

## **CHAPTER 29**

### **RC LEGAL ISSUES FOR AC COMMANDERS**

#### **SENIOR OFFICER LEGAL ORIENTATION COURSE**

##### **I. REFERENCES.**

- A. AR 15-6, Procedures for Investigating Officers and Boards of Officers (30 Sep 96).
- B. AR 27-10, Military Justice (6 Sep 02).
- C. AR 135-18, The Active Guard Reserve (AGR) Program (19 Jun 96).
- D. AR 135-91, Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures (26 Sep 00).
- E. AR 135-175, Separation of Officers (28 Feb 87).
- F. AR 135-178, Enlisted Separations (3 Dec 01).
- G. AR 140-1, Army Reserve: Mission, Organization, and Training (1 Sep 94).
- H. AR 140-10, Assignments, Attachments, Details, and Transfers (1 Sep 94).
- I. AR 140-111, U.S. Army Reserve Reenlistment Program (28 Jun 02).
- J. AR 350-21, Instructions in Benefits of an Honorable Discharge (4 Mar 85).
- K. AR 600-8-24, Officer Transfers and Discharges (29 Jun 02).
- L. AR 600-20, Army Command Policy (13 May 02).
- M. AR 623-105, Officer Evaluation Reporting System (1 Apr 98).
- N. AR 623-205, Noncommissioned Officer Evaluation Reporting System (15 May 02).

- O. AR 630-10, Absence Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings (31 Aug 01).
- P. AR 635-200, Enlisted Personnel (1 Nov 00).
- Q. DOD Directive 1332.30, Separation of Regular and Reserve Commissioned Officers, (14 Mar 97).
- R. DOD Instruction 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers, (16 Sep 97).
- S. Masterton, Urinalysis Administrative Elimination Boards in Reserve Components, The Army Lawyer, April 1995 at 3.

## **II. INTRODUCTION.**

A. PURPOSES. This outline has two purposes:

1. To acquaint the Active Army commander with the reserve component environment and some of its key terminology. An understanding of this basic, foundational material assists greatly when commanders face more complicated legal and other issues from the RC.
2. To highlight some of the significant legal and regulatory provisions applicable to soldiers of the Army Reserve (USAR) and Army National Guard (ARNG) (the Reserve Components).

## **III. THE RESERVE COMPONENTS IN GENERAL.**

A. THE BASIC ENVIRONMENT.

1. The Army Reserve.
  - a) The USAR consists of units (primarily combat support and combat service support) known as Troop Program Units (TPU).
  - b) Other soldiers, not assigned to units, are assigned to the Individual Ready Reserve (IRR).

- c) Reserve soldiers and units normally serve under FORSCOM with the units reporting through the U.S. Army Reserve Command (USARC).
  - d) Some reserve units serve as part of the U.S. Army Civil Affairs and Psychological Operations Command (USACAPOC).
2. The Army National Guard.
- a) Each state and territory has a National Guard made up of a variety of combat, combat support, and combat service support units.
  - b) While each state or territory has a headquarters, the units may, for mobilization purposes, have an association with other states' National Guard units or units from the Active Army.
  - c) Under normal circumstances, the units of the ARNG report to their respective governors.
  - d) In addition to their service to the state, ARNG soldiers and units hold a dual status as reserve soldiers in the United States Army. Thus, they may serve at times in a Federal status and at other times in a state status under the governor's command.
    - (1) ARNG soldiers often serve in a state status when performing disaster relief and civil disturbance missions. In this capacity they are brought to duty under their state. They are commanded by state authorities and they are funded with state money.
    - (2) **Unless serving in a Federal status, ARNG soldiers do not come under the Uniform Code of Military Justice (UCMJ) for disciplinary purposes.** National Guard units and soldiers have recently been "federalized;" that is, brought to Federal active duty under the provisions of Title 10 of the United States Code. For example, they have been ordered to active duty under a Presidential Selected Reserve Call-up (PSRC) or under the partial mobilization authority.
    - (3) Typically, the ARNG trains in a so-called "Title 32 status." That is, they are on duty under the provisions of Title 32 of the United States Code. In this hybrid

capacity they are under the command and control of their state authorities, but the training money comes from the Federal government. Despite the fact that they are on duty pursuant to a portion of the U.S. Code, there is no jurisdiction under the UCMJ.

## B. ARMY RESERVE ORGANIZATION.

1. Office of the Chief, Army Reserve (OCAR).
  - a) DA Staff element.
  - b) Chief, Army Reserve = LTG.
  - c) Manages USAR policy, programs, priorities, and resources.
2. U.S. Army Reserve Command (USARC).
  - a) Ft. McPherson, GA.
  - b) Commands, controls, and supports USAR forces.
  - c) Oversees the organization and training of USAR forces.
3. Army Reserve Personnel Command (AR-PERSCOM).
  - a) St. Louis, MO.
  - b) Supports the assignment of USAR soldiers and their records management.
  - c) Provides some veterans' services as well as retirement and transition assistance.
  - d) Should be combined with PERSCOM in the near future to form Human Resources Command.
4. Regional Readiness Commands (RRCs).
  - a) Formerly known as Regional Support Commands (RSCs).

- b) Twelve commands geographically aligned with the Federal Emergency Management Agency (FEMA) regions. The number of these commands may change depending on the outcome of the Army's current transformation. Continued alignment with FEMA is doubtful.
  - c) Serve as command and control for USAR units located in regions, less units assigned to divisions and USACAPOC.
  - d) Provide installation-like support to downtrace units.
  - e) Commanded by a major general.
5. Institutional Training (IT) Divisions.
- a) Seven divisions.
  - b) Provide soldiers capable of conducting basic training and other types of individual training. Work to augment TRADOC upon mobilization.
6. Training Support (TS) Divisions.
- a) Five divisions.
  - b) Plan, conduct, and evaluate USAR and ARNG training exercises (e.g., Battle Command Staff Training and Combat Support Simulation Exercises).
7. Other General Officer Commands.
- a) Several, larger commands report to the USARC during peacetime, but exercise, plan, and mobilize under a variety of Active Army chains-of-command.
  - b) Examples.
    - (1) 332nd Medical Brigade, Nashville, TN.
    - (2) 377th Theater Support Command, New Orleans, LA.
    - (3) 416th Engineer Command, Darien, IL.

## C. NATIONAL GUARD ORGANIZATION.

1. National Guard Bureau.
  - a) DA and Department of Air Force joint bureau.
  - b) Director of the Army National Guard = LTG.
  - c) DOES NOT command and control National Guard units.
  - d) Serves to assist units with meeting Federal training, organizational, and operational standards.
  
2. State and Territorial Headquarters.
  - a) All 50 States.
  - b) Commonwealth of Puerto Rico, the territories of Guam and the Virgin Islands, and the District of Columbia.
  - c) Led by a major general (The Adjutant General (“TAG”)).
  
3. Divisions.
  - a) Seven Infantry Divisions.
  - b) One Armored Division.
  - c) Headquartered in one state with units in several states.
  - d) Example: 38th Infantry Division, Indianapolis, IN. Units from Indiana, Illinois, Michigan, and Ohio national guards.
  
4. Enhanced Separate Brigades.
  - a) Fifteen.
  - b) Example: 45th Separate Infantry Brigade, Oklahoma City, OK. Serves as one of three maneuver brigades under the 7th Infantry Division (Light), a command with an Active Army commander.

- c) Two Special Forces Groups.
- d) 19th SF Group, Utah.
- e) 20th SF Group, Alabama.

#### D. ADDITIONAL TERMINOLOGY.

1. No military organization could function without a plethora of terms and acronyms. The USAR and ARNG are no different. Along with the terms already discussed, the following list hopefully serves to help one better understand the reserve components.
2. Basic terminology.
  - a) AT: Annual Training:
    - (1) Usually a two-week period of training performed as a unit pursuant to Federal orders. Some headquarters units are allowed to have their members perform duty in fragmented periods, rather than in the traditional two-week increments.
    - (2) Now somewhat archaic, but also referred to as “summer camp.”
    - (3) A type of active duty.
    - (4) Statutorily limited to 30 days per year.
  - b) ADT: Active Duty Training:
    - (1) Like AT it is a type of active duty.
    - (2) IADT: Initial Active Duty Training: Basic Training and Advanced Individual Training. Same training as performed by Active Army counterparts, but may be split into two periods. (Example: College student enlists with this option. Attends basic training during summer break and AIT during the next year’s summer break.)

- (3) ADT-S: Active Duty Training, Schools: Funds coded into these accounts are used to send soldiers to MOS-producing schools and other professional development courses.
  
- c) ADSW: Active Duty for Special Work: Tours of varying length in support of USAR and ARNG missions.
  
- d) TTAD: Temporary Tours of Active Duty:
  - (1) Used to support Active Army needs.
  
  - (2) CO-TTADs: Contingency Temporary Tours of Active Duty: Used for OCONUS missions.
  
- e) Drill:
  - (1) Weekend training, usually conducted one time per month. (See “IDT.”)
  
  - (2) Drills are normally broken down into four-hour blocks, called Unit Training Assemblies (UTAs) with four UTAs constituting a drill weekend and with two or more consecutive drill periods constituting a Multiple Unit Training Assembly (MUTA).
  
- f) IDT: Inactive Duty Training: Normally the weekend drill, but other types exist.
  - (1) ADAs: Additional Drill Assemblies:
    - (a) RMAs: Readiness Management Assemblies. Additional periods of funded service allowing soldiers to do those things necessary to prepare the unit for a drill. For example, soldiers scheduled to present instruction to their unit may use an RMA, if available, to prepare for the instruction.
  
    - (b) ATAs: Additional Training Assemblies: Used to conduct training when training beyond that conducted at regularly scheduled drills is necessary.

(c) AFTP: Additional Flight Training Periods.

g) AGR: Active Guard Reserve:

(1) USAR soldiers who serve on active duty with the USAR, in a Title 10 status.

(2) ARNG soldiers who serve on active duty with the ARNG, but in a Title 32 status.

h) IMA: Individual Mobilization Augmentee: USAR soldiers who do not perform regularly scheduled drills. AT is spent with Active Army units.

#### E. THE BASIC ANNUAL CYCLE.

1. Normally, USAR and ARNG soldiers perform duty for one weekend each month. They also participate in a two-week annual training period.
2. In recent years it has been possible for units and individuals to perform additional periods of annual training. In other words, it is possible for USAR and ARNG units to adapt to missions and training opportunities beyond those found within the framework of their historic training cycle.
3. A member of a TPU is required, by statute, to attend 48 drills each year. By regulation, the Army provides that a drill can be as short as four hours. Hence, a drilling USAR or ARNG soldier can serve four drill periods on a drill weekend in each of the twelve months in order to accumulate the required number of drills.
4. Retirement.
  - a) USAR and ARNG soldiers may draw retired pay, depending on their election, at either age 60 or age 65.
  - b) To be eligible, they must accumulate twenty years of qualifying service.
  - c) A qualifying year is based on the accumulation of fifty retirement points in any year.

- (1) One retirement point is awarded for each day of annual training or each day of other active duty performed.
- (2) One retirement point is awarded for each drill period performed.
- (3) A soldier assigned to a TPU ordinarily receives a minimum of 62 retirement points each year (14 days AT plus 48 drill periods).

#### **IV. MILITARY JUSTICE AND THE RESERVE COMPONENTS.**

##### **A. Jurisdiction.**

1. As noted, ARNG soldiers must be on orders, in a Federal, Title 10 status in order for there to be jurisdiction under the UCMJ.
  - a) Ordinarily, ARNG soldiers are not in a Title 10 status during weekend drills. Instead, they perform duty in a Title 32 status.
  - b) The states and territories have codified versions of the UCMJ and may discipline their soldiers pursuant to those provisions for offenses committed while in a Title 32 status.
2. In other words, a soldier must be on Federal active duty at the time a crime is committed in order for there to be jurisdiction.
3. The same is true for USAR soldiers. USAR soldiers always perform duty in some form of Title 10 status.

##### **B. Bottom Line.**

1. Many offenses, involving USAR and ARNG soldiers, such as minor drug offenses, cannot be sanctioned under the UCMJ. This is because it is impossible to determine when the crime was committed. At other times, it is possible to determine when a crime was committed, but if the soldier was not “in status,” then there can be no jurisdiction.
2. This result is true for both courts-martial and nonjudicial (Article 15) punishment.

3. **Title 10 status is not an element for processing under the Army's regulatory (administrative) provisions.** In other words, adverse action may be used regardless of the soldier's status at the time of the offense.
  - a) Bar to reenlistment.
  - b) Administrative memorandum of reprimand.
  - c) Adverse elimination.

## **V. ARMY REGULATORY LAW AND THE RESERVE COMPONENTS.**

- A. Many of the Army's regulations are applicable to soldiers regardless of whether service is with the Active Army, the Army Reserve or the Army National Guard. For example, one regulation controls officer performance evaluations regardless of assignment. See AR 623-105.
- B. In other instance, differences exist and process changes are necessary.
  1. For example, different regulations are necessary because the reserve components perform duty during limited periods of time.
  2. Differing contractual obligations, and the like, also necessitate a broader regulatory scheme.
- C. Although processes are sometimes different, the Army standard remains the same regardless of component. (Compare, Chapter 14, AR 635-200, governing Active Army enlisted separation for misconduct with Chapter 12, AR 135-178 which governs ARNG and USAR enlisted separations for misconduct.)
- D. The remainder of this outline considers adverse actions as applicable to the ARNG and USAR. Those adverse actions with little variation throughout the Army, such as those involving memoranda of reprimand, are not discussed.

## **VI. ENLISTED ADVERSE SEPARATION ACTIONS.**

- A. **COUNSELING AND REHABILITATIVE TRANSFERS BEFORE INITIATION OF SEPARATION ACTION.**

1. Counseling is required at least once before initiation of some separation actions. AR 135-178, para 2-4.
2. Rehabilitative transfer within commuting distance for a minimum of 2 months is required, but the separation authority may waive transfer. AR 135-178, para. 2-4c & d.

#### B. COMMAND-INITIATED SEPARATION ACTIONS.

1. Notification Procedures. (AR 135-178, Chapter 3, Section II). Generally, the immediate commander initiates the process by giving written notice. The notice must contain:
  - a) Specific allegations on which the proposed action is based.
  - b) Cite the specific provision in the regulation authorizing separation.
  - c) Advise the soldier that the separation could result in discharge, transfer to the IRR or being dropped from the roles.
  - d) State the least favorable characterization of service or a description of separation he or she could receive.
  - e) The soldier must be advised of the following rights:
    - (1) To consult with consulting counsel, or to consult with civilian counsel at no expense to the government.
    - (2) To submit statements.
    - (3) To obtain copies of documents that will be sent to the separation authority.
    - (4) To present the case to an administrative board, if he or she has 6 or more years of total Regular and Reserve service or if being considered for a discharge under other than honorable conditions.
    - (5) To waive these rights in writing.

(6) If an intermediate commander makes a recommendation based upon additional information outside the proposed action he must give written notice to the soldier and afford him/her an opportunity to rebut the additional information. Military counsel will be made available to prepare rebuttal.

f) The soldier will be given 30 days to respond to the notice. Failure to respond to the notice within 30 days constitutes a waiver.

g) The soldier has the right to submit a conditional waiver.

## 2. Administrative Board Proceedings.

a) Notice must contain the same information as notification procedure (basis for separation; authority for initiation of the action; characterization of discharge). The additional notice provisions concerning the intermediate commander are also required.

b) All the rights provided in notification procedures.

c) Soldier has a right to representation before the board by military counsel, or by civilian counsel at soldier's expense and no expense to the Government.

## C. SEPARATION AUTHORITY.

a) Who are separation authorities?

b) For ARNG soldiers: State adjutant generals have been delegated this authority by the Secretary of the Army, except for soldiers with 18-20 qualifying years of service, whereby the Chief, National Guard Bureau, is the approval authority.

c) For USAR soldiers:

(1) Commander AR-PERSCOM: IRR and IMA soldiers.

(2) Area commanders: soldiers attached or assigned to troop program units of the Selected Reserve.

- d) Delegation by Area Commanders is authorized under AR 135-178, para 1-10b(2) to the following commanders:
  - (1) RRC and GOCOM commanders with SJA available for soldiers subordinate to RRC or GOCOM.
  - (2) First GO in the chain with SJA available when no RRC or GOCOM subordinate to Area Command.
  - (3) No further delegation is authorized.
  - (4) USARC Commander is the area commander for TPU members except for special operations units (USACAPOC) and overseas units.
  
- 2. Separation Authority action upon receipt of recommended separation packet when a board is not required.
  - a) Determine whether sufficient basis exists to support the separation. Standard of review is a preponderance of the evidence.
  - b) If there isn't sufficient basis, disapprove the recommendation and return the case to the originating command with reasons for the disapproval.
  - c) If there is sufficient factual basis for separation, the separation authority must determine whether separation is warranted by applying the criteria in Chapter 2, AR 135-178.
  - d) Separation Authority may:
    - (1) Direct retention.
    - (2) Direct separation.
    - (3) Suspend separation.
  
- 3. Separation Authority's Action on recommended separation packet requiring an administrative board.

- a) If the basis to support separation is not sufficient, return the action to originating command with reasons for disapproval.
- b) If there is sufficient factual basis for separation determine whether separation is warranted. If separation is warranted the separation authority must convene a separation board.

D. ACTIONS OF SEPARATION AUTHORITY BEFORE BOARD HEARING.

1. Separation authority must appoint a board of at least three commissioned, warrant or noncommissioned officers. AR 135-178, para 3-17.
  - a) At least one member must be a Major or above.
  - b) A majority of the board must be commissioned or warrant officers.
  - c) Noncommissioned officers may not serve on a board when an other than honorable (OTH) discharge could result.
  - d) Qualifications of board members.
    - (1) Experienced soldier of mature judgment.
    - (2) Impartial and fully cognizant of the regulations and policies related to separation actions.
  - e) Female or minority representation on the board is not required, but the regulation does express that they will be given an opportunity to serve.
  - f) Standing board appointment orders are encouraged.
2. Appearance of Respondent's Witnesses. AR 135-178, para 3-17.
  - a) If the appearance will require TDY or invitational travel orders, the request must be in writing and:
    - (1) Give a synopsis of the testimony.
    - (2) Explanation of relevance of the testimony.

- (3) Explanation why written testimony is not sufficient.
- (4) Convening authority makes the determination.
- b) Witnesses not requiring expenditure of funds.
  - (1) Request must be in writing, and
  - (2) Specify the type of information the witness will provide.
  - (3) The board is to secure the attendance of the witness if, reasonably available and the testimony will materially add to the case.

E. SEPARATION AUTHORITY'S ACTION. AR 135-178, para 3-18.

- 1. Options when board recommends separation.
  - a) Direct separation for any reason set forth in the notification and established by the evidence.
  - b) Disapprove the recommendation and direct retention when grounds for separation are not documented in the file.
  - c) Suspend the execution of the discharge for a period not to exceed 12 months.
- 2. Options when board recommends retention.
  - a) Approve recommendation and direct retention, or
  - b) Request Secretary of the Army to discharge soldier for the convenience of the government. (Rarely invoked and should be used only under extraordinary circumstances.)
- 3. Separation authority cannot direct discharge if a board recommends retention or discharge of a soldier with a less favorable characterization than recommended by the board.
- 4. Options when error or defects in board action.

- a) If approving authority determines the errors to be harmless, take final action.
- b) If errors are substantial (failure to make required findings and recommendations; action which materially prejudiced a substantial right of the respondent; or there was fraud or collusion in obtaining the findings of the board) and if there is a proper objection from respondent's counsel, the separation authority may:
  - (1) Direct retention.
  - (2) Return case to board to make findings and recommendations required by the regulation.
  - (3) Set aside the proceeding and direct a new board.

F. LIMITATION OF SEPARATION ACTIONS. AR 135-178, para 2-3.

- 1. No soldier will be considered for separation, if the conduct was subject to a judicial proceeding resulting in an acquittal or "similar action." See *Cooney v. Dalton*, 877 F. Supp. 508 (D. Hawaii 1995).
- 2. No soldier will be considered for separation if the conduct was subject to a prior administrative separation board in which the board determined the evidence did not sustain the factual allegation.
- 3. If the conduct was the subject of a separation action resulting in the separation authority directing retention.
- 4. If Government introduces limited use information (soldier-supplied voluntary information of drug use for purposes of rehabilitation), then soldier must be given an honorable discharge in misconduct proceedings, except when the action is under Chapter 8 (drug rehab failure).
- 5. Unlawful command influence in the administrative separation process may result in voiding separation action as a violation of minimal due process. AR 15-6, para. 5-7. May also be a criminal violation. See UCMJ, Article 134, Manual for Courts-Martial, para. 96a (wrongful interference with adverse administrative proceeding).

G. JUDGE ADVOCATE INVOLVEMENT IN THE SEPARATION PROCESS.

1. Consulting Counsel and Counsel for Representation. Provides advice and assistance to respondents. Must perform functions in a fully independent manner. See AR 27-26, Rule 5-7.
2. Legal Review.
  - a) No pre-board legal review is required at any stage. However, it is strongly recommended that prior to referral of an action to a separation board that a judge advocate review the action to ensure the adequacy of the notice and that there is sufficient factual basis to warrant separation, and so inform the appointing authority in writing.
  - b) Post-hearing legal review by a judge advocate only required in those cases in which the board has recommended an OTH or where the respondent identifies specific legal issue for consideration by the separation authority. AR 135-178, para 3-18.
3. Legal Advisor. Appointment of a legal advisor to the board is optional. However, it is recommended that whenever possible a legal advisor will be appointed. Use of Reserve military judges is encouraged; however, they must understand that evidentiary rules are relaxed, and they should not require counsel to submit written briefs on evidentiary questions or dismiss the board members when hearing argument on evidentiary matters.
4. Recorder. A nonvoting recorder may be appointed. The recorder does not have to be a judge advocate, but it is strongly recommended that the recorder be a judge advocate.
5. Several alternate recorders and legal advisors and additional voting board members should be listed on standing board orders. In cases of time conflict or when members are disqualified, the commanding general appointing authority's staff judge advocate can excuse one and substitute another before the first session of the board, IAW AR 15-6, para 5-2a.

#### H. REASONS FOR SEPARATION ACTION.

1. Unsatisfactory Performance AR 135-178, Chapter 9.
  - a) If in the judgment of the commander

- (1) The soldier will not develop sufficiently; or
  - (2) Soldier's retention would have an adverse impact on discipline, good order and morale; or
  - (3) Soldier would be disruptive; or
  - (4) Potential for advancement or leadership is unlikely.
  - (5) Second consecutive APFT failure or elimination for cause from NCOES.
- b) Generally, notification procedures are used in Chapter 9 actions. No board required unless soldier has more than 6 years of service.
  - c) Soldier will receive Honorable Discharge or General Discharge under honorable conditions.
  - d) Counseling and rehabilitation efforts required. See para. 2-4, AR 135-178.
2. Misconduct. AR 135-178, Chapter 12.
- a) Minor disciplinary infractions. Relates to conduct in a military environment.
    - (1) Counseling and rehabilitative efforts required before separation action may be initiated.
    - (2) May utilize notification procedures.
  - b) Pattern of misconduct.
    - (1) Counseling and rehabilitative efforts required before separation action may be initiated.
    - (2) Conduct may have occurred in the military or civilian communities.
    - (3) Involves conduct that does not carry with it a punitive discharge.

- (4) Must be more than one incident.
- c) Conviction by Civilian Court.
  - (1) Soldier is convicted by civil authorities and;
  - (2) A punitive discharge would be authorized for the same or similar offense under the UCMJ or the civil sentence includes confinement for 6 months or more.
  - (3) Conviction does not have to be final. If the conviction has been appealed or the soldier indicates an intention to appeal and the period for appeal has not expired, the execution of the separation will be held in abeyance until the appeal is finalized.
- d) Commission of a Serious Offense.
  - (1) Commission of military or civilian offense if a punitive discharge is authorized for the same or similar offense under the UCMJ.
  - (2) Abuse of illegal drugs constitutes serious misconduct.
    - (a) Separation action must be initiated and the soldier processed for discharge.
    - (b) Administrative board notification should be used.
  - (3) Soldier does not have to have been in a Title 10 status at the time of the activity that gave rise to the separation action.
- 3. Homosexuality. AR 135-178, Chapter 10.
  - a) Note: All Army legal offices (including reserve component) are required to report pending homosexual discharge cases to OTJAG Administrative Law Division.
- 4. Expiration of service obligation. AR 135-178, Chapter 11.

5. Other reasons. AR 135-178, Chapter 15.
  - a) Medically unfit for retention.
  - b) Noncitizens who are members of the ARNG or USAR.
  - c) Ministers of religion and divinity students.
  - d) Attainment of maximum allowable age.
  
6. Unsatisfactory Participation. AR 135-178, Chapter 13.
  - a) Soldier is determined to be an unsatisfactory participant under provisions of AR 135-91, Chapter 4:
    - (1) Nine or more unexcused UTAs/year.
    - (2) Fails to attend or complete Annual Training.
    - (3) Soldier verbally or in writing refused to comply with orders or correspondence or a second notice sent by certified mail was refused, unclaimed, or otherwise undeliverable.
  - b) Administrative board procedures apply, unless an OTH is not warranted or the SM has less than six years total military service.
  - c) All limitations on separations, rights associated with board actions, appointment of counsel apply.
  
7. Weight Control Failure. AR 135-178, Chapter 7.
  - a) Applies only to USAR soldiers who have not completed Initial Entry Training (IET) and have not been awarded an MOS.
  - b) Most USAR soldiers will be transferred to the IRR under the provisions of AR 140-10, or are boarded IAW AR 600-9.

## **VII. OFFICER ADVERSE SEPARATION ACTIONS.**

A. COMMAND-INITIATED ACTIONS.

1. Who may recommend separation action against an officer? AR 135-175, para 2-16.
  - a) A commander with respect to an officer in his/her command.
  - b) A proper agency of HQDA.
  - c) A duly constituted selection board.
2. Notice Requirements of Separation Action. AR 135-175, paras 2-17 and 2-19.

B. REASONS REQUIRING INVOLUNTARY SEPARATION.

1. Substandard Performance of Duty. AR 135-175, para 2-11. An Honorable Discharge Certificate will be furnished.
2. Moral or Professional Dereliction. AR 135-175, para 2-12. An OTH Discharge is authorized.

C. BOARD PROCEEDINGS.

1. Appointing authority must appoint a board of at least three commissioned officers. AR 135-175, para 2-25.
  - a) Equal or higher in grade and senior in rank, at a minimum grade of O-6.
  - b) One member will be a Regular Army officer or a reserve officer on active duty.
  - c) One member of the board must be of the same sex/branch as the respondent, unlike enlisted elimination boards, if reasonably available.
  - d) If possible, minority member if the officer respondent is a minority officer. Respondent has 15 days from board notice to request.

- e) The appointing authority may appoint a judge advocate as legal advisor.
  - f) A commissioned or warrant officer will be named as recorder. Generally, a judge advocate officer should act as recorder.
  - g) Commands should use standing boards for the same reasons mentioned for enlisted elimination boards. Consider use of IRR/IMA officers to sit on boards.
2. Notice of Proceeding. Recorder will notify respondent of the time and place of the hearing at least 10 days prior to date of the board.
3. Conduct of the hearing.
- a) The recorder is responsible for presenting the government's case. [Recorder has an obligation to do more than just present the drug lab litigation packet and the soldier's 201 file. Live witness testimony and prehearing preparation is essential to success.]
  - b) If a legal advisor is not assigned, the President makes all rulings on procedure and evidence. When legal advisors are lawyers, they should not act as judges--relaxed rules of evidence, no briefs or written decisions required. The President of the board is still in charge.
  - c) Formal rules of evidence do not apply to separation boards. AR 15-6 is to be consulted in determining the procedures and rules to be applied as to evidence.
  - d) The standard of proof for the government is a preponderance of the evidence, not "substantial evidence."
  - e) The board must make a finding on each allegation stated in the notification memorandum. If they find the allegation is supported by the evidence they must make a finding as to whether the conduct warrants separation. AR 135-175, para 2-34.
  - f) The board must make a recommendation of retention or separation and the characterization of the discharge.

4. Record of the Proceeding. No verbatim record is required. Only the findings and recommendations must be verbatim. The proceedings must be summarized as fairly and accurately as possible. Officer boards require that there be a statement that the findings and recommendations were determined by secret written ballot in closed session. AR 135-175, para 2-35.

D. LIMITATION OF SEPARATIONS. AR 135-175, para 2-5.

1. No officer will be considered for separation if the conduct was subject to a judicial proceeding resulting in an acquittal on the merits.
2. No officer will be considered for separation if the conduct was subject to a prior administrative separation board resulting in a final determination that the member should be retained.

## **VIII. RECURRING PROBLEMS IN ENLISTED AND OFFICER SEPARATION CASES.**

A. Inadequate notice to the soldier.

1. Failure to state the factual basis for the separation action. Notice should tell the soldier the act or acts that were relied upon for the separation.
2. Failure to state the type of discharge.
3. Notification not signed by the commander.

B. Improper signature in the consulting counsel portion of the notification form.

1. Commanders have signed as consulting counsel. If an individual refuses to consult with counsel the commander is to annotate the form indicating that the soldier declined to consult with counsel. He or she is not to sign as consulting counsel.
2. Other staff officers have signed as consulting counsel.

## **IX. AGR SOLDIERS.**

- A. Must receive counseling/rehabilitative transfer (or waiver), if being processed for involuntary separation IAW AR 600-8-24 (officers) and AR 635-200

(enlisted). The DA Form 4856, General Counseling Form, must meet the rights advisement requirements listed in the Active Army regulations, not AR 135-178 or AR 135-175.

- B. AGR officers may also be involuntarily released from active duty (REFRAD) through a DA Active Duty Board (DAADB).
1. Secretary of the Army is the approval authority for DAADB boards and the Secretary's decision is final. No AGR soldier will be processed before a DAADB board if they have between 18-20 years of Active Federal Service, without the written approval of the Secretary.
  2. The bases for DAADB action are basically the same as those under AR 135-175. A case may be initiated by any commanding officer, the Chief, Army Reserve, Commander, AR-PERSCOM, or Chief, National Guard Bureau.
  3. The USAR AGR officer is notified of the DAADB referral by the Commander, AR-PERSCOM Full Time Support Management Directorate (FTSMD), and given 30 days from receipt of notice to respond in writing. There are no personal appearances before the board.
  4. If the board recommends separation and the recommendation is concurred with by the Secretary of the Army, the officer will be released from active duty no earlier than 5 calendar days and no later than 14 calendar days from notification by FTSMD when misconduct, moral or professional dereliction is found. Separation solely because of substandard performance will result in release from active duty not less than 30 days from notification by FTSMD. Officers released under DAADB board REFRAD procedures for misconduct or substandard performance receive no separation pay.
  5. Enlisted USAR AGR soldiers may be removed from active duty by administrative separation board UP AR 635-200.
- C. Commanders and their judge advocates must coordinate closely with FTSMD, Officer and Enlisted Special Action sections when attempting adverse administrative action against a USAR AGR soldier. All USAR AGR personnel records are stored centrally at FTSMD. Coordination is critical for filing adverse actions (e.g., memoranda of reprimand) and to insure soldiers are properly flagged.

## **X. OTHER ADVERSE PERSONNEL ACTIONS.**

- A. INVOLUNTARY TRANSFER TO THE IRR. AR 140-10.
  - 1. Unsatisfactory participation. Soldiers who receive nine unexcused absences in one year may be transferred to the IRR.
  - 2. Exception: soldiers who have not completed initial entry training or are within 3 months of ETS will not be transferred to the IRR. Paragraph 4-15.
  
- B. DROPPED FROM THE ROLLS. AR 135-178, Chapter 15.
  - 1. Unauthorized absence from AD or ADT covered by AR 630-10.
  - 2. Felony conviction by civilian criminal court. Must be finally sentenced to confinement in a Federal or state penitentiary or correctional institution. Appeal rights must have run (time limit)/appeal finally denied, or proof soldier waived his appellate rights.
  - 3. This action is not a discharge.
  - 4. Approval authority is the area commander [USARC] for USAR TPU soldiers (non-SOF), State Adjutants General for ARNG soldiers, and Commander, AR-PERSCOM for IRR/IMA USAR soldiers.
  
- C. BARS TO REENLISTMENT. AR 140-111, Chapter 1, Section VII.
  - 1. A bar to reenlistment is not a punitive action. It is designed to put the soldier on notice that he or she:
    - a) Is not a candidate for reenlistment, and
    - b) May be separated if the circumstances that gave rise to the bar are not overcome.
  - 2. When may a bar be initiated?
    - a) Bars normally are not imposed when:
      - (1) A soldier has been assigned to the unit for less than 90 days, or

- (2) During the last 90 days (30 days for AGRs) before the soldier is discharged, transferred from the command or released from active duty.
  - b) Rules related to retirement eligibility. A bar may be initiated against a soldier with at least 18 but less than 20 years qualifying years; however, if the chain of command does intend to permit the soldier to extend his/her enlistment to retirement eligibility, approval of the bar is the Chief, Army Reserve.
3. Who may initiate a bar?
- a) Any commander in the soldier's chain of command.
  - b) Any commissioned officer in the soldier's chain of command on a headquarters staff, agency or activity for soldiers he/she has supervisory responsibility.
  - c) The chief of an enlisted management division under AR-PERSCOM.
4. What are the categories of soldiers that should be considered for a bar?
- a) Untrainable soldiers. Individuals who lack the ability, aptitudes or motivation to qualify for an MOS.
  - b) Unsuitable soldiers.
    - (1) Single soldiers/in-service couples with dependents who fail to have family care plan in place.
    - (2) Persons who exhibit interests or habits detrimental to the maintenance of good order and discipline.
    - (3) Paragraph 1-30c, AR 140-111 contains a laundry list of conditions that are considered adequate basis for initiation of bar.
5. Who may approve a bar?
- a) Soldier with less than 10 years of service at ETS: first commander in rank of LTC or SPCMCA.

- b) Soldiers with 10 to 18 years; those with more than 20 years of qualifying service; those with 18 to 20 years when action has to be taken to extend him or her to qualify for retirement: first general officer or the GCMCA.
    - c) Soldiers with 18 to 20 years, when not extended to achieve retirement eligibility: Chief, Army Reserve.
  - 6. What are procedural rights of soldier?
    - a) Notice must be provided by officer initiating the bar.
    - b) If not on AGR tour, soldier has 30 days to respond. If on an AGR tour the soldier will have 7 days.
    - c) May be voluntarily REFRAD or discharged.
    - d) Appeal the bar.
  - 7. When must the bar be reviewed?
    - a) At least 6 months after approval and each 6 months thereafter.
    - b) days before the soldier's scheduled departure from the unit, REFRAD or discharge from USAR.
  - 8. Who must act on appeals?
    - a) Soldiers with less than 10 years the first general officer or GCMCA.
    - b) Soldiers with more than 10 years – Chief, Army Reserve.
    - c) If the Chief, Army Reserve approved the bar no appeal is authorized.
- D. USAR AGR Qualitative Management Program (QMP). AR 635-200, Chapter 19.
- 1. Enhance the quality of the AGR enlisted force by screening out the nonproductive soldiers.

2. Unlike its predecessor, the current QMP results in the elimination of active duty (Active Army and AGR) NCOs. It no longer serves merely as a bar to reenlistment.
3. The first LTC (or above) in the effected AGR soldier's chain of command is sent the memorandum and supporting documents, and is required to personally counsel the soldier, using a DA Form 4856 (General Counseling Statement), and the LTC must have the soldier fill out a Statement of Options (DA Form 4941-R). The supervisor must explain the impact of the QMP bar to reenlistment, discharge options, and appellate rights.
4. The soldier or the commander may appeal the QMP to Commander, AR-PERSCOM, on the grounds that the soldier has overcome the deficiencies listed as the basis for the bar action, and/or material error in the soldier's records that were reviewed by the selection board. An appeal stays the discharge process, until the appeal has been finalized or the soldier elects discharge.
  - a) Appeal period for soldier is 90 days from date of receipt of the Statement of Options.
  - b) Appeal from commander must reach AR-PERSCOM 120 days from notification to the soldier.
5. Soldiers who do not appeal will be involuntarily discharged.
6. Soldiers who unsuccessfully appeal the QMP decision will be discharged within 90-days from receipt of pre-discharge counseling.

## **XI. CONCLUSION.**