

CHAPTER 12

THE AMHERST PROBLEM AND EVERYDAY PROBLEMS IN ADMINISTRATIVE LAW

THE AMHERST PROBLEM

1. General Facts:

You recently took over command of the 3d Brigade, 52d Infantry Division. On 6 July 20XX, you are informed of a rape allegation in your unit. You learn that PFC Elizabeth Tucker, HHC, 301st FSB, has claimed that SGT Alvin Amherst, B Company, 1-14 Inf, sexually assaulted her on Friday night after a Fourth of July party. You also learn that the commander, B Company, 1-14 Inf, CPT Atkinson, had the MPs bring SGT Amherst to his office, where he asked SGT Amherst “What happened between you and Tucker?” or words to that effect. SGT Amherst blurted out something like “I didn’t mean to hurt her! I thought she wanted me! I just got upset when she said no!” The commander then read SGT Amherst his rights under Article 31, UCMJ, and the sergeant was taken to CID. When SGT Amherst arrived at CID, the agents read him his rights under *Miranda v. Arizona* and Article 31, UCMJ. SGT Amherst then gave the enclosed statement to an investigator (p. 8-9). Statements were also obtained from other witnesses, and are included in the investigation presented to you (and in this chapter of the deskbook).

SGT Alvin Amherst's formal education consists of completion of high school and the usual military education. He lived most of his childhood with his divorced mother, who relies on him today for most of her support. SGT Amherst scored 90 on his GT entry test and Captain Atkinson states that his conduct and efficiency ratings have been excellent. Similar ratings were received from previous commanders during SGT Amherst's 36 months service on his current four-year enlistment. He has no combat experience but has completed airborne training and qualified as an expert rifleman. He has no prior military or civilian criminal record. His record reflects no evidence of mental instability. He is married with one child, but he and his wife have been separated for six months, contemplating divorce.

On 10 July, you attend a community club function on post. There you chance to have a conversation with the command sergeant major of 1-14 Inf. You tell the sergeant major that SGT Amherst should probably be sent to a general court-martial for rape. You learn later that the CSM relayed this information to the B Company commander.

You are meeting with your trial counsel to discuss the case, including the questions listed below. As the commander, you may, of course, raise additional issues.

Major Ernest Harper
FY 2004 Senior Officers Legal Orientation Course
FY 2004

Question 1. What is the state of the evidence against SGT Amherst? Can his statement that “I didn’t mean to hurt her! I thought she wanted me! I just got upset when she said ‘no!’” be used against him at trial?

Question 2. Does your discussion with the CSM, 1-14 Inf, and his communication of your desires to the B Company commander raise any issues?

Question 3. Assume the company commander prefers charges, and he and the battalion commander recommend a GCM. When the court-martial packet comes to your desk, what disposition do you recommend? What are your options? Discuss your disposition of the pending charges in this case and the reasons why you have elected that disposition.

Question 4. After the case is referred to a GCM, SGT Amherst submits a request for a discharge in lieu of court-martial pursuant to Chapter 10, AR 635-200. The request is forwarded through the chain of command for endorsement. Do you support it? Why or why not? Discuss the relevant considerations and your disposition of SGT Amherst's request for discharge for the good of the service UP Chapter 10, AR 635-200.

Question 5. After the CG denies SGT Amherst’s request for a Chapter 10, the defense submits a pretrial agreement, in which he offers:

To plead Not Guilty to rape and burglary, but Guilty to fraternization and adultery. In return, he asks the convening authority to limit his confinement to eight months. The convening authority could approve any other part of the sentence adjudged by the court. The defense requests an opportunity to see you personally to discuss the pretrial agreement. PFC Tucker and her family would also like to meet with you to discuss the case.

a. The GCMCA is not required to get the chain of command’s recommendation on pretrial agreements, but wants your recommendation. What would it be? What factors do you consider?

b. Do you grant the defense counsel’s request for an office call? If so, any conditions?

c. Do you meet with the alleged victim and her family? Should you consider the alleged victim’s views when formulating your recommendation as to disposition?

Investigator's Summary

SA SWEENY: On the weekend of 4 July PFC Tucker claimed she was raped by SGT Alvin Amherst. SGT Amherst essentially confessed to the crime to his company commander.

Medical personnel have stated that the rape kit was taken too long after the alleged incident to yield any results. Serology testing has failed to detect the presence of semen in the alleged victim or on any of her bedclothes. No blood alcohol evidence exists due to the passage of time between the incident and the report. Medical personnel report seeing some faint bruising around the victim's legs and chest, but cannot pinpoint when the injuries would have occurred except to say "within one week of the exam."

No further evidence is anticipated at this time. Since sufficient evidence exists to support a reasonable belief that SGT Amherst committed the offense of rape, the case file will be closed.

Sworn Statement
PFC Elizabeth Tucker
6 July 0930

On Friday, 4 Jul 20XX, I went downtown to watch the fireworks with some of my friends. We got back to the dorm around 2200. I went to a party. SGT Michael King was having a party in his room, so I went up to see who was there. People were drinking and dancing. I had some drinks, my usual amount, 3 rum and cokes. I also saw my best friend, PFC Tracy Smith. I went to her room to see her. When I was walking back to the party alone I saw SGT Amherst. He asked me if I was going back to the party and I said yes. He put his arm around me, but I told him my boyfriend wouldn't like that. My boyfriend is SPC Johnny Bravo, currently deployed to Kosovo.

SGT Amherst came up to me again at the party, and put his arm around me and asked me to dance. I thought that was weird, since I'd just been working for him, plus I've got a boyfriend. I didn't want to dance, but I decided to, just to be polite and have a good time. We danced to a couple of songs, then a slow dance. After that I talked with some guys, and SGT Amherst wouldn't take his arm from around my shoulders. I had to work the next day, so I left the party around 0100 and went to my room. On the way SGT Amherst asked me if I wanted to party in his room, and I told him no, I was tired. I didn't see anyone in the hallway when I got to my room.

I was asleep when SGT Amherst came into my room. I heard a noise, and I woke up, and I sat up and saw him. I asked him what was he doing there, but he didn't say anything. He got on the bed with me, and said, "Let's party now. I know you want me." I told him no, but he got angry and said "Now!" he put his hand on my mouth and got on top of me, and he was touching me. I tried to get away, and I think I kicked him, but he was choking me with his hand on my mouth. He pulled his gym shorts down and used his knee to get between my legs. He stayed on top of me, and he was holding my right arm and hand down. I hit him with my left hand and tried to push him off, but he was too big. I hit him in the face. When he was done he said, "that was so good baby" in a sarcastic kind of voice. Then he said he was sorry, he got carried away, and told me I'd better not tell anyone. After he was gone I was crying and I didn't know what to do. I stayed in my room, took a shower and got dressed. Then I took my bed sheets and nightshirt and put them in the washer in the laundry room. I went to Tracy's room and told her what happened. She wanted me to call the MPs but I didn't want Johnny to find out.

When Johnny called me that Saturday night I tried to act normal, but he could tell something was wrong, so I told him what had happened. He was real angry, just like I knew he would be, but then he calmed down and asked me if I was OK, and if I had reported it to the MPs. I told him I was afraid and he said he'd call the MPs if I didn't.

Today, 6 July, I wasn't feeling well, so I went to the hospital. I told one of the RNs, 1LT Lesley Hill, what had happened because I thought she could help me, and then I went to the OB/GYN clinic and 1LT Hill told a tech there what happened. They did a physical examination at the hospital. I still had some bruises above my knees that you could see. The bruises were about the size of a half-dollar. I think I had a couple on each leg, and one or two above my breasts. I'm sure they all came from SGT Amherst.

I did not encourage SGT Amherst in any way that night. I did not want to have sex with him. I tried to fight him off, but he was too big. I told him "No" several times.

I have had other boyfriends besides SPC Bravo. I might have said something to him after dancing with SGT Amherst like "Hi sweetie," but I didn't mean anything by it. I do not have any other boyfriends now. Johnny and I are dating exclusively, meaning we agreed we would not see anyone else. I trust Johnny and I'm sure he trusts me.

I did not tell SGT Amherst to take his arm away from my shoulders after we danced. I don't know why I didn't tell him, but I didn't like it.

My barracks room must have been unlocked when SGT Amherst came in. Normally I lock my room when I go to sleep, but sometimes I forget. I must have forgotten that night.

I was not wearing panties when I got into bed that night. Sometimes I wear them and sometimes I don't, especially in the summer.

Sworn Statement
CPT Oscar Atkinson
6 July 1500

On the morning of 6 July, I got a call from the MPs. They told me that PFC Tucker, 301st FSB, had made a complaint of rape against SGT Amherst. He is in my unit. The MPs told me that they would need to talk to SGT Amherst. I told them to come over and get him. I also told them to bring him by my office before they took him down to CID.

When Amherst came into my office I may have asked him something like “So what happened between you and Tucker?” I was not trying to interrogate him. I was just making casual conversation. He said something like he hadn’t meant anything by it and that she had wanted him, I guess in a sexual sense. He also said he got angry when she said “no.”

Sworn Statement
SSG Jimmy LaRue, MP
6 July 1100

On 6 July we were told of a rape complaint against SGT Amherst. We were directed to apprehend him. We notified his CO that we were coming over to get Amherst because he was accused of raping PFC Tucker. He told us to get Amherst then bring him over before we went to CID. When we got to Amherst, we told him he was being apprehended for the rape of PFC Tucker. We didn't read him his rights because we didn't want to talk to him. We then took him to the CO's office as instructed. We went in to the office, and Amherst was standing at attention and CPT Atkinson said something like "Why did you rape Tucker?" Something like that. I'm not sure now. Amherst said he never meant to hurt her, he just got angry when she said "no." Then we left and went to CID. At CID, Amherst made a statement reflecting the aforementioned facts.

Sworn Statement
SPC Johnny Bravo
6 July 1030 (telephonic)

During the 4th of July weekend my girlfriend, PFC Tucker; told me she'd been raped by SGT Amherst. At first, I felt hurt, frustrated, and betrayed. I must say at first I didn't believe her, because she's fooled around on me in the past; you know, she's had sex with other guys while she's supposed to be dating only me. And then she'd lie about it, and I'd catch her in the lie. So I was skeptical. But she kept crying really hard and she told me she had bruises and that Tracy, her friend, had seen them too. I guess I believed her. So I told her she had to call the MPs. She didn't want to. She said she was too embarrassed, and she felt bad about destroying all the evidence (she said she took a shower after the rape, and that she washed the sheets the next day). I told her I wouldn't believe her unless she called the MPs. Maybe that's why she finally called them.

Sworn Statement
SGT Alvin Amherst
6 July 2330

My name is SGT Alvin Amherst. I am assigned to 1st Battalion, 14th Infantry, and 52d Infantry Division. I have been stationed here for approximately two years. I am married but my wife and I are separated.

I have known PFC Beth Tucker for approximately 18 months. We have worked together on a couple of occasions. In the time that I've been tasked out to work at the Installation Management Office, she has been sent over to work occasionally. I've supervised her maybe three times on details: police call, PMCS on some recreational vehicles, etc. In fact, she had worked with me on Friday the Fourth. She was part of a crew setting up bleachers for the parade. We were never what you would call good friends but I liked her a lot.

Over the past year or so, I've heard some of the guys talking about PFC Tucker. The scuttlebutt and rumors pretty much has it that she's pretty loose and likes to party. What I mean is that she has a reputation for being sexually promiscuous. I've also heard that she really enjoys rough sex. However, before the Fourth of July, I never knew this for sure, and quite frankly, never really paid that much attention to any of it.

Around 10:00 on the evening of the Fourth, I decided to go across the parking lot and see what was going on at SGT King's party. I walked up to the second floor, and when I got to SGT King's room, I noticed there were about 15 people there. I either knew or recognized almost everyone at the party. About this time, PFC Tucker came in. She was wearing a pair of black spandex shorts and a loose-fitting T-shirt. I noticed that she was real friendly with several of the guys at the party; I saw her greet some of the guys with a hug and a kiss.

PFC Tucker waved at me to come over to her and I did. We talked a while and she told me she was upset with her boyfriend, who is deployed, because he found time to call his roommate and co-workers more than he did her. I suggested that we dance, that it would help take her mind off her problems. We danced a couple of fast songs; although the music was fairly loud, we carried on a little conversation during our dances. She was still obviously upset with her boyfriend. At this point, a slow song came on, and she threw her arms around me and brought her body very close to mine. She told me that she thought she'd made a big mistake being totally faithful to her boyfriend. Something about him not knowing what a good thing he had. She then told me, "I'm not going to let that bastard take advantage of me." As she rubbed my shoulders, she whispered in my ear, "How about we go to my room and have our own private party?" I could hardly believe my ears; I told her, "That works for me." The song ended and she said, "give me 30 minutes, then meet me in my room downstairs, number 134. I'll leave the door unlocked." She went around the party saying goodbye to friends. At this time, I asked PFC Tucker, in the presence of her friends, as we had agreed, whether she wanted to go party with me somewhere else. She said, "No, I've got a boyfriend." She left the room and went down the hall, towards the end of the building.

I left the party and went to the day room, where I watched TV for about 30 minutes. Then I went down the hall to PFC Tucker's room. There was no one else in the hall at the time.

I knocked real soft and said “Hey it’s me.” I tried the door and it was unlocked. I opened the door and peeked in; she was lying on the bed. She said to come on in. I locked the door when I went in. There was a lamp on, but it was very low. I went over to the bed and sat down. She pulled up her gown, and I began kissing her and touching her breasts. After a few minutes, I took off my shorts and underwear and got on top of her. She began to moan loudly, and I put my hand over her mouth so no one would hear her. She seemed to get even more excited, and was moving around even harder, hitting at me. She even hit me in the face a couple of times. (I figure this was the rough sex part that I’d heard about it). I really had to struggle with her, and I was worried that someone might hear us. Just at the point I was about to climax, she shouted “No!” and tried to push me off her, but I pushed her back down hard on the bed. I figure she got angry because I was not wearing a condom. I apologized for that later. We just lay there together for a few minutes, catching our breath. I told her it was good, and I apologized again. PFC Tucker seemed very concerned. For the first time, she told me that she still loved her boyfriend, that this was a one-time deal, and that I was not to “tell a soul.” I got dressed and left.

On Sunday, the MPs roused me in my room and told me I was “busted” for “raping Tucker.” They took me to CPT Atkinson who demanded that I explain everything. By this time I was really scared that they’d never believe me about the rough sex thing, so I just blurted out something about her wanting to have sex and how I got upset when she said “no.” Only I think she said “no” because she was upset that I wasn’t wearing a condom.

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Senior Officers Legal Orientation

EVERYDAY PROBLEMS IN ADMINISTRATIVE ACTIONS AND REMEDIES

We will discuss the following series of hypothetical problems. The seminar will examine these problems from both a legal standpoint (what options are available to the commander?) and a practical standpoint (what options are best?).

At the conclusion of the problems, the moderator will distribute a “green sheet” or “school solution.” The solution does not purport to be the only correct solution; instead, it outlines the commander’s legal options. The “best” solution usually is influenced by factors which we can’t reproduce (but which we’ll discuss) in class: command climate, mission requirements, unit concerns, etc.

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DISCUSSION PROBLEM ONE

You are the 250th MP Brigade Commander. Last Friday afternoon, CPT Greenwood, one of your subordinate company commanders, came to see you during your open-door hours and related the following: CPT Greenwood's battalion commander recently relieved him from command, issued a written reprimand, which he filed locally, and made adverse comments on his OER. The battalion commander based these actions on CPT Greenwood's alleged dereliction of duty in failing to properly supervise his subordinates during a party that CPT Greenwood hosted at his home. During the party, several of his soldiers got drunk, and one soldier, SGT Doe, was arrested for DUI while driving home from the party.

CPT Greenwood requests that you redress these wrongs against him under Article 138, UCMJ, and AR 27-10, chap 20. What do you do?

DISCUSSION PROBLEM TWO

After your staff call, CPT Tom Smith (your battalion S-4) informs you that he has an issue he needs to discuss with you. He tells you that one of his soldiers in the S-4 shop, SPC Julie Barnett, just reported that SSG Joe Taylor was harassing her. SSG Taylor is a stellar NCO who works down the hallway in the S-3 shop. According to SPC Barnett, SSG Taylor has been doing things that make her feel uncomfortable. For example, she says SSG Taylor grills her every Monday morning about what she did over the weekend. He asks her if she went out on any dates and if so, who did she go out with and what did they do. He told her several times that she is an “attractive young lady” and once told her that if she ever needed a date to keep him in mind. Last week he sent her an email that said “Saw you coming in with your civies on this morning, Jules. Too bad we don’t have a competition for Best-Looking Soldier of the Quarter!” SPC Barnett says she has been ignoring SSG Taylor and his remarks, but lately he seems to be going out of his way to run into her and talk to her at work, in the dining facility, at the gym, etc. She says she is sick of him, wants him to leave her alone, and wants to be treated professionally like the other soldiers.

Is SPC Barnett required to tell SSG Taylor that his behavior must stop?

What should CPT Smith do?

Assume that after SPC Barnett talks with her company commander and the unit Equal Opportunity Representative, she elects to try to have the problem resolved informally by her company commander (she does not want to file a formal complaint against SSG Taylor at this time). **What, if any, timelines and reporting requirements apply?**

Assume SPC Barnett elects to file a formal EO complaint against SSG Taylor. **What timelines and reporting requirements apply?**

What if the last incident SPC Barnett complains of occurred over 60 days ago? Is she too late to file a formal complaint?

If SPC Barnett’s company commander (not SSG Taylor) was doing these things and making her feel uncomfortable, where would SPC Barnett go to get the problem resolved?

What if SPC Barnett's alleged harasser was not SSG Taylor, but Mr. Taylor, a civilian in the battalion headquarters? Could she file a complaint against Mr. Taylor with the installation Equal Employment Opportunity (EEO) officer?

Now assume that the person reporting the allegations to CPT Smith is not SPC Julie Barnett, but Ms. Julie Barnett, a civilian secretary in the battalion headquarters. **What complaint processes might be available to Ms. Barnett?**

Assume Ms. Barnett elects to file her complaint using the 10 U.S.C. § 1561 procedures. **What timelines and reporting requirements will apply?**

Assume Ms. Barnett elects to file her complaint with the EEO office. **What should the battalion commander do?**