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Administrative Due Process and Army Regulation 15-6

By: Major Jack F. Lane, Jr., Instructor, Civil Law Division, TJAGSA

In early February 1974, the Army Training and Doctrine Command (TRADOC) issued a command letter concerning the conduct of faculty boards.¹ These boards are utilized to "investigate deficient scholarship, disciplinary infractions and honor code violations" and, unless otherwise provided, are advisory in nature. The problem addressed by the letter is the application of Army Regulation 15-6² to faculty boards. It states that "The Judge Advocate General has determined that AR 15-6 does not apply to faculty boards that consider students attending a branch orientation or familiarization course" as these are governed by the procedures found in Army Regulation 635-100.³ However, faculty boards considering advanced course and specialist course students are not provided for in specific regulations and Army Regulation 15-6 does apply to them. In closing, the letter states:

The military has not prevailed in recent civil court cases that have been concerned with inadequate procedural due process at service schools. Thus, protection of the rights of a student, especially a career-oriented officer, is a necessity. AR 15-6 meets the requirements of due process and should be used for the conducting of an inquiry by a faculty board where a specific Army Regulation does not apply.

This letter points out two current areas of concern for the judge advocate. First, to what extent does Army Regulation 15-6 apply to administrative actions in the Army? Second, to what extent have the standards of due process been applied to military administrative actions by the courts?

Within the Army today there are a myriad of administrative actions, many of which are governed by a specific statute or regulation which includes all or some features of procedural due process—a hearing, personal appearance, con-

frontation of adverse witnesses, notice of specific allegations and a written decision. These due process safeguards, along with provisions for counsel, are also contained in Army Regulation 15-6, governing generally the conduct of investigating officers and boards of officers. However, as observed in the TRADOC letter, this regulation does not apply in every case where a board of officers is convened. In paragraph 1 of Army Regulation 15-6 it is stated that:

Investigating officers and board of officers . . . are appointed by superior authority, usually under an Army Regulation pertaining specifically to the matter requiring investigation. Generally, this regulation is supplemental to such specific regulations and, in addition, will govern in the investigation of matters not covered in specific regulations. . . . In case of conflict between this regulation and a pertinent specific regulation, however, the latter will govern.

Several basic observations as to the applicability of the procedures found in Army Regulation 15-6 can be made from this paragraph. First, a board or investigator is not "appointed under AR 15-6," but may simply use Army Regulation 15-6 as a procedural supplement. Second, the regulation is to be used for command prerogative boards, that is, boards appointed by a commander under his inherent authority to investigate matters within his command.⁴ Such boards are "not covered in specific regulations." Finally, a conflict between regulations is resolved *against* the provisions of Army Regulation 15-6.

This last provision has figured importantly in decisions involving the application of Army Regulation 15-6. In a 1971 TJAG opinion concerning screening boards under the Qualitative Management Program (QMP),⁵ Army Regulation 15-6 was found not applicable.⁶ These boards review the records of enlisted personnel identified

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as low quality or low potential personnel, and decide whether to authorize or deny reenlistment. The regulation sets out some procedure for the board to use in making its review, but does not provide for a hearing, appearing before the board or examination by the individual of the evidence used by the board. Army Regulation 15-6 was held not applicable, in part, because of the provision that it does not apply to boards whose procedures are provided for in specific regulations. This rationale was derived from earlier Army opinions finding that Army Regulation 15-6 did not apply to a board for removing an enlisted man's name from a recommended promotion list' nor to a school faculty board governed by specific regulations.⁸

However, the rationale for finding Army Regulation 15-6 not applicable to the QMP screening boards went on to point out an even more basic consideration. The opinion stated that:

The underlying theme . . . concerning the applicability of AR 15-6 . . . is that it applies to boards conducting investigations . . . in which the substantial rights of an individual become involved and that to deny the individual the benefits of AR 15-6 . . . would deprive him of due process.

To illustrate this point, the opinion stated that the prior decision finding Army Regulation 15-6 not applicable to a school faculty board was due to the fact that the board's function was one of evaluation and that general procedures had been provided. Therefore, it was deemed more appropriate to permit the board to employ those general procedures rather than the specific procedures of Army Regulation 15-6.

Following this rationale, the opinion stated that the QMP board "is established not for investigatory purposes but primarily to evaluate a member's qualification for reenlistment." It also states that reenlistment "is not a right but is a privilege" and therefore, "no 'right' is at stake here to bring AR 15-6 . . . into play."

The issue was raised more recently in a 1973 opinion which dealt with a board action in a reduction for inefficiency case.⁹ The opinion restated the concept that Army Regulation 15-6 does not apply when a specific regulation provides

some guidance for the board and that the applicability issue depends on whether substantial rights of the individual were involved to the extent that "due process" requires applying Army Regulation 15-6. Then, it added a new element of consideration, stating:

However, paras. 3(b), 6(a)(1), 11, 14 and 18 (of AR 15-6) specifically refer to "efficiency." This office has always treated the protections of AR 15-6... as applicable to Inefficiency Board reductions....

These paragraphs cover seniority of the investigating officer or members of a board (para. 3b), notice of the investigation, allegations and hearing (para. 6a(1)), presence at open sessions of a board and the protections of Article 31, UCMJ (para. 11), actions when an investigation raises adverse allegations against an individual not previously a party respondent (para. 14), and application of the suggested procedure in the Appendix to Army Regulation 15-6 (para. 18). In each of these paragraphs the reference is to an investigation of the "conduct, status, efficiency, character, fitness, pecuniary liability or rights of any individual," or a similar enumeration of circumstances. What is not entirely clear is whether the entire regulation or only these specific paragraphs are applicable in a case involving conduct, status, efficiency, character, fitness or pecuniary liability. Two of the precedent opinions cited in this 1973 opinion were inefficiency reduction cases which applied the substantial evidence rule and the summary record provision of Army Regulation 15-6,¹⁰ neither of which fall within the specific paragraphs above. Thus, the implication is that the whole regulation applies whenever triggered by one of the stated conditions. This is consistent with the earlier statement that Army Regulation 15-6 applies when the action involves substantial rights of an individual and not applying the regulation would deprive him of due process.¹¹

From these opinions several general propositions can be gleaned. If a specific regulation states that Army Regulation 15-6 applies to a particular administrative proceeding, or does not apply, there is no need to go further. If the specific regulation providing for a board or hearing officer does not mention Army Regulation 15-6, then it applies if the purpose of the proceeding is investigatory and involves substan-

tial rights of an individual, that is, if the proceeding is an investigation of the conduct, status, efficiency, character, fitness, pecuniary liability or rights of an individual. This proposition involves two problems of interpretation which make its application confusing. First, what constitutes an "investigation"? The QMP screening boards are charged with making an "evaluation of demonstrated performance and potential for future service" and "have the primary function of confirming the tentative determination of... denial of reenlistment."¹² Is this not an investigation concerning an individual's fitness and efficiency? It was said that the board does not investigate, but evaluates; the same could be said of an enlisted elimination board in light of the fact that the pertinent regulation provides that:

The president... will insure that sufficient testimony is presented to enable the board to fairly evaluate the usefulness of the individual.¹³

Second, what difference exists between evaluating a soldier's usefulness to serve out his term of enlistment (elimination proceeding) and evaluating a soldier for reenlistment (QMP board proceeding)? Both actions can quite conceivably be included in "fitness" or "efficiency" which constitute "substantial rights" triggering the application of Army Regulation 15-6.¹⁴

Additionally, by its own language, Army Regulation 15-6 applies to investigations of matters not covered in specific regulations, and thus not having any other procedures provided. What is left unclear is whether Army Regulation 15-6 would apply in a proceeding which is not an investigation and, though provided for by a specific regulation, has no procedural guidance stated. Presumably, Army Regulation 15-6 would not apply on the rationale that such a proceeding was not an investigation involving substantial rights¹⁵ and any procedure decided on by the appointing authority would be acceptable.

Thus, the judge advocate faces certain difficulties in determining the precise extent to which Army Regulation 15-6 is to be applied in administrative proceedings. In a doubtful case, he may also look to see if there are any sound military reasons (or "military necessity") for not requiring the use of these procedural standards. If it appears that the application of Army Regula-

tion 15-6 in such a case would create a delay or unduly complicate administrative action, efficiency of the service might well outweigh any potential "harm" to the individual. On the other hand, if he takes a broad reading of what constitutes an "investigation" or of what falls into the categories of "conduct, status, efficiency, character, fitness, pecuniary liability or rights of any individual," he could well expand the use of Army Regulation 15-6 beyond its intended scope. While the Army is bound to follow its own regulations, the reasonable interpretation as to the applicability of regulations is quite another matter. In light of the increasing importance being given to the application of due process in administrative proceedings, the interpretation and application of Army Regulation 15-6 as the Army's "due process" regulation takes on increasing importance. A look at several judicial decisions should provide some insight into this development.

An early case which dealt with due process in military proceedings was *Green v. McElroy*,¹⁶ which struck down a security clearance revocation proceeding for failing to disclose adverse evidence to the respondent. While the Court stated its decision was based on a lack of statutory authority to keep the evidence secret, its undercurrent was plainly the issue of due process. More recently, the Supreme Court has postulated due process standards for the termination of welfare benefits¹⁷ and the revocation of parole.¹⁸ The basic due process standards set out in these cases—notice, personal appearance, an impartial hearing body, confrontation of adverse witness, the right to present evidence and witness and a written decision with specific findings—parallels Army Regulation 15-6.

The cases most likely in the mind of the drafter of the TRADOC letter were those concerning the elimination of cadets from the Merchant Marine Academy¹⁹ and West Point.²⁰ Since the cases are quite similar, discussion of the West Point case, *Hagopian v. Knowlton*, will provide the necessary concepts. Cadet Joachim Hagopian was ordered separated from West Point for deficiency in conduct after receiving 107 demerits, an excess of five over the maximum allowed for the December 1971—June 1972 demerit period. His separation came after consideration by the eighteen-member Academic Board which could recommend reten-

tion upon finding that the cadet's "potential warrants retention"; otherwise, it must recommend separation. The cadet was not allowed to appear, but was permitted to submit written material to the Board. He could not confront adverse witnesses, present his own witnesses or have counsel. He challenged this procedure as a denial of due process.

The court began by considering the nature of due process, stating that it is "a flexible concept which depends upon the balancing of various factors, including . . . the private right or interest that is threatened" and relevant government interests "such as the necessity for prompt action in the conduct of crucial military operations." The court examined earlier cases and concluded that since the factors governing what process is due vary from case to case, prior decisions cannot afford more than general guidelines.²¹ The court found that when the accumulation of demerits results in as severe a sanction as expulsion and denial of a commission, the minimum due process would be substantial. Additionally, the Board considering the cadet's potential was composed of men who would not all know the cadet personally and more than written submissions were needed to meet the demands of fairness. The court concluded that the Academy must allow the cadet facing expulsion "to appear and present evidence, including witnesses, on his behalf." Interestingly enough, the court decided that the informal, non-adversary nature of the proceeding allowed the Board to keep secret faculty evaluation reports and militated against requiring that the cadet be furnished counsel.

The court did not consider Army Regulation 15-6 or its application to this expulsion hearing, but had it been applied, it would have provided more than adequate due process. Under the investigation-evaluation rationale, the proceeding could likely be characterized as an evaluation rather than an investigation, and thus Army Regulation 15-6 would not be applicable—beyond what the court now requires.

Other Federal personnel have contested elimination actions for lacking due process and been successful.

In *Lindsay v. Kissinger*,²² due process was held to require notice, a hearing confrontation and

appearance in Foreign Service "selection-out" cases. Previously, a selection board ranked all Foreign Service officers and notified those who failed to meet the prescribed standard of performance. The officer could protest to a Special Review Panel, but without an evidentiary hearing. The court felt the procedural guarantees were mandated by the finding that a selection-out is a "stigmatizing" separation.²³

This case involved a situation not unlike that found today with the QMP screening board, whose function is to select marginal performers to be denied reenlistment. In both situations, the boards are evaluating. It appears, however, that the courts may not be deterred from considering due process issues on such a rationale. Instead, they will look at what harm is done to the individual and to see if the employee's rights were adequately protected in a fair and effective hearing.²⁴ The conclusion one must draw at this point is that the Army might reconsider its administrative actions²⁵ and its use of the due process procedures set out in Army Regulation 15-6. Several approaches could be taken in this regard.

One approach would be to review all administrative actions which in any way adversely affect an individual. This review would be to determine which actions have a substantial effect and whether there is any military necessity or if there would be an unreasonable burden which would justify less than full Army Regulation 15-6 procedures. Then, each specific regulation could be amended to provide that Army Regulation 15-6 would be applied, in whole or in part, or was not to be applied to that particular action. Such an approach would assist the judge advocate in the field who must presently make judgments as to what is or is not an investigation involving substantial rights.

On the other hand, it might be advisable to revise paragraph 1 of Army Regulation 15-6 to read:

Investigating officers and boards of officers are appointed under the authority of specific Army Regulations. Generally, this regulation will apply to any proceeding which involves consideration of the conduct, status, efficiency, character, fitness, pecuniary liability or other matters adverse to an individual. Exceptions in whole or part to this policy may be provided

in specific Army Regulations, but will be limited to cases where the application of this regulation is impracticable or conflicts with military necessity. In addition, this regulation will govern in the investigation of matters not covered in specific regulations.

Admittedly, this provides for a broader application of the due process provisions of Army Regulation 15-6. It eliminates the term "investigation" as to proceedings under specific regulations, keeping it only in the case of command prerogative boards which are not appointed under specific regulations. This change anticipates the possibility that *Lindsay* might be extended to military administrative actions. Some definition will have to be given to the phrase "impracticable or conflicts with military necessity." However, this would require specific reasons for *not* applying Army Regulation 15-6, rather than the present situation where the definition of terms determines whether the regulation will be applied.

In the long run, broader application of Army Regulation 15-6 can be advantageous. If tailored to the specific administrative action—a possibility since *Hagopian* did not require as much as Army Regulation 15-6 contains—it should not seriously affect the need for prompt administrative actions. It would also place the Army in a better position for defending due process challenges by a good faith effort to apply due process procedures wherever some harm is likely, even in a situation where it has been determined that tailoring is necessary.

Until such changes occur, the judge advocate may have difficulties in making decisions on the application of Army Regulation 15-6 in those areas where an opinion has not been rendered. In light of the recent cases, the TRADOC letter, stating that Army Regulation 15-6 procedures apply to advanced course faculty boards, represents the current state of the law. Whether the courts will continue their trend in applying due process standards in other military administrative actions is yet to be known.

Footnotes

1. TRADOC Letter, ATJA, dated 5 February 1974, Subject: Conduct of Faculty Boards. TJAG reviewed this letter and had no objection, but did point out that it might affect current policies, such as the confidentiality of faculty board recommendations, DAJA-AL 1973/5364, 21 January 1974.

2. 12 August 1966.
3. 19 February 1969.
4. See Dep't of Army Pamphlet No. 27-21, Military Administrative Law Handbook, para. 3.21b (1973).
5. Army Reg. No. 600-200, Chap. 4 (C51, 26 September 1972).
6. DAJA-AL 1971/5397, 17 November 1971.
7. JAGA 1971/3428, 5 February 1971. See Army Reg. No. 600-200, paras. 7-33, 7-35 (C51, 26 September 1972). The removal boards uses the same procedures provided for selection boards.
8. JAGA 1970/3890, 29 April 1970.
9. DAJA-AL 1973/4094, 29 June 1973.
10. JAGA 1963/3951, 22 May 1963; *id.* 1963/3656, 27 February 1963.
11. DAJA-AL 1971/5397, 17 November 1971.
12. Army Reg. No. 600-200, para. 4-12c (C51, 26 September 1972).
13. Army Reg. No. 635-200, para. 13-22e (C40, 5 December 1972).
14. DAJA-AL 1973/4094, 29 June 1973.
15. DAJA-AL 1971/5397, 17 November 1971.
16. 360 U.S. 474 (1959).
17. *Goldberg v. Kelly*, 397 U.S. 254 (1970).
18. *Morrissey v. Brewer*, 408 U.S. 471 (1972).
19. *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967).
20. *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972). The cadet also challenged the method of awarding demerits, but the court held that the awarding of demerits was part of the educational process of the Academy, there was a procedure for reviewing demerits and the system was "sufficient to meet minimum standards of due process."
21. This parallels Justice Frankfurter's comment that due process is just what it says it is—a process. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, at 163 (1951).
22. 367 F. Supp. 949 (D.D.C. 1973).
23. *But see Arnett v. Kennedy*, 42 U.S.L.W. 1161 (U.S. Apr. 16, 1974). The Court distinguished the dismissal of a non-probationary federal civil employee from the termination of welfare benefits (*Goldberg v. Kelly*, 397 U.S. 254 (1970)), stating that some interests are not so important as to require a hearing before termination.
24. See *Arnett v. Kennedy*, 42 U.S.L.W. 1161 (U.S. Apr. 16, 1974). The Court found that the notice of charges and the right to submit matters in writing before termination, plus a post-termination hearing, was adequate protection.
25. TJAG has reviewed similar Army procedures in light of the *Lindsay* decision and found sufficient distinguishing features to conclude that the case does not require changes to Army procedures. DAJA-AL 1973/5343, 21 January 1974.

Administrative Separations: The Old Order Changeth

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As the United States Army heads toward the start of its third century, it emerges from an era in which public scrutiny has been focused upon practically every aspect of its operations. During the Vietnam era, the public eye daily observed the Army on television, and read of every facet of the Army's life, from tactics to strategy, to drug abuse, to the manifold problems of fighting a brush-fire war with a largely conscript Army. We are still seeing some of the after-effects of Vietnam, but we Army lawyers have yet to experience the full impact of this latest period of "high visibility" upon the practice of military law. Just as public scrutiny of the military justice system during the Second World War resulted in the substantial changes wrought by the Uniform Code of Military Justice, public scrutiny and, more precisely, judicial scrutiny, has started what may become a change in the Army's administrative

separation procedures. The courts, as expositors of the public's sense of justice and fair play, have indicated such a conclusion with a number of decisions in the area of administrative separation. Indeed, as the Burger court intensifies its emphasis upon developing notions of due process in administrative proceedings,¹ one need not possess an especial degree of prescience to predict that many changes in the administrative separation process are yet to come. The Judge Advocate General has seen the handwriting on the wall, and has, in several recent cases, opined that due process safeguards must be built into certain administrative proceedings where they did not previously exist.²

This article will survey the field and will note several areas in which changes may yet come. "Separations," as that word is used in this

article, refers to all discharges of enlisted members and officers (except discharges [or dismissal] executed pursuant to the sentence of a court-martial), and, in the case of Reserve officers, involuntary relief from active duty.

Characterizing Service.

The first point which must be made clear is that there are two judicially recognized species of administrative discharges: stigmatizing and non-stigmatizing. Of the three types of discharge certificates which can be awarded administratively to an enlisted person (honorable, general and undesirable),³ the honorable discharge is clearly nonstigmatizing. That is, the recipient of an honorable discharge carries forward into civilian life no continuing stigma (such as difficulty in finding employment) owing to the character of his military service, although courts may some day go beyond the surface characterization of "honorable" to hold even an honorable discharge stigmatizing if accompanied by a "derogatory" Separation Program Designator (e.g., for homosexuality, drug abuse, etc.). Even though the recipient of a general discharge has been held to suffer "a stigma of tremendous impact which [has] a life-long effect,"⁴ most courts have held such a discharge to be nonstigmatizing.⁵ The Army may be able to prevent a determination that all general discharges are stigmatizing by safeguarding the basis therefore.

The Department of Defense has just recently terminated the practice of annotating certain copies of separation documents (DD Form 214) with a numerical Separation Program Designator (SPD), a numerical Reenlistment Code (RE), and a narrative reason for separation. The changes were outlined in DA Message 222052Z March 1974 as follows:

A. SPD's, reason and authority for discharge, and RE code will not be included on any DD Form 214 provided to the individual upon separation or reenlistment.

B. Copies of DD Form 214 provided to the Veterans' Administration and the Selective Service will not include the above information, except for the narrative reason for discharge in the remarks section of the form (see AR 635-5-1).

C. If the individual requests the reason for his discharge, the same narrative reason furnished the Veterans' Administration and Selective Service will be provided on a separate form.

In addition, provision was made in the referenced message for retroactive application of the announced changes. These changes undoubtedly will have an impact upon the question of what types of discharges will, in the future, be judicially categorized as stigmatizing. The retroactive feature of the new policy may prevent widespread extension of the concept that honorable and general discharges can in fact be stigmatizing. In any event, it appears that an argument could be advanced that stigmatization is more dependent in such cases upon the reason for the general discharge, not the mere issuance thereof. There is more judicial agreement on the point that an undesirable discharge is in fact stigmatizing.⁶ The three types of discharge certificates are reflective of three different ways of characterizing a man's military service. An honorable discharge means that his service was "honorable," a general discharge that his service was "under honorable conditions," and an undesirable discharge that his service was "under conditions other than honorable."⁷

At the present time, the weight of judicial authority is to the effect that considerations of due process become paramount only when a stigmatizing discharge is issued. Indeed, one commentator, arguing from premises stated in *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886 (1961), has observed that "if derogatory administrative discharges did not have such deleterious effects, a serviceman could not mount a viable due process challenge, since due process does not otherwise limit the government's discretion to dismiss its own employees."⁸

In view of the fact that the award of stigmatizing discharges entails due process problems and, consequently, what some commanders undoubtedly view as unduly burdensome procedures,⁹ and in view of the relatively small proportion which general and undesirable discharges bear to the total number of discharges issued,¹⁰ one wonders—why bother? Why not just give everyone an honorable, or, perhaps, a "neutral" discharge? According to testimony given Congress by Lieutenant General (then Major General) Leo E. Benade, doing away with the present characterization system would diminish "the value of the discharge to the man who has given honorable service. You need a way to

characterize the service for what it truly is."¹¹ Consequently, it currently appears that, as a matter of policy, the Department of Defense will adhere to published guidelines¹² calling for, and defining the parameters of, discharge characterization for the foreseeable future. This being the case, let us turn to specific instances of separations.

Separation of Enlisted Persons: Stigmatizing.

Assuming for the moment that the undesirable discharge is what courts would label as "stigmatizing," what are the grounds which give rise to it, and what are the due process safeguards built into the procedure for awarding it, both under Department of Defense and Department of the Army directives and regulations? DoD Directive 1332.14 contains current substantive and procedural guidance on the subject. Generally speaking, an undesirable discharge is issued for one of four causes: discharge for the good of the service (Chapter 10, AR 635-200); misconduct (civil conviction, fraudulent enlistment, and AWOL of a year or more (AR 635-206 and Chapter 14, AR 635-200)); in the interests of national security (AR 604-10); and unfitness (Chapter 13, AR 635-200). Except for the Chapter 10 situation, the greatest number of undesirable discharges involving involuntary separations are for unfitness. "Unfitness" is a term of art encompassing such miscellaneous grounds as drug abuse,¹³ frequent incidents of a discreditable nature, shirking, and patterns showing dishonorable failure to pay just debts or adequately to support dependents. Both DoD Directive 1332.14 and AR 635-200 provide a number of procedural guarantees for those about to be separated for unfitness. The individual is, of course, entitled to the fundamental components of due process — notice and an opportunity to be heard. He also is entitled to representation by counsel (with limited exception), meaning a lawyer qualified within the meaning of Article 27, UCMJ. Effective 1 March 1974, AR 635-200 was changed to introduce the concept of a bifurcated counsel procedure, in which the enlisted man will be able to consult "counsel for consultation" at the outset of an elimination action (before ETS) for advice concerning his rights and possible waiver of the board action. If he chooses not to waive the board, he will be represented by another

military lawyer, the "counsel for representation." Such a two-step process of dispassionate advice will insure that any waiver of board hearing entered into by an enlisted man will be a knowing and intelligent waiver as required by the cases.¹⁴ Although the substantive grounds for award of an undesirable discharge may suffer a bit from vagueness,¹⁵ it would appear that present procedures meet or exceed current judicial notions of procedural due process,¹⁶ with one arguable exception. That exception is that administrative discharge boards lack subpoena powers; there is no complete and unfettered opportunity for the enlisted man to confront and cross-examine adverse witnesses, although he is not barred from confronting and cross-examining those who do appear before the board. However, it is a fact that written testimony can be used against an individual in an unfitness proceeding, and at least one commentator has suggested that this is a fatal flaw, although there appears to be no judicial decision directly in point.¹⁷

At this juncture it must be pointed out that no matter what our regulations say and no matter what they give the individual in the way of due process, they may not prevent a person from successfully attacking his discharge in Federal court unless they are followed in every case. This principle has been stated by the Supreme Court as follows, ". . . regulations validly prescribed by a government administrator are binding upon him as well as the citizen. . . ."¹⁸ Although it is often confused with the notion of due process, the follow-your-own-regulation rule has been characterized as a "judicially evolved rule of administrative law."¹⁹ Additionally, an evidentiary standard must be satisfied by the administrative discharge process, that is, the discharge must be neither arbitrary, capricious, nor unsupported by substantial evidence.²⁰ The Supreme Court has said that to meet this type of standard, there must be a showing that "the decision is based on a consideration of the relevant factors and [that] there has been [no] clear error of judgment."²¹ It is rather apparent that, if the safeguards provided in AR 635-200 are followed, as indeed they must be if the failure-to-follow-regulations penalty is to be avoided, there should be sufficient evidence of record to support the decision to discharge as being other than arbitrary, capricious, or an abuse of discretion.

Despite the fact that our unfit and unsuitability separations are in fairly good shape constitutionally, there are some problem areas. If it were to be judicially determined that all general discharges, for whatever reason issued, are stigmatizing, then a fairly drastic change in thinking would be forced upon the Army. In particular, the Secretarial prerogative to characterize service as "under honorable conditions" rather than "honorable"²² would have to give way to the considerations of due process as set forth in such cases as *Goldberg v. Kelley*, 397 US 254 (1970), as interpreted by *Hagopian v. Knowlton*, 470 F. 2d 201 (2d Cir., 1972), to include notice, an opportunity for a hearing, and limited rights of confrontation and cross-examination. The impact would be felt primarily in the areas of "Convenience of the Government" separations and in those cases in which, under the criteria contained in Section III, Chapter 1, AR 635-200, an individual's service may be characterized as "under honorable conditions" upon ETS without a hearing of any sort. Although the "balancing test" in *Goldberg* provides a basis for argument that the individual's interest in a hearing is outweighed by the Government's interests in speedy separation of individuals without the tremendous costs in time, personnel and paperwork attendant upon furnishing a hearing in these traditionally discretionary cases, it is noted that in the *Goldberg* case itself, the Court held that a state's interest in conserving similar resources must give way to the individual's interest in receiving procedural due process protection. The next few years will tell us with certainty what the answer to these questions must be. If the courts do not first invade this heretofore sacrosanct area, Congress very well might act *sua sponte* in enacting some broad reforms in the entire panoply of administrative discharge procedures.²³

Enlisted Separations: Nonstigmatizing.

Turning to the general discharge, and assuming that it is, in fact, nonstigmatizing, what are the grounds for which it may issue? It may issue simply because the individual's record does not merit award of an honorable discharge at ETS.²⁴ It may issue for "Convenience of the Government," which is, under Chapter 5, AR 635-200, a multi-headed Hydra comprising anything from Secretarial prerogative in an in-

dividual case²⁵ to early release to attend school. Under DoD Directive 1332.14, a general discharge may issue for minority, hardship, dependency, or disability. Of course, in the discretion of a board of officers or the appropriate discharge authority, a general discharge may issue for the same reasons an undesirable discharge may issue. But the largest number of general discharges are awarded for "unsuitability," which is again a term of art. "Unsuitability" covers such diverse grounds as inaptitude, character and behavior disorders, apathy, alcoholism and homosexuality. In the area of unsuitability separations, the Army is far ahead of the Department of Defense in according rights of procedural due process. Whereas DoD Directive 1332.14 calls for the protections of hearing, counsel, and the like in unsuitability separations only if the serviceman has eight or more years of continuous active military service, AR 635-200 extends these rights, with one exception,²⁶ to all unsuitability separatees, whether they have one or twenty years of service. Subject to the comment made in connection with unfit separations concerning the unfettered right to confront and to cross-examine, it would appear that the Army's unsuitability separation scheme meets or exceeds current notions of procedural due process.

What are the conditions under which an enlisted individual may be separated from the service without his consent before the normal expiration of his term of service, assuming he is awarded an *undeniably* nonstigmatizing (honorable) discharge? The Secretary is vested with broad statutory powers to prescribe regulations for the separation of enlisted persons prior to ETS.²⁷ Assuming that the separation is not stigmatizing, it appears that the Secretary may do away with the requirements of a hearing.²⁸ However, even honorable discharges which are awarded involuntarily must conform to the follow-your-regulation rule and must not be arbitrary, capricious, nor an abuse of discretion. In some instances, there is little in the way of regulatory procedure to be followed,²⁹ but it would appear that in each case the existing regulatory procedures must be followed and that there must be some reason for the premature termination of services to avoid application of the "arbitrary and capricious" rule.³⁰ We have yet to see the day when a court tells us that an individual enjoys a

right to continued military service such that it cannot be terminated even honorably without the trappings of a hearing, although some commentators have suggested that that day is not all that far off.³¹ Such an event is less likely to occur if we scrupulously observe the procedural provisions of our separation regulations.

Officer Separations: Stigmatizing.

There is really rather little to report in the area of stigmatizing separations of officer personnel. In the case of Regular officers, there are detailed statutory³² and regulatory³³ provisions which govern. These procedures call for a series of boards, with a complete due process hearing occurring at the Board of Inquiry stage.³⁴ It would appear that these procedures satisfy current notions of due process. Similar procedures are provided by regulation for Reserve officers,³⁵ and the same observation applies.

Officer Separations: Nonstigmatizing.

The more immediate problem in officer separations arises in connection with the involuntary relief from active duty of Reserve officers. As the reader is undoubtedly aware, many officers on active duty are reservists serving on what they hope is a career basis. However, there are times, such as the present, when the size of the officer corps is drawn down. At these times, many Reserve officers are involuntarily relieved from active duty. The Secretary of the Army is vested with broad discretion to prescribe procedures for relieving reservists from active duty,³⁶ subject to the provisions of the "twilight clause" which protects officers within two years of retirement from involuntary release from active duty without Secretarial approval.³⁷ Of course, such separations are nonstigmatizing, but they do have a drastic impact on the individuals concerned. By regulation, there are two types of boards used to effect the vast majority of involuntary releases from active duty.³⁸ One of these boards (the "a" board) bases its decisions upon "degree of efficiency and manner of performance," while the other (the "b" board) bases its decisions upon budgetary considerations. It has been held that the Secretary of the Army is bound by regulatory provisions for the involuntary release of Reserves, and that he cannot exercise his broad statutory

authority³⁹ to accomplish release without the board proceedings he has prescribed.⁴⁰ Up to the present, most of the cases in which a Reserve officer has contested involuntary relief from active duty have involved an alleged failure to follow statutory or regulatory procedures in the REFRAD process, the familiar "follow-your-regulation" rule discussed above at length.

However, a recent case gives reason to believe that a change in REFRAD procedures might be in the winds. In *Lindsay v. Kissinger*, 367 F. Supp. 949 (D.D.C. 1973), the court held that Foreign Service and USIA officers being involuntarily retired under a "selection out" process were entitled to notice pointing out the specific deficiencies in their performance and an opportunity for a hearing prior to dismissal. Prior to the decision in *Lindsay*, the selections-out were made by a board which reviewed the State Department equivalent of the Officer Evaluation Report and which afforded no opportunity for a hearing. The similarity between this procedure and the "a" board⁴¹ is indeed noticeable. In *Lindsay*, the court applied the balancing test of cases such as *Goldberg v. Kelley*, *supra*, and held that the individual rights of the relatively few officers involved outweighed the interest of the State Department in continuing to adhere to the no-hearing selection-out process, especially as the Department failed to advance a cogent reason for *not* affording a hearing, although the unstated premise of the Department must surely have been that fiscal and administrative considerations warranted adherence to the no-hearing procedure. Viewed in the context of the Reserve officer REFRAD, *Lindsay* can be distinguished: first, on the basis of the numbers involved; second, upon the grounds that *Lindsay* involved career officers with vested tenure rights, whereas Reserve officers have no tenure, but, by law, serve at the will of the Secretary of the Army — they are called to active duty when needed and released from active duty when the need is over; third, upon the basis that in *Lindsay* the plaintiffs were being separated from their agency, whereas Reserve officer REFRAD only results in a change in status within the agency; and, fourth, upon the Secretary's interest in maintaining a mechanism for the almost instantaneous alteration of the size of the active-duty Army officer corps. Certainly, the Department of State need not have the same

degree of flexibility in altering officer strength levels as the Army must have. However, at this writing, it is unsettled whether the *Lindsay* holding might be extended to the case of involuntary REFRAD of Reserve officers. Unless overtaken by Congressional action,⁴² *Lindsay* and extensions thereof could mean the end of such non-stigmatizing separations (the rule could logically be extended to cover both officers and enlisted men) issued without the panoply of due process protections which we Army lawyers have historically tended to associate only with stigmatizing separations.

Conclusion.

Although most administrative separations meet current standards of due process, it is possible that some changes will be judicially forced upon the Army in the not-too-distant future. If the changes come, we as Army lawyers must be ready to take on the inevitable workload, both in advising and representing affected individuals, and in advising discharge authorities on permissible courses of action. Today, many lawsuits could have been avoided by more careful adherence to applicable regulations and by constructing a record concrete enough to convince the court not to apply the "arbitrary and capricious" rule.⁴³ In addition, the Government must document the case as completely as possible to preclude subsequent attack, direct or collateral, upon the discharge proceeding, whether before a court or an administration board such as the Army Discharge Review Board or the Army Board for Correction of Military Records. Poorly documented records leave themselves open to attack on specious grounds, such as personality conflict or inadequacy of counsel.

In the days and years to come, we must be ready to cope not only with these problems, but with the prospect of representing individuals and the Government in perhaps thousands more administrative hearings each year.

Footnotes

1. See, e.g., *Goldberg v. Kelley*, 397 U. S. 254 (1970); *Fuentes v. Shevin*, 407 U.S. 67 (1972).
2. See, e.g., DAJA-AL 1973/3737, 30 March 1973 (separation of USMA cadet for deficiency in aptitude).

3. Para. 1-5, AR 635-200, 15 July 1966, as changed.
4. *Unglesby v. Zimny*, 250 F. Supp. 714, 717 (ND Cal. 1965).
5. See, e.g., *Grant v. United States*, 162 Ct. Cl. 600, 609 (1963); *McCurdy v. Zuckert*, 359 F. 2d 491 (5th Cir. 1966), cert denied sub nom *McCurdy v. Brown*, 385 U.S. 903 (1966).
6. At least one court has "equated" an undesirable discharge to a dishonorable discharge from the civilian employer's point of view. *Conn. v. United States*, 180 Ct. Cl. 120, 127 (1967).
7. Para 1-5, AR 635-200, *supra*.
8. *Lunding, Judicial Review of Military Administrative Discharges* 83 YALE L. J. 33, 45 (1973).
9. See, e.g., sec. V, chap. 13, AR 635-200, *supra*, for procedure governing hearings which must take place before separation for unfitness or unsuitability.
10. For statistics, see *Lunding, supra*, 34n.9 (9.36 percent of all enlisted discharges in fiscal 1972).
11. Statement of MG Leo E. Benade, *Hearings on H.R. 523 (H.R. 10422) Before Subcommittee No. 3 of the House Committee on Armed Services*, 92d Cong. 1st Sess., p. 5866 (1971).
12. See DoD Dir. 1332.14, 20 December 1965, as changed.
13. Recently revised by C6, dated 26 October 1973, to DoD Dir 1332.14, *supra*, which will be implemented by a change to AR 635-200, *supra*.
14. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938).
15. E.g., discharge for "unsanitary habits" (para VII.I.7, DoD Dir 1332.14 *supra*) or "frequent incidents of a discreditable nature with civil or military authorities" (para 13-5a(1), AR 635-200, *supra*).
16. See *Goldberg v. Kelley*, 397 U.S. 254 (1970).
17. *Lunding, supra*, 52.
18. *Service v. Dulles*, 354 U.S. 363, 372 (1957).
19. *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959).
20. See, e.g., *Sanford v. United States*, 399 F. 2d 693 (9th Cir. 1968).
21. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).
22. DAJA-AL 1972/3445, 18 January 1972.
23. See, e.g., S. 2684, 93d Cong., 1st Sess., the so-called "Ervin Bill".

24. Sec. III, Chap. 1, AR 635-200, *supra*.
25. Para 5-3, AR 635-200, *supra*.
26. The right to legally qualified counsel. Para 13-19b, AR 635-200, *supra*.
27. 10 USC 1169.
28. See n. 8, *supra*.
29. See, e.g., para 5-3, AR 635-200, *supra*.
30. See, e.g., DAJA-AL 1972/5353, 5 March 1973.
31. See Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 *U.C.L.A. L. REV.* 1052 (1972).
32. 10 USC 3781 *et seq.*; 10 USC 3791, *et seq.*
33. Chap. 5, AR 635-100, 19 February 1969, as changed.
34. The point in time at which a full due process hearing is held is not material so long as it is held before final administrative action is accomplished. *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 152-53 (1941).
35. Chap. 2, AR 135-175, 22 February 1971, as changed (for Reserve officers not on active duty); Chap. 5, AR 635-100, *supra* (for Reserve officers on active duty).
36. 10 USC 681(a).
37. 10 USC 1163(d); para 3-58e, AR 635-100, *supra*; cf. 10 USC 1006.
38. Para 3-58, AR 635-100, *supra*.
39. See n.36, *supra*.
40. *Roberts v. Vance*, 343 F. 2d 236, 119 US App. D.C. 367 (1964).
41. Para 3-58a, AR 635-100, *supra*.
42. See, Proposed Defense Officer Personnel Management Act, which, *inter alia*, would significantly alter current distinctions between Regular and Reserve officers on active duty.
43. In an inclosure to his letter of 15 December 1972 to all Staff Judge Advocates, The Judge Advocate General gave his view of the four cardinal lessons learned in Army litigation:
1. Federal courts expect the Army, and those who act for it, to scrupulously follow its own regulations.
 2. Federal courts expect the Army, and those who act for it, to be scrupulously fair.
 3. In personnel matters, Federal courts expect the Army, and those who act for it, to act unemotionally and with good judgment.
 4. Similarly, in command authority cases, Federal courts expect that the commander, and his staff, must act unemotionally and base judgments on facts and objective analysis rather than on visceral reaction (even though that reaction is understandable).

The Defense Counsel: An Important Factor in Race Relations and the Military Judicial System

By: Captain David E. Graham, Instructor, International and Comparative Law Division, TJAGSA

This is the third of several proposed case studies for the Handbook on Race Relations. The Judge Advocate General's School has been tasked by The Judge Advocate General to draft this handbook and preview various portions in *The Army Lawyer*. Additional installments in this series will appear later this year.

Comments on suggestions on the format and discussion are invited. They should be addressed to The Judge Advocate General's School, Civil Law Division, ATT: Captain Ronald Griffin, JAGC, Charlottesville, Virginia 22901.

Fact Situation.

Camp Brooks is a large basic training installation located in the southeastern United States. Due to the large number of basic trainees at Brooks, the SJA office is staffed with a large number of attorneys. The turn-over rate is high, however, and many of the newer attorneys often find themselves in the role of defense counsel. Recently, several of these attorneys have voiced concern over their lack of experience in counseling minority personnel. "How do you talk to those guys?" is a question often asked. One attorney

from the Deep South declares: "With my accent, no black guy is going to trust me." Still another says: "Maybe we can learn their language." Several other defense counsel have indicated they have no problem with developing good rapport with minority soldiers, but they are concerned over whether they should pass along specific information on racial problems that has come to their attention. "Does the SJA want this sort of input?" asks one. "Is that really part of our job?"

The Deputy SJA has called a meeting to discuss the questions raised by these attorneys. What should he tell them? What recommendations should be made?

1. Rapport with Minority Clients.

It is essential that the SJA impress upon new defense counsel coming into his office that they will often encounter minority clients with backgrounds which vary greatly from those of the majority of the attorneys. Moreover, these JA's should be informed that they may be confronted with language difficulties, not only with Spanish-speaking minority soldiers but also with blacks who may have undergone a completely different cultural experience and, as a result, speak what is often referred to as "street" English. If this is the case, the black may have difficulty communicating when he or she enters upon active duty—not only with commanders and first sergeants, but also, if he gets involved with the military judicial process, with his attorney. Defense counsel must therefore develop the ability to counsel a young soldier in this situation. This is often an extremely difficult task, and the ability to communicate effectively with minority clients comes only through effort, experience, and a desire to understand and assist these individuals.

In establishing attorney-client rapport, it is essential that defense counsel be aware that there often exist differences between the attitudes, values, and beliefs of white and minority soldiers. Minority personnel may react differently than whites in similar situations and may express views which are difficult for the white defense counsel either to understand or appreciate. Moreover, it is important that the attorney be aware of the fact that certain words and

actions may be perceived as discriminatory. This may often be due to an overly sensitive reaction on the part of minority personnel. However, whether justified or not, their "perceived discrimination" makes the attainment of the desired attorney-client relationship extremely difficult, and the white defense counsel must be informed of those words and phrases which may be viewed as racist in nature:

There are no textbook guidelines which may be issued to attorneys dealing with minority personnel. Constant effort on the part of the attorney, experience, and an honest desire to understand and meet the needs of minority soldiers are the primary ingredients of success in this area. Several steps might be suggested with a view toward improving defense counsel-client rapport, however. It is advisable that new defense counsel discuss these problems with attorneys experienced in counseling minority personnel as quickly as possible in order to benefit from their knowledge. The SJA should be instrumental in assuring that these meetings occur. These experienced attorneys should then remain available to aid new defense counsel who encounter communication and credibility problems. It is also advisable that defense counsel attend, to the fullest extent possible, the race relations instruction given at their installations. This aids in giving counsel a much greater understanding of minority personnel and the often unique problems which confront them.

The new defense counsel in the field is, on occasion, informed that the only way to establish credibility and rapport with minority clients is to "become black or brown." He may be advised to "speak their language," or "dap with the best of them." In the cases of some few individual attorneys, this approach toward minority clients may prove to be effective. For the great majority of white attorneys, however, such an approach would be personally and professionally dishonest. Behavior such as this would most probably result in a mocking distrust on the part of the minority soldier involved. *Experience has shown that an attorney-client relationship built on frankness, honesty, and professionalism will consistently prove to be the most effective.* An honest and hard-working defense counsel will soon win a favorable reputation among minority personnel, regardless of his accent or home state.

Emphasizing the ability and willingness of defense counsel to communicate with and relate to minority soldiers cannot be overdone. These attorneys are provided with a very real opportunity to demonstrate the fairness of and establish credibility in the military judicial process.

2. *Defense Counsel As a Source of Information.*

If defense attorneys are able to communicate effectively with minority soldiers and do, in fact, earn their trust and confidence, they will prove to be invaluable to the SJA as sources of advice and counsel regarding the racial situation within the command. This is not to be interpreted as a recommendation that these attorneys be utilized as "spies" or "informers." Experience has simply shown that minority personnel with problems will often speak more frankly to their attorneys than to commanders. Moreover, as a result of changes in Article 15 requirements and other phases of military justice, more and more soldier will have the right to see attorneys. Along with Equal Opportunity and Race Relations Officers, military lawyers are in a good position to keep authorities advised of racial difficulties which may not be readily apparent. It is suggested that the SJA advise the lawyers in his office that he desires to be kept informed of matters of racial concern. Acting on the basis of his own experience, the SJA may then choose to pass this information on to the commanding officer.

One note of caution must be set forth. In keeping his SJA advised of racial problems of which he has become aware, the military attorney must always bear in mind his professional responsibilities and limitations under the attorney-client relationship.

The opportunity allowed defense counsel to provide timely and accurate information with regard to racial problems is much too valuable to be wasted. If seized upon, it should prove to be an integral part of a progressive preventive law program.

Checklist.

A. Rapport with Minority Clients.

1. Alert new defense counsel that they may encounter clients with vastly different sociological backgrounds and language problems.
2. Advise new defense counsel that a difference in minority attitudes, values, and beliefs may result in statements and actions difficult for the attorney to understand.
3. Apprise the new attorney of words and phrases which may be perceived as discriminatory in nature.
4. Insure that new defense counsel meet with attorneys experienced in counseling minority soldiers.
5. Have new defense counsel attend race relations training, if at all possible.
6. Advise the new attorney to "be himself." Honesty and professionalism are the keys to the establishment of a workable attorney-client relationship.

B. Defense Counsel As A Source of Information.

1. Inform defense counsel that they are to keep the SJA informed of racial matters which come to their attention.
2. Acting on the basis of his own judgment and experience, the SJA may choose to pass this information to the commanding officer.
3. Defense counsel are not to be used as "spies" or informers."
4. The defense counsel must act within the limitations of any attorney-client relationship which he may have established.

Filing Of Administrative Reprimands In Official Personnel Files

By: Lieutenant Colonel Kenneth A. Raby, Chief, Military Personnel Law Team, Administrative Law Division, OTJAG

For years administrative reprimands could not be filed in official military personnel files (OMPF) maintained at Headquarters, Department of the Army. Such filing was prohibited by paragraph 4c, Army Regulation 640-98, 19 July 1965. In April 1972, the Chief of Staff of the Army dispatched a message (102141Z Apr 72) to the field announcing a forthcoming policy change which would, in part, authorize such filing under certain conditions. (Note: This message also announced a change in Article 15 filing policy.) The Chief of Staff stated in the message that:

Our present officer personnel records system too often discourages or prohibits filing information concerning deficiencies and shortcomings in an officer's character or professional performance. This results in some instances of officers of questionable suitability being considered for sensitive positions of authority and responsibility because of lack of information.

Army Regulation 600-37, 16 October 1972, became effective on 1 November 1972. This regulation, in part, implemented that portion of the above policy message which stated that, "Any general officer will have the prerogative to authorize the permanent filing of administrative reprimands in the officer's efficiency files maintained at Headquarters, Department of the Army." This authority was extended to situations involving the permanent filing of administrative reprimands tendered to noncommissioned officers and enlisted men. Thus, an administrative reprimand, when permanently filed, becomes another distinguishing factor (like any other type of adverse information so filed) which assists personnel decision-makers in carrying out their particular responsibilities of the moment. A properly prepared and processed administrative reprimand may provide valuable insight to a personnel manager regarding the character, efficiency, integrity, maturity, reliability, or judgment of a given individual. For example, if a member engages in off-post misconduct, an administrative reprimand is a reliable means of insuring that official personnel files contain known information relating to the member's character and integrity. Two general principles should be remembered with respect to administrative reprimands. First,

an administrative reprimand should be placed in the member's OMPF if the nature of the deficiency so warrants, or fundamental fairness to his contemporaries dictates that his file should contain a "distinguishing factor." Second, an administrative reprimand should accurately reflect the circumstances surrounding the incident or deficiency. It is more important for decision-makers to know the facts involved than to read well-written censures rendered for inadequately-identified reasons. Moreover, administrative reprimands have been modified, or removed from files in some instances, where the reprimanding language went substantially beyond the supportive facts (e.g., DAJA-AL 1973/4728, 19 Sep 1973 [DA Suitability Evaluation Board action]; *id.* 1973/4715, 10 Oct 1973 [Art. 138 complaint]). The Administrative Law Division has rendered two significant legal opinions interpreting the provisions of Army Regulation 600-37 relating to administrative reprimands (DAJA-AL 1974/3511, 11 Feb 1974; *id.* 1973/4448, 9 Aug 1973 [FOUO]). The Office of the Deputy Chief of Staff for Personnel was informed of these opinions and has transmitted them to MILPERCEN to insure uniformity of regulatory interpretation. In summary, the combined effect of these opinions is to clarify applicable Army Regulation 600-37 procedures as follows: Paragraph 2-4 of the regulation is interpreted as authorizing any military commander or supervisor in a member's chain of command or staff supervision to impose a written administrative reprimand, admonition, or censure upon the member. Further, a former commander or supervisor may take similar action for transgressions occurring when the member was under his command or supervision (see also para 5-8b, AR 600-20). (Note: The Secretary of the Army has inherent authority to impose administrative reprimands separate and apart from the provisions of AR 600-37.)

Moreover, any general officer, whether or not in the member's chain of command or supervision, may, by indorsement or other written designation, cause such documents to be placed in a member's OMPF. Although it is not customary

for a general officer who has no command or supervisory relationship to the member to impose a reprimand, situations may occur where such action is appropriate. In this regard, ODCSPER is considering extending the authority to direct permanent reprimand filing to all officers exercising general courtmartial jurisdiction, in addition to general officers.

Presently all written administrative reprimands are filed in the recipient's Military Personnel Records Jacket (MPRJ, i.e., field 201 file). Paragraph 2-4a, Army Regulation 600-37, precludes "desk drawer" written administrative reprimands (which have on occasion been imposed without referral to the member for rebuttal). However, ODCSPER may make the MPRJ filing requirement discretionary for general officers in the near future.

Paragraph 2-6, Army Regulation 600-37, prescribes that recipients of written reprimands will reply thereto by using one of the formats shown in the paragraph. Rebuttal correspondence should be reviewed to insure that this procedural requirement has been satisfied. If a member is directed to reply to the reprimand correspondence

"in accordance with the procedures prescribed by paragraph 2-6," and thereafter responds to the correspondence using an unauthorized format, a procedural waiver may occur. However, the preferred solution is to return the member's rebuttal to him for substantial regulatory compliance.

Another problem develops if, after receipt of a member's rebuttal, additional information is added to the file prior to forwarding it to the Department of the Army. As a general rule, if the file, through indorsement or otherwise, thereafter contains new adverse information, a substantially different or harsher reprimand, or directs filing in a manner other than the member was previously notified, the correspondence must again be returned for rebuttal.

By following the above guidelines, the likelihood of having an administrative reprimand returned by the Department of the Army for corrective action will be substantially reduced, and the value of the document as a personnel management tool will be enhanced.

Judiciary Notes

From: U. S. Army Judiciary

1. Recurring Errors and Irregularities.

a. *Court-Martial Orders.*

(1) The second and any subsequent even numbered pages of a court-martial order should be printed head-to-foot to facilitate reading of the order when it is made part of the record. Moreover, it should be dark enough to be readable. To preclude the need for a corrected copy, it must be authenticated (signed and sealed) in accordance with the provisions of paragraph 12-4c, AR 27-10, and paragraph 1-24c, AR 310-10.

(2) When it is necessary to rescind a court-martial order, the reason for the rescission should be stated therein, for example: "having been issued prior to completion of appellate review"; "having been erroneously published as a general court-martial order instead of a special court-

martial order"; "having been inadvertently published prior to evaluation of the accused by the general court-martial convening authority as required by AR 190-36." Further, the revoking order should include the accused's name, service number, and organization.

b. *March 1974 Corrections by ACOMR of Initial Promulgating Orders:*

(1) Showing incorrectly under the PLEAS paragraph, rather than under FINDINGS, that a Charge and its specification had been dismissed by the military judge, for failure to allege an offense, after arraignment and pleas had been entered.

(2) Failure to reflect that certain specifications were formally amended during trial — 3 cases.

(3) Failing to show in the PLEAS paragraph that a plea of guilty was changed by the military judge to one of not guilty.

(4) Failing to include in the name paragraph the accused's service number.

(5) Failing to show all the charges and specifications upon which the accused had been arraigned — 2 cases.

(6) Failing to show in the PLEAS paragraph that certain charges and specifications had been withdrawn by the Government after arraignment.

(7) Failing to show after and below the authority paragraph the accused's name, service number, armed force, and organization.

2. Notes from Defense Appellate Division

a. Previous Convictions—Proof of Finality.

At least one panel of the Army Court of Military Review has decided that Change 8 to Army Regulation 27-10, effective 15 December 1971, changed the requirements for proving the finality of a previous court-martial conviction under paragraph 75b(2), *Manual for Courts-Martial, United States, 1969 (Rev. ed.)*. Insofar as paragraphs 2-24, 2-25, and 2-31 of AR 27-10 require a showing of finality on the promulgating order, on Form 20B and on DD Form 493 (Extract of Previous Convictions), such records *cannot be presumed* to prove finality of a conviction. The records *must* also reflect the date of appellate or supervisory review or the presumption is now against finality. See AR 640-2, Section II, Chapter 3, page 3-71, 1 September 1972; DA Pam 27-2, *Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Rev. ed.)*, para 75b(2), at 13-6 (July 1970).

Review of recent cases reveals that personnel clerks in completing DD Form 493 are entering the date of the action of the convening authority rather than the date of JAG supervisory or appellate review in the block labeled "DATE SENTENCE FINALLY APPROVED." Such entries are immediately suspect when the dates "sentence adjudged" and "sentence finally approved" on DD Form 493 are the same or nearly

so. Defense counsel should always compare the DD Form 493 with the promulgating order and the Form 20B for conformity with the text and sample figure in AR 640-2, *supra*, and AR 27-10.

Defense counsel should object to all exhibits of previous court-martial convictions not reflecting appellate or supervisory review. Appellate relief has been obtained in the following cases where defense counsel made the appropriate objection at trial: *United States v. Stone*, CM 429627 (ACMR 13 April 1973) (MSF); *United States v. Reed*, CM 430323 (ACMR 31 October 1973) (MSF); *United States v. Yokley*, CM 430204 (ACMR 11 October 1973) (MSF); *United States v. Bryant*, CM 428332 (ACMR 18 January 1973) (MSF). These cases are all modified short forms (MSF) not full opinions, and, hence, copies are not available locally.

b. Documentary Evidence in Drug Cases.

Several cases have been received by the Defense Appellate Division in which the prosecution has proved its entire drug case by the use of the apprehending officer and two documents — a Military Police Receipt for Property Report to prove chain of custody and a laboratory report to prove the nature of the substance seized. Unfortunately, a number of defense counsel have failed to object to the admission of these documents into evidence and have thereby lost important opportunities to win their case at trial and on appeal.

Perhaps this disturbing trend is a result of a misreading of *United States v. Evans*, 21 USCMA 579, 45 CMR 353 (1972), where the Court of Military Appeals held that a laboratory report qualified as a business entry and that it was not error to premise a drug conviction on its findings. However, this decision is not authority for the proposition that the government may prove a drug charge with only documentary evidence.

At the outset it must be noted that the laboratory report, and the change of custody document, must be properly authenticated as business entries. Authentication of a *business entry* is accomplished, not by a self-authenticating certificate, but only by the person who made the entry or the person receiving the entry in the normal course of business. See paragraphs 143b(1),

144b, 144c, *Manual, supra*. Defense counsel in *Evans* twice affirmatively waived any objection to consideration of the chain of custody document and laboratory report. Further, standing alone, the chain of custody document will not prove that the object taken from the accused was, in fact, the object tested. Only live witnesses can establish such facts.

Recognizing the distinguishing features of *United States v. Evans, supra*, the Army Court of Military Review in *United States v. Miller*, S-8945 (ACMR 25 March 1974) recently held that the military judge improperly considered a laboratory report where a defense counsel indicated his objection to its receipt into evidence because:

There has been no evidence whatsoever as to the identification of these items, other than a suspicion of what it is. And I still believe that there should be expert testimony testifying and identifying exactly what this is, rather than just a printed piece of paper which has been certified to, that this is a copy of the lab records.

Although the defense counsel's objection in *Miller* was inartful and unspecific it managed to

lead to a successful appeal. The Court in *Miller* considered the objection as at least a request to examine the test procedures and the chemist.

Trial defense counsel should be alert to the limitations of *United States v. Evans, supra*, and the chain of custody document and make appropriate objections in the best interests of the accused.

Both the above developments highlight the importance of trial defense counsel making timely and precise objections. Further information about these lines of cases and assistance in trial litigation can be obtained from the Defense Appellate Division, United States Army Legal Services Agency, Autovon 289-1807.

3. Note on U.S. Army Court of Military Review. Current pictures of the U. S. Army Court of Military Review are now available at USALSA. Staff Judge Advocates desiring copies should direct their requests to Director, Administrative Office (HQDA JAAJ-ZX), Nassif Building, Falls Church, Virginia 22041, Autovon: 289-1752.

Criminal Law Items

From: Criminal Law Division, OTJAG

1. Supplementary Orders for Other Commands. Staff judge advocates are urged to insure that when they publish a supplementary court-martial order in a case initially acted on by another command, two copies of the order are provided to the staff judge advocate of the original command in accordance with the provisions of paragraph 12-5e, AR 27-10. Frequently, the SJA of the original command must obtain copies of supplementary orders published by other commands from the Office of the Clerk of Court, U.S. Army Court of Military Review. The failure to comply with the regulatory provision previously mentioned impedes the administrative processing of records of trial.

2. Summarized Records of Trial and Affirmative Defenses. Staff Judge advocates are urged to be alert to the need to amplify pertinent portions of DD Form 491, Summarized Record of Trial, 1 April 1970, in non-verbatim records of

courts-martial in which affirmative defenses are raised, to provide a sufficiently complete record for appellate review. If the court was instructed on an affirmative defense, the summarized record should be specific enough regarding those instructions to enable the supervisory authority to execute his review knowledgeably under paragraph 94, MCM, 1969 (Rev.).

3. Promulgating Orders Reflecting Forfeitures of DB Prisoner Pay. Prisoners who arrive at the United States Disciplinary Barracks in a pay status continue to receive pay and allowances until such time as the F&AO, Fort Leavenworth, receives copies of the court-martial promulgating orders announcing the approval of adjudged forfeitures. In a number of cases, the F&AO, Fort Leavenworth, has not received a copy of the court-martial promulgating order until more than a month after the effective date for application of the forfeitures. For practical pur-

poses such excess payments are not recoverable. In order to alleviate the problem, when a prisoner is transferred to the United States Disciplinary Barracks, the F&AO, Fort Leavenworth, should

be included on the distribution list for copies of the court-martial promulgating order. Additionally, a copy of the order should be forwarded directly to that office.

Claims Items

From: U.S. Army Claims Service

1. Claims Against the United States for Maritime Torts of the Army. A cause of action involving alleged tortious action of the Army may suggest a relationship between the wrong and some maritime service, navigation or commerce on navigable waters within the United States, its territories and possessions. In these cases an early determination must be made whether a suit, if filed, would fall under the Suits in Admiralty Act (46 U.S.C. 741-752) (hereinafter called SAA) or the Public Vessels Act (46 U.S.C. 781-790) (hereinafter called PVA) or the Federal Tort Claims Act (28 U.S.C. 2671-2680) (hereinafter called FTCA). The FTCA by its terms excludes from consideration any claim which is cognizable under SAA or PVA.

As originally enacted the SAA covered only suits for damage caused by a merchant vessel of the United States or government cargo. In 1960 the SAA was made as broad as general admiralty jurisdiction over private vessels, cargo, property or persons. Thus many nonvessel maritime torts such as improperly placed or maintained buoys and lighthouses and accidents involving locks and dams became cognizable under SAA rather than FTCA. The PVA continues to apply to claims generated by government owned or bareboat chartered vessels which are not merchant vessels.

The Army's authorization for the settlement of maritime claims against the United States (10 U.S.C. 4802) (hereinafter called MCSA) was originally enacted for the purpose of providing a means of administratively settling claims which otherwise would be settled judicially under SAA or PVA. The MCSA, however, was not broadened in scope as was the SAA in 1960 and many claims generated by other than a vessel could not be settled administratively. On 29 August 1972 the MCSA was broadened to cover virtually all maritime torts arising out of Army activities in-

cluding civil works. As the 1972 amendment to the MCSA was not retroactive, the Army at present has administrative jurisdiction over two categories of claims for maritime torts. As to claims arising before 29 August 1972, the Army's jurisdiction is limited to claims generated by vessels of or in the service of the Army. As to claims arising on and after 29 August 1972, jurisdiction under MCSA is about as broad in scope as jurisdiction under SAA.

Due, however, to the operation of the time limitations provision discussed further below, the first mentioned category of claims normally will be ineligible for administrative consideration after 29 August 1974. In this connection, it is important to remember that nonvessel maritime claims arising before 29 August 1972 are not necessarily cognizable under the FTCA because they are not cognizable under MCSA. If the claimants have a judicial remedy under SAA or PVA, the FTCA does not apply and claimant does not have an administrative remedy.

Aside from the fact that substantive law applicable to claims under MCSA is very different from that applicable under FTCA, the differences in the time limitations provisions of the two acts make it imperative to process a claim under the proper settlement authorization. Under FTCA as to claims arising on and after 18 January 1967, a claim must be presented in writing within two years after it accrues and suit cannot be filed until final denial of the claim or the expiration of six months from the date of presentation of the claim, whichever comes first. Additionally, a claimant must file suit, if he wishes to do so, not later than six months after notification by registered or certified mail of the denial of the administrative claim. On the other hand, except under circumstances not pertinent here, under MCSA only a period of two years from the date of origin of the

cause of action is available for administrative settlement of the claim. Filing a claim, consideration thereof and any negotiations toward settlement of the claim do not extend the liminary period. A claim must be settled or suit filed prior to the end of the period, otherwise the cause of action ceases to exist. As to claims for damage or injury done or consummated on land, no suit may be filed under SAA or PVA as extended to cover damage or injury to person or property on land caused by a vessel on navigable water (46 U.S.C. 740) until there shall have expired a period of six months after the claim has been presented in writing to the responsible federal agency. Except as noted above, however, there is no requirement for administrative filing of a MCSA claim prior to suit.

Admittedly, it is not always easy to determine whether a particular administrative claim should be processed under MCSA or FTCA. If, however, the procedures set forth in paragraphs 2-11b(2), 2-11b(5) and 8-8c, AR 27-20, are followed, the U.S. Army Claims Service will have advance notice of the incident and will be in a position to give prompt advice as to which claims settlement authorization is applicable.

2. Errors and Irregularities in Recovery Actions. The following comments are published for information and guidance of claims personnel handling household goods recovery actions against carriers, warehousemen, insurers and others for damage to household goods and other personal property of members and employees of

the Army while in transit or storage at Government expense.

a. Many claim files forwarded to this Service as "Impasses" contain copies of DD Form 1840, Notice of Loss or Damage, and DD Form 1843, Demand on Carrier/Contractor, which are unsigned and the date of dispatch is not shown. Such documents are worthless as evidence to be used against the carriers in establishing the timeliness of dispatch. All copies of such documents must be signed and dated. Every claims office must insure that the installation Transportation Officer is dispatching DD Form 1840, Notice of Loss or Damage, promptly as required by paragraph 11-29b, AR 27-20, and paragraphs 13002 and 13003, C5, DOD 4500.34-R (Personal Property Traffic Management Regulation).

b. Recovery from third parties is on an item-by-item basis. Claim files forwarded to this Service as "Impasses" must show on DD Form 1845, Schedule of Property, the complete and detailed adjudication of the field claims office paying the claim.

c. When a shipment moves under a Government bill of lading, a copy of the bill of lading must be in the file to insure that the claim is directed to the proper carrier. Correct names and addresses of carriers can be obtained from your local transportation office, which has been furnished a complete listing by MTMTS.

JAG School Notes

1. AUTOVON Access to TJAGSA. AUTOVON access to TJAGSA is now through the Army Foreign Science and Technology Center at Charlottesville, Virginia. The AUTOVON number is 274-7110. The FSTC operator connects callers to TJAGSA *commercial* numbers. The more frequently used numbers are:

Commandant	293-3936
Director, Academic Department	293-9298
Deputy Director for Nonresident Instruction	293-6286
Resident Course Info & Quotas	293-7475

Correspondence Course Info	293-4046
Criminal Law Division	293-4730
Civil Law Division	295-4230
Procurement Law Division	293-3938
International and Comparative Law Division	295-4330
Assistant Commandant for Reserve Affairs	293-7469
JAG RC Career Management Training Office	293-7808
	293-2028

Director, Developments, Doctrine and Literature Department	296-4668
Military Operations, Management and Plans Division	293-4668

Doctrine and Literature Division	293-7376
School Secretary	293-4732
Post Judge Advocate	293-4731
Logistics Division	293-2402
Adjutant and Nonduty Hours	293-4047

On 1 June 1974, or as soon thereafter as this information has had time to reach the field, TJAGSA's AUTOVON service through Fort Bragg, North Carolina, will be terminated.

2. Allied Officer Gala. TJAGSA staff, faculty and students recently honored their allied student officers with a formal dinner-dance held atop nearby Afton Mountain. Subsequent to the festivities, four of the departing students from the 72nd Basic Class presented gifts to the School; the fifth honoree, an Ethiopian officer, remains in the 22nd Advanced Course. The two Iranian officers left behind a Persian-English version of *The Glorious Koran*, along with a pair of dictionaries for additional translation between the two languages. Our officer-guest from Thailand presented the School with a victory gong from his country. A Royal Doulton figurine of "The Judge" was received from the visiting officer from the United Kingdom. Among the honored guests were: Lieutenant Colonel and Mrs. R. C. Harmer, representing the British Embassy; Major and Mrs. A. K. Montazami, representing the Iranian Embassy; Professor and Mrs. Kenneth Redden, a UVA law professor who coincidentally taught our officer-guest from Ethiopia while a visiting professor in that country; Dr. Arthur Akers, a visiting British professor teaching at Virginia's School of Engineering; and Mr. Edward Von Selzam, a retired member of the German Foreign Service.

3. Mug Collection. The School's OOM Mug Collection received two recent and welcomed additions, one from Colonel Jim Macklin and his officers at Fort Knox; and another, compliments of Colonel Thomas W. Adair, Commander of the U.S. Army Retraining Brigade at Fort Riley. There is still plenty of TJAGSA shelf space left for displaying that stein, tankard or noggin which bears your unit's or installation's distinctive insignia. We'd like to note your contribution.

4. Advanced Class Orals. Springtime is also thesis-time at TJAGSA, and members of the Ad-

vanced Class spent the last days of April "at the rail" undergoing oral examination on their chosen topics before various guest experts in Charlottesville. These visiting authorities were picked from several backgrounds—university, governmental, military and civilian—and represented some of the finest minds in their field. Our list of guest experts from within the Corps included: Brigadier General Lawrence H. Williams; Colonel (Retired) Carlisle Taylor; Colonel (Judge) Matthew B. O'Donnell; Colonel (Judge) William T. Rogers; Colonel Wayne E. Alley; Colonel Victor A. DeFiori; Colonel Alton H. Harvey; Colonel Kenneth A. Howard; Lieutenant Colonel James G. Garner; Lieutenant Colonel Edward A. Lassiter; Lieutenant Colonel Richard P. Scheff; Major H. Jere Armstrong; and Major William G. Eckhardt.

5. Leavenworth Trip. Members of the 22nd Advanced Class journeyed to the midwest last month. New Hampshire Air National Guardsmen from Portsmouth's 157th Tactical Airlift Group flew the group by C-130 from Charlottesville to Salina, Kansas for the traditional tour of military correctional facilities. The itinerary included stops at the Eisenhower Center in Abilene; a visit to the Retraining Brigade at Fort Riley; and a tour of the Disciplinary Barracks and federal penitentiary in the Leavenworth area. The group returned from the three-day trip, again by C-130, courtesy of the California Air National Guard's Tactical Airlift Squadron from Van Nuys.

6. Recent Visitors. April brought a long-awaited spring to Charlottesville, along with a number of guest-lecturers and visitors to TJAGSA classes and short courses. Some of the familiar and more notable visitors included: Mr. Sven Kramer of the National Security Council, White House; The Joint Chiefs of Staff SALT representative, Lieutenant General E. L. Rowny, USA; Mr. George Aldrich, Deputy Legal Adviser, Department of State; Mr. J. Howard Hayden of the Austin law firm of Baker, Watkins, Ledbetter, Hayden and Ramsey; Dr. Browning Hoffman, Associate Professor of Law and Psychiatry at UVA; former POW's Lieutenant Commander Edward Davis, USN and Lieutenant Colonel (Ret.) Norman Wells, USAF; and Colonel Jere W. Sharp, Chief of the Operations Division, DA Materiel Acquisition.

Administrative Law Opinions*

(Separation From The Service - General) **Suspension Of Approved Chapter 10 Discharge Considered Inappropriate.** MILPERCEN requested an opinion whether there was legal objection to a discharge authority suspending an approved discharge for the good of the service. The inquiry observed that provisions for suspension of approved discharges were made within paragraph 13, AR 635-206, 15 Jul 1966, as changed (conviction by civil authorities), and in paragraph 13-27, AR 635-200, 15 July 1966, as changed (unfitness and unsuitability)—and that suspension of an approved discharge was also provided by paragraph 1-15, AR 635-200, *supra* without specification as to the discharge program to which it applied.

The opinion noted that, as presently written, neither AR 635-200, *supra*, nor DOD Directive 1332.14 specifically prohibit suspension of an approved discharge for the good of the service (Chapter 10, AR 635-200) or for fraudulent entry (Chapter 14, AR 635-200). Conversely, it was pointed out that neither cited chapter specifically authorizes such suspension action. In view of the stated purposes of the discharge for good of the service found in paragraph 10-4 of the regulation (i.e., to discharge members considered beyond all rehabilitative efforts) exercise of the power to suspend a discharge was not considered appropriate. The opinion added that lack of specific authority to suspend an approved discharge within the applicable chapter of AR 635-200, *supra*, should be interpreted to render such suspension action improper. (DAJA-AL 1973/5904, 27 Nov 1973).

(Separation From The Service - General) **Collateral Federal Attack On State Conviction Is Not An "Appeal" For 206 Purposes.** An individual was convicted of murder in state court and was unsuccessful in appealing his case at the state level. He was subsequently discharged from the military with a UD by virtue of action brought pursuant to AR 635-206, 15 Jul 1966, as changed. Collateral relief was then sought in the federal courts. After the individual's petition for writ of habeas corpus was denied by the district court, an appeal was filed with the circuit court of appeals.

In response to an inquiry OTJAG opined that neither a collateral attack upon a state court con-

viction by way of federal habeas corpus nor an appeal from the denial of habeas corpus relief is an "appeal" within the meaning of paragraph 34, AR 635-206, *supra*. As such, the executed discharge was noted as presumptively final, subject to change only by application to the Discharge Review Board or Board for the Correction of Military Records. (DAJA-AL 1973/5268, 26 Dec 1973).

(UCMJ - Article 138) **Failure To Provide Supporting Evidence For Article 138 Complaint Was No Basis For Imposition of Disciplinary Punishment.** A sergeant submitted a complaint under Article 138, Uniform Code of Military Justice (10 USC 938), naming three of his commanders as respondents. The senior commander named as a respondent ordered the complainant to submit witness statements and documentary evidence in support of the allegations in his complaint. When the complainant failed to submit the information, the commander named as a respondent ordered the commander punishment UP Article 15 (10 USC 815) or prefer charges under the Uniform Code of Military Justice for failure to supply supporting evidence. Although no punishment was ever administered to the complainant, The Judge Advocate General, as designee of the Secretary of the Army, concluded there was no basis in law or regulation for imposition of disciplinary punishment in the event that a complainant failed to provide additional evidence in support of a complaint under Article 138. The evidence a member submits in support of his complaint is entirely within his discretion. (DAJA-AL 1974/3431, 25 Feb 1974.)

(Separation From The Service - General) **Serious Injury To Individual Does Not Invalidate An Otherwise Effective Separation.** Inquiry was directed as to whether an injury to an individual requiring hospitalization prior to the effective time of separation invalidated the act of separation. An EM was discharged from the service, and was injured in an auto accident while en-

*The headnotes for these opinions conform to the list of topic headings found at Appendix 8-A to DA Pamphlet No. 27-21, Military Administrative Law Handbook (1973).

route to his home of record that same day. His separation order was allegedly revoked some three days later, based on reliance upon 44 Comp. Gen. 43, 49 (1964).

OTJAG expressed its unawareness of any authority to support a proposition that injury to an individual invalidates an otherwise effective separation from the service. It was noted, however, that a discharge authority could take action to revoke a separation order prior to its effective time in any appropriate case of disease or injury sustained prior to the effective time of separation. As to the cited opinion of The Comptroller General, it was observed that that situation dealt merely with entitlement to travel of dependents and shipments of household goods. (DAJA-AL 1973/5176, 8 Nov 1973.)

(Boards and Investigations — General) Formal Investigation Under AR 15-6 Is Not A Prerequisite To Disciplinary Action For Security Violation Under DOD Dir 5200.1-R. Guidance was sought by the Safeguard System Command whether a formal investigation under AR 15-6, 12 Aug 1966, as changed, must be conducted prior to disciplinary action in certain cases involving security violations. The question arose because paragraph 6-103a, DOD Dir 5200.1-R, 15 Jul 1972, provides that if a preliminary informal inquiry establishes: (1) either a loss of classified information did not occur, or the possibility that classified information was compromised is remote and no significant security weakness is found, and (2) disciplinary action is not appropriate, then such preliminary inquiry is sufficient action by the responsible individual. Conversely, if initial inquiry establishes that compromise did occur or that the possibility of compromise cannot be discounted, further investigation is required. The Directive does not require what might be considered a formal investigation under AR 15-6, *supra*, in any other instances.

It was opined that neither AR 15-6 itself, nor any related Army Regulations, mandate a formal investigation as a prerequisite when the responsible official decides to impose disciplinary action against the individual concerned, even though preliminary investigation has satisfactorily concluded that no compromise has occurred or that the possibility of compromise is remote. The opin-

ion added that the DOD Directive should not be construed to restrict imposition of disciplinary action against military or civilian personnel—in either situation, such action should be accomplished in accordance with applicable law and regulation. (DAJA-AL 1973/5337, 11 Jan 1974.)

(Separation From The Service — General) "Former Jeopardy" Exception Of Paragraph 1-13b(3), AR 635-200 Applies Only To 1-13a(3) Cases—Not 1-13a(1) Or (2) Situations. An exception under the provisions of paragraph 1-13b(3), AR 635-200, 15 Jul 1966, was sought from Headquarters, Department of the Army, in order to process an EM for a Chapter 13 discharge after a preceding GCM had failed to result in his discharge. The individual had been tried for several unauthorized absences and various incestuous sex offenses, but was convicted only of AWOL. The military judge granted a motion for a finding of not guilty as to the other offenses when the prosecutrix failed to appear and no other evidence of sex offenses was offered at trial.

It was determined that, under these facts, the EM had been tried by a court-martial resulting in action tantamount to an acquittal, for conduct identical to that upon which his administrative separation was sought. As such, OTJAG reasoned that an undesirable discharge in these circumstances was precluded by Sec. V. A. 7, DOD Directive 1332.14, 20 Dec 1965, as changed. It was further opined that the exception authorized by paragraph 1-13b(3), AR 635-200, *supra*, is applicable in cases covered by paragraph 1-13a(3) only, and not paragraphs 1-13a(1) or (2). Accordingly, no exception was granted in the instant case. It was additionally noted, however, that a discharge for the convenience of the Government might be warranted. (DAJA-AL 1973/5082, 26 Nov 1973.)

(UCMJ — Article 138) Disposition Of Chapter 13 Action Was Not An Actionable "Wrong." An EM complained after the Commander, U.S. Army Personnel Control Facility, recommended him for elimination UP Chapter 13, AR 635-200, 15 Jul 1966, as changed. The complainant had been assigned to the PCF after an AWOL, and

was tried by SPCM for that offense. The individual alleged, *inter alia* that: (1) records of two instances of nonjudicial punishment which accompanied the elimination recommendation were over two years old and "outdated"; (2) a record of nonjudicial punishment which he had never acknowledged erroneously accompanied the elimination action; (3) allegations of misconduct appearing on an MP Form 19-32, all but one of which were dropped by civil authorities, should not have been forwarded with his case; and (4) his commander had failed to make any necessary attempt to rehabilitate the complainant by reassignment or otherwise. The GCM convening authority considered the EM's claim as non-cognizable under Article 138, and treated it as a request for extraordinary relief.

OTJAG noted that, while the convening authority's characterization of the complaint as being a non-Article 138 action was contrary to AR 27-14, 15 Feb 1972, as changed, the resulting examination of the case on its merits did not prejudice the complainant. The opinion concurred with the convening authority's findings that the alleged wrongs were acts involving judgment and discretion on the part of the complainant's commander in arriving at a determination whether to

process him for elimination—which did not give rise to an actionable "wrong" within the meaning of Article 138.

The opinion directed these additional comments regarding the complainant's correspondingly numbered allegations: (1) the policy against retaining allegedly "outdated" Article 15 records (Paragraph 3-15b, AR 27-10, 26 Nov 1968, as changed by DAJA-MJ 1972-12850 [Sep 72]) was obviously intended to apply to records not removed from personnel files as of the date it went into effect; (2) a commander recommending elimination is obliged to forward as complete an elimination file as practicable—the board determines the effect of nonacknowledgment of punishment on admissibility and weight; (3) likewise, the board may consider the relevancy of the contents of an unspecified incident on an MP Form 19-32 which is later dropped by civil authorities; and (4) FORSCOM possessed properly delegated authority to allow commanders of PCF facilities to waive the rehabilitation requirements of AR 635-200, *supra*—furthermore, previous precedent (JAGA 1969/4515, 17 Oct 1969) supports the proposition that an elimination board may complete action on a case even before a waiver need be exercised. (DAJA-AL 1973/5191, 28 Dec 1973.)

New Management Aid

By: Major William J. Dwyer, Armor, Military Operations, Management & Plan Division, TJAGSA

Processing times for inferior courts-martial vary with factors under the control of the SJA. (See, Daniel & Costello, "Processing Times in Inferior Courts—A Preliminary Analysis," *The Army Lawyer*, DA Pam 27-50-16 (April 1974).) Those factors include priorities assigned, work methods, procedures, office organization, and skill levels. Other conditions such as workload and staffing are to be taken as constants or "givens" in this discussion; they may even be regarded as obstacles to be overcome. Pity the poor SJA. He has no place to go to seek assistance in getting a handle on these things, and there is no document available to him that might provide a little management insight or a few basic procedures to improve his operation. Right? Wrong!!! With the publication of Department of the Army Pamphlet 5-4-6, *Work Scheduling*

Handbook, in January of this year, the SJA has available to him in a single document all the factors he needs to know to improve the management of his operation through work scheduling techniques.

Who ever heard of using such things as a Process Chart to show a description of a work cycle, or turning such an item into a Leadtime Chart by adding a time scale to depict where you should be at a given point in time during completion of a project? Such things would be downright unprofessional, wouldn't they? Not according to Mr. J. Howard Hayden of the firm of Baxter, Watkins, Ledbetter, Hayden and Ramey of Austin, Texas, who recently spent two hours explaining to The Judge Advocate General's School's First Management for Military Lawyers Course

how private law firms are being forced into using every available management tool to avoid pricing themselves out of reach of the average citizen. Many management articles provide much theory and little practical, usable procedures. This is not the case here. For instance, the pamphlet tells you how to make an accurate estimate of the time it will take to complete a project, based on something other than a good guess. The formula goes like this:

$$T = \frac{A + 4M + B}{6}$$

For those of you who would like to give the formula an immediate try, *T* stands for estimated time, *A* for the most optimistic guess, *M* stands for the most likely time, and *B* stands for the most pessimistic time. If you have any reasonable experience factor upon which to base your time es-

timates, this simple computation can provide a remarkably accurate forecast. The Handbook then provides several options for the application of your forecast to planning, scheduling and workload appraisal.

While Judge Advocate General's Corps managers are not concerned with pricing themselves completely out of the reach of their client, more and more of you are becoming concerned with not having sufficient time or manpower to serve your client properly. The cost question for the Army lawyer is: how can we avoid failure to perform services too valuable to drop, even though resources are declining? DA Pamphlet 5-4-6 will not provide all the answers for you, but it certainly will provide some. You can't beat the price, it's free from AG publications.

Personnel Section

From: PP&TO

1. **Retirements.** On behalf of the Corps, we offer our best wishes to the future to the following personnel who retired.

MAJ GEN Kenneth J. Hodson, 31 March 1974
COL Wade Williamson, 31 March 1974

2. Order Requested As Indicated:

Name	From	To	Approx Date
COLONELS			
LATHROP, Robert M.	US Army Berlin	USALSA w/sta Benning	Jul 74
MOORE, Carl G	USALSA, Falls Church, Va	USALSA w/sta Ft Ord, Ca	Sep 74
NOBLE, James	OTJAG	US Army, Berlin	May 74
O'NEIL, Donald S	Europe	USAADC, Ft Bliss, Tx	Jul 74
RECTOR, Lloyd K	USAADC, Ft Bliss, Tx	Europe, VII Corps	Jul 74
LIEUTENANT COLONELS			
COKER, James R	C&GSC, Ft Leavenworth	Europe	July 74
LASSITER, Edward A	OTJAG, Wash DC	Panama	Jul 74
WEBB, John F. Jr.	HQ MDW	Fitzsimons Hosp, Colo.	Jul 74
MAJORS			
BOLLER, Richard R	S&F, TJAGSA, Charlottesville	Ft Polk, La	Apr 74
COLEMAN, Gerald C	Japan	OTJAG	Jul 74
DEMETZ, Robert A	USA Gar, Presidio S.F	Europe	Jul 74

Name	From	To	Approx Date
ECKHARDT, William G	OTJAG, Wash DC	USA Gar, Presidio S.F. Ca	Jul 74
JACOB, Gustave F	Ft Campbell, Ky	USALSA, w/sta Ft Ord, Ca	Jun 74
LURKER, Ralph L	Thailand	Ft S. Houston, Texas	Jul 74
MURRAY, Charles A	Vietnam	Thailand	Jul 74

CAPTAINS

ADAMS, John B	Europe	TJAGSA, Charlottesville	Aug 74
ANDERSON, Gary L	Europe	TJAGSA, Charlottesville	Aug 74
ARKOW, Richard D	USALSA, Falls Church	TJAGSA, Charlottesville	Aug 74
BENSHOFF, Terrence J	Korea	Ft Sheridan, Ill	Oct 74
BRITTIGAN, Robert L	TJAGSA, Charlottesville	Ft Polk, La	Jul 74
BROWN, Stanley D	Ft Dix, N. J.	Thailand	Jun 74
BURGER, James A	Europe	TJAGSA, Charlottesville	Aug 74
CATHEY, Theodore F. M.	Japan	TJAGSA, Charlottesville	Aug 74
COUPE, Dennis F	Hawaii	TJAGSA, Charlottesville	Aug 74
CREAN, Thomas M	OTJAG, Wash DC	TJAGSA, Charlottesville	Aug 74
DAVENPORT, David E Jr.	Europe	TJAGSA, Charlottesville	Aug 74
DEBERRY, Thomas P	Europe	TJAGSA, Charlottesville	Aug 74
DEPUE, John F	Europe	TJAGSA, Charlottesville	Aug 74
FEIGHNY, Michael	Ft Meade, Md	Korea	Jun 74
FINLAYSON, Robert M. II	Hawaii	OTJAG, Wash DC	Aug 74
FOSTER, Paul L	Ft Campbell, Ky	USA Gar, Ft Devens, Mass	Oct 74
FRANKLIN, Douglas P	Europe	USA Gar, Ft Devens, Ma	May 74
GRAY, Kenneth D	OTJAG, Wash DC	TJAGSA, Charlottesville	Aug 74
GUZIAK, Ronald G	USA Gar, Ft Hood, Tx	USA Gar, Ft Meade, Md	Jun 74
HARA, Glenn S	Fort Ord, Ca	Japan	Jun 74
HOWELL, John R	Japan	USALSA w/sta Ft Knox, Ky	Jun 74
LANCE, Charles E	Korea	USALSA w/sta Korea	Apr 74
MACKEY, Richard J	Europe	TJAGSA, Charlottesville	Aug 74
MCNEILL, David Jr.	Europe	USAADC, Ft Bliss, Tx	Jul 74
MCSPADDEN, Gary R	Ft Leonard Wood, Mo	Ft Sill, Okla	Jun 74
MEACHAM, Christopher L	Europe	TJAGSA, Charlottesville	Aug 74
MILLER, Joe D	Ft Jackson, S.C	USA Gar, Carlisle Bks, Pa.	Jun 74
OSBORNE, Zebulon L	Korea	Homestead AFB, Fla	Aug 74
RAMIREZ, Cuebas	USA Gar, Ft Meade, Md	Ft Buchanan, P.R	Jul 74
RICHARDSON, John W	USALSA, Falls Church	TJAGSA, Charlottesville	Aug 74
RICHARDSON, Quentin W	Fitzsimons Hosp, Colo.	TJAGSA, Charlottesville	Aug 74
RIPPLE, Raymond M	USMA, West Point, NY	USALSA, Falls Church	May 74
ROBBLEE, Paul A	Ft Belvoir, Va	TJAGSA, Charlottesville	Aug 74
ROBERSON, Gary F	Hawaii	Thailand	Jul 74
RUSSELL, Richard D	TJAGSA, Charlottesville	USALSA w/sta Ft Hood, Tx	Jul 74
SEPULVEDA, Eloy	Europe	TJAGSA, Charlottesville	Aug 74
SMITH, Edgar A	Hawaii	TJAGSA, Charlottesville	Aug 74
STADING, Ronald J	Korea	Ft Sam H. Texas	Aug 74
STRASSBURG, Thomas M	Ft Benjamin Harrison	S&F, TJAGSA, Charlottesville	Jul 74
SWEENEY, Marshall M	Europe	101 Abn Div, Ft Campbell	Jul 74
THOMAS, Evan E	Hawaii	TJAGSA, Charlottesville	Aug 74
THOMPSON, Lewis L	Ft Stewart, Ga	USA Gar, Carlisle Bks, Pa	Sep 74
TODD, Stephen K	OTJAG, Wash DC	S&F, TJAGSA, Charlottesville	Aug 74
WILKERSON, James N	Ft Hood, Texas	TJAGSA, Charlottesville	Aug 74
YUDESIS, Benjamin M	Europe	TJAGSA, Charlottesville	Aug 74
ZIMMERMAN, Charles A	Europe	TJAGSA, Charlottesville	Aug 74

WARRANT OFFICERS

ALLRED, Charles	Okinawa	2d Armor Div, Ft Hood, Tx	May 74
GUNDERMAN, Arthur	Ft Sam Houston, Tx	Ft Carson, Colo	Apr 74
KNIGHT, Lawrence G Jr	Fort Gordon, Ga	HQ FORSCOM Ft McPherson	Jun 74
McINTYRE, John L.	HQ FORSCOM Ft McPherson	Fort Campbell, Ky	Apr 74

3. Awards: Congratulations to the following officers who received awards as indicated:

CPT John H. Shows	Army Commendation Medal	5 Jan 71 - 22 May 74
CPT Thomas W. Wilson	Army Commendation Medal (1st OLC)	19 Apr 73 - 1 May 74

4. Legal Clerks' Course. Beginning 1 July 1974, the Legal Clerk Course at the Adjutant General School, Fort Benjamin Harrison, Indiana; will be extended from 52 days duration to 67 days. The extension of the course length is the result of a change in Army-wide clerical training pursuant to which the skills necessary in a particular MOS are to be taught at the MOS-producing school and not, as in the past, at the various training centers. Therefore, beginning in FY 75, the majority of legal clerk students are expected to be recent graduates of basic training possessing MOS 09B. Those clerical skills (including typing) essential to a legal clerk will be integrated into the expanded course.

All prerequisites for the Legal Clerks' Course remain the same, with the exception that possession of MOS 71B20 will no longer be a prerequisite. Furthermore, anyone in the field may apply for the Legal Clerk Course in the same manner as for any other service school. SJA's should encourage applicants to attain basic typing proficiency through their local education center or otherwise prior to submitting a request to attend the Legal Clerk Course. This action will in many cases prevent the recycling of students and the attendant increase in expense and loss of manpower to the command concerned.

The present schedule for FY 75 is as follows:

Class No.	Report	Close	Input
1	24 Jul 74	2 Oct 74	46
2	7 Aug 74	17 Oct 74	46
3	4 Sep 74	14 Nov 74	46
4	7 Oct 74	18 Dec 74	45
5	30 Oct 74	23 Jan 75	45
6	30 Nov 74	13 Feb 75	45
7	8 Jan 75	27 Mar 75	45
8	29 Jan 75	9 Apr 75	45
9	19 Feb 75	29 Apr 75	45
10	2 Apr 75	11 Jun 75	45
11	14 May 75	24 Jul 75	45

Total FY 75 498

Enlisted legal clerks in grades E6 and E7 returning to CONUS from any overseas area who are interested in becoming an instructor in the Legal Clerk Course are encouraged to forward a copy of their DA Form 20 at least seven months prior to their return to:

CW2 Larry Turner
USA Institute of Administration
AG School, Legal Division
Fort Benjamin Harrison, IN 46216

5. Letters of Commendation/Appreciation. Officers are reminded that the inclusion of items in their personnel file such as letters of commendation or appreciation not previously distributed IAW AR 672-5-1 should be forwarded by themselves to DAPC-PAR-R Hoffman Building No: 2, 200 Stovall Street, Alexandria, Virginia. Such documentation should not be furnished to the Office of The Judge Advocate General except for inclusion in their branch file.

6. Registration of Iowa Attorneys Now Required. Iowa attorneys are reminded that 1 March 1974 was the cutoff date for registration with the newly created state Client Security and Attorney Disciplinary Commission. Filing of the necessary annual statement and questionnaire is required of all members of the Iowa Bar regardless of whether they reside, practice or work outside the state. Provision is made for excluding periods of military service from the new dues schedule, and members who work outside the state may make application for a certificate of retirement which exempts them from any assessments until their return to practice in Iowa. Those Iowa attorneys who have not received notice of this program should write to the Commission, located in the Statehouse, Des Moines, Iowa 50319.

7. Help Wanted. a. Court Reporter Stenotypist/Stenographer. Legal Service Center, Headquarters, Fort Huachuca, Arizona. Rating GS-9. Available immediately. Contact CW2

Dennis McCormick, Autovon 879-3175 or Commercial (602) 538-3175.

b. Civilian Attorney — Advisor (General). Rating GS-14. Should be familiar with civilian personnel and/or labor-management relations. Civilian Personnel Law Office, OTJAG, DA, Washington, D.C. 20310. For more information contact LTC David A. Fontanella, (202) 695-9300.

c. Civilian Attorney — Advisor (GS 9-12, starting grade dependent on qualifications). Dealing with procurement, appeals, environmental and regulatory law. Office of District Counsel, U.S. Army Engineer District, Walla Walla, Washington 99362. Contact Robert Heins, (509) 525-5500, Extension 106.

8. JAG Reservists Receive Army Superior Unit Certificate. On 16 February 1974 the Commanding General of FORSCOM, General W. T. Kerwin, Jr., presented Army Superior Unit Cer-

tificates to the Commanders of the 214th JAG Detachment (Headquarters), the 134th JAG Detachment, and the 128th JAG Detachment. Certificates are awarded annually by the Secretary of the Army to those Reserve units which have achieved superior ratings during the preceding training year. The effort and excellence exhibited by these units during the training year 1972-73 demonstrates their dedication to duty and their wholehearted support of the "total force concept."

The quality of the personnel in these units enables them to reach their "mobilization readiness" posture and contribute significantly to the accomplishment of the mission of their active duty counterparts, through mutual support programs and active duty for training missions.

Congratulations are in order, specifically to the commanders and members of these fine units, and to all our unsung reserve JAG officers performing outstanding service to their country.

Current Materials of Interest

Articles.

Johnson, "Report to Help Fight Traffic Accident Problems," I Mil. Police L. Enforcement J. 17 (Spring 1974). Highlights the forthcoming field manual guidelines for use with the new Military Police Traffic Accident Report (DA Form 3946) which has replaced the old Military Police Traffic Accident Investigation form (DA Form 19-68).

Brede, "The New Military Police Report: An Aid to Managers," I Mil. Police Enforcement J. 50 (Spring 1974). Presents a preview of the forthcoming official instructions for filling out two new DA Forms: 3975 (Military Police Report) and 3975-1 (Commander's Report of Disciplinary Action Taken).

Note, "Polygraph Testimony: 'And the Truth Shall Make You Free'," 5 N.C. Central L. J. 111 (Fall 1973). Discusses restrictions and qualifications on opinion testimony as established

by *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich 1972).

Note, "Federal Medical Care Recovery Act: Effect of a Release on the United States' Claim," 26 Okla. L. Rev. 616 (November 1973).

Note, "Video-Tape Trials: A Practical Evaluation and a Legal Analysis," 26 Stanford L. Rev. 619 (February 1974).

Comment, "Variance Procedures Under the Clean Air Act: The Need for Flexibility," 15 Wm & Mary L. Rev. 324 (Winter 1973).

Course.

The 1974 College of Advocacy, San Francisco, July 28 — August 3. \$195.00 for Federal attorneys. For more information write to: Hastings Center for Trial and Appellate Advocacy, 198 McAllister Street, San Francisco, California 94102.

By Order of the Secretary of the Army:

CREIGHTON W. ABRAMS
General, United States Army
Chief of Staff

Official:

VERNE L. BOWERS
Major General, United States Army
The Adjutant General

11-11-1964

11-11-1964

11-11-1964

11-11-1964

11-11-1964



