bind the government up to a limit of $500,000).
- On occasion, an individual without authority will enter into a commitment expecting the government to assume responsibility for the financial obligation. Rarely are such unauthorized commitments the product of a deliberate attempt to circumvent the procurement system. Rather, it is usually a matter of ignorance of the procurement procedures, coupled with an honest effort to satisfy a legitimate need. Nevertheless, an individual who makes an unauthorized commitment is subject to disciplinary action.

Ratification of Unauthorized Commitments

- The Federal Acquisition Regulation (FAR) has a procedure for the ratification of an unauthorized commitment. Ratification means the act of approving an unauthorized commitment by an official who has the authority to do so. However, the FAR also requires agencies to take positive action to preclude the need for ratification actions. Additionally, depending on various factors, including the amount of money involved, the approval authority may be at a high level.
- In general, an unauthorized commitment must meet the following criteria to be eligible for ratification

  - Supplies or services have been provided to and accepted by the government, or the government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment
  - The ratifying official has the authority to enter into a contractual commitment
  - The resulting contract would otherwise have been proper if made by an appropriate CO
  - The CO, upon reviewing the unauthorized commitment, determines the prices to be fair and reasonable
  - The CO recommends payment and legal counsel concurs
  - Funds are available and were available at the time the unauthorized commitment was made
  - The ratification is in accordance with any limitations prescribed under agency procedures
- Commanders have a responsibility to ensure their personnel are informed of proper contracting authority
- Bottom line: Ratification procedures exist as a possible avenue to minimize the impact of an unauthorized commitment, but they should not be viewed as a substitute for compliance with proper procurement practices
- Any unauthorized commitments that are not later ratified are the sole financial responsibility of the individual making the unauthorized commitment and are therefore not the financial responsibility of the government

Reference:
Federal Acquisition Regulation (FAR), Subpart 1.6

Outsourcing and Privatization

Whenever possible, and to achieve greater efficiency and productivity, the federal government should conduct competitions to determine whether the public or private sector can best perform a service known as a "commercial activity." This is known as competitive sourcing. The government will not perform a commercial activity that the private sector can provide more economically. In contrast, the transfer of ownership and provision of functions, business assets, or both from the public to the private sector is known as privatization.

Three Degrees of Privatization

- Competitive sourcing governed by Office of Management and Budget (OMB) Circular A-76
  - -- Competitions are held between public agencies and the private commercial sectors
  - -- OMB Circular A-76 states that its procedures for conducting competitions "shall apply to executive departments. . ." (i.e. federal agencies). The circular, however, does not, mandate that any particular commercial activities must be competed—only that the circular's procedures must be followed when the activities are competed. When conducting a more formal "standard competition" (vice a "streamlined" competition") federal agencies are required to:
    - --- Develop a performance of work statement, defining the technical aspects of the work to be performed
    - --- Determine the most efficient organizational structure using the current government workforce, called the Most Efficient Organization, or MEO. This is accomplished through realignment/reexamination of the management structure, personnel requirements and procedures, and when such a comparison is required.
    - --- Conduct cost comparison studies among all sectors, including private, other public agencies, and the current government MEO
  - -- The procedures are fairly complex and commanders should work closely with the legal office during the process
- Housing privatization governed by 10 U.S.C. §§ 2871-2884
  - -- Section 2872: Acquisition or construction of family housing units and unaccompanied housing units by private persons
    - --- On or near military installations

--- May or may not involve the transfer of Air Force owned property and waiving the usual government property disposal process

-- May enter into contracts for the lease of housing units that the Secretary of the Air Force determines are suitable for use as military family housing or military unaccompanied housing

-- Units, whether built or leased, must be generally comparable to the room patterns and floor areas of similar housing units in the locality concerned

-- Construction of housing may include ancillary facilities that support housing

-- Under sections 2873 and 2875, the services may offer market incentives to include:

--- Loan guarantees up to the lesser of 80% of the project value or the outstanding principal of a loan

--- Loans directly to a contractor up to the limit of budget authority

--- Equity investment in the enterprise in the form of a limited partnership or corporation and/or through the purchase of stocks or bonds

-- Military members assigned to privatized housing may be required to make rental payments through allotments under section 2882

-- Differential lease payments that bring rental payments up to fair market value without increasing a military member's out of pocket expenses are authorized under section 2877

- Utility systems privatization governed by 10 U.S.C. § 2688. Includes equipment, fixtures, structures and other improvements utilized in connection with electricity generation; water treatment; wastewater treatment; natural gas delivery; steam generation; telecommunications.

-- Transfers of DOD property may convey all right, title, and interest of the United States, or less, in the utility system

-- If more than one utility or entity notifies the Secretary concerned of an interest in a conveyance the Secretary shall carry out the conveyance through the use of competitive procedures

-- Government must receive fair market value

REFERENCES:

10 U.S.C. § 2688

10 U.S.C. §§ 2871-2884

OMB Circular A-76 (Revised) (29 May 2003)

Bankruptcy: Government Contractors

The Federal Bankruptcy Code affords special protection to businesses that seek bankruptcy protection, including those that do business with the government.

Types Of Contractor Bankruptcy Proceedings

- There are two types of business bankruptcy proceedings:
  - -- Chapter 7 (Liquidation Bankruptcy), which entails the complete liquidation of all contractor assets and cessation of business activities
  - -- Chapter 11 (Reorganization Bankruptcy), which entails a reorganization of the business with continued operation during the reorganization process (Although occasionally the corporation may choose to liquidate in chapter 11. Also you may see a small business operated by an individual file a chapter 13 bankruptcy, which is handled very similar to a chapter 11).
- Protection against creditors begins the day the bankruptcy petition is filed. Even if the government is unaware of the filing, the petition acts as an automatic stay of potential adverse actions against the contractor.
- Typical adverse actions (for example, termination for default, recovery of government furnished equipment or materials, reprocurement, and setoffs) cannot be initiated or continued without the express permission of the bankruptcy court. Permission can be obtained but generally takes sixty to ninety days. It is important to determine what you want to do, terminate or keep a contractor, as soon as possible so that a course of action can be determined.
- Some actions not affected by bankruptcy include criminal actions, issuance of a show cause or cure letter (tailored to avoid violation of the bankruptcy law), conducting an inventory or audit to identify government property, issuance of a final decision of a contractor's claim, or coordinating a proposed termination letter through Air Force channels so that it is ready to serve immediately upon removal of bankruptcy protections

Protecting Air Force Interests

- Protection of Air Force interests in the bankruptcy forum is a unique challenge. It requires the assistance of personnel at all levels, including prompt notification of bankruptcy cases, and assistance in gathering facts, affidavits and documents.
- The government's monetary claims against the debtor's estate are filed as a proof of claim with the bankruptcy court. Time limits exist, so coordinate with the legal office

as soon as possible. Do not allow payment of any invoices to a bankrupt contractor until it is determined whether the contractor owes the Air Force funds on any contract.

- In many instances, the filing of a bankruptcy petition should be anticipated. It is often preceded by delinquency, failure to pay vendors or subcontractors, reduced production capacity, or other evidence of financial difficulty.

- The base legal office must be notified immediately in any case where contractor bankruptcy is suspected or known. Early warning of anticipated bankruptcy maximizes protection of Air Force interests; failure to react swiftly to an actual filing may result in loss of important rights.

- The Bankruptcy Code also contains protections against discrimination for contractors that have filed bankruptcy. A contracting officer cannot discriminate against a contractor in the award of a contract or an option solely because it has declared bankruptcy.

- The appropriate way to analyze a contractor's eligibility for award is through a responsibility determination or another nonbankruptcy basis for analysis. While a contractor may not be found ineligible for award merely because it is involved in bankruptcy proceedings, financial capability is always a factor to be considered in evaluating a bidder's responsibility.

- Protection against contractor bankruptcy often requires close cooperation with the Air Force Legal Operations Agency, Commercial Litigation Division (AFLOA/JAQ) and the U.S. Attorney's Office. The base legal office provides the necessary liaison between the installation and the other offices charged with protecting the government's interests.

References:

11 U.S.C. § 101, Definitions

11 U.S.C. § 362, Automatic Stay

11 U.S.C. § 525, Protection against Discriminatory Treatment

11 U.S.C. Chapter 7, Liquidation

11 U.S.C. Chapter 11, Reorganization

Federal Acquisition Regulation, Subpart 42.9, *Bankruptcy*

Contractor Personnel Authorized to Accompany the U.S. Armed Forces

Contractors support military forces overseas today more than ever. Commanders must understand the basic rules and policies regarding contractor personnel overseas. The following information applies to Department of Defense (DOD) contingency contractor personnel.

Definitions

- Contingency contractor personnel: includes defense contractors and employees of defense contractors and associated subcontractors, including U.S. citizens, U.S. legal aliens, third country nationals (TCN), and citizens of host nations (HN) who are authorized to accompany U.S. military forces in contingency operations or other military operations, or exercises designated by the geographic Combatant Commander. This includes employees of external support, systems support, and theater support contractors. Such personnel are provided with an appropriate identification card under the Geneva Conventions.

- Contractors Deploying with the Force (CDF): a sub-category of "contingency contractor personnel" defined above. CDF are employees of system support and external support contractors, and associated subcontractors, at all tiers, who are specifically authorized in their contract to deploy through a deployment center or process and provide support to U.S. military forces in contingency operations or in other military operations, or exercises designated by a geographic Combatant Commander. CDF includes forward-deployed system support and external support. Such personnel are provided with an appropriate identification card under the Geneva Conventions. CDF do not include TCN or local national personnel hired in theater using local procurement. (e.g., day laborers).

Types of Contracts

- External Support: awarded by a supporting headquarters outside the contingency operation area that provide support for deployed operational forces

  -- Usually prearranged, but may be awarded or modified during the mission based on the commanders' needs

  -- Examples include the Army Logistics Civil Augmentation Program, the Air Force Contract Augmentation Program, the Navy Construction Capabilities Contract, Civil Reserve Air Fleet contracts, and war reserve materiel contracts

- Systems Support: awarded by Military Department program managers or by Component Commands outside the contingency operation area to support deployed

operational forces. They provide essential support to specific systems throughout the system's life cycle (including spare parts and maintenance for key weapons systems, command and control infrastructure, and communications systems) across the range of military operations. Support under systems support contracts is often designated as "essential contractor services" under the contract.

- Theater Support: awarded within the contingency operation area to support deployed operational forces. Theater support contracts provide goods, services, and minor construction, usually from the local vendor base, to meet the immediate needs of operational commanders.

International Law and Contractor Legal Status

- Contractors may support military operations as civilians accompanying the force, so long as:
  - They are designated as such by the force they accompany
  - Are provided with an appropriate identification card
- Contingency contractor personnel may be at risk of injury or death incidental to enemy actions while supporting military operations
- Contingency contractor personnel may support contingency operations through the indirect participation in military operations, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, and providing logistic services such as billeting, messing, etc
- If captured during armed conflict, contingency contractor personnel accompanying the force are entitled to prisoner of war status

Applicability of Laws

- Subject to the application of international agreements, contingency contractor personnel must comply with applicable host nation and third country nation laws
- Contingency contractor personnel remain subject to U.S. laws and regulations and may be subject to prosecution under
  - Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261, which extends U.S. Federal criminal jurisdiction to certain DOD contingency contractor personnel, for certain offenses committed outside U.S. territory
  - War Crimes Act, 18 U.S.C. § 2441, which extends federal criminal jurisdiction to conduct that is determined to constitute a violation of the law of war when committed by a civilian national of the United States

- -- Uniform Code of Military Justice, which applies to civilians serving with or accompanying U.S. forces in the field, when there is a formal declaration of war by Congress or during a contingency operation. Detailed guidance for application of the UCMJ to DOD contractors was released by SECDEF in march 2008. Among the covered topics are, required coordination with DOJ, authority to investigate, authority to apprehend suspected offenders and to address immediate needs of the situation.

- -- Status of Forces Agreements (SOFA) and other types of formal agreements may or may not specifically address contingency contractor personnel. On 17 November 2008, the United States entered into a SOFA with the Republic of Iraq. Under this agreement, Iraq has the primary right to exercise jurisdiction over US contractors and contractor employees. The United States may also enter into other types of agreements with foreign governments within establish jurisdictional rules over DOD military and civilian personnel. In 2003, the State Department exchanged "Diplomatic Note No. 202" with the Islamic Transitional Government of Afghanistan which authorized the US to "exercise criminal jurisdiction over United States personnel."

Importance of the Contract

- The contract is the principal legal basis for the relationship between the DOD and the contractor

- The contract shall specify:

  - -- The terms and conditions under which the contractor is to perform

  - -- The method by which the contractor will be notified of the deployment procedures to process contingency contractor personnel

  - -- The specific support relationship between the contractor and the DOD

Roles of Contractors

- Contingency contractor personnel may not perform functions and duties that are inherently governmental. "Inherently governmental" is defined by the Office of Management and Budget as an activity that is so intimately related to the public interest as to mandate performance by government personnel.

- When writing contracts, planners and contracting officers must consider:

  - -- International agreements and host nation support agreements

  - -- Applicable status of forces agreements (SOFAs) and related agreements to determine their effect on the status and use of contractors in support of contingency operations

Accountability

- Defense contractors awarded external support contracts and systems support contracts are required to input employee data and maintain by-name accountability of contractors deploying with the force in the joint database designated in the contract
- Contractors must include the general location of their employees and must keep the database up-to-date to reflect all contractor employees actually deployed in the area of responsibility (AOR). Prime contractors are responsible for information regarding their subcontractors at all tiers.

Letter of Authorization

- The contracting officer will issue a Letter of Authorization to CDF, which will be required to process through a deployment center; to travel to, from, and within the AOR
- The Letter of Authorization shall provide, at a minimum:
  - The prime contract number
  - The sub-contract number, if applicable
  - An emergency contact phone number and email address of the government contracting officer
  - An emergency contact 24/7 phone number and email address of the defense contractor point of contact
  - The contact information of the sponsoring in-theater supported unit
  - The intended length of assignment in the AOR, and
  - Identify government facilities, equipment, and privileges in the AOR as authorized by the contract

Medical Issues

- Defense contractors must provide medically and physically qualified contingency contractor personnel
- Secretary of Defense may direct immunizations as mandatory for CDF performing DOD-essential contractor services
- Defense contractors must provide their own medical care. The government may provide resuscitative care, stabilization, hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb or eyesight could occur.

- -- All costs associated with the treatment and transportation of contingency contractor personnel to the selected civilian facility are reimbursable to the government
- -- Primary medical or dental care is not authorized unless specifically provided for under the terms of the contract and the corresponding Letter of Authorization. Primary care includes inpatient and outpatient services; non-emergency evacuation; pharmaceutical support; dental services and other medical support.

Individual Protective Equipment

- Generally, contractors shall be required to provide all life, mission, and administrative support to its employees necessary to perform the contract
- However, the component commander may decide it is in the government's interests to provide selected life, mission, and administrative support to some contingency contractor personnel. This equipment shall typically be issued before deployment to the AOR at the deployment center and must be returned to the government, otherwise accounted for, or purchased, after use.

Uniforms

- The individual contractor or contingency contractor personnel are responsible for providing their own personal clothing, including casual and working clothing required by the particular assignment
- Generally, commanders shall not issue military clothing to contingency contractor personnel or allow the wearing of military or military look-alike uniforms. However, geographic combatant commanders may authorize certain contingency contractor personnel to wear standard uniform items for operational reasons.
  - -- This authorization shall be in writing and carried by authorized contingency contractor personnel
  - -- Care must be taken to ensure, consistent with force protection measures, the contingency contractor personnel are distinguishable from military personnel through the use of distinctive patches, arm bands, nametags, or headgear

Legal Assistance

- Generally, contingency contractor personnel are not entitled to military legal assistance with personal legal affairs, either in theater or at the deployment center
- The individual contractor or contingency contractor personnel are responsible for preparing and completing personal legal affairs (including powers of attorney, wills, trusts, estate plans, etc.) before reporting to deployment centers

Force Protection and Weapons Issuance

- The geographic combatant commanders must develop a security plan for protection of those contingency contractor personnel in locations where there is not sufficient or legitimate civil authority and the commander decides that it is in the interests of the government to provide security because of any of the following:
  - The contractor cannot obtain effective security services
  - Such services are unavailable at a reasonable cost
  - Threat conditions necessitate security through military means
- Contingency contractor personnel may be armed for individual self-defense, on a case-by-case basis, only if
  - It is determined that military force protection and legitimate civil authority are deemed unavailable or insufficient
  - It is authorized by the geographic Combatant Commander. In 2006, USCENTCOM delegated to authorize arming DOD civilians and DOD contractors to the senior US forces commanders in Iraq and Afghanistan.
  - It does not violate applicable U.S., host nation (HN), and international law, relevant SOFAs or international agreements, or other arrangements with local host nation (HN) authorities
- Commanders should consult with the staff judge advocate prior to authorizing the arming of contractors
- If weapons are authorized
  - The government shall provide or ensure weapons familiarization, qualifications, and briefings on the rules regarding the use of force to the contingency contractor personnel
  - Acceptance of weapons by contractor personnel shall be voluntary and permitted by the defense contractor and the contract
  - These personnel must not be otherwise prohibited from possessing weapons under U.S. law

Security Services

- If consistent with applicable U.S., host nation, and international law, and relevant SOFAs or other international agreements, a defense contractor may be authorized to provide security services for other than uniquely military functions

- Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires legal analysis. Variables such as the nature of the operation, the type of conflict, any applicable status agreement related to the presence of U.S. forces, and the nature of the activity being protected require case-by-case determinations.

  -- Requests shall be reviewed on a case-by-case basis by the appropriate staff judge advocate to the geographic combatant commander

  -- Contracts shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. In these situations, contract security services will not be authorized to guard U.S. or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the geographic combatant commander. In November 2006, the authority to approve use of contract security services to protect military personnel in Iraq or Afghanistan was delegated to the Commander of the Multinational Force–Iraq and to the senior US Forces Commander in Afghanistan.

References:

10 U.S.C. § 802(a)(10)

18 U.S.C. § 2441

18 U.S.C. § 3261

DODI 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces* (3 October 2005)

CHAPTER FOURTEEN: ETHICS ISSUES

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Standards of Ethical Conduct

Each commander has the responsibility of ensuring that the standards of conduct in the Joint Ethics Regulation (JER), DODD 5500.7-R, are brought to the attention of all personnel. It is fundamental Air Force policy that personnel shall not engage in any personal business or professional activity that places them in a position of conflict between their private interests and the public interest of the United States. In order to preserve the public confidence in the Air Force, even the appearance of a conflict of interest must be avoided.

- Air Force personnel shall not use inside information to further a private gain for themselves or others if that information was obtained by reason of their Air Force position and is not generally available to the public
- All personnel, upon first assumption of Air Force duties, should be thoroughly informed of the regulation's provisions
- Annual reminders of the regulation can be accomplished by requiring unit members to read the regulation, by posting bulletin board items, by regularly published literature, and at commanders' calls
- Personnel may obtain further clarification of the standards of conduct and conflict of interest provisions by consulting with their servicing legal office
- The commander must realize that the resolution of a conflict of interest should be accomplished immediately
- The JER prohibits some specific activities, including:
  - -- Active duty members making personal commercial solicitations or solicited sales to DOD personnel junior in rank at any time (on or off duty, in or out of uniform), specifically for insurance, stocks, mutual funds, real estate, or any other commodities, goods, or services
  - -- Soliciting or accepting any gift, entertainment, or thing of value from any person or company which is engaged in procurement activities or does business with any agency of the DOD (including contractors). There are exceptions to this rule, so if offered a gift, do not hesitate to consult the ethics counselor, normally the staff judge advocate (SJA).
  - -- Soliciting contributions for gifts to an official superior, except voluntary gifts or contributions of nominal value on special occasions like marriage, illness, transfer, or retirement
  - -- Active duty military or civilian personnel using their grades, titles or positions in connection with any commercial enterprise or for endorsing a commercial product

- -- Endorsing a non-Federal entity, event, product, service, or enterprise (explicit or implied). DOD employees must not use their official capacities and titles, positions, or organization names to suggest official endorsement or preferential treatment of any non-Federal entity except those listed in subsection 3210, such as the Combined Federal Campaign and the Air Force Assistance Fund.
- -- Accepting employment outside of the Air Force or off duty, if it interferes with or is not compatible with the performance of government duties, or if it might discredit the government. Squadron commanders are normally the approving authority for requests for off duty employment.
- -- Unauthorized gambling, while on base or on duty

- DOD employees may not participate in their official DOD capacities in the management of non-Federal entities without authorization from the DOD General Counsel, except under very limited circumstances requiring the approval of the Secretary of the Air Force
- DOD employees may, however, serve as DOD liaisons to non-Federal entities when appointed by the head of the DOD Component command or organization who determines there is a significant and continuing DOD interest to be served by such representation. Liaisons serve as part of their official DOD duties, under DOD Component memberships, and represent only DOD interests to the non-Federal entity in an advisory capacity.
- The Joint Ethics Regulation imposes annual financial reporting requirements for officers in the grade of O-7 or above and other government officials such as commanding officers and procurement officials
- As always, if you have specific questions, the installation SJA is the standards of conduct/ethics counselor and can assist you

Reference:

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

Financial Disclosure Forms

The DOD currently uses two different financial disclosure forms, the OGE 450 and the SF 278. The Joint Ethics Regulation (JER) lists who must file, outlines the required contents in these reports, and specifies filing times. Although the JER contains sample forms, these forms are outdated and as with all issues involving the JER, commanders should contact their servicing staff judge advocate (SJA) for assistance and guidance. Which form an individual must use depends on the rank or grade and responsibilities of that individual.

Confidential Financial Disclosure Report (OGE 450)

- Persons required to file this form include:
  - -- Commanding officers, heads and deputy heads of all installations or activities. A person who must file a SF 278 does not file an OGE 450. Only the SF 278 is required from General Officers and Senior Executive employees.
  - -- All military members (O-6 and below) and all civilian employees (GS/GM-15 and below) when the official position of such employees or members requires them to participate personally and substantially in taking an official action for contracting or procurement, or if the supervisor of such employee or member determines the position requires such a report to avoid an actual or apparent conflict of interest
  - -- If any questions exist as to whether an individual should file such a report, contact the servicing SJA
- The specific requirements for the content of this report are set forth in Chapter 7 of the JER. Several of these requirements are worth highlighting.
  - -- A complete report is required for each filing period if changes have occurred since the last submission. A short version of the OGE 450 (form 450-A) may be used by filers who have <u>not</u> had reportable changes in their financial status since their last report. The short version cannot be used in years evenly divisible by four (e.g., 2008, 2012); all filers in those years must use the full OGE 450.
  - -- The report must provide sufficient information about the individual, as well as the individual's spouse and dependent children, that an informed judgment can be made regarding compliance with conflict of interest laws
  - -- No disclosure of amounts or values is required
- This report must be filed within 30 days after assuming a covered position and annually thereafter

- Annual reports are submitted to the servicing SJA no later than 15 February for the preceding calendar year

Public Financial Disclosure Report (SF 278)

- Persons required to file this form include:
  - -- Regular and Reserve officers whose grade is O-7 or above
  - -- Members of the Senior Executive Service
  - -- Civilian employees whose positions are classified above GS/GM-15 or whose rate of basic pay is fixed at or above 120% of the minimum rate of basic pay for a GS/GM-15
- The specific requirements for the content of this report are also set forth in Chapter 7 of the JER
  - -- Generally, this report is far more detailed in content than the OGE 450
  - -- For annual reports, a new report is required even if no changes have occurred since the last submission
  - -- Although specific amounts are not required on the report, individuals must indicate the value of assets within both a given range and type of asset
- This report must be filed within 30 days after assuming a covered position
- Annual reports must be filed between 1 January and 15 May and cover the preceding calendar year
- An individual must also file a termination report between 15 and 30 days after terminating a covered position unless, within 30 days, the individual assumes another covered position
- OGE has published updated editions of the SF 278, *Public Financial Disclosure Report*. In 2000, it was updated to incorporate the category of assets over $1 million, a continuation page for transactions listed on Schedule B, and a check-off box on the front of the form to indicate a filing extension. In 2008, the reporting threshold for gifts was raised to $335.

References:

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

http://afmcethics.wpafb.af.mil/updates/index.htm#DISCLOSURE

http://www.defenselink.mil/dodgc/defense_ethics

Forms:

SF 278 and OGE 450 are available at: http://www.usoge.gov/

Gifts to Superiors

To avoid the appearance that a supervisor is being improperly influenced, the Joint Ethics Regulation (JER) issues the following guidelines concerning gifts to superiors.

- Generally, Air Force personnel may not:
  - -- Solicit a contribution from other DOD personnel for a gift to a superior
  - -- Make a donation for a gift or give a gift to a superior
  - -- Accept a gift from subordinate personnel
- Exceptions to the general rule prohibiting gifts to superiors or their solicitation:
  - -- On an occasional basis, including occasions where gifts are traditionally given or exchanged, items having an aggregate market value of $10 or less per occasion, items such as food and refreshments, or personal hospitality at a residence may be given to superiors and accepted from subordinates
  - -- On special, infrequent occasions (marriage, birth of child, etc.) or on occasions that terminate the superior-subordinate relationship (retirement, separation, or PCS)
    - --- Employees may solicit a contribution for a group gift for a special, infrequent occasion, as long as the amount solicited does not exceed $10 per person. Solicitation must be without pressure or coercion.
    - --- The general rule is that a DOD employee may NOT accept a gift if the market value of the gift exceeds $300 per donating group or organization. However, groups of employees are permitted to give gifts exceeding $300 in value to superiors on special, infrequent occasions that terminate the superior-subordinate relationship and the gifts are appropriate for the occasion and are uniquely linked to the departing employee's position or tour of duty, and commemorate the same.
  - -- Under all circumstances, gifts must be truly voluntary

References:

5 C.F.R. §§ 2635.301–2635.304

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

HQ USAF/JAG Message, *JER Amendment Gifts to Superiors* (10 January 1997)

Foreign Gifts

The United States Constitution prohibits persons holding an "office of profit or trust" for the United States from accepting gifts from foreign "personages or governments" without consent of Congress. Congress has consented to retaining and accepting gifts under certain conditions and when following certain procedures.

- This prohibition applies to military members, civilian employees, consultants, and their spouses or other dependents. This includes retired and reserve component members, regardless of duty, Air National Guard members, when federally recognized, and their spouses and dependents.
- No DOD employee may request, or otherwise encourage, the offer of a gift from a foreign government
- Table favors, mementos, remembrances, or other tokens bestowed at official functions, and other gifts of minimal value received as souvenirs or marks of courtesy from a foreign government, e.g., plaques or paper certificates, may be accepted and retained by the recipient
- "Minimal value," is defined as not exceeding $335 in retail value. "Minimal value" is based on the Consumer Price Index and is subject to change.
  - -- The Government Services Agency (GSA) periodically adjusts the amount
  - -- The value of the gift is determined by United States retail value
  - -- Must aggregate the value if more than one gift is given at the same occasion
- DOD employees must refuse offers of gifts of more than minimal value if practical to do so
  - -- Advise donor that United States law prohibits persons in service of the United States or their dependents from accepting the gift
  - -- Exceptions to the refusal rule
    - --- May accept a gift of greater value if refusal is likely to offend or embarrass the donor or adversely affect foreign relations. The gift becomes United States property and must be reported and turned in to the Air Force in accordance with procedures prescribed in AFI 51-901.
    - --- A gift recipient may purchase a gift if he or she desires by paying full retail value
- For minimal value gifts accepted, the person receiving the gift should make a written record describing the circumstance of the gift, including the date and place of

presentation, identity and position of the donor, description and value of gift, and means by which the value was determined

References:

5 U.S.C. § 7342

41 C.F.R. § 102-42.10 (defines "minimal value" gifts at $335)

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

DODD 1005.13, *Gifts and Decorations from Foreign Governments* (19 February 2002), Incorporating Change 1 (6 December 2002), Certified Current (21 November 2003)

AFI 51-901, *Gifts From Foreign Governments* (16 February 2005)

Use of Government Resources for Mementos and Gifts

Air Force policy is that appropriated funds cannot be used to purchase gifts for military members, employees, or private citizens unless specifically authorized by law. The only authority to use Air Force appropriated funds for gifts is AFI 65-603, which specifies the circumstances and the individuals to whom gifts (or "mementos") may be presented. Generally, nonappropriated funds cannot be used when appropriated funds are authorized, whether such funds are available or not. The use and limits on the use of nonappropriated funds is outlined in AFI 34-201.

Impermissible Use of Funds

- You cannot use appropriated funds to purchase PCS or retirement mementos for either military or DOD civilian personnel
- You cannot use nonappropriated funds to purchase PCS mementos for either military or DOD civilian personnel
- In general, you cannot use nonappropriated funds to purchase trophies and awards that are used to recognize either mission accomplishment or individual achievements that contribute to military effectiveness. Nonappropriated funds may be used to purchase trophies and make nominal monetary awards for winners under the individual recognition program provided appropriated funds are not available or not authorized.
- You cannot use mission accomplishment recognition funding to honor PCS or retiring personnel. AFI 36-2803 and AFI 36-1001 provide for appropriate recognition in these circumstances.

Permissible Use of Funds

- You can use nonappropriated funds in support of a retirement ceremony to purchase light refreshments and mementos ($20 limit) for retiring military and DOD civilian personnel
- You can use appropriated funds to purchase special trophies and plaques that are used to recognize mission accomplishment, such as personnel of the quarter awards
- You can use appropriated funds, i.e., representation funds, to purchase mementos/gifts for distinguished citizens of foreign countries, and certain U.S. citizens who are not DOD employees

REFERENCES:

DODI 7250.13, *Use of Appropriated Funds for Official Representation Purposes* (30 June 2009)

AFI 34-201, *Use of Nonappropriated Funds (NAFS)* (17 June 2002)

AFI 36-1001, *Managing the Civilian Performance Program* (1 July 1999)

AFI 36-2803, *The Air Force Awards and Decorations Program* (15 June 2001)

AFI 65-603, *Official Representation Funds—Guidance and Procedures* (17 February 2004)

Participation in Frequent Flyer Programs

Chapter 4 of the Joint Ethics Regulation (JER) contains the key rules associated with travel benefits. This chapter of the JER discusses Frequent Flyer Programs (FFPs) and what can be done with accumulated bonus mileage and other benefits received from official travel. Long-standing travel policy (now changed) dictated that military members and Federal government employees were obligated to turn over to the government any gift, gratuity, or benefit received while performing official travel.

- With few exceptions, the old rules barred the personal use of benefits offered as part of a frequent flyer club, or similar incentive program, that offered upgrades, travel perks, and free trips based upon an accumulation of frequent flyer mileage with a particular airline
- The law supporting this policy was substantially changed by the FY02 DOD Authorization Act, signed into law on 28 December 2001
- Under the new law, Federal employees (including military members) and their families who receive a promotional item as a result of traveling at government expense, or while traveling in furtherance of government business at the expense of a non-Federal entity under 31 U.S.C. § 1353, may keep the item for personal use if the item
  - -- Is available to the public under the same terms; and
  - -- Can be accepted at no additional cost to the government
- The term "promotional item" includes, among other things, frequent flyer miles, travel upgrades, and access to carrier clubs or facilities
- The new policy applies to promotional items received before, on, or after the date of the enactment of the Act (28 December 2001)
- The new rules were implemented in the Joint Federal Travel Regulations (JFTR), for military members, and Joint Travel Regulations (JTR), for civilian employees, on 31 December 2001
- Therefore, personnel may now accumulate and use official travel mileage and benefits for personal use
- Travelers should be reminded of two related considerations:
  - -- First, they may not be reimbursed twice for the <u>same</u> travel expenses
  - -- For example, a government traveler may accept reimbursement for lost luggage from the offending airline, but then may not then file a claim against the government for the loss since the traveler has already been made whole by the carrier

- -- Similarly, a traveler who accepts payments from an airline for voluntarily relinquishing a seat may keep those payments, but may not seek additional reimbursement from the government for expenses incurred by the resulting delay, i.e., per diem, lodging, miscellaneous expenses
- -- Member must take regular leave if delay would cause member not to arrive at his appointed place of duty on time
- -- Voluntary bumping may not be done if it will interfere with the TDY mission

- A traveler who is <u>involuntarily</u> bumped from a seat is considered to be "awaiting transportation" for per diem and miscellaneous expense reimbursement; therefore, any monetary compensation from the airline (including meal and/or lodging vouchers) for the denied seat belongs to the government
  - -- Member must turn in all such items with his TDY voucher on return
  - -- Second, government travelers are still required to use the government travel card to cover the expenses incurred while traveling on official orders. Thus, a traveler who has a personal credit card that would generate more desirable travel benefits in conjunction with an official trip cannot decide to use his or her personal credit card in lieu of the government travel card.
  - -- Air Force will pay additional costs and per diem associated with the delay caused by involuntary bumping

References:

31 U.S.C. § 1353

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

Joint Federal Travel Regulations (C247, 1 July 2007)

Joint Travel Regulations (C501, 1 July 2007)

59 Comp. Gen. 203 (1980)

Use of Government Communications Systems

With the explosion of the Information Age, government employees now have access to computers, copier machines, fax machines, cellular phones, the Internet, and electronic mail. Under the Joint Ethics Regulation (JER) the use of government resources, communications systems, and equipment, including telephones, data fax machines, electronic mail, and the Internet, are for official and authorized use only.

- All usage of government communications is subject to being monitored, and no classified information may be communicated over unclassified lines
- E-mail use
  - -- Official use may include morale and welfare communications for deployed personnel, when approved by the theater commander
  - -- Examples of authorized limited personal use include, but are not limited to:
    - --- Notifying family members of official transportation or schedule changes
    - --- Exchanging important and time-sensitive information with a spouse or family member, such as scheduling doctor, automobile, or home repair appointments, brief Internet searches, or sending directions to visiting relatives
    - --- Educating or enhancing the professional skills of employees
    - --- Sending messages on behalf of a chartered organization, such as unit booster club, base top 3, company grade officers association
    - --- Limited use by deployed members for morale, health, and welfare purposes
    - --- Searching for a job if related to separations or retirements
  - -- Digitally signing and encrypting are two measures to secure the network
    - --- Digital signatures are required when the message contains only unofficial information and does not contain an embedded hyperlink and/or an attachment
    - --- Encryption should be used to protect the following types of information
      - ---- For Official Use Only
      - ---- Privacy Act Information
      - ---- Personally Identifiable Information (PII)
      - ---- Individually identifiable health, DOD payroll, finance, logistics, personnel management, proprietary, and foreign government information

---- Operations Security (OPSEC) information

---- Other information which required encryption by area of responsibility

--- Encryption will not protect classified information

-- The number of e-mail recipients should be kept to a minimum

-- Prohibited use

--- Distributing copyrighted materials by electronic messaging without consent from the copyright owner

--- Sending or receiving electronic messages for commercial or personal financial gain

--- Intentionally or unlawfully misrepresenting your identity or affiliation in electronic messaging communications

--- Sending harassing, intimidating, abusive, or offensive material, to, or about others

--- Using someone else's identity

--- Causing congestion on the network by such things as chain letters, junk e-mails, and broadcasting inappropriate messages to groups or individuals

--- Using government systems for political lobbying

--- Accessing commercial web mail accounts and instant messaging services, except accessing personal GI Mail and other instant messaging services on official Air Force web sites is authorized

-- Failure to comply with the prohibitions and mandatory provisions by military personnel is a violation of Article 92, UCMJ. Violations by civilian employees may result in administrative disciplinary actions.

- Internet use

-- Government-provided hardware and software are for official and authorized purposes only. Appropriate officials may authorize personal uses consistent with the requirements of the JER after consulting with their ethics counselor. Such policies should be explicit.

-- Prohibited use

--- Use of government communications systems for unauthorized personal use

--- Uses that would adversely reflect on the Department of Defense or Air Force, such as chain letters, unofficial soliciting, or selling except on authorized bulletin boards established for such use

--- Storing, processing, displaying, sending, or otherwise transmitting offensive or obscene language or material. Offensive material includes, but is not limited to, hate literature, such as racist literature, materials or symbols; sexually harassing materials; pornography; and other sexually explicit materials.

--- Storing or processing classified information on any system not approved for classified processing

--- Using copyrighted material in violation of the rights of the copyright owner

--- Participating in chat lines unless for official purposes and approved by Public Affairs

--- Unauthorized use of the account or identity of another person or organization

--- Viewing, changing, damaging, deleting, or blocking access to another user's files or communications without appropriate authorization or permission

--- Attempting to circumvent or defeat security or modifying security systems without prior authorization or permission

--- Obtaining, installing, copying, storing, or using software in violation of the appropriate vendor's licensing agreement

--- Permitting any unauthorized individual access to a government-owned or government-operated system

--- Modifying or altering the network operating system or system configuration without obtaining permission from the system administrator

--- Copying and posting official information to unauthorized web sites

--- Downloading and installing freeware/shareware or any other software product without approval

-- Failure to comply with the prohibitions and mandatory provisions by military personnel is a violation of Article 92, UCMJ. Violations by civilian employees may result in administrative disciplinary actions.

-- To protect against downloading viruses from the Internet and introducing potential risk to the Air Force networks, check all downloaded files for viruses and do not download any files directly to a network or shared drive

References:

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

AFI 33-119, *Air Force Messaging* (24 January 2005), Incorporating through Change 4 (2 September 2008)

AFI 33-129, *Web Management and Internet Use* (3 February 2005), Incorporating Through Change 3 (12 September 2009), AFGM 1 (3 May 2010)

AFPD 33-4, *Enterprise Architecting* (27 June 2006)

Honoraria

Military members may accept the payment of money or anything of value for an appearance, speech or article, unrelated to their official duties, assuming there are no statutory or regulatory prohibitions.

- An honorarium is generally defined as a payment given to someone, such as a consultant or a speaker, for services for which fees are not legally required
- In the context of the Joint Ethics Regulation (JER), honoraria are considered compensation for a lecture, speech, or writing and involve the payment of money or anything of value
- Prior to 1996, military members were generally prohibited from accepting any honorarium on any topic, even if there was no connection between the subject of the appearance, or article, and the individual's official duty
- However, pursuant to a Department of Justice opinion dated 26 February 1996, that prohibition is no longer enforced against any government employee, military or civilian. Military members are no longer prohibited from accepting the payment of money or anything of value for an appearance, speech, or article, unrelated to their official duties.
- Travel reimbursement for an appearance, speech, or article related to official duties may be accepted, but a speaker's fee or other direct compensation may not be accepted
- Questions concerning the acceptance of an honorarium, should be addressed to your ethics counselor or the servicing SJA

References:

5 C.F.R. § 2635.807(a)(2)(iii)(D)

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

Wolfe v. Barnhart, 446 F.3d 1096 (10th Cir. 2006)

Honorary Memberships

Air Force personnel are occasionally offered memberships in various non-defense contractor private organizations such as golf, tennis, gun, health, or social clubs. Such offers usually waive initiation fees and may waive all or a portion of membership dues, but the individual is responsible for all charges incurred and any dues not waived. Usually, these memberships terminate on the individual's reassignment or retirement and do not create an equity position in the club.

- The Joint Ethics Regulation (JER) prohibits military members or civilian employees from accepting such a membership if the membership is offered because of their official position
  - -- Previously, there was no prohibition to members accepting an unsolicited honorary membership from a non-defense contractor entity. This included country clubs.
  - -- Now, an Air Force member may accept honorary membership only if the offer is unrelated to government employment and offered to all military members, regardless of rank or position
- Air Force personnel may become regular members of associations whose membership includes DOD contractor personnel, e.g., Air Force Association
- If acceptance is not otherwise prohibited, acceptance of an honorary membership does not violate 18 U.S.C. § 209 (unauthorized acceptance of compensation by a government official for services as a government official)
- Before accepting any honorary membership, military members should seek the advice and guidance from their ethics counselor or servicing SJA

References:

18 U.S.C. § 209

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

Off Duty Employment

Air Force members may participate in off duty employment, subject to the limitations and prohibitions stated in the Joint Ethics Regulation (JER).

- Personnel should obtain approval from their commander prior to engaging in outside employment. Although the Air Force does not require an individual to complete AF IMT 3902, *Application and Approval for Off-Duty Employment,* individuals should be aware there is frequently a local or command policy to do so.
- Financial disclosure filers shall obtain prior approval before working for a prohibited source. For more information on who is required to file financial disclosures, see your servicing SJA.
- Personnel may not engage in outside employment, with or without compensation, that:
  - -- Interferes with or is not compatible with performing their government duties
  - -- May reasonably be expected to bring discredit upon the government or the Department of Defense
  - -- May tend to create a conflict of interest
  - -- Will detract from readiness or pose a security risk
- Personnel are encouraged to engage in teaching, writing, or lecturing
  - -- Such activities must not depend upon information gained as a result of government service, unless available to the public or with SecAF approval
  - -- Civilian presidential appointees may not accept anything of monetary value for imparting information substantially relating to responsibilities, programs, or operations of the Air Force, or for official ideas which have not been made public
  - -- Generally, federal employees may not receive payment for articles or speeches related to their official duties

References:

5 C.F.R. § 2635, subpart H

DOD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), Incorporating Through Change 6 (23 March 2006)

Wolfe v. Barnhart, 446 F.3d 1096 (10th Cir. 2006)

CHAPTER FIFTEEN: CIVILIAN PERSONNEL AND FEDERAL LABOR LAW

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Overview of the Civilian Personnel System

Introduction

On October 28, 2009, President Obama signed the 2010 National Defense Authorization Act (NADA), effectively abolishing the Department of Defense's controversial pay-for performance personnel system, commonly referred to as the National Security Personnel System (NSPS).

The 2010 NADA (Public Law 111-84) requires the transition of NSPS employees, with no loss of or decrease in pay upon conversion out, to non-NSPS personnel systems by no later than January 1, 2012. The majority of NSPS employees are scheduled to transition to non-NSPS personnel systems by September 30, 2010. Employees will be advised of the transition date through their component channels. Employees will experience no loss of or decrease in pay upon conversion out of NSPS. The grade of the position will be determined using the same procedures and criteria currently in use for GS employees.

The NSPS Transition Office (NSPSTO) is the successor organization to the Program Executive Office, NSPS. The office title was changed to reflect its new mission, which is to effectively and efficiently transition NSPS employees to appropriate non-NSPS personnel systems. Up to date NSPS transition guidance can be found at http://www.cpms.osd.mil/nsps/index.html. Consult your civilian personnel office regarding whether particular employees are currently covered by NSPS and the extent to which coverage impacts the concepts and procedures discussed below.

The area of labor and personnel relations is covered by an assortment of statutes, executive orders, and regulations and is administered by a myriad of administrative bodies located in a variety of federal departments and independent agencies and is a complicated area of the law.

The Workforce Structure

- Six categories that offer varying degrees of protection in adverse personnel actions
  - -- Competitive service
    - --- All positions not specifically exempted
    - --- Most employees enter federal service after passing a competitive exam
  - -- Excepted service—usually excepted from competition by OPM regulations
  - -- Senior Executive Service (SES)
    - --- Reserved for civil servants above GS-15

--- Considered general officer equivalents

-- Probationary employees

-- Hybrid military/civilian position

--- National Guard technicians

--- Air Reserve technicians

-- Nonappropriated fund employees

PAY SYSTEMS

- Appropriated fund employees: There are currently two appropriated fund pay systems in use within the Department of Defense—the Legacy system and the NSPS system

  -- The Legacy system:

  --- General Schedule (GS)

  ---- GS-1 through GS-18

  ---- Statutory–same pay scale nationwide

  ---- Automatic pay increases for "acceptable" performance

  --- Executive Schedule

  ---- Statutory-same basic pay nationwide

  ---- Merit pay increases

  --- Federal Wage Survey

  ---- Wage Grade (WG)/Wage Leader/Wage Supervisor

  ---- Pay reflects private sector pay rates in locality for same type of work

  ---- Manner of computing pay set by statute

  -- The NSPS system:

  --- Pay increases and/or performance bonuses are based on employee performance

  --- NSPS does not apply to Senior Executive Service or to bargaining unit employees

  --- NSPS contains four career groups

---- Standard Career Group

----- Professional/Analytical, YA1-YA3

----- Technician/Support, YB1-YB3

----- Supervisor/Manager, YC1-YC3

----- Student, YP

---- Scientific and Engineering Career Group

----- Professional, YD1-YD-3

----- Technician/Support, YE1-YE4

----- Supervisor/Manager, YF1-YF3

---- Investigative and Protective Services

----- Investigative, YK1-YK3

----- Fire Protection, YL1-YL4

----- Police/Security, YM1-YM2

----- Supervisor/Manager, YN1-YN3

---- Medical Career Group

----- Physician/Dentist, YG2-YG3

----- Professional, YH1-YH3

----- Technician/Support, YI1-YI3

----- Supervisor/Manager, YJ1-YJ4

- Nonappropriated fund (NAF) employees

  -- Morale, welfare and recreation employees

  -- Pay rates determined by management and may be negotiable with unions

Administrative and Adjudicative Bodies

- Merit Systems Protection Board (MSPB)

  -- Adjudicates cases brought by the Office of Special Counsel, such as whistle-blower claims and allegations of mismanagement

  - Hears appeals by certain civilian employees of agency actions in misconduct or performance cases where the employee was disciplined by reduction in grade, removal, suspension for more than 14 days or furlough for 30 days or less for misconduct
  - Possesses full authority to mitigate or completely reverse agency adverse actions, but cannot mitigate performance based actions taken under 5 U.S.C., Chapter 43
  - Hears appeals concerning reduction-in-force (RIF)
- Equal Employment Opportunity Commission (EEOC)
  - Adjudicates claims of unlawful discrimination based on race religion, national origin, sex, color, disability, age, and reprisal
  - If illegal discrimination is found, it may order back pay, retroactive personnel actions, correction of records, reinstatement, promotion, payment of attorney fees, and compensatory damages
- Federal Labor Relations Authority (FLRA)
  - Administers the interaction between federal agencies, labor organizations and employees
  - Decides unfair labor practice (ULP) cases filed by either the agency or the union
  - Decides appeals of certain arbitration awards and negotiability appeals
  - Has authority to direct the Air Force to comply with its orders
- Federal Service Impasses Panel (FSIP)
  - Resolves negotiation impasses between agencies and labor organizations
- Federal Mediation and Conciliation Service (FMCS). Aids federal agencies and labor organizations in resolving negotiation impasses; provides parties with lists of arbitrators; provides mediators for alternative dispute resolution.
- Office of Personnel Management. Addresses personnel management issues such as civil service retirement programs, insurance, examinations, and classification appeals.
- Office of Special Counsel. Investigates and prosecutes allegations of violations of merit principles, prohibited personnel practices and violations of the Hatch Act.

Litigation Responsibilities

- Administrative litigation (FLRA, MSPB, EEO, unemployment compensation, etc.)
  - Installation staff judge advocate (SJA)

--- Remains the legal advisor to the commander providing legal advice to commanders, managers, civilian personnel officers, and EEO officials concerning all labor and employment law issues

--- Provides management representation in arbitrations, agency and negotiated grievance proceedings, unemployment compensation hearings, and workers' compensation hearings

--- Requests assistance from the AFLOA Labor Law Field Support Center (LLFSC)

-- Labor Law Field Support Center (LLFSC). The LLFSC was established in July 2007 to provide labor and employment law advice and litigation support to installation legal offices. The LLFSC has a main office in Washington D.C. and four field offices in the United States. Air logistics centers and certain other locations are excluded from LLFSC coverage. Regardless, the installation SJA remains the legal counselor to the commander.

--- Provides representation before the MSPB, the EEOC, the FLRA, and Federal Court (unless specifically delegated to installation)

--- Handles ALL class complaints of discrimination before EEOC

--- Provides legal advice, assistance, and training to judge advocates and civilian attorneys and to personnel experts

- Federal court litigation (any case filed within the U.S. federal court system)

-- The Department of Justice "has the statutory responsibility to represent the Air Force and Air Force officials who are being sued in their official capacities…. This responsibility extends to litigation in foreign courts." AFI 51-301, para 1.2.

-- AFLOA or HQ USAF/JAI, on behalf of TJAG, ordinarily determines who may appear as an attorney or counsel for the Air Force in a civil judicial or administrative action, foreign or domestic

References:

5 U.S.C. § 9902 (NSPS)

5 U.S.C. §§ 5101-5115, Classification

5 U.S.C. §§ 1201-1204 (MSPB)

5 U.S.C. § 7101, *et seq.*, Federal Service Labor-Management Relations Statute

5 C.F.R. Part 1201, Appendix II (MSPB regulations)

5 C.F.R. § 9901 (NSPS regulations)

29 C.F.R. Part 1614 (EEOC regulations)

AFI 36-701, *Labor Management Relations* (27 July 1994)

AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)

AFI 36-1201, *Equal Employment Opportunity Complaints* (12 February 2007)

AFI 36-1203, *Administrative Grievance System* (1 May 1996)

AFI 51-301, *Civil Litigation* (1 July 2002)

AFGE v. Rumsfeld, D.D.C., No. 05-2183 (27 February 2006)

Overview of Federal Labor Management Relations

Used technically, labor law concerns relationships among management, employees, and unions. Generally, it covers the rules that govern how employees and managers should work together to accomplish the mission. The statutory and regulatory basis for these rules and their interpretation are described below.

- The Civil Service Reform Act of 1978 (CSRA) is the foundational authority that governs the rights and privileges of federal employees. Others include:
  - -- Title VII: Federal Service Labor Management Relations Statute (FSLMRS)
    - --- FSLMRS covers certain civilian employees of the Air Force. Among others, the statute excepts the following categories:
      - ---- Active duty members
      - ---- Supervisors and management officials, and
      - ---- Aliens or non-U.S. citizens employed outside U.S.
  - -- Air Force guidance: AFI 36-701, *Labor Management Relations*

Employee Rights

- FSLMRS recognizes certain employee rights
  - -- The right to form, join or assist any union, or to refrain from any such activity, freely and without fear of penalty or reprisal (no right to strike)
  - -- Serve as representative of union
  - -- Present union views to management
  - -- Engage in collective bargaining about conditions of employment (COE) through chosen representatives

Management Rights

- FSLMRS similarly recognizes certain rights that are reserved to management. When the agency exercises a reserved management right, the agency is not required to bargain over the substance of that decision. However, the agency is required to bargain over any legitimate proposals that the union submits concerning the impact or implementation of the agency's decision to exercise a reserved management right. Some of the reserved management rights include the right to:
  - -- Determine agency mission

- -- Determine agency budget
- -- Determine agency organization
- -- Determine number of employees
- -- Determine internal security practices
- -- Hire, assign, direct and retain employees
- -- Suspend, remove, reduce in grade or pay, or take disciplinary action
- -- Assign work
- -- Make determinations on outsourcing
- -- Determine the personnel by which agency operations will be conducted, and
- -- Fill positions and promote employees

Union Representation Rights and Duties

- A union is entitled to negotiate collective bargaining agreement (CBA) covering employees in unit
  - -- Installation represented by base negotiating team
  - -- Both sides must negotiate in good faith (duty to approach negotiations with sincere resolve to reach agreement)
  - -- A union may designate its representative during the negotiations
- A union is entitled to be present during formal discussions between one or more representatives of the Air Force and one or more employees in the bargaining unit (or their representatives) concerning any grievance or any personnel policy or practices or other general conditions of employment
  - -- There are a number of factors that can be considered to determine if the discussion is formal. Some of the factors include: Who held the meeting; where the meeting was held; how long the meeting lasted; was there a formal agenda; whether attendance was mandatory; how the meeting was conducted? Please note that some meetings may be formal even though they are not intended to be.
  - -- Discussion is synonymous with meeting and does not require debate or argument
  - -- Check with the civilian personnel office (CPO) and the SJA before conducting such discussions to see if the union should be notified

- A union is entitled to be present during an investigatory interview of a bargaining unit employee if the employee reasonably believes that the examination may result in disciplinary action against the employee, and the employee requests representation. This is known as a "Weingarten" right. Generally, management does not have to advise the employee of this right at the beginning of each interview unless the collective bargaining agreement between management and the union requires it.

- A union is entitled to information "normally maintained by the agency in the regular course of business" that is "reasonably available and necessary" for full and proper negotiation and not prohibited from disclosure by law

  -- Need not request pursuant to Freedom of Information Act (FOIA). The standard for releasing information is different from the FOIA standard.

    --- The union must demonstrate a particularized need for the information sought (use to which it will be put, how that use relates to representation, why needed)

    --- Undue delay, failing to explain a denial, or failing to advise the union that the information does not exist, may be grounds for an unfair labor practice (ULP)

  -- The union cannot be charged for the information

  -- Need not release information if it contains guidance to management officials relating to bargaining

  -- Must provide the information to the union even if readily available from another source

  -- May assert countervailing interests outweigh union's need

- A union's duty of fair representation

  -- When the union decides to represent unit employees in any manner that affects the COE, it must represent them fairly. No discrimination allowed.

  -- Must represent all employees in bargaining unit whether or not they are union members

Union Right to Official Time

- Union representatives are entitled to wages when on official time to negotiate collective bargaining issues

  -- The union has a statutory right to official time for as many negotiators as are on the management negotiating team, although the union has the right to negotiate official time for additional negotiators as well

-- Official time for all negotiations

--- Ground rules negotiations

--- CBA negotiations

--- Mid-term negotiations

--- Impact and implementation bargaining

- No official time for internal union business (collecting dues, soliciting new members, etc.)
- Official time must be granted for any employee participating in any phase of a Federal Labor Relations Authority (FLRA) proceeding if the FLRA determines the employee to be necessary
- Official time for other purposes is bargainable and the CBA should outline who is entitled to the official time and how much time they are entitled to

Union Right to Dues Allotments

- Air Force must process dues allotments in a timely fashion or it will be considered an unfair labor practice
- If Air Force fails, it must reimburse the union and Air Force cannot recoup money from employee

Agency Unfair Labor Practices

- Most common agency unfair labor practices:

  -- To interfere with, restrain, or coerce employees in exercising their FSLMRS rights. <u>Lack of illegal motivation or anti-union animus is not a defense.</u>

  -- To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment

  -- To sponsor, control, or assist a union

  -- To discipline or otherwise discriminate against an employee for filing a ULP or testifying in a ULP proceeding

  -- To refuse to bargain in good faith

  -- To fail or refuse to cooperate in impasse procedures or decisions

  -- To enforce a rule or regulation which conflicts with a preexisting CBA

-- To otherwise fail or refuse to comply with any provision of FSLMRS

Union Unfair Labor Practices

- Major commands have the responsibility to authorize ULP charges against a union, however, AFI 36-701 permits this authority to be delegated to installations
  - -- Not frequently used by Air Force
  - -- ULPs by union are similar to agency ULPs, and include
    - --- To coerce, discipline, or fine a union member as punishment to hinder or impede employee's work performance
    - --- To discriminate regarding union membership on basis of race, creed, color, sex, age, handicap, marital status, national origin, or political affiliation
    - --- To call, participate, or condone a strike, work stoppage, or slowdown; nondisruptive informational picketing is permitted
    - --- To refuse to bargain in good faith
    - --- To fail or refuse to cooperate in impasse procedures or decisions
    - --- To otherwise fail or refuse to comply with any provision of FSLMRS

Unfair Labor Practice Procedures

- Charge filed with FLRA regional office
- Investigation by FLRA regional office attorney/agent
  - -- Investigation conducted in person or by interviewing witnesses over the phone
  - -- Air Force must make bargaining unit employees available for interview
  - -- Investigators are not always neutral and detached
    - --- Often they will amend charges to conform to their investigation
    - --- <u>NEVER</u> permit management officials to be interviewed without notifying the legal office. With the exception of some bases within AFMC, JACL/LLFSC is designated as the agency representative for ULP charges. For those cases in which the LLFSC is designated as the agency representative, the LLFSC must be notified before management officials are interviewed by the FLRA.
  - -- Legal counsel can present a written or oral position statement and explore settlement options

- Regional director of the FLRA determines whether to issue a complaint
- Hearing before administrative law judge (ALJ)
  - -- FLRA General Counsel represents charging party (generally the union) and has burden of proof
  - -- Except at air logistics centers, the LLFSC represents the base
  - -- ALJ issues written decision (may take 6 months or longer)
- Exceptions to ALJ decision
  - -- Appeal is taken to FLRA in Washington D.C.
  - -- FLRA decision may be appealed to either U.S. Court of Appeals for the D.C. Circuit or the circuit having geographic jurisdiction over the installation

REFERENCE:

AFI 36-701, *Labor Management Relations* (27 July 1994)

Collective Bargaining

The Federal Service Labor-Management Relations statute (5 U.S.C. §§ 7101-7135) is contained in the Civil Service Reform Act of 1978. This Act grants certain federal employees the right to join or form labor unions and to engage in collective bargaining through their chosen representatives. Air Force labor-management relations policies and procedures are set forth in AFI 36-701, *Labor Management Relations*.

- The Air Force must bargain with bargaining unit employees through their duly elected representative (union) over all conditions of employment (COE), which are defined as personnel policies, practices, and matters affecting working conditions. The Act does not require bargaining with appropriated fund employees over the following subjects:
  - -- Matters specifically regarding certain political activities
  - -- Classification of positions
  - -- Matters provided for by federal statute, includes but not limited to:
    - --- Pay
    - --- Vacations
    - --- Health benefits
    - --- Holidays
    - --- Retirement plans
  - -- Proposals that conflict with government-wide rules or regulations
  - -- Proposals that conflict with "reserved management rights" under the Act, including among other things, the mission of the agency, the budget, internal security practices, the number of agency employees, the assignment of work, the ability to hire, fire and discipline employees
- Management is not required to bargain over matters already covered in the contract (or collective bargaining agreement)
  - -- To the extent a matter arises concerning a COE that is not covered in the contract, the union can engage management in mid-term bargaining
  - -- Union may not engage management in mid-term bargaining if the collective bargaining agreement contains a "zipper" clause that bars such during the life of the agreement

- Air Force must bargain in good faith, including having negotiators who have authority to bind the activity

- Must bargain before changing COE even if the change is made during life of CBA

- Parties may establish a COE by consistently, over an extended period of time, engaging in a certain practice, and a labor contract clause can be modified or even overturned by such a COE created in this manner (often called a "past practice")

  -- This refers to matters that are already considered conditions of employment and the past practice has merely changed the way the condition of employment was originally handled

  -- It is not possible for a past practice to create a condition of employment where the subject matter underlying the practice does not pertain to a COE

Bargaining Situations

- Bargaining can occur in one of three contexts

  -- Bargaining leading to a "labor contract" of fixed duration and covering a variety of topics or bargaining in the absence of a collective bargaining agreement when one party wants to change a COE

  -- Impact and Implementation (I & I) Bargaining

    --- I & I bargaining concerns the procedures to be used in exercising management's rights (i.e. right to determine agency mission) and the appropriate arrangements for employees affected by exercise of management's rights

      ---- But the change must have more than a minimal foreseeable impact (often called a de minimus impact) on the group of employees that would be affected by the change

      ---- Several things may require I & I bargaining, such as a change in procedures for turning in leave slips, a change in employee duty hours, or overtime pay issues, to name a few

    --- Procedure: Give the union notice in writing of the change in COE and afford it a reasonable period of time to submit written I & I proposals

  -- Mid-term bargaining: Union demand to bargain over a condition of employment that has not already been addressed in the collective bargaining agreement

Permissive Bargaining

- Under the Civil Service Reform Act (Pub. Law 94-454), management is allowed to determine whether to bargain on certain subjects. If management refuses to bargain, this decision is unilaterally binding on the union. "Permissive" subjects include:
  - -- Management's right to determine the numbers, types, and grades of employees assigned to any subdivision, project, or tour of duty
  - -- Management's right to determine the technology, methods, and means of performing work

Negotiability

- Determining whether an issue is bargainable is often a confusing and highly complex matter in the federal sector labor law arena
  - -- If commanders are presented with a demand that a dispute or issue be dealt with through formal bargaining, the safe response is merely to advise the union representative that he/she will ask the Civilian Personnel Office and staff judge advocate to review the request. This area is sufficiently sensitive that wing staff organizations will coordinate a decision to declare a proposal "nonnegotiable" with MAJCOM DPC and JA. JACL/CLLO should also be notified of any decision to declare a proposal nonnegotiable.
  - -- Depending on the substance of the proposal, it could be determined to be outside the duty to bargain or nonnegotiable for several reasons. For example, it could be inconsistent with law (outside the duty) or affecting a reserved management right (nonnegotiable).
- When management declares a proposal "nonnegotiable," the union may appeal to the Federal Labor Relations Authority (FLRA)
  - -- 15 day time limit to appeal
  - -- Agency has 30 days to submit its position or withdraw its decision not to negotiate
  - -- Decision by the FLRA is often made based on the written submission of the parties without a hearing
- Regardless of whether negotiations are deemed "substantive" or "I&I," union negotiators who are also federal employees have a right to be in an "official time" status during the negotiations (receive pay and benefits even though not "working") in equal number with the management negotiators

- -- Unions may negotiate for additional official time for representational activities (grievances, etc.)
- -- Unions may not use official time for internal union business

REFERENCES:

5 U.S.C. § 7101-35

AFI 36-701, *Labor Management Relations* (27 July 1994)

Air Force Civilian Drug Testing Program

Executive Order 12564, *Drug Free Workplace* (1986), formally announced the President's policy that the federal workplace would be free from drugs.

- President's Statement of Policy: Federal employees required to refrain from the use of illegal drugs; use of illegal drugs by federal employees, on or off duty, is contrary to the efficiency of the service; persons who use illegal drugs are not suitable for federal employment; each agency will develop a plan to achieve objectives of the Executive Order
- Air Force plan was approved by Secretary of the Air Force on 24 January 1990
- In January 1995, USAF Chief of Staff directed Air Force Surgeon General (AF/SG) to assume responsibility for the civilian (and military) drug testing program
- Required elements of a civilian drug testing plan include:
  - -- An overall program coordinator appointed for each installation
  - -- Drug testing to detect and deter illegal drug use
  - -- Personnel actions initiated if illegal drug use is discovered
  - -- Employee assistance program (EAP): Education and counseling program that includes referral to rehabilitation and treatment programs available in the local community

Types of Drug Testing

- Random drug testing
  - -- Only employees in "sensitive positions," which are also known as testing designated positions (TDP) and include national security and public health or safety. Applicants for such positions are also subject to testing.
  - -- 30-day notice to TDP employees
- Probable cause / reasonable suspicion of illegal drug use
  - -- All Air Force employees can be tested based on reasonable suspicion arising from on-duty conduct
  - -- Only TDP employees can be tested based on reasonable suspicion arising from off-duty conduct

- Following Class A or B accident or safety mishap. All Air Force employees can be tested.

- Voluntary testing

  -- For Air Force employees not in TDP positions

  -- Volunteer for unannounced random drug testing

- Follow-up to counseling/rehabilitation

Testing Based On Reasonable Suspicion of Illegal Drug Use

- Reasonable suspicion: An articulated belief that an employee uses illegal drugs drawn from specific and particularized facts and from reasonable inferences based on those facts

- Helpful to have evidence to support need for testing

  -- Direct observation of drug use, possession, and/or physical symptoms of being under the influence of an illegal drug by a trained observer

  -- A pattern of abnormal conduct or erratic behavior

  -- Arrest or conviction for drug-related offense; or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking

  -- Information provided by a reliable and credible source or independently corroborated

  -- Newly discovered evidence that the employee has tampered with a previous drug test

- Procedure for reasonable suspicion testing includes:

  -- Supervisor documentation of supporting facts

  -- Supervisor coordination with the staff judge advocate

  -- Proper notification to employee required. Must be done in writing.

  -- Test for THC, cocaine, PCP, opiates, and amphetamines

Testing As A Result of A Mishap Or Accident

- Toxicology testing is immediately considered following a mishap, if required or deemed necessary. The testing will be accomplished promptly and in accordance

with The Air Force Civilian Drug Testing Plan for civilian personnel. The Air Force Civilian Drug Testing Plan is available from the civilian personnel office.

- DOD civilians will be subject to testing when their action or inaction may have contributed to the mishap subject to the limitations and guidance in The Air Force Civilian Drug Testing Plan

Testing Procedures

- Testing procedures are different from those used for testing military members
  - -- The use of Department of Health and Human Services guidelines for drug testing is required
  - -- The Air Force collects the sample and a contract lab tests the sample
  - -- Bottles, labels, individual shipping containers provided by contract lab
  - -- Samples suspected of being adulterated are also sent to lab
- Normally civilian employees are not observed when providing samples, unless:
  - -- Reason to believe employee has in the past adulterated or will attempt to adulterate a sample
  - -- Drug test is result of accident or safety mishap investigation
  - -- Testing related to rehabilitation program
- Medical review officer (MRO) verification of test results is required
  - -- MRO function is currently performed by a contractor
  - -- Interviews employee to determine if there is a medical reason for the test result (usually positive)
  - -- MRO makes final determination of positive, adulterated, diluted, substituted or negative result

Confidentiality Requirements

- Absent employee consent or a statutory exception, results of a drug test may not be disclosed
  - -- Drug test results can be disclosed pursuant to EO 12564 (under 5 U.S.C. § 7301) for the following reasons:
    - --- To the MRO for medical review

--- To administrator of EAP

--- To management official, i.e., supervisor, for disciplinary action

-- Drug test results can be disclosed as part of rehabilitation records for

--- Medical emergency

--- Research without personal identification

--- Court order

- Results cannot be used for law enforcement purposes
- Can disclose for security requirements, e.g., SSFs, clearances

Personnel Actions On Finding of Illegal Drug Use

- Required actions upon MRO certification of positive result, i.e., illegal drug use

-- Removal from TDP

-- Disciplinary action may be initiated

-- Consider safe harbor provisions. Final disciplinary action generally not permitted if employee:

--- Voluntarily admits drug use prior to identification

--- Goes to counseling or rehabilitation

--- Signs agreement (called last chance agreement) to refrain from further drug use

--- Refrains from further use of illegal drugs

-- Referral to EAP for counseling/rehab as appropriate

- The range of disciplinary actions includes:

-- Reprimand to removal for drug use or failure to take test

-- Mandatory removal

--- For refusing rehabilitation or counseling

--- If second drug use offense

--- If employee altered or attempted to alter sample

- Required actions upon MRO certification of adulterated or substituted sample, i.e., illegal drug use
  - -- Considered refusal to test
  - -- Mandatory removal
- As with any kind of disciplinary action taken against a civilian employee, SJA involvement may be necessary under AFI 36-704, *Discipline and Adverse Actions*

References:

Exec. Order No. 12564, *Drug Free Workplace* (1986)

DODD 1010.9, *DOD Civilian Employee Drug Testing Program* (23 August 1988), Incorporating Change 1 (20 January 1992)

DODD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (2 January 1992), Administrative Reissuance Incorporating Through Change 4 (20 April 1999)

AFI 31-101, *Integrated Defense (*FOUO) (8 October 2009)

AFI 31-501, *Personnel Security Program Management* (27 January 2005)

AFI 36-810, *Substance Abuse Prevention and Control* (22 July 1994)

AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)

AFI 91-204, *Safety Investigations and Reports* (24 September 2008)

Civilian Employee Workplace Searches

The general rule is that a government search of private property without proper consent is unreasonable and unconstitutional under the Fourth Amendment unless the search has been authorized by a valid search warrant. However, the government employer can in some instances conduct a warrantless search of an employee's workplace for "work-related" purposes, such as to retrieve government property or to investigate work-related misconduct.

- In the leading case on workplace searches, *O'Connor v. Ortega*, the Supreme Court recognized that government employees may have a reasonable expectation of privacy in their work areas which may be protected from warrantless searches by a government employer and law enforcement

- An employee's expectation of privacy depends on how much control he or she exercises over his workplace. The more control the employer exercises, the lower the employee's expectation of privacy, the lower the resulting right to privacy, and the less need there would be for the employer to obtain a search warrant in order to conduct a search.

- All workplace searches must be reasonable under all the circumstances. Reasonableness depends upon (1) whether the action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances that prompted the search.

- In order to determine if the action is justified, employers must determine if the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. Employers frequently need to enter the offices and desks of employees for legitimate, work-related reasons wholly unrelated to illegal conduct.

- Whether the search is a non-investigatory, work-related intrusion or an investigatory search for evidence of suspected work-related employee misconduct, the proper approach for civilian employee workplace searches is to balance the employee's legitimate expectations of privacy against the government's need for supervision, control, and efficient operation of the workplace

Bottom Line

- Government offices are provided to employees for the purpose of facilitating the work of an agency. Employees may avoid exposing personal belongings at work by simply leaving them at home.

- Government searches to retrieve work-related materials or to investigate violations of workplace rules do not violate the Fourth Amendment. Hence, supervisors are generally not required to obtain a search warrant whenever they wish to enter an employee's desk, office, or file cabinet.

- Personal handbags, luggage, and briefcases are not usually considered part of the workplace and, therefore, a search warrant or authorization is required before searching them
- ALWAYS CONSULT WITH THE SJA BEFORE PROCEEDING WITH ANY SEARCH AND SEIZURE ACTION

Reference:

O'Connor v. Ortega, 480 U.S. 709 (1987)

Unacceptable Performance By Civilian Employees

Note

On October 28, 2009, President Obama signed the 2010 National Defense Authorization Act (NADA), effectively abolishing the Department of Defense's controversial pay-for performance personnel system, commonly referred to as the National Security Personnel System (NSPS).

The 2010 NADA (Public Law 111-84) requires the transition of NSPS employees, with no loss of or decrease in pay upon conversion out, to non-NSPS personnel systems by not later than January 1, 2012. The majority of NSPS employees are scheduled to transition to non-NSPS personnel systems by September 30, 2010. Employees will be advised of the transition date through their component channels. Employees will experience no loss of or decrease in pay upon conversion out of NSPS. The grade of the position will be determined using the same procedures and criteria currently in use for GS employees.

The NSPS Transition Office (NSPSTO) is the successor organization to the Program Executive Office, NSPS. The office title was changed to reflect its new mission, which is to effectively and efficiently transition NSPS employees to appropriate non-NSPS personnel systems. Up to date NSPS transition guidance can be found at http://www.cpms.osd.mil/nsps/index.html. Consult your civilian personnel office regarding whether particular employees are currently covered by NSPS and the extent to which coverage impacts the concepts and procedures discussed below.

Introduction

The Civil Service Reform Act (CSRA) of 1978 was enacted to improve government efficiency, give authority to supervisors and managers, and adequate protection to employees. AFI 36-1001, *Managing the Civilian Performance Program,* implements a program to evaluate the performance of civilian employees. The CSRA and AFI 36-1001 require:

- The appraisal and rating of employees' job performance to be based on written performance elements and standards
- The performance appraisal rating to be used as a basis for decisions to pay, reward, assign, train, promote, retrain, or remove employees

Appeals and Grievances

- The substance of performance elements and performance standards may not be appealed to the Merit Systems Protection Board (MSPB) or grieved under the Air Force grievance system provided for in AFI 36-1203, *Administrative Grievance System*, except to the extent that the employee alleges the standards in and of

themselves violate the statutory requirements pertaining to them. Similarly, disputes concerning the identification of the critical elements of a position and establishment of performance standards are nongrievable and nonarbitratable under negotiated grievance and arbitration procedures.

- Employees who are not members of a bargaining unit resolve disputes on ratings pursuant to AFI 36-1203. Bargaining unit employees resolve disputes on ratings through the negotiated grievance procedure of the local collective bargaining agreement (CBA).

- Most employees may appeal a demotion or removal for unacceptable performance to the MSPB. Bargaining unit employees must choose either to appeal to the MSPB or use the CBA's grievance procedure, but cannot do both.

- Allegations of discrimination may be processed under either AFI 36-1201, *Discrimination Complaints*, or the negotiated grievance procedure, but not both

Performance and Appraisal Process

- Development of the performance plan

  -- Most employees are required to have a performance plan

  -- AF IMT 860, *Civilian Performance Plan*, is completed within 30 days of accession and it documents the critical position performance elements and standards for evaluation of overall performance for the position. AF Form 1003, Core Personnel Document, can also be used for this purpose.

  -- Each performance plan must contain the critical elements to describe the performance requirements of the position

    --- A critical element is a job responsibility so important that failure to perform that element would make the employee's overall performance unacceptable

    --- As a general rule, seven elements should be sufficient, though there must be at least one in the performance plan

  -- Performance standards must be developed for each critical performance element, describing, at a minimum, acceptable performance – to include characteristics such as quality, quantity, timeliness, and behavior

  -- Additional non-critical performance elements and performance evaluation requirements to judge the performance are also included in the plan

  -- Although the employee should be given an opportunity to provide feedback, the supervisor makes the ultimate decision

-- Once the plan is approved, the employee is informed of the job requirements and the plan, given an opportunity to sign the performance plan, and is given a copy

- Annual performance appraisal

  -- The normal appraisal period for most employees starts on 1 April and ends 31 March. However, for NSPS employees, the appraisal period runs from 1 October through 30 September.

  -- At the beginning of the appraisal period the supervisor and the employee meet to discuss the performance elements and standards in the plan

  -- At least one progress review, usually at the midpoint of the period, is also required and must be documented on the AF IMT 860B, *Civilian Progress Review Worksheet*. This review is confidential between the reviewer and employee.

  -- If the rating official or the employee is newly assigned, the performance plan will be reviewed and discussed, normally within 30 days

  -- A copy of any such review is provided to the employee

- At the end of the appraisal period (within 30 calendar days), the supervisor must complete the rating form, AF IMT 860A, *Civilian Rating of Record*

  -- The supervisor evaluates the employee's performance on each critical element to determine if "meets standards" or "does not meet standards." A rating of "does not meet standards" on any critical element results in an overall rating of unacceptable performance. The employee is entitled to a copy of the form.

Dealing With Performance Problems Involving Non-NSPS Employees

- All supervisors should conduct periodic performance reviews

  -- Performance reviews are accomplished at the end of the cycle or "out-of-cycle"

  -- The employee must have been in the position for 90 days or more before an out-of-cycle evaluation can be done

- At any time during the performance cycle that the employee's performance in one or more critical elements becomes unacceptable, the supervisor must inform the employee of the critical element for which performance is unacceptable, in what way it is unacceptable, and what is required to bring it back to an acceptable level

  -- This notice should be accomplished in writing (check with civilian personnel office and SJA for preparation and review) and provide the employee a period of time within which to improve

    --- Called the performance improvement period (PIP) or opportunity period

--- The employee's performance must be unacceptable; it is impermissible to place an employee on a PIP when their work has been only marginal

--- The length of the PIP depends on the duties involved and the nature of the deficiencies; generally, 30-60 days will be sufficient

-- An employee may have the right to appeal an appraisal to the next higher level supervisor but the reconsideration must comply with proper grievance procedures

-- The supervisor must help the employee improve during the PIP through counseling, coaching, OJT, and other methods

- When unacceptable performance in one or more critical elements continues after the PIP has expired, demotion or removal is authorized

- If performance on a PIP rises to an acceptable level, then a new rating is completed and forwarded in accordance with instructions

- If the employee's performance improves during a PIP, but thereafter falls to unacceptable levels again, another PIP may be initiated within one year after the date of the beginning of the previous PIP

- Probationary employees are covered by different procedures

-- The standards and procedures for probationary employees can be found in AFI 36-1001, Chapter 3, and for supervisors and managers in Chapter 4

-- The probationary period for an employee is one year

--- The supervisor certifies performance in writing no later than the tenth month of probation

--- Failure to complete certification on time may result in the employee passing probation by default

--- If the supervisor recommends not keeping the employee, the civilian personnel flight (CPF) must be contacted before the end of the period concerning the proper course of action

---- Written notification is required if the employee does not pass the probationary period

---- The employee is permitted a reasonable period of time to respond and submit supporting documentation

-- The probationary period for a supervisor or manager is no more than one year

--- The probationary period is required whenever a civilian employee first assumes either a supervisory or management position. There are exceptions to

this requirement based on the individual's previous experience as a supervisor or manager.

--- Advanced notice of the probationary period must be given to the would-be supervisor or manger and a performance plan concerning the probationary period is also required

--- If the probationary period is not successfully completed, the employee is returned to a non-managerial or non-supervisory position

---- They must be given written notice of this decision which must include the facts and reasons that motivated the decision and information on how the Air Force will deal with the employee's placement rights

---- When an employee is returned to a non-supervisory or non-managerial position, ensure that the appropriate procedures are followed concerning grade and pay

Procedural Requirements

- Commander and supervisor actions to remove or reduce the grade of an employee who is not performing adequately are called Chapter 43 cases because the procedures for these actions can be found in Chapter 43 of Title 5 of the United States Code. Certain procedures must be followed.

  -- The supervisor should coordinate with CPF first

  -- The employee is entitled to 30 calendar days advance written notice of the proposed action, which includes:

    --- Specific instances of unacceptable performance

    --- The critical elements of the position the employee failed to perform properly

  -- The employee has the right to be represented by an attorney or other representative

  -- The employee must be given a reasonable period of time to provide a written or oral response

  -- Within 30 days after the expiration of the notice period, the employee must be informed of the decision in writing. The supervisor can extend this period for another 30 days.

    --- The final decision must specify the unacceptable performance on which the reduction in grade or removal is based

    --- A higher level manager must concur with the final decision

--- It must inform the employee of his or her appeal rights and whether he or she is eligible for disability or retirement

- After demoting or removing an employee, pertinent documents are kept in accordance with AFMAN 37-139, *Records Disposition Schedule*, and must be available for review by the employee or his representative. Included among those documents are:

  -- A copy of the notice of proposed action

  -- The employee's reply and/or a summary of the oral reply

  -- Notice of the decision and the reasons therefore

  -- Documentation supporting the personnel action

Action In NSPS Cases Involving Performance

- Actions for performance related problems for NSPS employees may not be taken under Chapter 43. Chapter 43 is waived for NSPS employees under 5 C.F.R. § 9901.403.

- As a result of the waiver of Chapter 43, performance actions must be taken using Chapter 75 procedures

- Performance management under NSPS is governed by the provisions of 5 C.F.R. § 9901.401 to 5 C.F.R. § 9901.409

- This part of NSPS was never enjoined and must be used by DOD components for NSPS employees

- Under this system, performance of employees is monitored and employees are provided regular and timely feedback on their performance including one or more interim performance reviews during an appraisal cycle under NSPS

- Performance expectations will be communicated to the employee prior to holding the employee accountable for them

- Under NSPS the supervisor has the following options to use if an employee's performance is unacceptable

  -- Remedial training

  -- An improvement period

  -- A reassignment

  -- An oral warning

  -- A letter of counseling

  - A written reprimand
  - Adverse action that includes a reduction in the rate of basic pay or pay band and removal
- The supervisor must take into account the circumstances of the situation which includes the nature and gravity of the unacceptable performance and its consequences
- Employees will have appeal rights when they receive a suspension over 14 days, reductions in pay and pay band or removal
- Supervisors may use a rating of record as a basis for the following:
  - A reassignment
  - A pay determination under applicable pay rules
  - Determining reduction in force retention standing
  - Used to determine the number of shares to the employee prior to pay out

Action Required When A Medical Condition Affects Performance

- Supervisors will not always know whether the employee's health is impaired or whether it is causing a performance problem. If the supervisor suspects the employee's performance is affected by drugs or alcohol abuse, or by some other medical condition, follow the provisions of AFI 36-810, *Substance Abuse Prevention and Control.*
- When a medically based performance problem exists or might exist, the supervisor must inform the employee his or her performance is suffering, advise the employee to supply medical documentation of the condition that is or could be affecting work, and explain what documents are required and when they should be provided
  - The employee will be informed as to exactly what documentation is required and the amount of time granted to provide it. If not provided on time, the supervisor may grant an extension or proceed with the process. Medical documentation is defined in 5 C.F.R. Part 339, Section 339.102.
  - Any documentation provided will be reviewed by the supervisor and an Air Force or other federal medical officer
  - The employee should provide the needed documentation
    - Based on the length of service and position of the employee, the employee will be furnished information concerning disability retirement

--- The information will be reviewed by the supervisor and a qualified physician; such a review may lead to a medical examination

- The Air Force follows the rules set forth in 5 C.F.R. Part 339 for medical examinations. Basically, Air Force directed medical examinations are severely limited and may be ordered only when:

  -- The employee occupies a position that has physical/medical standards, also known as fitness for duty exams

  -- The Air Force needs to determine whether employee who claims worker's compensation may be accommodated in another job, or

  -- The Air Force needs to determine qualifications of employee for reassignment rights because of a RIF (reduction in force)

- The Air Force may always offer a medical exam to supplement medical documentation, but acceptance is optional with the employee

- The Air Force always has an obligation to reasonably accommodate a handicapped employee. Supervisor must coordinate with the appropriate civilian personnel official and SJA prior to taking any action.

References:

5 U.S.C. §§ 4301-4315

5 C.F.R. Part 339

5 C.F.R. § 9901.401 to 5 C.F.R. § 9901.409.

AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)

AFI 36-810, *Substance Abuse Prevention and Control* (22 July 1994)

AFI 36-1001, *Managing the Civilian Performance Program* (1 July 1999)

AFI 36-1201, *Discrimination Complaints* (12 February 2007)

AFI 36-1203, *Administrative Grievance System* (1 May 1996)

Civilian Employee Discipline

Note

In 2003, Congress passed the Fiscal Year 2004 National Defense Authorization Act. That law, codified at 5 U.S.C. § 9902, authorized DOD to establish a new human resources system, a new adverse actions/appeals system, and a new labor relations system. Pursuant to that law, DOD published final regulations at 5 C.F.R. § 9902 establishing what is commonly referred to as the National Security Personnel System (NSPS).

As a result of delays due to litigation, the adverse actions/appeals system and new labor system were never implemented. Further, the 2008 NDAA contained provisions preventing any implementation of these two systems.

Consult your civilian personnel office regarding whether particular employees are covered by the NSPS human resources system and the extent to which coverage alters the concepts and procedures discussed below. Remember, the adverse actions/appeals and labor relations portions of NSPS are not and will not be implemented.

Introduction

Federal law and Air Force instructions enable commanders to take disciplinary action against civilian employees for misconduct that affects the workplace or mission accomplishment. Certain adverse actions create appeal rights for the employee.

- Disciplinary action or adverse action must be taken without regard to marital status, political affiliation, race, color, religion, sex, national origin, or age. Adverse action based on physical handicap is not taken when the employee can effectively perform assigned duties.
- Disciplinary action or adverse action must be taken only when necessary, and then promptly and equitably
  - -- Disciplinary actions and adverse actions are personal matters and are carried out in private
  - -- An adverse action is an action giving a civilian employee a right to appeal. They include: removals, suspensions for more than 14 days, furloughs for 30 days or less, and reductions in grade or pay.
    - --- Adverse actions may or may not be for disciplinary reasons—for example, it is possible to take adverse action for unacceptable performance
    - --- Nonappropriated fund employees do not have the right to appeal, regardless of the type of action taken

- -- Disciplinary action not subject to appeal include: admonishments, reprimands, and suspensions for 14 days or less

Authority and Requirements

- All Air Force commanders (and supervisors) are delegated authority to take disciplinary and adverse action when necessary
  - -- AFI 36-704, *Discipline and Adverse Actions*, covers all competitive and excepted service employees
  - -- AFI 34-301, *Nonappropriated Fund Personnel Management and Administration*, covers nonappropriated fund employees
- Management may take a disciplinary or adverse action only for such cause as will promote the efficiency of the service, unless the action is being taken for unacceptable performance, in which case different standards apply
- Management may not take an action that would result in a prohibited personnel practice. A prohibited personnel practice is an adverse action taken against an employee for an illegal or inappropriate reason, such as reprisal or discrimination.
- Burden of proof: Management must be prepared to support disciplinary and/or adverse action by a preponderance of the evidence, i.e., more likely than not, and must be capable of proving, before the Merit Systems Protection Board (MSPB) or a federal sector arbitrator, the following:
  - -- The reason for the action taken, i.e., that the alleged misconduct occurred and the action was taken in response to that misconduct
  - -- How the action taken promotes the efficiency of the service
  - -- A connection between the misconduct and the employee's job
    - --- Known as the “nexus” and it must be shown in each case
    - --- There has to be a connection between what the employee did and the ability of the Air Force to do its job. In other words, the Air Force has to show what the employee did was harmful or that the action taken to discipline the employee was necessary to help the Air Force do its job.
  - -- The penalty imposed is appropriate to the offense

Procedures

- Management procedures (unless there is a local collective bargaining agreement that contains other provisions)

-- Gather the facts. Interview the employee if necessary, but remember the employee has rights (called Weingarten rights) to have union representation if the employee believed disciplinary action could result from questioning from his employer and he/she requested a union representative.

-- Consult with the civilian personnel officer (CPO) and the staff judge advocate (SJA) to consider options and determine what action is appropriate

- Civilian personnel officer will prepare and the Labor Law Field Support Center (LLFSC) will review the notice letter of adverse and/or disciplinary action for signature by the "proposing official" (normally a first or second level supervisor)

  -- The local SJA will work with the Labor Law Field Support Center (LLFSC) during this review. NOTE: The LLFSC was established on 2 July 2007. It is composed of a group of 40-50 labor lawyers and paralegals headquartered in Arlington, Va., as well as other field offices throughout CONUS. Its mission is to assist local SJAs in labor law matters and to provide representation in most administrative and all judicial tribunals. The base SJA remains the advisor to the commander.

  -- The notice letter must be signed by the proposing official and inform the employee of the following. Some of the items listed below are considered non-mandatory but prudent practice dictates the inclusion of all of these items.

    --- Notice of the precise action being proposed, i.e., suspension or removal

    --- The reason for the action, which includes the type of misconduct and a brief factual description of the misconduct. Keep it simple and straightforward; there are additional specific requirements when the proposed action is furlough.

    --- A statement of the employee's right to review the material or evidence relied upon to support the reason for action

    --- A description of the arrangements the employee can make to review the evidence or include a copy of the evidence

    --- Date the proposed action is to take place

    --- Notice of the right to respond orally, in writing or both, and to furnish documentary evidence. Include the name and office of the person to whom the response should be sent.

    --- Amount of official time for preparation of a response

    --- Right to representation (union representative, private attorney, or other person)

--- Additional non-mandatory information mentioned in the instruction as might be necessary based on the particular situation or that might be necessary pursuant to the collective bargaining agreement

- The employee gets a reasonable amount of time, but not less than seven days to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer

- The "deciding official" makes the final decision

  -- Usually the supervisor one level up from the proposing official (but may be the same person)

  -- In most cases, the final decision is made 30 days after the notice is given to the employee

    --- Must be in writing (prepared by CPO and reviewed by SJA) and served on the employee. It must include, among other things:

      ---- The specific decision

      ---- The specific reasons for the decision

      ---- The date of the decision and the effective date of the action

      ---- Information concerning the employee's appeal rights

      ---- The signature of the deciding official

    --- Additional non-mandatory information described in the instruction may also be included if the situation dictates or that might be necessary pursuant to the collective bargaining agreement

  -- The deciding official must consider employee's response

  -- The deciding official must also document his/her consideration of the Douglas factors governing appropriate penalty selection

    --- Douglas factors are those factors that management must consider before taking disciplinary action. They include, for example, the seriousness of the misconduct, the work record of the employee, and other similar considerations. See AFI 36-704.

    --- Use the CPO and SJA to assist in preparation

  -- A decision letter must be sent to the employee

Appeals

- If employee is a bargaining unit (union) member, he/she may file a grievance under the negotiated grievance procedure of the local collective bargaining agreement
- Regardless of bargaining unit status, an employee may file
  - -- An equal employment opportunity (EEO) complaint if the employee is alleging discrimination
  - -- An appeal within 30 days with the regional office of the Merit Systems Protection Board (MSPB), but the action must involve:
    - --- A removal
    - --- Suspension for more than 14 days
    - --- Reduction in grade or pay
    - --- Furlough of 30 days or less
- Appeals can result in an administrative, trial-type hearing before:
  - -- Federal sector arbitrator
  - -- The MSPB
  - -- The Equal Employment Opportunity Commission (EEOC)
- If an appeal is filed, Air Force management officials will probably be required to testify
- Failure to meet the burden of proof described above could result in mitigation and/or reversal of the penalty imposed along with the employee receiving back pay, reinstatement, and attorneys' fees
- The LLFSC will provide representation during hearings on these matters. While the LLFSC will provide a substantial amount of litigation support, the local SJA will remain the commander's advisor.

References

5 U.S.C. § 9902 (2008)

AFI 34-301, *Nonappropriated Fund Personnel Management and Administration* (25 July 1994)

AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)

Civilian Employee Interrogation

In 1975, the U.S. Supreme Court, in *N.L.R.B. v. Weingarten*, established a right for an employee to have union representation if the employee believed disciplinary action could result from questioning by his employer and if the employee requested the presence of a union representative. In the federal sector, employees have the right for labor union representation as well. This section outlines the employee's rights during an interrogation. These rights are commonly known as Weingarten rights.

- The union's and the employee's statutory right to union representation in connection with an investigation is applicable when four conditions are present:
  - -- A meeting is held in which management questions a bargaining unit employee
  - -- The examination is in connection with an investigation (need not be a Security Forces or other formal investigation)
  - -- The employee reasonably believes that discipline could result from the examination; and
  - -- The employee requests representation
- Other guidelines concerning this rule:
  - -- It does not apply to an actual counseling session
  - -- The role of the union representative during the interview is to
    - --- Clarify the facts and the questions
    - --- Help the employee express his/her views
    - --- Suggest other avenues of inquiry
    - --- Suggest other employees who may have knowledge of the facts
    - --- Insure the employer does not initiate or impose unjust punishment
    - --- There may also be a right for the union representative and the employee to confer in private, but this depends on the nature of the case
  - -- Agencies must announce this right on an annual basis at all places where employees normally receive employment information
  - -- Individuals being investigated may not serve as representatives for other employees being investigated until their own investigations are completed
  - -- An employee may waive his/her Weingarten rights

- -- Executive Order 12171 exempts AFOSI, when acting under its independent mandate to conduct criminal and security investigations, from the Federal Labor Management Relations Statute. In such criminal investigations, AFOSI is not obligated to honor an employee's request for representation.

- Management cannot tell a union representative to remain silent or not to offer advice. Employer may place reasonable limitations on union representative's role to prevent adversary confrontation, but aggressive, unreasonable management behavior interferes with right to union representation. This is an unfair labor practice (ULP).

- Once an employee requests a union representative, management may:

  - -- Grant the request

  - -- Suspend the interview

  - -- Give the employee the choice of having an interview without a union representative or having no interview

- Civilian employees also have a legal obligation to account for the performance of their duties, and a failure to provide desired information can serve as a basis for removal under certain circumstances

  - -- An employee cannot be discharged simply because he/she invokes his/her Fifth Amendment privilege against self-incrimination; nor can statements coerced by a threat of removal be used against the employee in a subsequent prosecution

  - -- An employee can be removed for not replying if he/she is adequately informed both that he/she is subject to discharge for not answering and that his/her replies cannot be used against him/her in a criminal case

  - -- Any desire to offer immunity to an employee must be coordinated with the SJA who will consult with (and possibly get approval from) the Department of Justice and/or U.S. Attorney

- An employee also has the right to be advised of the consequences of participating or not participating in an interview for a third party proceeding (unfair labor practice hearing, arbitration, MSPB hearing, etc.), and failure to do so can be a ULP by management. These rights are known as Brookhaven rights, and the employee must be advised of:

  - -- The purpose of the interview

  - -- That no reprisal will take place if the employee refuses to participate; and

  - -- Participation is voluntary

- The interview cannot be coercive in nature. Questions must not exceed the scope of the legitimate purpose of the inquiry and cannot otherwise interfere with the employee's statutory rights.

References:

5 U.S.C. §§ 7114(a)(2)(B); 7116(a)(1)

NLRB v. Weingarten, 420 U.S. 251 (1975)

Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968)

IRS and Brookhaven Service Center, 9 FLRA 930 (1982)

Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973)

Equal Employment Opportunity (EEO) Complaint Process

Note

In 2003, Congress passed the Fiscal Year 2004 National Defense Authorization Act. That law, codified at 5 U.S.C. § 9902, authorized DOD to establish a new human resources system, a new adverse actions/appeals system, and a new labor relations system. Pursuant to that law, DOD published final regulations at 5 C.F.R. § 9901 establishing what is commonly referred to as the National Security Personnel System (NSPS). Portions of NSPS remain unimplemented. Of importance to the discussion below, NSPS had no effect on the equal employment opportunity process.

Informal Complaint

- Timing: Persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, or disability or who believe they have been subjected to sexual harassment or retaliated against for participating in the complaint process must initiate contact with a counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of personnel action, within 45 days of the effective date of the action

- Tolling: Initial contact beyond 45 days will be permitted if the employee was not notified of and was not otherwise aware of the 45-day limit, or did not know and reasonably could not have known that the discriminatory matter or personnel action occurred, or was prevented by circumstances beyond his control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Equal Employment Opportunity Commission (EEOC). Normally, the employee can be deemed to be on constructive notice of the time limits if management has included the time limit information on the EEO posters that are posted around the base.

- Initial Counselor Interview: Counselors must advise individuals in writing of their rights and responsibilities. Counselors shall advise aggrieved persons that, where the agency agrees to offer alternative dispute resolution (ADR) in the case, they may choose between participation in the program and the counseling activities. If the matter is not resolved in the ADR process within 90 days of the date the complainant contacted the EEO, the complainant must be issued a notice of final interview.

- Final Interview: If the matter has not been resolved, either through ADR or the complaint process, the counselor shall inform the aggrieved person in writing, of the right to file a formal discrimination complaint within 15 days of the notice of final interview

- -- Counselors must conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling (unless the aggrieved person chose ADR)
- -- The aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days
- -- Where the aggrieved person chooses to participate in an ADR, the pre-complaint processing period (informal complaint processing), shall be 90 days

Formal Complaint

- Written complaint: Complaint must be submitted in writing within 15 days of final interview notice. Complainant may amend the complaint (with like or related claims) at any time prior to conclusion of investigation. Complainant may also amend his complaint on motion to judge after request for hearing.
- Dismissals of complaint: Prior to a request for a hearing in a case, the agency can dismiss an entire complaint for the following reasons:
  - -- Failure to state a claim: Generally, an employee states a claim when he articulates that he has been harmed by an employment policy or practice due to his protected status (i.e., race, religion, disability, etc.). This ability to articulate a claim does not mean the employee wins on the merits, it simply allows the employee to continue processing his case in the EEO forum.
  - -- Identical complaint
  - -- Not against the proper agency
  - -- Untimely at either formal or informal stage
  - -- Pending civil action in a United States District Court
  - -- Raised in negotiated grievance procedure or in an appeal to the Merit Systems Protection Board (MSPB)
  - -- Issue is moot, or issue is a proposal to take a personnel action or other preliminary step to taking a personnel action
  - -- Complainant cannot be located
  - -- Failure to prosecute: Complainant fails to respond to requests for relevant information
  - -- Complaints about the process. These complaints are generally expressed as accusations of not processing the case fast enough or failing to interview all of the

requested witnesses etc. The employee can raise concerns about the processing of the complaint with the EEO counselor and can also raise them with an EEOC judge if there is a request for a hearing, but a separate complaint about the processing must be dismissed.

  - Abuse of process: Complainant is part of a clear pattern of misuse of the EEO process for reasons other than the prevention and elimination of employment discrimination

- Appeal of dismissal: A complaint dismissed in whole by the agency may be appealed, within 30 days of receipt, to the EEOC's Office of Federal Operations.

- Partial dismissals: When an agency dismisses some but not all of the claims in a complaint, it must notify the complainant in writing of the rationale for the decision and shall notify the complainant that those claims will not be investigated. This determination is reviewable by the administrative judge (AJ) if a hearing is requested on the remainder of the complaint.

- Investigation: The Department of Defense, Civilian Personnel Management Services, Investigations and Resolutions Division (IRD), will conduct the investigation. The IRD investigator collects the exhibits gathered by the agency representative and the complainant, interviews the witnesses, drafts the affidavits for the witnesses to sign, and writes a report.

- Complainant decides on course of action: Within 30 days of receipt of the investigative file, complainant must either:

  - Request a final decision from the agency head based on the record, or

  - Request a hearing and decision from an EEOC AJ

EEOC Hearing

- Request for hearing: Complainants make requests for a hearing directly to the EEOC office indicated in the agency's acknowledgment letter. The Complainant must send a copy of the request for a hearing to the agency's EEO office.

- Discovery: The parties may engage in discovery before the hearing. The AJ may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. A party may object to requests for discovery that are irrelevant, over burdensome, repetitious, or privileged.

- Evidence: The AJ shall receive into evidence information or documents relevant to the complaint. Federal Rules of Evidence shall not be applied strictly, but the AJ shall exclude irrelevant or repetitious evidence.

- Witnesses: Agencies shall provide for the attendance at a hearing of all federal government employees approved as witnesses by the AJ

- Alternatives to testimony: Written statements sworn under penalty of perjury are admissible

- Record of hearing: The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts

Post Hearing

- Decision: Within 180 days of receipt of the complaint file from the agency, the AJ will issue a decision on the complaint, and will order appropriate remedies and relief where discrimination is found

- Final agency action after hearing: When an AJ has issued a decision, the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision

- Complainant's appeal of final agency action: The complainant may appeal the agency's final action to the EEOC's Office of Federal Operations. If a complainant is going to appeal, she/he must do so within 30 days of receipt of a dismissal, final action or decision.

- Request for reconsideration: A decision issued by the EEOC/OFO is final unless the full Commission reconsiders the case

- Timing of request for reconsideration: Any party may request reconsideration within 30 days of receipt of a decision of the EEOC/OFO

- Grounds for reconsideration

  -- The appellate decision involved a clearly erroneous interpretation of material fact or law, or

  -- The decision will have a substantial impact on the policies, practices or operations of the agency

Civil Action

- A complainant may sue for discrimination in federal court

- Prior to filing a civil action under Title VII or the Rehabilitation Act, a complainant must first exhaust the administrative process. "Exhaustion" for the purposes of filing a civil action may occur at different stages of the process. The regulations provide that civil actions may be filed in an appropriate federal court: (1) within 90 days of receipt of the final action where no administrative appeal has been filed; (2) after 180 days

from the date of filing a complaint if an administrative appeal has not been filed and final action has not been taken; (3) within 90 days of receipt of EEOC's final decision on an appeal; or (4) after 180 days from the filing of an appeal with EEOC if there has been no final decision by the EEOC.

- Under the Age Discrimination in Employment Act (ADEA), a complainant may proceed directly to federal court after giving the EEOC notice of intent to sue. 29 C.F.R. Section 1614.201. An ADEA complainant who initiates the administrative process in 29 C.F.R. Part 1614 may also file a civil action within the time frames noted above. 29 C.F.R. Section 1614.408.

- Under the Equal Pay Act, a complainant may file a civil action within 2 years (3 years for willful violations), regardless of whether he or she has pursued an administrative complaint

- Filing a civil action terminates EEOC processing of an appeal

Remedial Actions

- Reinstatement or nondiscriminatory placement: Placement in the position the victim would have occupied if the discrimination had not occurred

- Back pay reduced by interim earnings; employee had to have been ready, willing, and able to work to be entitled to back pay

- Front pay: Front pay is an equitable remedy, an element of the “make whole” relief available to victims of employment discrimination. “Make whole” relief includes all actions necessary to make a victim of discrimination whole for the discrimination suffered, by placing the individual as near as possible in the situation he or she would have occupied if the wrong had not been committed. The remedy of front pay compensates a victim in situations where reinstatement or nondiscriminatory placement would be an available remedy, but is denied for reasons peculiar to the individual claim. The compensation of front pay makes the victim of discrimination whole generally until such nondiscriminatory placement can be accomplished.

- Erasing from the agency’s records any adverse materials relating to the discriminatory employment practice

- Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling)

- Fees and costs: Attorney’s fees and costs shall apply to allegations of discrimination prohibited by Title VII and the Rehabilitation Act. A finding of discrimination raises a presumption of entitlement to an award of attorney’s fees.

- Compensatory damages: Compensatory damages include damages for past pecuniary loss (out of pocket loss), future pecuniary loss, and nonpecuniary loss (emotional

harm). There is a statutory cap of up to $300,000 on future pecuniary damages, and non-pecuniary damages. The $300,000 cap does not include past pecuniary damages, back pay, front pay, attorney fees, or lost benefits. Punitive damages are not available.

- Injunctive relief

Miscellaneous

- The primary source for legal advice for informal complaints is the installation legal office

- The LLFSC is the primary source of legal advice for formal complaints and civil actions arising from EEO claims. LLFSC personnel will coordinate on dismissals or acceptance of formal complaints, will represent the agency through the IRD investigation and any administrative hearing before the EEOC and will defend the Air Force with the US Attorney in Federal Court.

- NOTE: The LLFSC was established in July 2007 to provide labor and employment law advice and litigation support to installation legal offices. The LLFSC has a main office in Washington DC and seven field offices in the United States. The Air Logistics Centers and certain other locations are excluded from LLFSC coverage. Regardless, the installation SJA remains the legal counselor to the commander.

- Official time: Reasonable time to prepare complaints and attend hearings, ADR or meetings regarding the complaint should be allowed. Official time is normally considered in hours, not days or weeks. Witnesses for EEO complaints do not get official time to prepare, but do get it when their presence is authorized or required by Commission or agency officials in connection with a complaint.

- The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (commonly known as the "No FEAR Act")

  -- The No FEAR Act was enacted on 15 May 2002, and became effective 1 October 2003

  -- The purpose of the act is to improve agency accountability for anti-discrimination and whistleblower laws by requiring federal agencies to reimburse the Treasury's Judgment Fund for settlements and judgments paid to employees as the result of such complaints, and by establishing extensive agency reporting requirements. Previously most settlements and judgments in favor of federal employees who sued agencies in discrimination and whistleblower cases were paid from a government-wide "judgment" fund.

  -- Agencies must provide to their employees written notification of discrimination and whistleblower protection laws

  -- Federal agencies and the EEOC must disclose and post statistical complaint data

REFERENCES:

Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107-174, 116 Stat. 566 (2002)

29 C.F.R. § 1614

AFI 36-1201, *Equal Employment Opportunity Complaints* (12 February 2007)

EEO Management Directive 110 (1999)

Whistleblower Protection Act

In 1989 Congress amended the Civil Service Reform Act of 1978 with the Whistleblower Protection Act (WPA) of 1989. The Act substantially strengthened the protection for whistleblowers in the federal government.

- The Act made the Office of Special Counsel (OSC) independent of the Merit Systems Protection Board (MSPB) and specifically charged the OSC with protecting the employee-whistleblower
- If the OSC fails or refuses to act on the complaint, the individual has an independent right to bring the case him/herself before the MSPB as an Independent Right of Action (IRA) appeal
- A prevailing whistleblower has a right to obtain attorneys fees and costs associated with litigation

Individual Actions, Protections, and Burden of Proof

- Employees (including former employees and applicants) who believe they have suffered reprisal (a negative or prohibited personnel action in some form) for disclosing matters of gross mismanagement, gross waste of funds, abuse of authority, a substantial and specific danger to public safety, or a violation of law, rule or regulation, must first seek the assistance of OSC before bringing an individual action
  - -- If OSC notifies the employee that its investigation is over and that the OSC will not act, the employee has 60 days to file an appeal alleging reprisal with MSPB
  - -- If requested by the OSC, the MSPB will grant a 45-day postponement ("stay") of a personnel action (such as a removal) taken against a whistleblower
  - -- If the employee receives no notice from OSC within 120 days of filing a complaint, the employee then may file an appeal with the MSPB
- The following employees are protected by the WPA:
  - -- Persons who make protected disclosures
  - -- Persons who suffer a retaliatory personnel action because they are believed to have made protected disclosures, even if they have not actually done so
  - -- Persons who suffer a retaliatory personnel action because of their relationship to someone who has made protected disclosures
- To establish a basic (prima facie) case of whistleblowing, the employee (or OSC acting for the employee) must prove by a preponderance of the evidence only that the

whistleblowing was a contributing factor in the personnel action taken or threatened against that employee

-- Preponderance of the evidence means "more likely than not"

--- If a prima facie case is established, then the agency must prove by clear and convincing evidence that it would have taken the same personnel action regardless of the whistleblowing

--- Clear and convincing is defined as that measure or degree of proof that will produce in the mind of the fact-finder a firm belief or conviction as to the truth of the allegation. This standard falls somewhere between preponderance of the evidence and the beyond a reasonable doubt standard.

- Mere harassment and threats, even without any formally proposed personnel action, can constitute a prohibited personnel action under 5 U.S.C. § 2302(b)(9), triggering the protection of the Act

Outcomes

- An individual who has committed a prohibited personnel practice by taking a reprisal action against a whistleblower may be disciplined

-- OSC files written complaint with MSPB and acts as a prosecutor

-- The employee is entitled to a hearing before the MSPB

-- MSPB may impose the following sanctions on the individual that took the prohibited personnel action:

--- Removal

--- Reduction in grade

--- Debarment from federal service for up to 5 years

--- Suspension

--- Reprimand

--- Civil penalty not to exceed $1,000

-- An employee may appeal an adverse decision to U.S. Court of Appeals for the Federal Circuit

- The whistleblowers who win their cases may have the retaliatory personnel action, for example the suspension, demotion, or removal, completely overturned

- OSC may recommend to the head of the employee's agency that disciplinary action be taken against a member of the armed forces

References:

5 U.S.C. §§ 1201, *et seq*.

5 U.S.C. § 2302

Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA) is intended to balance the demands of the workplace and the needs of families, and to promote the stability and economic security of families, thereby promoting the national interest in preserving family integrity. The FMLA seeks to accomplish these goals by allowing employees to take reasonable amounts of unpaid leave for various medical and personal reasons.

- Federal employees are covered by the FMLA. It does not apply to active duty military personnel or to intermittent or temporary employees.

Leave Entitlement Under The Act

- Entitlements under the Act may not be diminished by any collective bargaining agreement or any other employee benefit plan. Conversely, an agency must comply with any employment policy or collective bargaining agreement that provides for a greater family or medical leave entitlement than under the FMLA.
- Each employee may use up to 12 work weeks of unpaid leave during any 12-month period for specified reasons
  - -- May be taken in conjunction with, or substituted with, other available paid time off (annual leave, sick leave, advanced leave, or other leave without pay)
  - -- May be taken as a block or intermittently (under certain conditions)
  - -- Less detailed documentation required than for sick leave
- Procedures for determining the type of leave to be used are complicated, making consultation with the SJA crucial
- FMLA entitlement may be used for the following purposes:
  - -- The birth and care of a child of the employee
  - -- The placement of a child with the employee for adoption or foster care
  - -- The care of a spouse, child, or parent who has a serious health condition
  - -- A serious health condition of the employee that makes the employee unable to perform the essential functions of his/her position

Notice of Intent to Use Leave Under The FMLA

- The employee must provide notice to supervisor not less than 30 days prior to when the need for leave is foreseeable. If circumstances preclude providing the 30-day notice, it is the employee's responsibility to give the agency as much notice as possible.

- Notice may be provided in person, in writing, by telephone, by any electronic means, or in emergencies, through a third party such as a spouse or other responsible person

Medical Certification

- Supporting documentation must include a statement that the employee is "needed to care for" the individual and that the patient requires assistance for care, safety, or transportation needs and the employee's presence would be beneficial or desirable for the care of the individual

- In the case of leave for his/her own serious health condition, the Air Force can require medical certification from the employee's health care provider, which must include, among other things, a statement that the employee has a serious health condition that makes it impossible to perform the essential functions of the position. The Air Force can also require periodic reports as to the employee's status and intent to return to work.

- If the agency doubts the certification, it may require a second medical certification; however, it must select and pay for the services of the health care provider. If the second opinion differs, the agency and employee must jointly agree on a third provider who will provide a final and binding opinion.

- If the employee is unable to provide the certification prior to commencing the leave, then the agency must grant leave on a provisional basis. If ultimately the employee is unable to provide the required certification, then the leave granted should be charged to the employee's paid leave account.

Return to Work

- An employee, absent from work under the FMLA, is entitled to be returned to the same position or to an equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment

- If the employee has not fully recovered at the time they return to work, additional leave may be taken, to include annual or sick leave, leave under the Family Friendly Leave Act, donated leave, or additional leave without pay

References:

5 U.S.C. §§ 6381-87

5 C.F.R. § 630.401

5 C.F.R. §§ 630.1201-11

AFI 36-815, *Absence and Leave* (5 September 2002), Incorporating Through Change 4 (21 December 2006)

Unemployment Compensation

Introduction

Since 1955, federal employees have been eligible for state unemployment benefits. This section outlines the authority for the program and the procedures that should be followed.

- Benefits are paid by the states, applying applicable state unemployment compensation law, BUT
  - -- Department of Labor (DOL) reimburses the states on a quarterly basis
  - -- Federal agencies reimburse the DOL for payments to state agencies
  - -- Air Force pays approximately $5 million annually in unemployment compensation

The Concern

- If an employee is successfully removed because of either misconduct or unsatisfactory performance, the Air Force may still be required to pay unemployment compensation
- Eligibility
  - -- Monetary eligibility: To qualify for unemployment benefits, an employee must have earned a certain amount during a certain period of time
  - -- Separation: The employee must have been separated through no fault of his own
  - -- Availability: Applicant must be able and available to accept work, and must be actively seeking work
- It takes a team effort of the SJA, CPO, and Accounting and Finance to defeat meritless unemployment compensation claims
- Unemployment compensation matters should be considered an important part of all personnel actions resulting in termination

Procedures

- Vary from state to state, but generally the procedure is as follows:
    - --- A form (SF-8, *Notice to Federal Employees About Unemployment Insurance*) is given to employee by the civilian personnel office upon separation
  - -- Claim filed by former federal employee with appropriate state agency

--- The former employee may file a claim anywhere, if he chooses, but benefits are paid by the state of the employee's last duty assignment

--- If the employee was overseas, he must return to the United States to file, and his state of residence will pay any appropriate benefits

-- State agency sends Form ES-931, *Request for Wages and Separation Information*, to the federal agency requesting "federal findings," i.e., the facts reported by a federal agency pertaining to an individual as to:

--- Whether the individual performed federal civilian service for the agency

--- The period of such service

--- The individual's wages

--- The reasons for termination

-- Air Force has four workdays after receipt to:

--- Return the forms correctly completed or notice that the time limit cannot be met and an estimated completion date

--- Retrieve retired records

-- If federal findings are not received within 12 days, the state agency may make an entitlement determination without the findings (subject to redetermination if subsequently received)

--- Federal findings are <u>not</u> binding on the state agency. The forms should be completed in a manner that maximizes the likelihood that the Air Force's views will be adopted with respect to eligibility, ineligibility, and disqualification.

--- Delays in this regard could hurt the Air Force's ability to appeal the state's determination

-- State agency makes initial determination

--- Either party may appeal and request a hearing

--- At the hearing, the Air Force may have to relitigate the basis for the termination, even if the Air Force's position has already been upheld by the Merit Systems Protection Board or by an arbitrator

--- <u>Witnesses are necessary</u>. In other words, a commander who removed the employee may have to testify as to her reasons for that action

--- If a party fails to appear for the hearing, the other party may win by default, although some states require the employer to put on its case proving misconduct even when the claimant fails to appear

-- Examiner issues a written decision

-- An administrative appeal can be made from examiner's decision

-- Judicial review held in state court

- Time limits in state unemployment compensation cases are usually very short and strictly enforced

REFERENCES:

5 U.S.C. §8501 *et seq*.

20 C.F.R. Part 604, 609

DODI 1400.25, *DOD Civilian Personnel Management System* (*Unemployment Compensation*, Chapter 850) (6 April 2009)

Base Closure Civilian Personnel Issues

Base closures have considerable potential for civilian personnel controversy and litigation.

- Federal employee unions must be notified at losing sites and given an opportunity to negotiate with the Air Force over the impact of the closure decision and the manner of implementing the closure decision called Impact and Implementation (I & I) bargaining

  -- The decision to close a base is not negotiable, but it may be necessary to bargain concerning the impact and implementation of the decision

  -- I & I bargaining obligation with unions can take considerable time and effort and must be fulfilled before closure can be implemented

    --- Unions must be given enough time to seek information, prepare proposals, and initiate bargaining

    --- Bargaining can be protracted, negotiability questions can arise, impasses can be resolved by outside help (all very slow)

    --- Completing closure before bargaining is finished may result in unfair labor practice (ULP) litigation based on unilateral change and bargaining in bad faith

    --- Injunctive relief against Air Force is possible

    --- Administrative litigation can result in status quo ante remedy (i.e., returning the circumstances to the way they were before the action by the Air Force) requiring Air Force to go back to square one

    --- While Air Force should ultimately prevail on right to close and when to close, the best course of action is to avoid litigation by early notification to affected unions

- Additionally, federal employee unions at gaining sites may also have to be notified if there is more than a de minimis impact on employees at gaining location from moving employees to that location, and given opportunity to bargain over I & I of moving employees. Notification to unions at gaining locations is subject to the same concerns, although impact on the closure process not as severe.

- In addition to Freedom of Information Act (FOIA), unions have a statutory right to information necessary to accomplish representational responsibilities

- -- Processing of such requests is separate and distinct from FOIA channels, base Civilian Personnel Office (CPO) is OPR (in the absence of CPO, check with the SJA's office)
- -- With few exceptions, if information is normally maintained by agency and is reasonably available, it must be released upon request

- Civilian employees must be formally notified of transfer of organization, have their options explained, and given a reasonable amount of time to respond as to whether they want to transfer with the function
  - -- Most movements will be "transfer of function," where entire organization and staff moved to different part of country
  - -- However, not all affected personnel may be needed for same or comparable job at gaining location, so reduction-in-force (RIF) would occur to eliminate personnel overage
  - -- In either case, considerable time is needed to ascertain what affected personnel will do, prepare necessary follow-on paperwork, such as PCS orders, RIF/separation notices

- Civilian employees involuntarily terminated or reduced in grade as result of transfer have right to litigate action before various administrative agencies, usually with right of judicial review of decision. Civilian employees "released from competitive level" (RIF term of art meaning essentially reductioninforce or removal) or removed for failing to transfer with function have numerous appeal avenues available.
  - -- Air Force Equal Employment Opportunity channels (AFI 36-1201, *Discrimination Complaints*) if alleging violation of Title VII of 1964 Civil Rights Act
  - -- Negotiated grievance procedure for employees covered by collective bargaining agreement (both appropriated and nonappropriated fund employees)
  - -- Merit Systems Protection Board
  - -- Federal Labor Relations Authority if alleging violation of Federal Service Labor Management Relations Statute
  - -- Special agency procedures (AFMAN 34-310, *Nonappropriated Fund Personnel Management and Administration Procedures*) for nonappropriated fund employees
  - -- Reinstatement and other equitable or "make whole" relief available to employees through any of above
  - -- Procedures vary in speed, cost to agency, and available judicial review by one or both sides

- Civilian employees who have been PCS'd have right to file claim for some costs of selling home at old location/buying home at new location
  - -- Entitlement and procedures are covered in Joint Travel Regulations
  - -- Reimbursement cap limits amount paid and may affect ability of employees in high cost areas (parts of California) to recover costs otherwise allowable
- Relocated civilian employees are entitled to file claim against Air Force for damage to household goods shipped pursuant to PCS orders
  - -- Entitlement and procedures are covered in AFI 51-502, *Personnel and Government Recovery Claims*
  - -- Claims subject to dollar limitations and depreciation, resulting in possible unreimbursed losses

References:

AFI 36-701, *Labor Management Relations* (27 July 1994)

AFI 36-1201, *Discrimination Complaints* (12 February 2007)

AFI 51-502, *Personnel and Government Recovery Claims* (1 March 1997), Incorporating Change 1 (31 July 2008), Interim Change 2 (10 November 2008)

AFMAN 34-310, *Nonappropriated Fund Personnel Management and Administration Procedures* (1 December 1995)

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Environmental Laws: Overview

- Federal statutes now cover virtually all major environmental issues
  - -- Although most statutes provide a method for exemption, this usually requires personal action by the President or the Secretary of Defense and, as a result, exceptions are rare
  - -- Most major federal environmental statutes also waive the federal government's immunity from state and local pollution control regulations, including permit and other procedural requirements as well as substantive pollution control standards
  - -- Most subject the Air Force to state and local enforcement. Federal facilities are explicitly subject to fines and penalties for violations of requirements related to hazardous waste, underground storage tanks, drinking water, lead-based paint and others.
  - -- Most statutes subject Air Force personnel to criminal liability for violations of environmental laws and regulations
- Federal environmental statutes usually establish a joint federal-state system of pollution control. In addition, state authority allows delegation to local regulatory agencies.
  - -- The typical role of the federal government is to establish the basic pollution control standards and to ensure that the states achieve those standards
  - -- Most states have delegated authority to establish standards for particular sources of pollution, integrate the individual controls into an overall plan that will achieve the federal standards, and enforce the controls on a day-to-day basis
- Thus, three levels of enforcement authority typically apply:
  - -- The U.S. Environmental Protection Agency retains authority to enforce when it has not delegated that authority to the relevant state or when it learns of violations that are not being prosecuted by a delegated state
  - -- State or local enforcement agencies have primary responsibility for taking administrative or judicial actions for most violations
  - -- When federal and state or local enforcement authorities have failed to abate violations, most environmental statutes allow private citizens to initiate civil enforcement proceedings in a federal district court
- Assistance in deciphering all of the above falls to members of your environmental team
  - -- Legal, bioenvironmental engineer, medical, civil engineering, safety and others

-- Required meetings of the installation environmental protection committee (EPC), which is normally chaired by the vice commander, will assist leadership in addressing environmental issues and instilling stewardship values base wide

References:

AFI 32-7040, *Air Quality Compliance* (27 August 2007)

AFI 32-7041, *Water Quality Compliance* (10 December 2003)(28 January 2010)

AFI 32-7042, *Waste Management* (15 April 2009), Incorporating Change 1 (31 March 2010)

AFI 32-7044, *Storage Tank Compliance* (13 November 2003)

Environmental Tort Claims

- Environmental Tort Claims are claims for personal injury, death, or property damage under the Federal Tort claims Act, filed using the Standard Form 95, based on an allegation that the Air Force has damaged property or human health as a result of base activities. The classic example is on-base use of hazardous but useful chemicals that either, as a result of a spill or cumulative use, accumulates in the soil or groundwater and migrate off-base. Claims for asbestos and toxic mold exposure are also treated as environmental claims.

  -- These claims are distinct from other statutory liability cases under federal environmental statutes such as Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA), although they may arise from the same set of operative facts

  -- Unlike previously noted environmental laws such as CERCLA and RCRA, suites filed under the FTCA for environmental tort claims do not provide for personal liability against the installation commander

    --- Depending on the amount of the claim, these claims are paid by the Installation or MAJCOM out of O&M funds or out of the Department of the Treasury's Judgment Fund

- The liability of the United States for environmental torts is determined in accordance with the law of the state where the alleged acts(s) or omission(s) occurred

  -- Generally, when dealing with an environmental tort claim, the FTCA applies in CONUS, and the MCA applies worldwide

- In accordance with AFI 51-501, bases receiving environmental tort claims will be responsible for investigating and processing those claims which arise in their assigned geographic areas

References:

10 U.S.C. § 2733, 1346(b)

28 U.S.C. §§ 2671-2680, 1346(b)

28 C.F.R. Part 14

32 C.F.R. 842.40-842.54

AFI 51-501, *Tort Claims* (15 December 2005)

Garcia v. USAF, 533 F.3d 1170 (10th Cir. 2008)

OSI v. United States, 285 F.3d 947 (11th Cir, 2002)

Sovereign Immunity and Environmental Fees

- The Federal government, as a sovereign, is not subject to state, interstate, or local laws, and is not subject to lawsuit—unless Congress has expressly waived sovereign immunity. Waivers are strictly construed in favor of the United States, and entities (state, interstate, and local) cannot regulate Federal entities absent a clear, unequivocal waiver. For example, the following are not waivers: executive orders, failure to object to a state requirement, compliance agreements, and a base commander's actions.

- While there is a waiver of sovereign immunity in most of the major federal statutes (for example, CAA, RCRA-waste management, RCRA-USTs, CWA, and SDWA) to allow the Air Force to pay reasonable environmental fees (also referred to as "service charges"), there is no waiver for the federal government to pay state and local taxes

  -- Fees are charges for services provided by state or local governments in administering their environmental programs (e.g., fees for environmental permits, underground storage tank registration, and hazardous waste generation)

  -- Taxes are revenues collected to provide for the general support of the entire community. The only environmental statute waiving immunity from taxation is 42 U.S.C. §2021d(b)(1)(B), which is applicable to low-level radioactive waste owned or generated by the Federal government that is disposed of at a regional disposal facility or a non-Federal disposal facility within a State that is not a member of a regional compact.

  -- Any person who uses appropriated funds for a purpose not authorized by Congress violates the Anti-Deficiency Act (ADA), 31 U.S.C. § 1341 ("Limitations on expending and obligating amounts") and may be subject to appropriate adverse action

- The legal test that DOD should use to evaluate whether a fee is payable or an illegal tax is under review. Since the mid-1990's, the widely accepted test within DOD has been based on the Supreme Court's decision in *Massachusetts v. U.S.,* 435 U.S. 444 (1978). In this case, the Supreme Court articulated a test in the situation where the Federal government assessed a federal aircraft registration tax against a state. Over time, the three-prong fee/tax test applied in the *Massachusetts* case was modified and applied to the situation where a state assessed a fee against the Federal government in order to determine whether the fee was, in fact, an illegal tax.

  -- This fee/tax test, the elements of which essentially are incorporated into the DOD instruction governing environmental compliance (that is, DODI 4715.6, *Environmental Compliance* (24 April 1996)), provides that a fee is not a tax if the charges: (1) do not discriminate against Federal functions; (2) are based on a fair

approximation of use of the system; and (3) are structured to produce revenues that will not exceed the total cost to the state of the benefits to be supplied

  -- However, whether DOD should continue to apply the *Massachusetts* test as the sole fee/tax test is questionable. The Comptroller General and some federal Courts of Appeal specifically reject the *Massachusetts* test in the context of federal immunity from state taxation because immunity of the Federal government from state taxation is grounded in the Supremacy Clause [art. VI, cl. 2] while the States' immunity from federal taxes was judicially implied from the States' role in the constitutional scheme.

  -- Any legal analysis of an environmental fee assessed by a state or local entity should consider the analysis used by the Comptroller General in 2006 to assess whether a state surface water management fee against the Forest Service constituted a tax. Of course, relevant decisions within a specific circuit must also be considered.

- Other issues may arise when an environmental fee is not paid by the specified deadline, such as the assessment of interest or imposition of penalties for late payment. There is no waiver to allow the payment of such interest. A legal analysis would be required to determine whether a particular penalty must be paid, to include identifying a specific rule that was violated as well as an applicable waiver of sovereign immunity for penalties.

- Base personnel should coordinate all questions regarding payment of environmental fees with the base SJA. A legal review of all new fees and fee increases should be accomplished prior to the installation sending payment. If an assessment appears to be a tax and its legality questionable, payment is not authorized and should be deferred. The base legal office will coordinate, as appropriate, with the ELFSC and regional environmental counsel. When the fee also applies to the other military services, the AF regional environmental counsel will coordinate with regional counsel for the other military services to help obtain a consistent position within DOD.

References:

Matter of Forest Service-Surface Water Management Fees, B-306666 (5 June 2006)

DODI 4715.6, *Environmental Compliance* (24 April 1996)

DOD 7000.14-R, *Financial Management Regulation* (Volume 10, Chapter 6, section 0605) (September 2009)

AFI 51-301, *Civil Litigation* (1 July 2002)

Memorandum, SAF/MIQ, *Environmental Fee/Tax Policy Action* (17 November 1989) (under revision)

Controls on Air Force Decision-Making: NEPA

The National Environmental Policy Act (NEPA) requires federal agencies to evaluate environmental impacts as part of their overall planning and decision-making process. It also requires that the public be informed of, and involved in, the decision-making process. Executive Order 12114 applies a similar process to proposed actions outside of the United States and its territories. This section is limited to NEPA procedural requirements within U.S. jurisdiction.

- Within NEPA's mandates are carried out throughout the Environmental Impact Analysis Process (EIAP). The Air Force EIAP can be found at 32 C.F.R. 989. In brief summary, EIAP requires the following, before any final decision on a proposed action is made:
  - -- Consideration and documentation of the environmental effects of proposed action on AF IMT 813; <u>and</u>
  - -- Determination that a categorical exclusion (CATEX) applies; preparation of an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI); or preparation of an Environmental Impact Statement (EIS) and Record of Decision (ROD)
- Failure to follow the process can result in the action being delayed through litigation challenging the adequacy of the NEPA documentation
- Pending completion of EIAP, generally the Air Force may not irretrievably commit money or resource for any proposed action
  - -- The Environment, Safety, and Occupational Health Council (ESOHC), which replaced the Environmental Protection Committee (EPC), implements this process at base level
    - --- The wing commander is the ESOHC chairperson, but this duty may be delegated to the vice wing commander. The chairperson selects the executive secretary, who generally is the base civil engineer.
    - --- Other functions normally represented are environmental planning, natural and cultural resources, biomedical engineering, logistics, operations, plans, judge advocate, public affairs, comptroller, personnel, non-appropriated fund activities, weather, safety and tenants
    - --- Representatives of the major hazardous waste generators as well as the Defense Reutilization and Marketing Office (DRMO) should also be included
- Under NEPA, the Air Force must prepare an EIS for a "major federal action significantly affecting the quality of the human environment"

  - Requirement of a "major" action refers to the impact on the environment, not to the size of the project; thus, even a small project can qualify as "major"
  - The Air Force must also prepare an EIS for a private action essentially under Air Force "control" (e.g., actions that require Air Force permission)
  - Consider whether environmental effects are significant based on context and intensity
  - For proposed actions where impacts are uncertain, an Air Force prepares an EA which either results in a Finding of No Significant Impact (FONSI), or leads to an EIS
  - A reviewing court's focus will be whether the Air Force has taken a "hard look" and made a good faith assessment of potential impacts
  - The term "human environment" includes the natural and physical environment, as well as the relationship of people with that environment
  - Executive Order 12898 on Environmental Justice requires federal agencies to consider the effects of proposed projects upon minority and low-income populations
  - The heart of NEPA is the identification and analysis of alternatives. A reasonable range of alternatives that would satisfy the purpose and need of the proposed action must be analyzed, including a No Action alternative.
- The ESOHC reviews and makes recommendations on appropriate NEPA documentation
  - The base civil engineer, with the assistance of the ESOHC, is responsible for managing the EIAP
- The presence of classified information does not exempt the Air Force from its NEPA responsibilities, but it may modify the public's right to participate in the NEPA process. Unclassified portions of the required analysis would still be shared with the public.
- NEPA is a procedural law
  - The Air Force must ensure that environmental concerns are given "appropriate consideration," but NEPA does not require the Air Force to rank environmental concerns above mission goals. Most of the subject areas considered as part of the NEPA analysis have separate substantive requirements of their own.
  - The Air Force must also ensure that all reasonable measures are taken to mitigate adverse environmental impacts associated with an action that the Air Force has chosen to implement. An EIS or EA/FONSI should clearly identify mitigation

measures, and the ROD must state whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted or, if not, why they were not. In addition, Air Force regulations require a mitigation plan to be prepared by the action proponent and submitted to HQ USAF/A7CI for each FONSI or ROD that contains mitigation measures.

- Actions that would involve construction in wetlands, or that would take place in floodplains, need to be submitted to the MAJCOM for approval

References:

40 C.F.R. Parts 1500-1508, *Council on Environmental Quality Regulations*

32 C.F.R. Part 989, *Environmental Impact Analysis Process (EIAP)* (72 Fed Reg 37105, *Final Rule; technical corrections*, (July 9, 2007) contains the most recent changes to the regulations)

AFI 32-7061, *The Environmental Impact Analysis Process* (12 March 2003), Certified Current (2 April 2010)

AFI 90-801, *Environment, Safety, and Occupational Health Councils* (25 March 2005), Certified Current (29 December 2009)

Environmental Compliance Assessment and Management Program (ECAMP)

- The Environmental Compliance Assessment and Management Program (ECAMP) is a comprehensive self-evaluation and program management system designed to ensure compliance with environmental laws and regulations at Air Force installations

- Some major commands have expanded the scope of the assessment to include occupational health and safety. This broader assessment program is referred to as the Environmental, Safety, and Occupational Health Compliance Assessment and Management Program (ESOHCAMP).

- In October 2007, HAF/A7 (Maj Gen Eulberg) commissioned a transformation initiative to standardize and lean the ECAMP process. An updated AFI (currently numbered 90-803) is being developed that may drastically change the way the ECAMP is implemented.

  -- This paper speaks to the current process; please check AFPUBS to see if the new AFI has been published

Objectives

- Improve Air Force environmental compliance and environmental management worldwide

- Build supporting financial programs and budgets for environmental compliance requirements

Application

- Applies to all installations within the U.S. unless exempted by major command due to significant interference with military effectiveness

- Overseas installations must conduct assessments to measure compliance with applicable standard (final governing standards, overseas environmental baseline guidance document, international agreement, etc.)

- Assessments address compliance with state and federal requirements in areas such as air, hazardous materials and wastes, noise, solid waste, water quality, pesticides, petroleum, oil, lubricants, and natural and cultural resources. Safety and occupational health will also be examined by those major commands with an ESOHCAMP program.

Program Structure

- Major commands coordinate and conduct external assessments and installations coordinate and conduct internal assessments

- ECAMP Process

  -- Major commands conduct external assessments of their installations at least once every three years

  -- Installations conduct their own internal assessments annually, except when external assessments are conducted

  -- Pre-assessment activities include a pre-visit questionnaire to collect data and to familiarize the assessment team with the installation and its operation. Helps to define assessment scope and team responsibilities. Also provides a review of the relevant regulations and assessment protocols.

  -- Assessment activities include information collection regarding environmental compliance, management effectiveness and other matters through record searches, interviews with installation personnel, and site surveys

  -- Post-assessment activities include an outbrief, preparation of preliminary environmental findings (PEF) and base preparation of a management action plan (MAP) to address problems uncovered during the assessment

  -- Final ECAMP report incorporates the PEFs and MAP. As a matter of policy, EPA has stated that they will not request copies of reports. Requests for release of any ECAMP document must be forwarded to the base/major command staff judge advocate for a legal review. The installation commander, after consultation with the staff judge advocate, determines whether to self-report findings of noncompliance to regulators. The Department of Justice (DOJ) may consider ECAMP as a mitigating factor in deciding whether to pursue a criminal prosecution.

- Typical issues that arise include:

  -- Failure to treat vehicle antifreeze as hazardous waste (HW)

  -- Pharmaceuticals may be acutely hazardous waste and require additional treatment

  -- Waste amalgam and bite-wing X-rays are usually HW

  -- The Air Force is ultimately responsible for contractor-generated waste

  -- Lead acid batteries that crack or spill are HW

  -- Print shops, photo labs, etc. generate HW that often is not handled as such

- -- Leak detection equipment malfunctions at service stations
- -- Failure to label and appropriately manage universal waste
- -- Tank water bottoms need to be managed properly under the Clean Water Act or under RCRA. Hazardous wastewater must be manifested and transported or disposal in an appropriate manner.

- ECAMP follow-up: Installations, through the environment, safety and occupational health committee (ESOHC), should ensure appropriate actions are taken to remedy problems. This may include programming and budgeting for funds and documenting all steps taken.

References:

AFI 90-803, *Environmental, Safety, and Occupational Health Compliance Assessment and Management Program* (24 March 2010)

AFI 90-801, *Environment, Safety, and Occupational Health Councils* (25 March 2005), Certified Current (29 December 2009)

AFPD 90-8, *Environment, Safety and Occupational Health* (1 September 2004)

Responding to an Enforcement Action (EA)

- The enforcement action is an administrative enforcement mechanism used by a state or federal regulatory agency to provide notice of noncompliance with either statute or regulation. It is used for most environmental statutes. Enforcement actions are sometimes called notices of violation (NOV), notices of non-compliance (NON), notices of deficiency (NOD), compliance agreements (CA), or consent orders (CO).

- Enforcement actions are often issued after an inspection, with or without notice, by a regulatory agency

- Enforcement actions can be issued without an inspection based upon reports filed with the regulatory agency (effluent limitations, spills, etc.). Also, a failure to report can result in an EA.

  -- Depending on the nature of the violation, fines and penalties may be assessed

  -- Regulators may seek injunctions to shut down operations

  -- Violations can lead to criminal penalties, such as imprisonment and fines

  -- Any violation can lead to more inspections by regulators

  -- Installations may be issued enforcement actions for acts of non-Air Force personnel, e.g., AAFES, contractors

- Enforcement actions must receive priority treatment and must be reported to higher headquarters

  -- JAs are required to immediately and independently notify MAJCOM/JA, the regional environmental counsel, and AFLOA/JACE-FSC

  -- CEs are required to immediately notify the MAJCOM/CE and the regional environmental office

  -- Enforcement actions for each base are tracked in a quarterly report briefed to CSAF and the Deputy Assistant Secretary of the Air Force (Environment, Safety, and Occupational Health) (SAF/IEE)

Enforcement action Process and Avoidance

- The U.S. Environmental Protection Agency (EPA) and the states may assess fines and penalties for some violations

  -- The EPA "complaint" triggers a very formal administrative process

--- Must file answer within 20 days; failure to respond to any given allegation is an admission of its truth

--- Ensure that a coordinated effort is made to preserve evidence and document site conditions, as it may be some time before the hearing

--- Pursue settlement efforts while hearing is pending

-- State enforcement actions – follow state rules

--- Usually must submit a written response within 30 days of receipt, but may be less

--- Take corrective action as soon as practicable

--- Pursue informal resolution, except in CAA cases, which may require coordination with AFLOA/JACE-FSC, SAF/GCN, and DOJ prior to negotiations

-- All settlements regarding payment of fines or penalties must be approved by AFLOA/JACE Chief, Environmental Law and Litigation Division

- Enforcement actions are avoidable! Be prepared for inspections by regulators

-- Treat inspections like operational readiness inspections

-- Know your weak areas

-- Conduct pre-inspections

-- Complete the "easy fixes;" don't wait to be directed

-- "Neatness" really does count

-- Select and brief an escort team to go with inspectors

-- Know the areas most likely to produce violations

--- Hazardous waste management plans

--- Personnel training records

--- Documentation of "cradle-to-grave" management of hazardous waste, to include return manifests showing that wastes destined for disposal sites actually arrived

--- Labeling and condition of hazardous waste barrels

--- Contingency plans and emergency procedures

--- Air and water discharge monitoring reports, compared with actual permit limitations to be sure they were not exceeded

-- If you get an enforcement action, use all of the available resources to resolve it

--- Notify others (MAJCOM/JA, Air Force regional compliance office, public affairs)

--- Cooperate with regulating agency

--- Timely response is imperative

--- Regulators may propose compliance agreement. If so, involve your staff judge advocate (SJA) immediately. Never sign a compliance agreement without AFLOA/JACE and SJA coordination.

Bottom Line

- Preparation is the key to avoiding enforcement actions
- Prompt, cooperative response is the key to resolving enforcement actions

References:

AFI 32-7040, *Air Quality Compliance* (27 August 2007)

AFI 32-7042, *Waste Management* (21 April 2009), Incorporating Change 1 (31 March 2010)

AFI 32-7044, *Storage Tank Compliance* (13 November 2003)

AFI 32-7047, *Environmental Compliance Tracking and Reporting* (8 April 2004)

AFI 32-7060, *Interagency and Intergovernmental Coordination for Environmental Planning* (25 March 1994)

AFI 51-301, *Civil Litigation* (1 July 2002)

AFPAM 32-7043, *Hazardous Waste Management Guide* (1 November 1995), Certified Current (29 December 2009)

Liability Under Environmental Laws

Individual employees, as well as the Air Force itself, may be held liable for environmental law violations. While the Air Force is subject to civil and administrative liability, individuals may also be held criminally liable in their personal capacities.

The major environmental statutes (Clean Air Act, Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and Resource Conservation and Recovery Act (RCRA)) either contain immunity provisions for federal employees acting within the scope of their employment or have been held by courts to grant such immunity. *Meyer v. United States Coast Guard*, 644 F. Supp. 221 (D.N.C. 1986).

Federal officials have been held criminally liable for violations of environmental statutes containing criminal penalties when their actions do not fall within the purview of statutory immunity. *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989).

- Individual Liability (Civil Liability)
  - -- Department of Justice representation may be available to an individual who commits a violation while acting within the scope of employment
  - -- Representation is not automatic; the individual must submit a written request to DOJ, and DOJ will determine whether it is in the interest of the United States to provide representation
  - -- Often, the United States is substituted for the individual, who then is released from personal liability
- Criminal Liability
  - -- Every major environmental law has criminal provisions that can be applied to active-duty members, reservists, guardsmen, civilian personnel, and contractors
  - -- Generally applies to knowing or willful violations or wanton disregard of law or public safety. In some cases, negligence can form basis for criminal charges.
  - -- Sanctions can include a monetary fine and time in jail
  - -- Military members may also be subject to UCMJ prosecution
  - -- In 1990, 3 Army employees (SES-4, GS-15, and GS-14) were found guilty of storing and disposing hazardous wastes (HW) in knowing violation of the RCRA and sentenced to three years probation each

--- In this case, "knowing" meant that employees disposed of harmful substances. Prosecution did not have to show that they knew the substances were "hazardous wastes" or that the disposal was illegal.

--- DOJ did not provide representation and forbade the Army from doing so. Attorneys' fees reached $108,000 for each defendant

-- There have been other criminal prosecutions of military members and civilian employees, with the majority of the prosecutions resulting in convictions

--- For example, the manager of an Army wastewater treatment plant who was convicted of nine felony counts for violating a permit and falsifying reports, received an eight month jail sentence

--- A Navy fuels division director repeatedly instructed subordinates to pump fuels through a line that he knew would leak. He was sentenced to ten months confinement.

--- An airman was convicted by courts-martial of dereliction of duty after he caused an overflow of jet fuel. He then attempted to conceal his mistake. He was sentenced to one-month restriction to base and a reprimand.

-- In addition to prosecution by DOJ or under the UCMJ, individuals may be prosecuted by states under state law

-- If a defendant is being tried for violating federal (not state) criminal law, DOJ will generally decline both criminal and civil representation of the individual

-- Under the "responsible corporate officer doctrine," supervisors may be criminally liable for the acts of subordinates <u>despite a lack of knowledge regarding the specific violations</u>

-- Factors DOJ considers in deciding whether to prosecute include:

--- Voluntary disclosure of violation before regulators discover it

--- Cooperation with regulators

--- Good faith self-auditing program

--- Internal disciplinary action

--- Subsequent compliance efforts, such as ECAMP/ESOHCAMP follow-up

- <u>Organizational Liability</u>

-- Administrative and Civil Fines and Penalties

--- An administrative fine/penalty is enforced within the regulatory body that assesses it. The amount is often lower than the amount of a civil penalty.

--- A civil penalty is imposed through a court order

--- Historically, under the principle of "sovereign immunity," the federal government and its agencies cannot be sued without Congressional consent

--- In many statutes, sovereign immunity is waived for substantive and procedural requirements, but not for the payment of penalties. If sovereign immunity has not been waived for payment of fines and penalties, then payment would violate fiscal law.

--- Negotiations over environmental enforcement actions must be coordinated with the JACE-FSC. Any resolution involving the payment of a penalty or a request for a supplemental environmental project (SEP) must be approved by the JACE Division Chief.

--- Base fines and penalties are paid out of Base funds.

- Most statutes authorize payment of reasonable fees

- Most statutes also allow EPA to delegate its enforcement authority to qualified states. States' requirements are at least as stringent as the federal requirements.

- Additional issues related to commanders' liability

  -- Direct participation in the violation of an environmental statute is just one way in which a commander could be subject to prosecution

  -- By not acting promptly to correct an environmental violation, the commander may also be subject to prosecution even without direct involvement

  -- If violations of the law occur, immediately consult the staff judge advocate and appropriate regulatory authorities to establish good faith in the compliance resolution process

References:

Meyer v. United States Coast Guard, 644 F. Supp. 221 (D.N.C. 1986)

United States v. Carr, 880 F.2d 1550 (2d Cir. 1989)

AFI 51-301, *Civil Litigation* (1 July 2002)

AFI 65-601, Vol 1, § 10.6.2.1, *Budget Guidance and Procedures* (3 March 2005), Incorporating Through Change 3 (6 November 2009)

SAF/IEE, *Air Force Policy on Payment of Fines and Penalties for Violations of the Clean Air Act* (17 July 2002)

Media Relations and Environmental Incidents

Numerous federal statutes require reporting releases or discharges into the environment to local, state, or federal regulatory agencies. Every installation should have contingency or disaster plans that address the required notifications. Given the variety of overlapping jurisdictions and regulations, the requirements may be substantially different and dependent on the location of the installation.

Public Affairs Involvement

- The Office of Public Affairs (SAF/PA) maintains a program to involve the public in Air Force environmental activities and decisions, particularly within the Environmental Impact Analysis Process (EIAP), the Installation Restoration Program (IRP), and the Air Installation Compatible Use Zone (AICUZ) program

Environmental Impact Analysis Process (EIAP)

- SAF/PA responsibilities:
  - -- Reviews and clears environmental documents in accordance with AFI 35-101, *Public Affairs Policies and Procedures*, prior to public release
  - -- Assists judges from HQ AF/JAT or HQ AF/JAH in planning and conducting public scoping meetings and hearings
  - -- Ensures that public affairs aspects of all EIAP actions are conducted in accordance with the EIAP regulation and Chapter 9 of AFI 35-101
- Public Affairs Officer (PA) responsibilities:
  - -- Advises the Environmental Planning Function (EPF), the Environmental Protection Committee (EPC), and the action proponent on public affairs activities on proposed actions and reviews environmental documents for public involvement issues
  - -- Advises the EPF of issues and competing interests that should be addressed in the EIS or EA
  - -- Assists in preparation of and attends public meetings or media sessions on environmental issues.
  - -- Prepares, coordinates, and distributes news releases and other public information materials related to the proposal and associated EIAP documents

- -- Notifies the media (television, radio, newspaper) and purchases advertisements when newspapers will not run notices free of charge. The EPF will fund the required advertisements.
- -- Determines and ensures Security Review requirements are met for all information proposed for public release

Installation Restoration Program

- PA responsibilities:
  - -- Serving as the focal point for public affairs aspects of proposed IRP actions
  - -- Advising on the public affairs aspects of the Air Force responsibilities for the development, implementation and participation in the Restoration Advisory Board (RAB)
  - -- Ensuring all concerned community parties are in the communication channel
  - -- Conducting, during IRP remedial actions, community interviews to solicit concerns, informational needs, and desired levels of involvement. This includes:
    - --- Preparing an IRP community relations plan for MAJCOM approval and establishing an information repository accessible to the general public
    - --- Developing, coordinating, and distributing news releases and fact sheets on IRP progress and proposed actions

Air Installation Compatible Use Zone (AICUZ Program)

- The base community planner manages the AICUZ program, but the PA officer releases the AICUZ report and acts as an information conduit between the base and the community
- In the event noise complaints occur, PA will handle complaints directly; providing timely, responsive, and factual answers to maintain good media and community relations; and will refer all claims for damages to the base claims office

References:

AFI 35-101, *Public Affairs Policies and Procedures* (29 November 2005), Interim Change 3 (5 March 2010)

AFMAN 32-4013, *Hazardous Material Emergency Planning and Response Guide* (1 August 1997)

Cleanup of Contamination from Past Activities

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

- Also known as "Superfund," CERCLA provides a means of and process for investigating and responding to releases of hazardous substances (HS) into the environment, assessing parties responsible for such releases, and authorizes the Environmental Protection Agency (EPA) to order those parties to clean up the contamination, or recover response costs from responsible parties when EPA conducts the response actions and funds it from the Superfund

- Establishes "strict" liability for (1) current owners and operators of facilities where hazardous substances are released; (2) owners and operators of facilities at the time the hazardous substances were disposed; (3) persons who arranged for disposal or treatment of such substances, and; (4) persons who accepted such substances for treatment or disposal

  -- Most courts have ruled that any responsible party can be required to pay the total cost of cleanup, regardless of the amount that a liable party contributed to the contamination; however, responsible parties can seek cost recovery and contribution from other responsible parties

  -- Responsible parties are also liable for damages that are assessed for injury to, destruction of, or loss of natural resources. The definition of natural resources is broad in scope (e.g., land, wildlife, fish, biota, air, water, groundwater, drinking water supplies), though it is limited to those resources owned, held in trust, or otherwise controlled by a federal or state government agency or an Indian tribe, thus excluding damages to private property.

- CERCLA's waiver of sovereign immunity subjects us to CERCLA substantive, procedural and liability requirements

- Primary EPA regulations implementing CERCLA contained in the National Contingency Plan (NCP) at 40 C.F.R. Part 300

  -- EPA in 40 C.F.R. Part 302 lists hazardous substances which are subject to CERCLA

  -- EPA has also issued numerous guidance documents further implementing CERCLA; however theses are not legally binding

- For releases at or migrating from Air Force facilities, Air Force has been delegated by the President lead agency authority to investigate, and then plan, select and implement response actions, to be exercised consistent with CERCLA

- CERCLA §120(e) & (f) and 121(f) provides for local, state and federal (usually EPA) involvement in DOD cleanup by state and federal regulators

- CERCLA and the NCP also require extensive public participation opportunities throughout the response process, to include the creation of an administrative record (AR) and information repository (IR) that are publicly accessible

- CERCLA response action stages include:

  -- Discovery of release

  -- Removal evaluation and action—immediate or short term actions to address imminent and substantial endangerment or other risks that warrant a relatively prompt action

  -- Preliminary assessment and site inspection (PA/SI) to determine basic nature of release and if further investigation or action is necessary

  -- Remedial investigation (RI) to determine the nature and extent of contamination and determine through a baseline risk assessments whether the releases constitute an unacceptable risk to human health or the environment so as to necessitate remedial action

  -- Feasibility study (FS) which develops and assess alternative remedies to permanently address site risks, utilizing nine remedy selection criteria set forth in CERCLA and the NCP

  -- Proposed plan to present remedial alternatives assessed and rationale for preferred alternative, and obtain regulator and public comment

  -- Record of decision (ROD) selecting cleanup method, which is filed in the AR

  -- Remedy implementation/execution, which includes remedial design, remedial action, operation and maintenance, usually monitoring, and remedy completion and closeout

- The EPA evaluates DOD facilities for possible placement on the national priorities list (NPL), which is a list of the most seriously contaminated sites, presumably requiring the earliest cleanups

  -- For sites on the NPL, CERCLA § 120(e)(4) requires the Air Force to enter into Federally Facility Agreements (FFAs) with EPA; states are encouraged to sign FFAs

    --- FFA requirements are jointly developed and selected by the Air Force and EPA or solely by EPA

--- In 1988, to implement the FFA requirement, DOD and EPA agreed on model language provisions, which were last revised in 2009. Deviation from the model is not permitted without approval from SAF/IE and DOD.

--- FFA provisions are enforceable under CERCLA

-- For sites not on the NPL, the state provides the primary regulatory oversight

--- At non-NPL facilities, CERCLA further requires we comply with state response laws

--- FFAs are not required

DEFENSE ENVIRONMENTAL RESTORATION PROGRAM (DERP)

- Establishes DOD and service environmental restoration accounts (ERA) which are fenced and can only be used to fund environmental restoration activities

- DOD was granted by Congress complementary authority under CERCLA to administer an environmental restoration programs at DOD facilities

- Response actions under DERP must be consistent and in accordance with CERCLA

-- In addition to CERCLA response actions, Congress authorized DOD to correct other environmental damage that may present an imminent and substantial endangerment to public health or the environment. This authority is the primary authority used by DOD to respond to military munitions clean-up.

-- DERP requires the restoration program be conducted in consultation with EPA and requires notice and opportunity to comment to EPA, state and local regulators on most restoration phases

-- In recognition of the importance of public involvement at military installations DERP requires where practicable that installations form a restoration advisory board (RAB)

--- The RAB is composed of members from the local community and representatives from DOD, the state, and EPA, as appropriate. Community members selected for RAB membership should reflect the diverse interests within the local community.

--- The RAB provides an expanded opportunity for ongoing community input and participation in all phases of installation restoration activities, but not actual decision-making

-- Under DERP program known as the Defense State Memorandum of Agreement (DSMOA), DOD funds state services that assist DOD in the conduct of DERP, to include RAB participation, review, and comments on restoration documents

Third Party Site (TPS) Program

- The Air Force's TPS program resolves CERCLA claims by EPA, states, and private parties against the Air Force resulting from Air Force disposal of hazardous substances and waste at off-base properties not owned or operated by the federal government
- Cases are assigned to regional environmental counsel (REC) in Atlanta, Dallas, or San Francisco, based upon the location of the third party site
- The REC works with environmental attorneys and engineers from each base alleged to have disposed of hazardous substances and waste at the site to identify witnesses and documents relevant to the claim
- The REC determines the Air Force's share, if any, of the total volume and types of all hazardous substances disposal of at the site by all parties and negotiates, in consultation with AFLOA/JACE, SAF/GCN, and the Department of Justice, settlements of the Air Force liability based upon the Air Force's allocated share of the total cleanup cost for the site
- In virtually all cases, settlements of Air Force liabilities are paid by the Department of Justice from the Judgment Fund, not from Air Force funds

Affirmative Cost Recovery (ACR) Program

- Under CERCLA, DOD agencies may affirmatively recover the costs expended by DOD to clean up hazardous substances released onto DOD property by contractors and other non-federal entities, including costs for study, sampling, analysis, monitoring and surveying programs, and other planning and engineering services
- DERP further authorizes amounts recovered to be deposited into service a ERA account
- Chapter 26 of the Management Guidance for Defense Environmental Restoration Program requires the Air Force to investigate recovery of cleanup costs that have exceeded or are expected to exceed $50,000
- Base personnel should alert their major command and REC counterparts where there is a potential cost recovery action against a third party
- Generally RECs investigate potential ACR cases at bases, and AFLOA/JACE investigates them at Air Force plants

Resource Conservation and Recovery Act Corrective Action (RCRA CA) Current Issues

- RCRA establishes federal cradle to grave requirements for the management, storage, treatment, and disposal of hazardous waste. Most states are authorized to administer

the program in lieu of EPA under state laws that are equivalent and at least as stringent and broad in scope as RCRA.

- Facilities that store hazardous waste over 90 days, treat or dispose of hazardous waste must have a Treatment, Storage, and Disposal (T/S/D) permit which contains expansive provisions and requirements

  -- As noted in the FSOH discussion, above, busting the 90 day requirement has become an issue for a base that was storing JP-8 and tank bottom water before arranging to have the waste transported off-site to be incinerated. if you choose to treat under RCRA, busting the 90 day storage rule can expose your facility to significant penalties

  -- Permit must also contain requirements for corrective action (CA) to address release of hazardous wastes and constituents into the environment from solid waste management units (SWMUs), regardless of when the release occurred

    --- Where corrective action is concerned, be aware of the challenge posed by pesticides (esp. chlordane) if a residential construction project is planned. Plan on managing the chlordane tainted soil as a solid waste and characterize accordingly. Do not assume that because the chlordane was applied legally, it can be managed as a material or product in a situation where solid disturbance is occurring (e.g., grading during a constructions project). Ensure your soils management plans are approved by appropriate regulatory authorities in advance of construction start-up. Most states are authorized to administer the program in lieu of EPA under state laws that are equivalent and at least as stringent and broad in scope as RCRA.

  -- For facilities that applied for a permit, but withdrew their permit application before its issuance (interim status) the state or EPA may issue an administrative order to require corrective action where necessary to protect human health and the environment

- CA requirements largely parallel CERCLA, while terminology for cleanup phases differ

  -- Substantive cleanup under CERCLA or RCRA can vary significantly. Cleanup under one program may not satisfy the requirements of the other. While choice of which law governs is complex and beyond the scope of this paper, generally speaking RCRA is concerned with media (air, water, soil) clean-up standards and CERCLA is concerned with exposure rates to human population groups. Many times this difference in focus will cause clean-up standards as between the two statutes to vary; especially where clean-up in residential areas is concerned.

  -- DOD and services do not have lead agency authority under RCRA, thus regulators (usually the state) must approve all steps, documents, and decisions

REFERENCES:

10 U.S.C. §§ 2701 *et. seq*. (DERP)

42 U.S.C. §§ 6901 *et. seq*. (RCRA)

42 U.S.C. § 9601 *et. seq*. (CERCLA)

40 C.F.R. Part 300, CERCLA implementing regulations

40 C.F.R. Parts 260-282, RCRA implementing regulations

Executive Order 12.580, *Superfund Implementation* (23 January 1987)

AFI 32-7020, *Environmental Restoration Program* (7 February 2001)

AFI 32-7042, *Waste Management* (15 April 2009), Incorporating Change 1 (31 March 2010)

DOD MANAGEMENT GUIDANCE FOR THE DEFENSE ENVIRONMENTAL RESTORATION PROGRAM (September 2001)

MANAGEMENT GUIDANCE FOR THE UNITED STATES AIR FORCE ENVIRONMENTAL RESTORATION PROGRAM (February 2003)

UNITED STATES AIR FORCE REMEDIAL PROJECT MANAGER'S HANDBOOK (May 2000)

Natural and Cultural Resource Preservation Laws

In addition to the National Environmental Policy Act (NEPA), several federal laws present additional environmental planning responsibilities. In many instances, these requirements can be accomplished in conjunction with NEPA. For example, documents prepared or consultations conducted pursuant to these laws may become part of the NEPA document itself or of the administrative record setting forth the decision-making process.

Two areas that provide additional environmental requirements for federal agencies are:

- Natural Resource Stewardship: Responsibilities imposed under the following statutes:
  - The Endangered Species Act
  - The Sikes Act
  - The Migratory Bird Treaty Act
- Cultural Resource Stewardship: Responsibilities imposed under the following statutes:
  - The National Historic Preservation Act
  - The Archeological Resources Protection Act
  - The Native American Graves Protection and Repatriation Act
  - Religious Freedom Restoration Act
  - The American Indian Religious Freedom Act

Endangered Species Act (ESA)

- Requires Air Force to ensure that actions are not likely to jeopardize the continued existence of any endangered or threatened species, or to destroy or adversely modify their critical habitat
  - An endangered species is a plant or animal species or subspecies that is in danger of extinction throughout all or a significant part of its natural range
  - A threatened species is a plant or animal species or subspecies that is likely to become endangered within the foreseeable future throughout all or a significant part of its range
  - A critical habitat is a specific land area essential for the conservation of a species

- Before taking action that "may effect" the existence of an endangered/threatened species or to destroy or adversely modify its habitat, the Air Force must formally consult with U.S. Fish and Wildlife Service (FWS)

  -- If uncertain of effect of project on endangered/threatened species or its habitat, Air Force can have informal consultation with FWS. If the Air Force or FWS determine the action is likely to affect an endangered/threatened species or its habitat, formal consultation is required.

  -- If formal consultation is necessary, it will include evaluation of potential effects, reasonable and prudent mitigation measures, and ways to avoid a jeopardy determination

  -- FWS will issue a biological opinion (BO), which results in either a "no jeopardy" opinion or a "jeopardy" opinion

    --- <u>For a "no jeopardy" opinion</u>, FWS issues an "incidental take statement," excusing actions that would otherwise constitute a "take" and specifying permissible impact that the action may have, reasonable and prudent measures to minimize impacts, and required terms and conditions

    --- <u>For a "jeopardy" opinion</u>, the Air Force will modify its proposed action by adopting measures that will result in a "no jeopardy" opinion

Sikes Act

- Under the Sikes Act, each military installation is required to manage the natural resources on the installation in accordance with an integrated natural resource management plan (INRMP). INRMPs are detailed plans that integrate military training requirements with natural resource conservation needs. INRMPs require consultation with FWS and the state fish and game authority, and are also subject to public comments and five-year reviews.

Migratory Bird Treaty Act (MBTA)

- The MBTA protects migratory birds as well as their habitats and flyways. It prohibits unlawful, or unpermitted, taking or killing of migratory birds.

- The MBTA is a criminal statute. It establishes an absolute prohibition against any actions that result in the "taking" of migratory birds, including unintentional incidental takes resulting from military training.

- For 80 years, federal agencies were not considered a "person" subject to the permit requirements of the MBTA. *Humane Society v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) held that federal agencies are not exempt from these requirements.

- Currently, MBTA permitting categories do not cover many DOD activities. In the 2003 National Defense Authorization Act Congress directed the FWS to prescribe a regulation that exempts military readiness activities, including all training and operations of the Armed forces that relate to combat from the general prohibition of the MBTA. This incidental take authorization is set out at the MBTA regulations at Section 21.15 of 50 C.F.R. Part 21. As required by Executive Order 13186, DOD and FWS in 2006 entered into a memorandum of understanding (MOU) relating to the impacts on migratory birds from military activities. The MOU includes conservation measures and provide for minimization of intentional takes, identification of unintentional takes, and advance notice to FWS of anticipated takes.

National Historic Preservation Act (NHPA)

- Like NEPA, the NHPA is a planning statute. It ensures that historic properties are considered during federal project planning. It requires the Air Force to identify and take appropriate measures to preserve historical and archaeological resources under its control.

- Before approving the expenditure of funds on any "undertaking" or issuing a license, the Air Force is required to take into account the effect on any district, site, building, structure, or object that is included in, or eligible for inclusion in, the National Register of Historic Places (NRHP), and to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment

- The NRHP is an inventory of resources administered by the National Park Service (NPS)

- A property will be considered eligible for listing on the NRHP if it meets one of the following criteria:

  -- Association with events that have made a significant contribution to history

  -- Association with lives of persons significant in our past

  -- Embodiment of distinctive characteristics of a type or method of construction or representation of a master's work or possession of high artistic values (architecture)

  -- Potential to yield information important to history or prehistory (archeology)

- If a district, site, building, structure, or object meets the criteria and is eligible for listing, the Air Force must comply with identification, evaluation and consultation requirements of the NHPA, even if the resource is not yet listed on the NRHP

- If the Air Force determines that the undertaking will adversely affect historic properties, the Air Force should consult with the state historic preservation officer (SHPO) or, if applicable, the tribal historic preservation officer (THPO), to find ways to make

the undertaking less harmful. Consultation leads to a memorandum of agreement (MOA), outlining measures to avoid or mitigate adverse effects.

- Preservation is not required in every case. The installation commander retains complete authority in connection with the management of all facilities on the installation. In the event a historic property must be removed or destroyed, the Air Force can satisfy its mitigation requirements by accomplishing a recordation relating to the affected historic property. The SHPO/THPO or ACHP can provide expert advice, but has no veto power.

- Consultation under Section 106 of the NHPA should be completed before funds are expended or licenses are issued

- Failure to provide a reasonable opportunity to comment can result in a "foreclosure" letter sent by the ACHP to the Secretary of the Air Force, thereby making defense to legal challenges more difficult

- Ordinarily a property must have existed for at least 50 years to be considered historically significant unless the property is found to be of "exceptional" significance, such as is the case for the DOD "cold war resources" on some military installations

- Air Force is required to assume responsibility for preservation of historic properties it owns or controls and is also required to adaptively reuse historic properties, to the maximum extent feasible

Archeological Resources Protection Act (ARPA)

- Designed to protect archeological resources on federal and Indian lands, the ARPA requires identification of these resources on each installation. To prevent damage, destruction or vandalism, the location of the archeological sites can be kept confidential. FOIA does not apply to this information.

- Applies to past human life, resources over 100 years old, and retrievable scientific information. Does not include fossils, surface collected arrowheads, rocks, coins, bullets or minerals.

- Unauthorized excavation is prohibited. Therefore, private persons must obtain permits to excavate on Air Force land. This does not include Air Force contractors; however, all contracts should contain ARPA language for protecting archeological resources.

- Must notify tribes before issuing an ARPA permit if harm to a site with tribal, or traditional religious or cultural importance may result

- DOD regulations require installation commanders to establish public awareness programs to educate military personnel and their dependents and members of the community of the importance of these archeological resources to our national heritage

Native American Graves Protection and Repatriation Act

- Gives Native Americans the right to ownership and control of the disposition of human remains discovered on the installation, first to a lineal descendant or to the Indian tribe with cultural affiliation to the lands on the installation
- Requirements include creating an inventory of Native American cultural items in the possession of the AF, repatriating such items, and consultation with potentially affected Tribes prior to permitting an intentional archeological excavation or prior to removal of cultural items after an inadvertent discovery on the installation
- Cultural items include human remains, funerary objects, sacred objects and objects of cultural patrimony (having an ongoing importance to a group or culture)
- Intentional excavation requires an ARPA permit and consultation or consent of tribe
- In the event of an inadvertent discovery of cultural items, unless otherwise provided by agreement with an appropriate culturally affiliated tribe to a different standard operating procedure, the commander must stop activity for 30 days and reasonably protect the items. Then, must provide immediate notification and begin consultation in connection with the proper handling and disposition of the discovered cultural items.
- Scientific testing, investigation and curation are <u>not</u> authorized
- Consultation with federally-recognized Tribes to be conducted on a government-to-government basis, because Indian Tribes are sovereign nations

Religious Freedom

- Religious Freedom Restoration Act (RFRA) provides that the Air Force shall not substantially burden an American Indians traditional religious practice. Oftentimes these traditional religious practices are intertwined with the natural environment (e.g. mountain ranges, rivers) on or off the installation. Through government-to-government consultations, installations should be aware of traditional religious practices that could be affected by federal undertakings.
- American Indian Religious Freedom Act (AIRFA) promotes religious freedom by affirming the right of access to sacred places located on military installations. Promotes consultation with American Indian religious practitioners if a place of religious importance to American Indians may be affected by a federal undertaking.
- Executive Order 13007, Indian Sacred Sites, directs the federal land manager to accommodate access to and ceremonial use of Indian sacred sites on the installation to the maximum extent practicable with military mission, safety and security. The Air

Force should avoid affecting the physical integrity of such sites and should maintain confidentiality of their location, where appropriate.

Cultural Resource Preservation Duties

- To carry out these duties at the base level
  - -- The base CE designates an individual with a background in history, architecture, archaeology, or natural resources to serve as the base historic preservation officer
  - -- The wing CC may establish a historic preservation committee or assign this function to another installation committee such as the environmental protection committee

References:

Exec. Order No. 13007 (1996)

AFI 32-7061, *The Environmental Impact Analysis Process* (12 March 2003), Certified Current (2 April 2010)

AFI 32-7064, *Integrated Natural Resources Management* (17 September 2004)

AFI 32-7065, *Cultural Resources Management Program* (1 June 2004), Certified Current (2 November 2009)

Noise and Land Use

Issues regarding noise pollution and land use have the potential to directly affect the ability of Air Force installations to accomplish their mission and the manner in which that mission is accomplished. Limited noise regulations are established under the Federal Noise Control Act.

Federal Noise Control Act (FNCA)

- The FNCA exempts aircraft, military weapons, and equipment designed for combat use from noise regulation under the Act
- Although the FNCA generally subjects government agencies to state and local noise control regulation, the courts have determined that state and local regulation of aircraft noise is preempted by FAA regulation
- The FNCA requires the Air Force to comply with state and local noise stationary source regulations to the same extent as any other person

Air Installation Compatible Use Zone (AICUZ) Program

- Local governments ordinarily establish land use regulations. The Air Force supports and encourages local zoning and other land use controls that ensure the base environs, especially private lands adjacent to runways, remain compatible with continued Air Force operations.
- Without proper land use controls, new development near airfields may increase the number of noise complaints and the potential for injuries and damage due to aircraft accidents. Also, changes in operations, e.g., beddown of new aircraft, changes in flight paths, may result in lawsuits by private landowners claiming the Air Force has "taken" their land.
- To assist local governments in establishing suitable land use regulations in the vicinity of the base, the DOD has established the AICUZ program
- The Air Force develops and provides to local land use planning authorities, land use recommendations designed to ensure continued compatibility between the installation and neighboring civilian communities
    - The first step in preparing an AICUZ proposal is to identify areas that have a high accident potential or that are affected by high noise levels from aircraft operations from the military airfield
    - The Air Force uses this information to assess compatibility of land uses with current and projected Air Force operations and to make recommendations to the local zoning authority

-- The Air Force has no authority to implement the land use recommendations set forth in the AICUZ study or to control or regulate off-base land uses. The Air Force simply presents the proposal to the local zoning officials, which has the authority to approve or reject the Air Force proposal.

-- Presentation of the Air Force AICUZ study requires tact and discretion

-- The installation commander is responsible for ensuring that the AICUZ recommendations are presented to local zoning officials in a professional and persuasive manner. Close coordination between the commander and his/her base comprehensive planner and local zoning officials is essential to educate local land use planners regarding the noise and safety impacts on private lands adjacent to the ends of the runways or in the immediate vicinity of the airfield so that the local authorities will choose to prevent incompatible land uses and avoid inconsistent development from occurring in high noise or accident potential zones.

-- Encroachment upon important training airspace calls for expanding the AICUZ concepts to all critical real property and airspace assets needed to sustain the mission at the installation. These areas may be a distance from the airfield but the surrounding communities are encouraged to assist in maintaining the flying capacity of the installation through prudent land use planning to ward off unnecessary incompatible and conflicting land development. Congress has also provided authorities to acquire property interests where necessary to prevent encroachment upon installation critical assets. (10 U.S.C.§ 2684a).

-- Air Force representatives should be particularly careful to avoid threatening the local community with reprisals if the Air Force proposal is not accepted; and Air Force representatives ought not to appear to apply coercion or otherwise have undue influence on the local zoning officials who hold the exclusive authority to develop a comprehensive zoning plan for the community

-- Minimize potential for lawsuits by maintaining close consultation with the SJA

References:

42 U.S.C. §§ 4901-18, Noise Control Act of 1972

32 C.F.R. Part 256, Air Installations Compatible Use Zones

AFI 32-7063, *Air Installation Compatible Use Zone Program* (13 September 2005), Certified Current (17 November 2009)

AFH 32-7084, *AICUZ Program Manager's Guide* (1 March 1999)

Clean Air Act

The Clean Air Act (CAA) (42 U.S.C. §§ 7401 to 7671(q)) is one of the most comprehensive and complicated environmental statutes. This guide is intended to be an introduction to the Act. Specific questions or issues should be referred to your staff judge advocate (SJA). Federal facilities, including Air Force installations, are subject to the substantive requirements of the CAA as a result of a waiver of sovereign immunity in the Act.

Air Quality Emissions Limitations

- The primary air pollutants regulated by the CAA are called "criteria pollutants." Currently, there are six (6) criteria pollutants: Ozone (O3), Carbon Monoxide (CO), Sulfur Dioxide (SO2), Particulate Matter (PM10 & PM2.5), Lead (Pb), & Nitrogen Oxides (NOx)
  - -- The United States is divided into air quality control regions (AQCR) to control these pollutants. AQCRs usually consist of several counties but, depending on the area, it may only be one county or even a portion of a county.
  - -- For each criteria pollutant, EPA has established a health-based national ambient air quality standard (NAAQS). This standard establishes a bright line between healthy air and polluted air.
  - -- An AQCR that tests lower than this standard is considered to be in "attainment" for that pollutant. An AQCR that tests over this standard is considered to be in "non-attainment" for that pollutant. Once a nonattainment area reaches the NAAQS, it is considered a "maintenance area" because the area, although now in attainment, is subject to "maintenance plan" requirements for up to 20 years.
- <u>State Implementation Plans (SIPs)</u>
  - -- States have primary responsibility for assuring NAAQSs are met within the state
  - -- The states are required to create a planning document, called a state implementation plan (SIP), setting forth the means to achieve or maintain air quality within its AQCRs. States are required to submit SIPs to EPA for approval.
    - --- Once approved, SIP requirements are enforceable by both the state and the EPA
    - --- A state's SIP is required to set forth enforceable emissions limitations and timetables, technological or process changes, monitoring requirements, and an enforcement program
  - -- In "nonattainment" and "maintenance" areas, Federal entities are prohibited from supporting or taking any action that does not conform to a SIP. This requirement

is called "general conformity." The requirement means that before undertaking any action that impacts air quality (e.g. construction activity, weapon system bed-down, mission realignment, training exercise, etc.), in "nonattainment areas" or "maintenance areas," an analysis must be conducted to demonstrate that the proposed action will not hinder attainment or maintenance of air quality standards.

New Sources of Air Emissions

- In addition to meeting emissions limits under a state's SIP, new pollution sources (or major modifications of existing sources that increase pollution emissions) must meet new source performance standards (NSPS) or new source review (NSR) requirements

- New (or modified) sources must incorporate approved, environmentally safe, equipment to restrict emissions

- Large new sources are subject to preconstruction review and permitting

- The nature of the permitting requirement varies depending on whether the new source is a "major" or "minor" source. Determining whether a source is "major" depends on whether the source is in an attainment (clean) or nonattainment (dirty) area and the source's potential to emit (PTE). The definition and determination of a "major source" also varies upon what program applies. In attainment areas, a major source, for purposes of permitting new or modified sources, is typically one with the PTE up to 250 tons per year (tpy) of any one criteria pollutant per year. In a nonattainment area, PTE as little as 10 tpy may make your source "major" and, thus, require a permit. It is the PTE, not the actual or planned level of emissions that triggers the permit requirement.

Hazardous Air Pollutants (HAPS)

- In addition to the regulation of emissions of criteria pollutants, the Clean Air Act also regulates the emission of HAPs, also referred to as air toxics. These pollutants cause or may cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental and ecological effects.

- Under the 1990 amendments to the Clean Air Act, 189 specific air toxics are to be regulated. Examples of toxic air pollutants include benzene, which is found in gasoline; perchlorethlyene, which is emitted from some missile operations; and methylene chloride, which is used as a solvent and paint stripper by depots and a number of other industrial sources.

- Any stationary source having a potential to emit 10 tpy of a listed HAP or 25 tpy of any combination of HAPs is considered a "major source" subject to regulation, including permits

- Major HAP sources must install technology that will result in the maximum degree of HAP emission reduction that is achievable. This technology is called maximum available control technology (MACT) standards.

Operational Permits

- Title V of the Clean Air Act Amendments of 1990 requires that an operational permit be obtained for any "major" stationary source of a criteria or hazardous air pollutant

- Major sources for purposes of this program are sources with PTE of 100 tpy, or more, in attainment areas. In nonattainment areas, a major source is determined by the severity of the pollution; and the PTE thresholds range from as little as 10 tpy to 100 tpy.

- Title V permits; permit applications, certifications of compliance, emergency reports and required semi-annual emissions reports must be signed by the wing commander as the "responsible official." This responsibility cannot be delegated at federal facilities, and the authority cannot be assumed by an "acting" commander in the absence of the wing commander.

Mobile Sources

- In addition to addressing stationary sources of pollution, e.g., boilers, fueling systems, and heat plants, the Clean Air Act also addresses mobile sources, such as automobiles

  -- Mobile source controls normally take the form of requirements on manufacturers to meet tailpipe emissions standards (generally not of concern at the installation level), or requirements to use low polluting fuels or clean fuel vehicles (which may apply to installation vehicle purchase or use)

  -- Military aircraft and combat vehicles with weaponry or armor are entitled to application of automatic national security exemptions from tailpipe standards by the manufacturers and case-by-case exemptions are available for other tactical vehicles or equipment (e.g., two-stroke outboard motors for special forces Zodiac boats)

- However, new or modified operational emissions in nonattainment or maintenance areas from these same aircraft, vehicles, and equipment (that are eligible for national security exemptions when manufactured) are subject to the General Conformity requirement discussed above

Stratospheric Ozone Protection

- Generally, the Clean Air Act phases out the production of ozone depleting substances. Other laws and regulations regulate the continued use of these substances.

- -- Ozone-depleting substances are still used as fire suppressants, refrigerants, and inerting agents in combat aircraft fuel tanks
- -- Any use, storage, or handling of these substances is highly regulated

- In the absence of adequate substitutes, the EPA is authorized to grant exemptions to the consumption of specific ozone depleting substances

Enforcement

- Regulators, under the CAA, have all the common environmental enforcement rights -inspections, fines, injunctions, and criminal sanctions
- The CAA also provides for citizen suit rights
- Sovereign Immunity for fines and penalties
  - -- DOD does pay fines imposed by EPA
  - -- Presently, it is the position of the Department of Justice that Congress has not waived immunity for payment of fines and penalties imposed by states. DOD does not pay fines to states under the CAA except under limited circumstances, e.g., state-imposed CAA penalties are paid within 6th Circuit due to a Court of Appeals decision.
  - -- As with all areas of the CAA, please consult your SJA regarding CAA fines

References:

42 U.S.C. §§ 7401–7671q

AFI 32-7040, *Air Quality Compliance and Resource Management* (27 August 2007)

Clean Water Act/Safe Drinking Water Act

In general, the Clean Water Act (CWA) (33 U.S.C. §§ 1251 to 1387) regulates surface water quality and the disturbance of wetlands. The Safe Drinking Water Act (SDWA) (42 U.S.C. §§ 300f to 300j-26) regulates the quality of drinking water. The rights to the use of both surface water and groundwater are generally governed by state law and are not the focus of these acts.

Clean Water Act

- The CWA states that it is unlawful to discharge pollutants from a point source to surface waters without a permit
- The statute defines "pollutant" very broadly to include almost any man-made addition to a body of water, including dredge and fill activities (bringing in wetlands) and pollutants from stormwater that drains from facilities
  - -- The surface waters covered by the Act encompass all "waters of the United States, including the territorial seas." But, it does not include "isolated" wetlands, which is a term that continues to evolve.
  - -- The Act regulates discharges from a "point source," which is defined as "any discernible, confined and discrete conveyance" that discharges or may discharge pollutants
    - --- Examples of point sources are pipes, ditches, tunnels, conduits, wells, containers, rolling stock, and vessels
    - --- This definition excludes two major sources of pollution from the Act's coverage
    - --- Infiltration of ground water that does not have a distinct hydrological connection with surface water
    - --- Surface runoff that does not come from a point source, e.g., farmland runoff. However, stormwater from construction activities and industrial activities is either directed into a sedimentation pond or presumed to be channeled, e.g. in ditches, which leaves industrial and construction stormwater within the NPDES program.
- Under the CWA, there are two primary permitting systems—the Section 404 program, which regulates dredge and fill activities (i.e. activities which disturb wetlands), and the National Pollution Discharge Elimination System (NPDES), which regulates the discharge of other pollutants from wastewater plants and which includes the stormwater permit program

- NPDES program (§ 402)
  - -- Environmental Protection Agency (EPA) has delegated the authority to administer the NPDES program to most states
  - -- Each state retains the authority to adopt more stringent limitations than those established by EPA
  - -- EPA retains a veto authority over delegated states
- The EPA regional office issues permits in states that have not been delegated authority
- The NPDES program addresses discharge from both traditional point sources, such as sewage treatment plants, and storm water discharges
- The NPDES program regulates two very broad types of dischargers, direct and indirect
  - -- Direct: Discharge effluent directly from a facility to surface water. Such discharges will require a permit as discussed above.
  - -- Indirect: Discharge to a wastewater treatment works rather than directly into surface water
  - -- Though no NPDES permit is required for indirect dischargers, pretreatment of the wastewater is required before introducing it into a treatment works
- Dredge and Fill Activities (§ 404). In conjunction with EPA, the U.S. Army Corps of Engineers administers a second permit program that regulates dredge and fill activity.
  - -- EPA has responsibility for developing guidelines for the Corps to use in specifying disposal sites. The EPA also has authority to limit the use of a disposal site approved by the Corps when the discharge into that area will have an unacceptable adverse impact.
  - -- In some circumstances, a state may be delegated primary jurisdiction over dredge and fill permits within its boundaries
  - -- There may also be nationwide permits applicable for some minor activities
  - -- Clearing and construction in wetlands requires that the Air Force obtain a dredge and fill permit
  - -- Failure to obtain a permit can delay projects; require the Air Force to restore land to its prior natural condition; and/or subject Air Force personnel to criminal liability
- The CWA also mandates that each state develop a plan to reduce nonpoint source pollution that contributes to water quality control problems in the area

- Enforcement
  - The CWA waives sovereign immunity, subjecting federal agencies to state and local regulations
  - The waiver applies to both substantive and procedural requirements, including permits and reasonable service charges, but does not authorize the payment of civil or administrative fines and penalties

Safe Drinking Water Act

- The Safe Drinking Water Act (SDWA) (42 U.S.C. §§ 300f-300j-26) sets standards for public water systems (PWS) and prohibits underground injection that endangers drinking water sources
  - Standards apply to PWS that have 15 connections or serve 25 people for at least 60 days/year
  - The Act exempts from its coverage any PWS that receives all of its water from another PWS. That consists only of distribution and storage facilities (and does not have any collection or treatment facilities); that does not "sell" water to any person; and that is not a carrier conveying passengers in interstate commerce.
  - Many PWS do not qualify for this exemption simply because they engage in minor treatment of their water (e.g., adding chlorine to maintain disinfection levels), or because they "sell" water by virtue of providing it to tenants. The EPA has allowed the regulatory authority to modify the monitoring requirements imposed on such "consecutive PWS." This matter must be evaluated based on the law and regulations of the permitting authority.
  - The Act specifies maximum contaminant levels for drinking water as well as treatment, testing and reporting requirements enforceable by states with EPA oversight
- The 1996 amendments to the Act rewrote the waiver of sovereign immunity. As a result, federal facilities are now subject to punitive civil fines and penalties.

References:

42 U.S.C. §§ 300f–300j-26, The Safe Drinking Water Act of 1974

33 U.S.C. §§ 1251 *et seq.*, Clean Water Act

Executive Order Number 11900, *Protection of Wetlands* (24 May 1997)

AFI 32-1067, *Water Systems* (25 March 1994)

AFI 32-7041, *Water Quality Compliance* (10 December 2003) (28 January 2010)

AFI 32-7047, *Environmental Compliance Tracking and Reporting* (8 April 2004)

AFI 48-144, *Safe Drinking Water Surveillance Program* (19 March 2003), Interim Change 1 (1 October 2008)

Water Rights

- "Water rights" are a type of property right allowing for the diversion of water from its natural state, e.g. pumping it from the ground or transporting it from a stream. (Where we purchase water from a utility, the utility, not the installation, has the water right; utility contracts are thus outside the scope of this discussion.) Like other types of property law, most water rights law is state, not federal law, but federal law water rights are created upon public domain land which has been withdrawn for a specific federal purpose. These "federal reserved rights" will generally be found on western installations, and under most circumstances, are paramount to state rights. Local real estate offices can provide a history of whether a particular installation has parcels of "public domain" lands.

  -- Most states' water law is derived from one of two broad doctrines, the Riparian Rights Doctrine, and the Prior Appropriation Doctrine. Several states have hybrid schemes, drawing from both doctrines. Generally, riparian systems are found in the east and the prior appropriation system is found in western states. Washington, Oregon, and California have a combination of the two systems.

    --- The Riparian Rights Doctrine assigns the right to divert water from a water source to landowners with land riparian to (bordering or including) the water source. Landowners have analogous "overlying rights" to divert groundwater from sources situated beneath their land.

    --- The Prior Appropriation Doctrine assigns the right to divert water (and priorities among water rights holders) on the basis of historical usage, with first-in-time given priority over later uses

    --- The Federal Reserved Rights Doctrine is the third doctrine created under federal law pursuant to which land withdrawn from the public domain (in those western states in which all title derives from the Federal government), and reserved for a particular purpose, is entitled to the minimum amount of (previously unallocated) water necessary to fulfill the purpose of the reservation. This doctrine is judicially created by Supreme Court cases. As indicated earlier, these rights, when applicable, are favored, and provide a number of advantages.

  -- Sovereign immunity

    --- The key waiver of sovereign immunity with regard to water rights allows the United States to be sued in "general stream adjudications," i.e. in lawsuits designed to determine the rights of all potential claimants to a source of water. The Air Force has been involved in several major water adjudications in Arizona, Nevada, and Idaho. Water issues continue to be an issue at all major western installations and are also becoming more of an issue for all Air Force

installations as questions related to the need for permits and payment of fees for Air Force water use has increased.

--- There is no waiver of sovereign immunity as to the regulation of those water rights which state law provides to the Federal government as of right, e.g., by virtue of being a landowner, nor is there any waiver of sovereign immunity to comply with state water codes. As a matter of policy, SAF has previously directed the Air Force comply voluntarily with a state groundwater code to the extent practicable and consistent with fiscal law and sovereign immunity principles. Generally, the Air Force should not pay any fees associated with a state's efforts to charge the federal government with the privilege of withdrawing water; i.e. water assessment fees. Small administrative fees which protect Air Force water rights and provide a benefit to the installation may be paid after a determination that fees are appropriate. An example would be to pay an administrative fee to change a point of diversion for a well on an installation that does not have federal reserved rights; to protect the valuable water right under state law.

- Key issue for bases: Preservation of water rights

  -- In most prior appropriation states, water rights can be lost inadvertently, as by failing to follow procedures for transferring water rights when closing a well. Federal reserved rights cannot be abandoned as long as the installation is active.

  -- In many prior appropriation states, where records may be particularly important, bases do not always preserve important records, e.g. records of water usage necessary to establish the right to take water. It is prudent to maintain all water use records.

  -- As water becomes scarcer in prior appropriation states, new users may deprive installations with established water rights of water if those installations are not vigilant enough to file objections to applications for water rights which could draw down water to which the installation has an existing right. CE should monitor activities with local regulators relating to water sources within the area.

  -- In many riparian rights states, state and local authorities are eager to tax and to regulate rights which are not subject to any waiver of sovereign immunity as to taxation or regulation. Some bases have mistakenly paid these taxes. Questions regarding payment of water fees should be directed to the staff judge advocate.

Solid and Hazardous Wastes

The Solid Waste Disposal Act (SWDA) (a.k.a., the Resource Conservation and Recovery Act (RCRA)) imposes requirements for the management of hazardous wastes (HW) and non-hazardous solid wastes. The Act also provides for regulation of underground storage tanks (USTs).

Hazardous Waste Management: Subtitle C

- RCRA imposes comprehensive requirements on those who generate, transport, treat, store, or dispose of HW. Every Air Force installation generates HW and many have RCRA regulated facilities for the treatment, storage, and/or disposal of HW.

- RCRA hazardous wastes are solid wastes that are specifically listed as hazardous waste in the Code of Federal Regulations (C.F.R.) or solid wastes that exhibit a hazardous characteristic (ignitability, corrosivity, reactivity, or toxicity). The Act excludes certain categories of waste from its coverage.

- Although used oil destined for disposal or recycling is not a listed HW, RCRA imposes management requirements for used oil from generation to reuse or disposal. Used oil that exhibits a hazardous characteristic and is not recyclable must be managed as HW.

- RCRA creates a system that regulates and tracks HW from "cradle-to-grave"

  -- RCRA sets strict requirements for storing and handling wastes and for personnel training, equipment, inspections, and emergency response planning. Most of these requirements must be documented and the records kept for inspection.

  -- HW may only be accumulated in accordance with specific requirements. Containers must be properly marked, closed, and kept secure from unauthorized access or tampering.

  -- An initial accumulation point (a.k.a. "satellite point") is a designated location at or near the point of generation of HW. At this location, waste cannot exceed 55 gallons of HW or one quart of acutely hazardous waste. Once the limit is exceeded, the container must be moved to an accumulation site or permitted TSD facility within three days.

  -- An accumulation site is used to temporarily store hazardous wastes until they are shipped to a Treatment, Storage and Disposal (TSD) facility. For those generating large quantities of hazardous waste, the waste may be retained at an accumulation site for up to 90 days. For small quantity generators (defined by the Act and regulations), waste may be stored longer.

- -- HW is tracked by a manifest initiated by the generator. When waste is transferred to permitted entities that transport, treat, store or dispose of it, the uniform hazardous waste manifest is annotated to show that it passed into their possession and was properly managed.
- -- Transporters must properly label HW and deliver it to a designated TSD facility and must comply with Department of Transportation (DOT) requirements for containers, labeling, placarding of vehicles, and spill response

- Installations must develop a hazardous waste management plan (HWMP). The HWMP incorporates a waste analysis plan, which is the primary document used to identify all waste streams generated at the installation.

Solid Waste: RCRA, Subtitle D

- The Act establishes minimum requirements for controlling and monitoring solid waste disposal. States are given responsibility for the regulation of nonhazardous (municipal) solid wastes.

- Municipal solid waste includes containers and packaging, food scraps, and yard trimmings. It does not include medical and hazardous wastes, construction and demolition debris, municipal sludge, and ash from power plants and incinerators.

Underground Storage Tanks (USTs): RCRA, Subtitle I

- The Act covers tanks, including connecting underground pipes, when ten percent or more of the volume of the tank and its underground pipes are beneath the surface of the ground

- Tanks that meet this definition are covered if they contain a regulated substance. This includes any hazardous substance (defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)) or petroleum or substances that are derived from crude oil. Tanks containing HW are regulated under Subtitle C.

- Existing tanks must be brought up to specified performance standards or closed. If a tank has a release, owners and/or operators must take corrective action, including cleaning up the area around the tank. New tanks must meet specified standards, and the appropriate regulatory agency must be notified before a new tank is installed.

State Programs

- The Environmental Protection Agency (EPA) may delegate the authority to regulate RCRA activities so long as the state's program is at least as stringent as the federal requirements. The EPA retains the discretion to enforce RCRA even in states with delegated enforcement authority.

- Waivers of sovereign immunity in RCRA require federal facilities to comply with state and local substantive and procedural requirements. Congress recently amended the UST provision of RCRA to affect a similar waiver of sovereign immunity.

Pollution Prevention Program

- It is DOD policy to reduce the use of hazardous material, the generation or release of pollutants, and the adverse effects on human health and the environment caused by DOD activities
  - -- The Air Force manages to reduce use of hazardous materials and the release of pollutants into the environment in the following hierarchy of actions:
    - --- Reduce/eliminate dependence on hazardous materials and reduce waste streams
    - --- Reuse generated waste and recycle waste not reusable
    - --- Employ treatment
    - --- Dispose or release pollutants into the environment only as a last resort
  - -- Major commands establish procedures to ensure installations develop and execute pollution prevention management plans. Plans must contain management strategies for ozone depleting chemicals, EPA 17 industrial toxics, hazardous waste, municipal solid waste, affirmative procurement of environmentally friendly products, energy conservation, and air and water pollutant reduction.
  - -- Installations must conduct opportunity assessments on a recurring basis for all pollutant sources. The assessment examines the total waste generation by type and volume of content and determines the most economical and practical option for reduction.

Federal Procurement, RCRA subtitle F

- RCRA Section 6002 and Executive Order 13101 require federal agencies to establish an affirmative procurement program (also known as the green procurement program)
  - -- The EPA designates which items are or can be produced with recovered materials, such as paper, retread tires, building insulation, cement/concrete containing fly ash, and re-refined oils
  - -- Federal agencies must procure these designated items composed of the highest percentage of recovered material practicable, unless they are not reasonably available, fail to meet performance standards, or are available only at an unreasonable price

--- Procurement not limited to contracting activities, but also includes IMPAC card purchases

--- Installations must train all Air Force personnel on the federal procurement requirements

-- The EPA is required to evaluate the federal agency's compliance with RCRA Section 6002 and EPA guidance when conducting RCRA inspections. Although the EPA has no enforcement authority, it can issue a notice of violation for non-compliance with RCRA Section 6002 or the EPA guidance.

References:

42 U.S.C. § 6901-92, Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act (RCRA))

AFI 32-7042, *Waste Management* (15 April 2009), Incorporating Change 1 (31 March 2010)

AFI 32-7044, *Storage Tank Compliance* (13 November 2003)

AFI 32-7060, *Interagency and Intergovernmental Coordination for Environmental Planning* (25 March 1994)

AFI 32-7080, *Pollution Prevention Program* (12 May 1994), Certified Current (27 October 2009)

AFI 32-7086, *Hazardous Materials Management* (1 November 2004), Certified Current (29 December 2009)

AFMAN 32-4013, *Hazardous Material Emergency Planning and Response Guide* (1 August 1997)

OSD Memorandum, *Establishment of the DOD Green Procurement Program* (27 August 2004)

Control of Toxic Substances

- The Toxic Substances Control Act (TSCA) (15 U.S.C. §§ 2601-92) regulates the manufacture, processing, and distribution of chemicals that pose unreasonable risk of injury to human health or the environment

- Authorizes EPA to screen existing and new chemicals to identify potentially dangerous products or uses. The EPA can take action ranging from banning the production, import, and use of a chemical to requiring that a product bear a warning label.

- Prohibits manufacturing and distribution of polychlorinated biphenyls (PCBs)

  -- PCBs were common components in hydraulic fluids, lubricants, insecticides, and heat transfer fluids and were used in electrical equipment (e.g., transformers, capacitors)

  -- Old transformers and capacitors containing PCBs may be found on installations, as might PCB-contaminated soil. Other sources of PCBs or PCB contamination may be past insecticide spraying, ceiling tile coatings, and certain painted surfaces.

  -- Consistent with AF Policy and TSCA, installations focus on PCB elimination

- TSCA also regulates asbestos

  -- Asbestos was widely used in thousands of products because it is strong, flexible, will not burn, insulates effectively, and resists corrosion (e.g., floor tiles, insulation, or sealants)

  -- The inhalation or ingestion of asbestos fibers can cause disabling or fatal diseases

  -- Regulatory requirements cover, among many things, remediation of asbestos hazards, implementation of proper work practices, and training in proper handling

  -- Installations are most likely to encounter asbestos when maintaining, repairing, renovating, or demolishing buildings or utilities

  -- Asbestos is also regulated by other statutes, including the Clean Air Act and the Occupational Safety and Health Act

  -- Air Force manages asbestos to reduce exposure to airborne asbestos fibers

- TSCA also requires studies of federal buildings to determine the extent of indoor radon contamination. The Act does not require monitoring or abatement of radon.

  -- Radon is a naturally-occurring radioactive gas that may be found in drinking water and indoor air

- -- Radon in soil under homes is the biggest source of radon in indoor air, which presents serious health risks, including cancer
- -- In 1999, the EPA proposed a rule to reduce radon in drinking water. Although public comment was complete in 2000, the rule has not yet been adopted. (see http://www.epa.gov/ogwdw/radon/proposal.html)

- TSCA also addresses lead hazards, including requirements for the identification, reduction, disclosure, and management of lead-based paint
  - -- Lead, especially lead-based paint (LBP), is a major concern on installations. LBP was commonly used on many buildings prior to 1950, including military family housing. Lead-contaminated soil and dust are also a problem. Must address lead hazards during maintenance, repair, renovation, and demolition of buildings.
  - -- Lead hazards are also an important issue when property is transferred or sold
  - -- Lead exposure can cause serious health effects, particularly in children
  - -- TSCA seeks to reduce the lead hazard to young children by focusing on child-occupied facilities and "target housing" (housing built before 1978)
  - -- Although TSCA does not contain a general waiver of sovereign immunity, the waiver for LBP is extensive, requiring DOD to comply with federal, state, and local requirements
  - -- EPA and DOD have agreed that lead-contaminated soil outside a housing unit will be governed by TSCA and its implementing regulations rather than CERCLA
  - -- DOD policy requires military installations to comply with the disclosure regulations related to LBP in military family housing

References:

15 U.S.C. § 2601-92, Toxic Substances Control Act (TSCA)

AFI 32-1052, *Facility Asbestos Management* (22 March 1994), Certified Current (1 April 2010)

AFMAN 48-155, *Occupational and Environmental Health Exposure Controls* (1 October 2008), Certified Current (16 April 2010)

Memorandum, Office of the Under Secretary of Defense, *Lead-Based Paint Policy for Disposal of Residential Real Property* (7 January 2002) (w/attachment *Field Guide, Lead-Based Paint Guidelines for Disposal of Department of Defense Residential Real Property*, December 1999)

Memorandum, Office of the Under Secretary of Defense, *Disclosure of Known Lead-Based Paint (LBP) and/or LBP Hazards in DOD Family Housing* (18 February 1997)

Memorandum, Office of the Under Secretary of Defense, *Asbestos, Lead Paint and Radon Policies at BRAC Properties* (31 October 1994)

Memorandum, HQ USAF/CC, *Air Force Policy and Guidance on Lead-Based Paint in Facilities* (24 May 1993)

Memorandum, HQ USAF/CEV, *Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule* (19 August 1996)

Memorandum, HQ USAF/CEV, *Air Force PCB-free Status and Clarification of "Target" PCB Equipment* (15 May 1996)

Memorandum, USAF/CEV, *Polychlorinated Biphenyl (PCB) Pollution Prevention Program* (27 February 1996)

Environmental Law Overseas

Overseas compliance is governed by the requirements of: (1) international treaties and agreements; (2) the few United States laws that have extraterritorial application; and (3) DOD and service policy

- Treaties, Status of Forces Agreements (SOFAs), and International Agreements
  - -- Can be ambiguous as to applicable standards since many were drafted prior to development of specific environmental laws in the 1970s and 1980s
  - -- SOFAs and supplemental agreements
    - --- The 1993 Supplementary Agreement with Germany contains several provisions that the United States is obligated to observe
    - --- The U.S./South Korea SOFA includes provisions that address environmental protection
  - -- The Basel Convention, which governs trans-boundary movement of hazardous wastes (HW), is applicable to the Air Force. The United States has signed but not ratified.
    - --- Limits waste-handling options in countries with inadequate disposal facilities
    - --- The Environmental Modification Convention prohibits significant impairment of the environment during hostilities
- U.S. Laws
  - -- Generally do not have extraterritorial application unless expressly stated
  - -- The National Environmental Policy Act (NEPA) has limited overseas application, e.g., where a sovereign country does not assert jurisdiction
  - -- Some laws have extraterritorial application, such as the National Historic Preservation Act
- Executive Orders
  - -- Executive Order (E.O.) 12088 directed compliance with host nation environmental pollution control standards of general applicability
  - -- E.O. 12114, as implemented by DODD 6050.7, requires environmental analysis of overseas actions with potential for significant environmental impacts
    - --- Environmental reviews or studies are required for major federal actions significantly affecting the environment of a foreign nation not involved in the

action and for actions that produce a product that is strictly regulated in the United States

--- Environmental analysis is also required for actions that significantly affect natural and ecological resources of global importance and for actions that affect the global commons outside the jurisdiction of any nation, e.g., the oceans or Antarctica

- <u>DOD and Air Force Guidance</u>

  -- DODI 4715.5 prescribes overseas compliance rules for environmental programs and appoints an Environmental Executive Agent (EEA) for each host nation

  -- The Overseas Environmental Baseline Guidance Document (OEBGD) includes environmental management practices

    --- Sets environmental standards based on generally accepted standards for similar installations in the United States

    --- Provides the foundation for development of final governing standards (FGS)

    --- Provides environmental compliance and conservation standards where no FGS have been established

- <u>Final Governing Standards (FGS)</u>

  -- Country-specific substantive standards applicable to DOD operations

  -- Based on more stringent of either: OEBGD (applicable host nation law that is generally enforced) and applicable international agreements (developed in a multi-service committee review process under the guidance and direction of that country's EEA)

  -- Temporary waivers of FGS available if compliance at installation would

    --- Seriously impair operations

    --- Adversely affect relations with host nation; or

    --- Require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or at an installation that has been identified for a realignment that would remove the requirement

  -- Set compliance standards and priorities for environmental compliance funds

- <u>Cleanup/Restoration</u>

  -- For current operations, OEBGD or FGS (whichever is applicable) specifies management of spills and UST leaks as they occur

- For spills that occurred from past DOD activities, DODI 4715.8 and AFI 32-7006, Chapter 2, specify DOD policy
  - -- Response requirements depend on whether the overseas installation is currently in use and is not slated for return; has been designated for return or already has been returned to the host country; the contamination is on base or off; and/or whether the site poses a known imminent and substantial endangerment situation
  - -- Coordinate with the MAJCOM; spill cleanup can be required where there is imminent and substantial endangerment, when it is needed to maintain operations or protect human health and safety, or is required by international agreement. Additional cleanup may be undertaken by host nation and can affect residual value calculation.

References:

Exec. Order. No. 12088, *Federal Compliance with Pollution Control Standards* (13 October 1978)

Exec. Order. No. 12114, *Environmental Effects Abroad of Major Federal Actions* (4 January 1979)

DODD 6050.7, *Environmental Effects Abroad of Major Department of Defense Actions* (31 March 1979) Certified Current (5 March 2004)

DODI 4715.5, *Management of Environmental Compliance at Overseas Installations* (22 April 1996)

DODI 4715.8, *Environmental Remediation for DOD Activities Overseas* (2 February 1998)

AFI 32-7006, *Environmental Program in Foreign Countries* (29 April 1994), Certified Current (11 May 2010)

CHAPTER SEVENTEEN: INTERNATIONAL AND OPERATIONS LAW

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Introduction to International and Operations Law

Commanders increasingly need to understand the legal implications of being assigned, deployed, or involved beyond U.S. borders. Accordingly, the following provides a brief summary of the broadest area they must be familiar with, international law. It also provides the key rules associated with international agreements. Finally, it explains the terminology currently used to describe peace operations.

International Law: Definition and General Background

- The Law of Nations. International law is that law which governs the conduct of countries, also known as "states," and of recognized international organizations, but historically not that of individuals. Increasingly, individuals are the subjects of international law; primarily under international human rights law.
- This law is vastly different from the kind of law we are used to in the United States
- It is formed differently and the branches of government we generally associate with law do not exist in the same manner in the international legal system
- The fact that international law is different does not make it any less binding. Violations of international law get worldwide attention and may have significant international consequences.

Two Main Forms of International Law: Treaty Law and Customary Law

- Treaty law is a broad category of mostly written, but sometimes oral, agreements entered into by authorized representatives of the parties, with each party being either a nation or a recognized international organization
  - The parties in essence enter into a contract over the subject matter of the treaty, and agree that international law shall govern the terms of the agreement
  - Parties include any state and any recognized international organization; for example, United Nations Organization (UNO), North Atlantic Treaty Organization (NATO), International Committee of the Red Cross (ICRC)
  - Other terminology may be used to describe treaty law such as convention, international agreement, covenant, pact, protocol, status of forces agreement (SOFA), memorandum of understanding (MOU), or memorandum of agreement (MOA). Under international law the title or form of an agreement has no legal significance.
  - Some agreements, though entered into between foreign entities, will not be governed by U.S. requirements for international agreements. For example, it is a U.S. requirement to report international agreements to Congress. See AFI 51-701,

Negotiating, Concluding, Reporting, and Maintaining International Agreements, discussed below, to determine what type of international agreements fall outside of U.S. requirements.

-- Some classic examples of treaty law

--- United Nations Charter

--- Disarmament Treaties

--- NATO SOFA

--- Outer Space Treaty

--- Conventional Weapons Treaty

- Customary law, also called international custom and customary international law

-- Customary law is that form of international law created by the general and consistent practice of nations such that states view the practice, or custom, to be legally binding

-- Customary law may take centuries to evolve, or it may be formed very quickly. Examples include:

--- The 3-mile limit: This is a law of the sea custom, which states that a country's territorial sea extends outward three miles beyond the coast. Territorial sea retains all of the country's sovereign rights, the same as if on land. Over the centuries this custom evolved because a nation could defend its territory with coastal batteries, and the cannon ball could fly up to three miles out. Today, the "treaty" rule, found in the United Nations Law of the Sea Convention, recognizes up to a twelve-mile limit.

--- Outer space overflight: The customary law which states that a nation's space vehicles could overfly (in outer space) the territory of other nations without seeking prior consent became recognized as customary law within a few years of Sputnik

--- Law of land warfare: Those international rules we generally associate with the Hague Conventions of 1907 evolved as custom but were then codified in treaties

--- Law of the Sea: Most of the rules found in the U.N. Convention on the Law of the Sea, formed first as custom, then were codified in the Convention

International Agreements in the United States Air Force

- AFI 51-701 generally regulates this area for all Air Force personnel

-- Remember that someone in your chain-of-command is directly responsible for obtaining the proper authority to negotiate and conclude international agreements

-- With this firmly in mind, be careful that your own words or conduct do not lead your foreign counterpart to believe that you are entering into an international agreement

-- The files are full of well-intending commanders who independently struck deals, using U.S. money to fix foreign roads, or giving old communications gear to the host country's military, only to find out later they had no authority to act in these situations

-- Definition of "international agreement" from AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements*

--- Any agreement completed with one or more foreign governments or with international organizations

--- Signed or agreed to (oral agreements can be binding), by personnel of any DOD Component, or by representatives of the Department of State, or from other departments or agencies of the U.S. Government

--- Signifying the intention of the parties to be bound in international law

-- Definition of "negotiation" is very broad under AFI 51-701

--- Communication by any means of a position or offer

--- On behalf of United States, DOD, or of any officer or organizational element thereof

--- To an agent or representative of a foreign government

--- In such detail that acceptance would result in an international agreement

-- Bottom line: Don't do anything that might be construed as a negotiation unless you have received advance authority

--- Commanders do not have any independent power to negotiate international agreements. Any power to do so arises from a delegation of the President's executive power. There must be a specific grant of authority delegated to the commander to permit the making of such an agreement.

--- AFI 51-701: "Air Force personnel will not make any unilateral commitment to any foreign government or international organization (either orally or in writing), tender to a prospective party thereto any draft of a proposed international agreement, before obtaining the concurrence of either the Assistant

General Counsel, International Matters and Civil Aviation (SAF/GCI), or the responsible staff judge advocate as set forth below"

PEACE OPERATIONS

- The present trend sees more and more nontraditional deployments of U.S. forces to trouble spots around the globe. These operations carry with them very complex legal implications.
- Various terms describe such operations: Peace operations, military operations other than war (MOOTW), and preventive diplomacy
- Legal model: The United Nations Security Council passes an authorizing resolution permitting certain armed forces to expel or take action against international law violators
  - -- The first Persian Gulf War is an example of this model
  - -- This model was also used in Bosnia and Haiti
  - -- In essence, the governing law for such operations, at least for the authorized armed forces involved, is United Nations law
  - -- Legal problems develop when the operational mission goes through a territory where no apparent law exists. The temptation exists to presume that you are the law, or that the United Nations authorizing resolution gives you wider latitude to do more than feed people, protect your people, or stop warring factions.
    - --- For example, in Somalia, with the original mission being to feed people, the UN forces had to operate in a seemingly lawless territory. In moving food from the port to the famine-hit people far inland, these forces had to take care not to enforce criminal laws that Somali police were supposed to enforce.
    - --- Lesson Learned: Always consult with your deployed JAG (and continue up the chain if necessary) to determine precisely under what laws you operate

PEACE OPERATIONS UNDER JOINT PUBLICATION 3-07.3, *PEACE OPERATIONS*

- Peace operations: A broad term that includes peacekeeping operations and peace enforcement operations conducted to support diplomatic efforts to establish and maintain peace. Also called PO.
- The term generally refers to being invited into a country by the warring parties
  - -- Peacekeeping forces interpose themselves between the armed fighting forces to prevent further hostilities
  - -- Rules of engagement are designed for self-defense

-- Peace enforcement operations: Authorized under Chapter VII of the U.N. Charter

--- Enemy forces have not invited peace enforcement troops

--- Peace enforcement means the U.N. forces must force a peace with actual combat likely

--- Rules of engagement are designed for going beyond mere self-defense; armed with operations designed to defeat the enemy

-- Chapter VI versus Chapter VII: Distinguishing between these chapters is the responsibility of U.S. State Department UNO personnel. The U.N. Charter did not anticipate the current types of military operations, so characterizing peace operations according to the Charter is not of great practical significance for a military commander.

--- The terms "peacekeeping" and "peace enforcement" are not in the U.N. Charter. There are both U.S. military and UN/NATO definitions for each found in the glossary section of Joint Publication 3-7.03.

--- Being generally familiar with the terminology, where it came from, and how it involves different ROE are the key aspects of this area

-- Other Joint Publication 3-07.3 terminology

--- Peacemaking: Diplomacy, mediation, negotiation or other forms of peaceful settlement

--- Preventive diplomacy: Diplomatic actions taken in advance of a predictable crisis, aimed at preventing or limiting violence

--- Peace building: Nation building

References:

Charter of the United Nations (26 June 1945)

Joint Pub 3-07.3, *Peace Operations* (17 October 2007)

AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements* (6 May 1994)

The Law of Armed Conflict (LOAC)

One of the most critical subjects for today's military is the law of armed conflict (LOAC), also known as the law of war. As recent events have taught us, we cannot assume that every Airman is fully aware of all his/her rights and responsibilities under the law of armed conflict. Now more than ever, in the complex myriad of operational situations in which Air Force units are involved, commanders must ensure their personnel are trained and comply with the LOAC.

What Is LOAC?

- "That part of international law that regulates the conduct of armed hostilities." Joint Publication 1-02 (2007).
- LOAC has two main sources: Customary international law arising out of the conduct of nations during hostilities and binding upon all nations; and treaty law (also called conventional law) arising from international treaties and only binding upon those nations that have ratified a particular treaty
- LOAC treaty law is generally divided into two overlapping areas: Geneva Law (named for treaty negotiations held over the years at Geneva, Switzerland) and Hague Law (named for treaty negotiations held over the years at The Hague, Netherlands)
  - -- Geneva Law is concerned with protecting persons involved in conflicts (wounded and sick; wounded, sick and shipwrecked at sea; POWs; civilians)
  - -- Hague Law is concerned mainly with the means and methods of warfare (e.g., lawful and unlawful weapons, targeting)
- Purposes of LOAC
  - -- Limit the effects of the conflict (reduce damages and casualties)
  - -- Protect combatants and noncombatants from unnecessary suffering
  - -- Safeguard fundamental rights of combatants and noncombatants
  - -- Prevent the conflict from becoming worse
  - -- Make it easier to restore peace when the conflict is over
- Geneva Law
  - -- 1949 Geneva Conventions for the Protection of War Victims consist of four different conventions
    - --- Wounded and Sick (GWS)

--- Wounded, Sick, and Shipwrecked at Sea (GWS Sea)

--- Prisoners of War (GPW)

--- Civilians (GC)

-- The original parties to the 1949 Conventions negotiated two additional protocols in 1977. These protocols are not in effect for the United States, although the U.S. recognizes that many of their provisions reflect customary international law.

--- Protocol I (International Conflicts)

--- Protocol II (Non-International Conflicts)

- Hague Law

-- The Hague Peace Conferences of 1899 and 1907 resulted in the Hague Conventions of 1907; those conventions with continuing validity are:

--- Convention III, Relative to the Opening of Hostilities

--- Convention IV, Respecting the Laws and Customs of War on Land with annexed regulations (the "Hague Regulations")

--- Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land

--- Convention VIII, Relative to the Laying of Automatic Submarine Contact Mines

--- Convention IX, Concerning Bombardment by Naval Forces in Time of War

-- Efforts in 1922-23 to create the Hague Rules of Air Warfare resulted in draft rules that never took effect, but are today viewed as reflecting, not customary law, but guidelines for proper conduct

-- Other notable Hague Conventions

--- Declaration concerning Expanding Bullets (1899)

--- Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)

Basic Legal Principles of LOAC

- Military necessity

-- Definition: Permits the application of only that degree of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete

submission of the enemy with the least expenditure of life, time, and physical resources

-- Attacks must be limited to military objectives, i.e., any objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Examples include troops, bases, supplies, lines of communications, and headquarters.

- Distinction

  -- This principle imposes a requirement to distinguish (also termed "discriminate") between military objectives and civilian objects

    --- Civilian objects are such objects as places of worship, schools, hospitals, and dwellings

    --- Civilian objects can lose their protected status if they are used to make an effective contribution to military action

    --- In case of doubt whether a civilian object is being used to make an effective contribution to military action, the presumption should be that it is not used for military purposes

  -- An attacker must not intentionally attack civilians or employ methods or means (weapons or tactics) that would cause excessive collateral civilian casualties

  -- However, a defender has an obligation to separate civilians and civilian objects (either in the defender's country or in an occupied area) from military targets. Failure to separate them may lead to a loss of their protected status.

- Proportionality

  -- Those who plan military operations must take into consideration the extent of civilian destruction and probable casualties that will result and, to the extent consistent with the necessities of the military situation, seek to avoid or minimize such casualties and destruction. Civilian losses must be proportionate to the military advantages sought.

  -- The concept does not apply to military facilities and forces, which are legitimate targets anywhere and anytime. However, individual military personnel may be in a protected status (e.g., chaplains, medics, wounded, sick, shipwrecked at sea, surrendering, or aircrews parachuting from disabled aircraft).

  -- Damages and casualties must be consistent with mission accomplishment and allowable risk to the attacking force (i.e., the attacker need not expose its forces to extraordinary risks simply in order to avoid or minimize civilian losses)

- Humanity (also referred to as the principle of unnecessary suffering)
  - -- This principle prohibits the employment of any kind or degree of force that is not necessary for the purposes of war, that is, for the partial or complete submission of the enemy with the least possible expenditure of life, time, and physical resources
  - -- Relevant Hague Regulations provisions
    - --- "The right of belligerents to adopt means of injuring the enemy is not unlimited" (Article 22)
    - --- "In addition to the prohibitions provided by special Conventions, it is especially forbidden
      - ---- To employ poison or poisoned weapons
      - ---- To kill or wound treacherously individuals belonging to the hostile nation or army
      - ---- To employ arms, projectiles, or material calculated to cause unnecessary suffering" (Article 23)
  - -- Examples of <u>lawful</u> weapons:
    - --- Incendiary weapons (but see below)
    - --- Fragmentation weapons and cluster bombs (CBUs)
    - --- Nuclear weapons (but some international treaties forbid placement in certain areas – outer space, ocean seabeds, Antarctica, certain countries or regions)
    - --- Shotguns (but must have hardened [also called "chilled"] shot) and silencers
    - --- Landmines (but see below)
  - -- Examples of <u>unlawful</u> weapons:
    - --- Poisons or poisoned weapons
    - --- Bullets that expand or flatten easily in the human body ("dum-dum" bullets)
    - --- Any weapon the primary effect of which is to injure by fragments that, in the human body, escape detection by X-rays
    - --- Indiscriminate weapons
      - ---- Biological and bacteriological weapons
      - ---- Weapons incapable of being controlled

---- Chemical weapons (but see below)

-- Even lawful weapons may be used unlawfully. Examples: rifles to shoot POWs, strafing civilians, firing on shipwrecked mariners or downed aircrews.

- Chivalry

-- This principle addresses the waging of war in accord with well-recognized formalities and courtesies

-- It permits lawful ruses, such as camouflage, false radio signals, and mock troop movements

-- It forbids treacherous acts (perfidy). These involve misuse of internationally recognized symbols or status to take unfair advantage of the enemy, such as false surrenders, placing anti-aircraft artillery in hospitals, and misuse of the red cross, red diamond, or the red crescent.

- Recent treaty developments

-- Conventional Weapons Convention of 1980

--- Incendiary weapons are presently legal. Protocol III to the Conventional Weapons Convention places restrictions upon their use in certain instances.

--- Land mines are addressed by the Conventional Weapons Convention, Protocol II, but it has a fairly limited scope. It primarily concerns marking minefields (including air-delivered mines) and removing mines at the end of a conflict. The United States and a number of other countries amended the Protocol in 1996 to require anti-personnel land mines (APLs) outside marked minefields to self-detonate within a limited time and to forbid non-detectable APLs. However, the Ottawa Convention (which became effective as of 16 March 1999) bans all anti-personnel land mines. The U.S. declined to sign the treaty because it would have required the U.S. to remove our minefields along the intra-Korean border, a major deterrent to a North Korean attack.

--- Blinding lasers are addressed by Protocol IV of the Convention, which is in effect for the United States. The Protocol is very limited in its scope; it only prohibits the use of lasers that are specifically designed to cause permanent blindness to unenhanced vision.

-- The 1993 Chemical Weapons Convention, which became effective as of 29 April 1997, outlaws all use of chemical weapons, including self-defense. It also bans the use of riot control agents "as a method of warfare." The 1993 Convention complements, but does not replace, the 1925 Geneva Gas Protocol, which permits parties which had ratified the Protocol to make a reservation preserving their

right to use chemical weapons in response to a "first use" against them; the 1993 Convention does not permit such a reservation.

--- Two caveats

---- The 1925 Protocol only applies to conflicts between the parties (i.e., international armed conflicts); the 1993 Convention applies to both international and non-international armed conflicts

---- The 1993 Convention does not regulate "law enforcement including domestic riot control purposes"

References:

DODD 2311.01, *DOD Law of War Program* (9 May 2006)

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01C, *Implementation of the DOD Law of War Program* (31 January 2007)

AFPD 51-4, *Compliance with the Law of Armed Conflict* (26 April 1993)

AFI 51-401, *Training and Reporting to Ensure Compliance with the Law of Armed Conflict* (19 July 1994), Interim Change 1 (17 December 2008)

Chapter 2, Law of Armed Conflict for Airmen, and Chapter 16, Targeting and Weaponeering, Air Force Operations and the Law (2009)

Operations Law

Operations law (also called operational law) generally refers to those legal rules applicable in actual military operations. It is normally defined as that body of domestic, foreign, and international law that impacts upon the activities of U.S. forces in war and operations other than war.

- It is a collection of diverse legal areas. It is not a unique, stand-alone body of law or rules; rather, it consists of existing rules that usually take on greater significance during military operations.
  - -- Operations law includes such matters as military justice, procurement law, fiscal law, and legal assistance that also play a large role in the normal peacetime activities of the military
  - -- It includes matters such as the law of armed conflict, rules of engagement, law of the sea, humanitarian assistance, and other areas normally associated with combat activities or military operations in a deployed environment
- A judge advocate, acting as an operations law attorney, is:
  - -- Available at all times to assist the command on legal issues and problems that arise during all phases of the operation
  - -- Knowledgeable in laws and rules that are of specific importance during operations
  - -- Provided "reachback" to JAG assistance at other levels of the command and from JAG offices within the military department for unique and serious issues that may arise
- A common misconception is that JAG advice during a military operation is limited to issues involving the law of war (or the law of armed conflict)
  - -- Such issues are extremely important; however, most issues that arise are important yet more mundane, such as proper authority for the expenditure of funds and limitations on peacekeeping operations
  - -- The deployed JAG can play a crucial role in the overall success of an operation if kept involved in day-to-day operations. It is easier to confront legal issues before the fact than to address them afterwards.

Reference:

Air Force Operations and the Law (2009)

Information Operations

Information operations (IO) involve offensive and defensive actions covering a spectrum of capabilities ranging from ancient concepts of military deception to relatively new capabilities involving computers and satellite systems. IO poses several legal challenges, most of which are addressed at higher headquarters. IO must comply with the applicable Rules of Engagement (ROE) and Law of Armed Conflict (LOAC).

Electronic Warfare (EW)

- EW is "any military section involving the use of electromagnetic (EM) and directed energy to control the EM spectrum or to attack the adversary" JP 3-13 para.2e
- EW gained prominence in World War II and remains one of the most important components of IO
- EW consists of electronic attack (EA), electronic protection (EP), and electronic support (ES)
  - -- EA uses electronic jamming and deception to disrupt and degrade adversary radar, guidance, and communications systems
  - -- EP protects friendly forces and systems from enemy EA; examples of EP include stealth technology, chaff, and emissions control
  - -- ES includes surveillance of the electromagnetic spectrum and is conducted by systems such as airborne early warning aircraft
- It is important to consider possible collateral damage to friendly, civilian, or neutral aviation and infrastructure before conducting EW, particularly when jamming radar and guidance systems

Military Deception

- Actions intended to "deliberately mislead adversary military decision makers as to friendly military capabilities, intentions, and operations, thereby causing the adversary to take specific actions (or inactions) that will contribute to the accomplishment of the friendly mission" JP 3-13.4, para 2
- The primary legal consideration in military deception is distinguishing lawful ruses from perfidy, a job that is often difficult and may result in ambiguity
  - -- Lawful ruses may include aerial decoys, simulated damage, false radio signals, or false raids, such as the Allies' bombing of Norway prior to the 6 June 1944 Normandy invasion

- -- Perfidy involves treachery or a general failure to keep faith with an enemy; examples include abusing protected symbols such as the red cross, putting combatants in civilian clothes, and misusing enemy uniforms or transponder signals to attack
- -- Otherwise lawful ruses may also become unlawful if it involves performing an illegal act, such as tricking the enemy into attacking their own civilians

- Although all commanders are authorized to engage in deception operations, such operations are subject to special restrictions under the Standing Rules of Engagement (SROE)

Information Assurance (IA)

- IA consists of those actions designed to safeguard the "availability, integrity, authenticity, confidentiality, and nonrepudiation," of information and information systems. AFDD 2-5, p 40
- Communications squadrons routinely conduct and administer IA programs
- Most legal issues arising in IA deal with law enforcement activities and system administrators' ability to monitor their respective systems; the Electronic Communications Privacy Act, USA PATRIOT Act, and Fourth Amendment control these activities

Operations Security (OPSEC)

- OPSEC involves identifying those actions of friendly forces that can be observed by adversaries and used to the adversaries' advantage, then taking steps to reduce the intelligence value of the adversaries' observations
- OPSEC is closely tied to military deception and EW
- OPSEC is generally bound by the same legal guidelines as military deception

Psychological Operations (PSYOP)

- PSYOP "convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning and ultimately the behavior of foreign governments organizations, groups and individuals" JP 3-53, p. I-1
- PSYOP seek to "induce, influence, or reinforce the perceptions, attitudes, reasoning, and behavior" of our adversary's leaders and military forces. AFDD 2-5, p. 9.
- PSYOP may only be authorized by the President or his delegee (currently the Assistant Secretary of Defense, Office of Special Operations and Low Intensity Conflict after legal review by the OSD/GC)

- PSYOP may not be conducted against U.S. citizens
- PSYOP must be coordinated through the Department of State and the appropriate embassies during peacetime
- PSYOP may not engage in perfidy
- Public Affairs teams may be used to counter enemy PSYOP, but may only use truthful information to do so

Physical Attack

- Physical attack may be considered an information operation if the target is an "information" target
- The same LOAC rules and laws apply to physical attack for IO as for any other physical attack

Computer Network Operations (CNO)

- CNO consist of defensive measures (CND) to protect our computer systems and offensive measures (CNA) to disable, disrupt, or degrade the integrity, reliability, or accessibility of adversary computer systems
- CNO entail significant legal considerations, obviously greater if engaging in CNA
- United States Strategic Command (USSTRATCOM) and its subordinate Joint Functional Component Command–Network Warfare (JFCC-NW) (for CND) 2nd Joint Task Force–Global Network Operations (JTF-GNO) (for CNA)

Public Affairs (PA)

- PA is considered a component of IO by the Air Force, but is only a contributing activity in joint doctrine
- PA may not intentionally deceive the Congress, U.S. citizens, or U.S. news media
- Careful consideration must be used when involving PA in IO to ensure PA does not lose its credibility and, thereby, its ability to engage in counterpropaganda and counterdeception

REFERENCES:

U.S. CONST. AMEND IV

CJCSI 3.21.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces (13 June 2005)

JP 3-13, *Joint Doctrine for Information Operations* (13 February 2006)

JP 3-13.4, *Military Deception* (13 July 2006)

JP 3-53, *Doctrine for Joint Psychological Operations* (5 September 2003)

AFDD 2-5, *Information Operations* (11 January 2005)

AIR FORCE OPERATIONS AND THE LAW, Chapter 24 (2009)

USA Patriot Act, Pub. L. 107-56 (26 October 2001)

Electronic Communications Privacy Act of 2000, 18 U.S.C. §§ 2510-22

Rules of Engagement

As U.S. armed forces become involved in an ever-widening range of combat and contingency operations the significance of appropriate standing rules of engagement (SROE) and their promulgation will only increase. The SROE apply to all military operations. Within U.S. territory, the SROE apply to air and maritime homeland defense missions. The SROE are, by formal definition, the directives issued by competent military authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue combat engagement with other forces encountered. (Joint Publication 1-02, *DOD Dictionary of Military and Associated Terms*).

- Purposes of the Rules of Engagement (ROE)
  - -- Provide implementation guidance on the inherent right and obligation of self-defense and the application of force for mission accomplishment (SROE, Enclosure A, para 1a)
    - --- During "peacetime" missions (humanitarian, etc.)
    - --- During the transition from "peacetime" to "conflict"
    - --- During combat operations while engaged in a "conflict"
    - --- During the transition away from a "conflict" to "peacetime"
- SROE Self-Defense Concepts
  - -- Recognize commanders' inherent right (and obligation) of self-defense to accomplish mission objectives
    - --- The SROE does not limit a commander's inherent authority and obligation to use all necessary means available to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity (SROE, Enclosure A, para 3a)
  - -- In peacetime, U.S. forces may use force only in self-defense
    - --- Article 51, United Nations Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security"
  - -- Unit and Individual Self-defense arises during two occasions
    - --- In response to a use of force ("**hostile act**") (SROE, Enclosure A, para 3e)

--- In response to an imminent use of force ("**hostile intent**")(SROE, Enclosure A, para 3f)

-- Additional methods of Self Defense – What or who may we defend?

--- National Self-Defense. The act of defending the U.S., U.S. forces, U.S. citizens and their property (*in certain circumstances*), and U.S. commercial assets from a hostile act, or demonstrated hostile intent

--- 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 with President or Secretary of Defense approval

-- Self-defense response guidelines (SROE, Enclosure A, para 4).

--- De-escalation: When time and circumstances permit, the forces committing hostile acts or hostile intent should be warned and given the opportunity to withdraw or cease threatening actions

--- Necessity: Exists when a hostile act is committed or hostile intent is demonstrated against US forces or other designated persons or property

--- Proportionality: Amount of force necessary to decisively counter a hostile act or demonstrated hostile intent and ensure the continued safety of U.S. forces or other designated persons and property. The force used must be reasonable in intensity, duration, and magnitude to the threat based on all facts known to the commander at the time.

--- Pursuit: U.S. forces can pursue and engage a hostile force that has committed a hostile act or demonstrated a hostile intent

- Critical factors that influence the promulgation of ROE:

-- Domestic law and concerns (e.g., Executive Order 11850 limiting use of riot control agents)

-- National security policy (protect interests of United States and allies)

-- Operational concerns (protect our forces and those of our allies)

-- International law and concerns (LOAC, Status of Forces agreements, host nation law)

--- LOAC is international law that we have a legal duty to observe (infractions are punishable under the UCMJ)

--- ROE have to comply and can never authorize an act that is forbidden under LOAC. Essentially, ROE are always either equal in restrictiveness or more restrictive than LOAC.

- Specific guidance for U.S. forces operating with multinational forces (SROE, Enclosure A, para 1f)

  -- U.S. forces assigned under operational control (OPCON) or tactical control (TACON) of a multinational force (MNF) will follow the ROE of the MNF for mission accomplishment, if authorized by order of the Secretary of Defense. U.S. forces retain the right of self-defense. Apparent inconsistencies between the right of self-defense contained in U.S. ROE and the ROE of the MNF will be submitted through the U.S. chain of command for resolution. While a final resolution is pending, U.S. forces will continue to operate under U.S. ROE.

  -- When U.S. forces are under U.S. OPCON or TACON, operating in conjunction with a MNF, reasonable efforts will be made to develop common ROE. If common ROE cannot be developed, U.S. forces will operate under all applicable U.S. ROE and the MNF forces will be informed of this fact.

  -- ROE need to be tailored to local circumstances and the nature and history of the threat must be dynamic and changing as the mission evolves

- Considerations when preparing ROE

  -- Different ROE must be drafted for different tasks and different levels (e.g., information operations, counterdrug support operations, noncombatant evacuation operations, domestic support operations, and maritime, land, air, and space operations (SROE Enclosures B-J))

  -- What is the goal of the President and the Secretary of Defense? (e.g., hostage rescue, freedom of navigation, attack terrorist base)

  -- In order to carry out that goal, what is the mission? (e.g., warn an enemy, destroy bases, limited or minor attack)

  -- What is the threat? (e.g., Taliban, Iraq, Bosnian Serbs)

  -- Who else is involved? (e.g., NATO, coalition, United Nations)

  -- Are there any unique concerns? (e.g., fear of capture of U.S. forces, hostages, collateral damage)

  -- Who should draft the ROE? (e.g., those familiar with the weapons and the systems, keeping in mind that commanders are responsible for the ROE)

  -- What are the ROE sources? (e.g., SROE, joint task force guidance, NATO, United Nations)

- Requesting ROE Changes: Although the SROE are fundamentally permissive commanders at all echelons may request supplemental ROE or amplification of approved ROE (SROE, Enclosure J). Clarity is the goal. Some applicable considerations include:
  - -- Avoid strategy and doctrine
  - -- Avoid restating the law of war
  - -- Avoid tactics
  - -- Avoid safety-related restrictions

References:

Charter of the United Nations, Article 51 (26 June 1945)

DODD 2311.01E, *DOD Law of War Program* (9 May 2006)

Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms* (12 April 2001, as amended through 17 March 2009)

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement for U.S. Forces* (13 June 2005)

CJCSI 5810.01C, *Implementation of the DOD Law of War Program* (31 January 2007)

Fiscal Law During Deployments

In an era marked by a rapidly-expanding operational tempo, which may involve deployments anywhere in the world, commanders must be aware of the basic rules regulating the activities U.S. forces may conduct during a deployment, and the funding to pay for those activities. The most significant basic concept is to distinguish between those items or services we may sell, grant, or loan to a foreign country (security assistance, which is administered by the U.S. Department of State, with assistance from the Department of Defense) and those activities U.S. forces conduct as part of an exercise in a foreign country, for which we are the primary beneficiaries and the foreign country receives only a minor and incidental benefit.

- Deployment-Related Activities

  -- Problems first surfaced during the Ahuas Taras (Pine Tree) exercise series in Central America in 1980s. The General Accounting Office investigated U.S. military activities and found U.S. forces had repeatedly violated basic fiscal restrictions, and in some cases had acted with no authority.

  -- Deployment-related activity questions usually arise during combined (U.S. and foreign nation) exercises that are also joint (more than one U.S. armed force participating) and are located outside the U.S. (although CONUS exercises (e.g., Partnership for Peace (PFP) exercises) may be subject to some of the same constraints)

  -- THE PRIMARY BENEFICIARY OF EACH ACTIVITY MUST BE THE U.S. FORCES INVOLVED. THE BENEFIT TO THE HOST COUNTRY MUST BE ONLY MINOR AND INCIDENTAL.

Major Types of Activities

- Construction

  -- A military construction project includes all military construction work necessary to produce a "complete and usable facility" or a "complete and usable improvement to an existing facility" (10 U.S.C. § 2801). This eliminates the ideas of "project splitting" or "project incrementation" (a group of contracts using Operations & Maintenance (O&M) funds, each for less than $750,000, to accomplish a unified purpose) or "phasing" (do less than $750,000 this year and again next year and again the next year, etc.).

  -- Maintenance (recurrent work to prevent deterioration) and repair (restoration for use for a designated purpose) are not construction and not subject to these restrictions (although they may be subject to others)

-- The SECDEF must give the Appropriations and Armed Forces Committees at least 30 days prior notice of plan and scope of any proposed exercise when anticipated construction expenditures (temporary or permanent) will exceed $100,000

-- Unspecified minor military construction (UMMC) using MILCON funds

--- Each project must have an "approved cost" equal to or less than $2,000,000. However, the maximum is raised to $3,000,000 for a project "intended solely to correct a deficiency that is "life-threatening, health-threatening, or safety-threatening."

--- Funded costs <u>include</u> "out of pocket" expenses such as contract costs, TDY expenses, and the cost of fuel to operate equipment. They <u>do not include</u> military pay, equipment depreciation, or other "sunk costs" (but these still must be reported).

--- This activity uses military construction funds, <u>not</u> O&M funds

--- It is used to create <u>enduring improvements and structures</u> to be used during future operations (e.g., assault landing strips, roads, hangers, barracks)

-- Construction of an "unspecified minor military construction project" may be funded from exercise <u>operations & maintenance (O&M) funds</u>

--- This construction is limited to $750,000 cost per project, except that not more than $1,500,000 may be used for a project intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening

--- Funded costs <u>include</u> "out of pocket" expenses such as contract costs, TDY expenses, and the cost of fuel to operate equipment. They <u>do not include</u> military pay, equipment depreciation, or other "sunk costs" (but these still must be reported).

-- Notice must be given to Congress at least 21 days (14 days if by electronic means) before commencing any project exceeding $750,000

-- Exercise construction of "minor structures clearly of a temporary nature" may be funded from exercise <u>O&M funds</u>

--- GAO recognized DOD's authority to do so in both its 1984 and 1986 Ahuas Tara II opinions

--- In debating 10 U.S.C. § 2805(c), Congress took a very narrow view of "minor and temporary," e.g., base camp facilities such as tent platforms, field latrines, and range targets, must be removed at the end of the exercise

-- Training activities (often called either deployments for training (DFTs) or joint combined exchange training (JCETs)). The purpose of these activities must be to train our forces, with only an incidental benefit flowing to the forces we train.

--- Familiarization (interoperability) and safety training is proper, but not if it rises to the level normally provided by security assistance projects (MTTs, TATs, etc.)

--- Special operations forces (including civil affairs and psyops forces) training of indigenous forces of "developing countries" authorized to pay or reimburse "incremental expenses" of the developing country because of special operations force's own training requirements

-- Exercise activities and conferences

--- Military-to-military contact programs carried out by combatant commanders of unified commands to assist military forces of other countries to understand the appropriate role of military forces in a democratic society

--- Training Latin American forces, the basis for LATAM subject matter expert exchanges (SMEEs) carried out by USAF and USA

--- Using U.S. funds to pay for attendance of military personnel from developing countries at conferences, seminars, or similar meetings

--- Developing countries combined exercise program (DCCEP) pays "incremental expenses" of developing countries to participate in combined exercises

--- Expanded international military education and training (IMET) program to teach defense resource management, civilian control of the military, military justice systems, and human rights

--- Exchange of training and related support with a friendly foreign country or an international organization

--- Military-to-military contacts program with nations of former Soviet Union and Eastern Europe regional cooperation programs

---- Partnership for Peace (PFP)–assistance to and cooperation with PFP countries

---- Cooperative threat reduction with states of former Soviet Union ("Nunn-Lugar" Act)

-- Humanitarian and civic assistance (HCA); this activity includes two types

--- Earmarked funded HCA (using service operations and maintenance (O&M) funds) in conjunction with authorized military operations in a foreign country

in order to promote security interests of U.S. and the foreign country, and to improve specific operational readiness skills of U.S. armed forces members who participate in the activities

--- The Secretary of State must specifically approve the HCA to be given to any foreign country and SECDEF has to report HCA activities to Congress NLT 1 March each year

--- HCA activities shall complement, and may not duplicate, any other form of social or economic assistance provided by the U.S. to the country concerned and must serve the basic economic and social needs of the people of the country

--- Funded HCA only includes certain specified activities

---- Medical, surgical, dental, and veterinary care in rural or underserved areas, including education, training, and technical assistance related to the care provided

---- Construction of rudimentary surface transportation systems

---- Well drilling and construction of basic sanitation facilities

---- Rudimentary construction and repair of public facilities

---- HCA cannot be furnished to individuals or groups engaged in military or paramilitary activities

--- "De Minimis" HCA. DOD can use other funding (not clearly specified) for minimal expenditures incurred in furnishing funded HCA. However, O&M funds may only be obligated for "incidental costs" of carrying out funded HCA.

---- What is "incidental?" It has to meet the "reasonability" standard–i.e., would a reasonable person consider it "incidental to the exercise."

---- Generally, it cannot be the sort of foreign assistance provided by the U.S. Agency for International Development (USAID). However, in certain cases U.S. forces can perform assistance and be reimbursed by USAID under the Economy Act.

---- These activities should not significantly impact the deploying unit's readiness training

---- O&M funds expended for de minimis HCA should represent only a minor or reasonably small percentage of the exercise's total O&M funds

---- Examples provided by Congress

----- A unit doctor's exam of local villagers for a few hours with administration of several shots and issuance of some medication would be appropriate, but not appropriate to dispatch a medical team for mass inoculations

----- Opening of an access road through trees and underbrush for several hundred yards would be appropriate, but asphalting of any roadway would not be appropriate

References:

10 U.S.C. § 401

10 U.S.C. § 2801, 2805

DODI 2205.02, *Humanitarian and Civic Assistance (HCA) Activities* (2 December 2008)

DODI 2205.3, *Implementing Procedures for the Humanitarian and Civic Assistance (HCA) Program* (27 January 1995)

Comptroller General Decisions, To the Honorable Bill Alexander, B-213137 of 1984 (63 Comp. Gen. 422) and January 30, 1986 (unpublished)

Foreign Criminal Jurisdiction

Air Force members serving or deployed at overseas locations are subject to criminal proceedings by both the host nation (HN) and by the United States for offenses they have allegedly committed. Primary jurisdiction of the case is normally governed by the terms of the specific status of forces agreement (SOFA) with the particular HN. In certain peace operations, especially those run by the United Nations, a status of mission agreement (SOMA) may be used instead of a SOFA. In this discussion, SOFA will refer to both SOFAs and SOMAs.

- As a starting point, the HN has jurisdiction over any member physically within its borders based on territorial sovereignty
- Simultaneously, the United States always has court-martial jurisdiction over any member for UCMJ offenses (the UCMJ applies "in all places"). Which nation gets to prosecute and retain custody of the member depends upon a variety of factors spelled out in the SOFA.
- If a military member commits an offense that violates HN law, regardless of whether it violates the UCMJ, numerous steps may be triggered
  - -- Military commanders generally have an obligation to place U.S. personnel on "international hold" pending resolution of criminal cases within the HN
  - -- U.S. personnel generally must be released to HN officials upon indictment by the HN (specific timing of release varies by country)
  - -- Counsel fees for civilian HN attorneys may be paid on behalf of U.S. personnel; however, U.S. personnel may, and do, face HN criminal proceedings as well as sentencing and confinement in HNs
  - -- Trial observers, usually designated judge advocates, monitor HN criminal proceedings to determine whether U.S. servicemembers are receiving fair trials
- The major SOFAs (NATO, Japan, and Korea) contain similar formulas for determining which country gets to exercise jurisdiction over U.S. personnel for criminal offenses
  - -- Exclusive jurisdiction belongs to:
    - --- The United States for crimes under U.S. military or other applicable law that are not violations of HN law (e.g., AWOL, disrespect, and disobeying orders)
    - --- The HN for acts that are crimes under the HN's laws but not under U.S. law (e.g., religious crimes, political crimes, and certain negligent acts that, under U.S. law, do not rise to the level of criminal conduct)

-- Concurrent (shared) jurisdiction occurs when conduct is criminal under both U.S. and HN law. The HN has the primary right to try all concurrent cases, except:

--- Official duty cases: When the offense arises out of an act in the performance of the U.S. servicemember's official duty

--- Inter se: When the crime affects only U.S. parties or U.S. property

-- DOD policy is to maximize U.S. jurisdiction in appropriate cases

--- In a concurrent jurisdiction case, when the HN has the primary right to try a case the United States will request a waiver of jurisdiction from the HN

--- The procedures for and the likely success of a request for waiver vary depending on the HN and, frequently, the seriousness of the offense (the more serious the offense, the less likely it will be granted)

--- When a waiver is granted, the United States is normally obligated to take appropriate action against the member and to report the results to the HN

- Civilians and dependent family members accompanying the force

-- Civilians and dependent family members accompanying U.S. forces abroad are normally considered subject to the terms of the applicable SOFA

-- The HN will have jurisdiction based on its territorial sovereignty, but the U.S. commander usually does not have UCMJ authority over these persons

-- If the HN waives primary jurisdiction to the United States, the options of the commander are limited

-- To remedy this problem, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA) of 2000. The Act extends U.S. jurisdiction to cover offenses committed by dependents and other civilians accompanying our forces if the criminal act is punishable by at least one year in confinement. This act allows the Department of Justice, not the Air Force or DOD, to prosecute the offending civilian. MEJA can also extend jurisdiction over military personnel and contractors' employees who are not normally resident in the HN.

-- Congress also amended Article 2a(10), UCMJ, to provide jurisdiction over civilians serving with or accompanying U.S. armed forces in the field during either declared war or a contingency operation

- Absence of a SOFA

-- The prevailing international view is that, in the absence of an agreement to the contrary, criminal jurisdiction rests exclusively with the HN

- While the United States has worldwide personal jurisdiction over servicemembers, the exercise of that jurisdiction without HN permission may be considered a breach of its territorial sovereignty
- Particular emphasis has been placed on ensuring a SOFA or other agreement is entered into with all HNs

References:

10 U.S.C. § 802(a)(10), Persons Subject to the Uniform Code of Military Justice

10 U.S.C. § 805, Territorial Applicability of the Uniform Code of Military Justice

10 U.S.C. § 1037, Counsel Before Foreign Judicial Tribunals and Administrative Agencies; Court Costs and Bail

18 U.S.C. § 3261, *et seq*., Military Extraterritorial Jurisdiction

DODD 5525.1, *Status of Forces Policy and Information* (7 August 1979), Incorporating Through Change 2 (2 July 1997), Certified Current (21 November 2003)

AFI 51-703, *Foreign Criminal Jurisdiction* (6 May 1994), Certified Current (16 December 2009)

AFJI 51-706, *Status of Forces Policies, Procedures, and Information* (15 December 1989)

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