
B6



DEPARTMENT OF THE ARMY
U. S. ARMY HUMAN RESOURCES COMMAND
200 STOVALL STREET
ALEXANDRIA, VIRGINIA 22332-0400

REPLY TO
ATTENTION OF

AHRC-JA (2007-0000)

DEC 14 2007

MEMORANDUM THRU the Command Judge Advocate, ^{(b)(6)} [redacted] 14 Dec 2007
Human Resources Command

FOR Office of the Inspector General, ATTN: Office of Legal Counsel, ^{(b)(6)} [redacted]
Deputy Legal Counsel, Department of the Army, 1700 Army Pentagon, Washington, DC 20310

SUBJECT: Interpretation of AR 635-205

1. This memorandum responds to your request for a legal opinion as to whether a Non-Commissioned Officer Evaluation Report (NCOER) issued to "Complete the Record" (CTR NCOER) is optional or mandatory. For the reasons set forth below, a Complete the Record NCOER is optional for all members of the rating chain, and thus a reviewer can decline to render a CTR NCOER.
2. The facts as you provided them in your 6 December 2007 Memorandum are incorporated by reference.
3. While AR 635-205, *Noncommissioned Officer Evaluation Reporting System*, 15 May 2002 (superseded by AR 623-3, *Evaluation Reporting System*, 15 May 2006), paragraph 3-33a, states that a CTR NCOER is optional at the discretion of the rater, such language does not limit the authority of the other members of the rating chain to decline to render a CTR NCOER. Paragraph 1-11b(5) states that *optional* evaluations to complete the Soldier's OMPF prior to promotion or selection consideration *may* be prepared; paragraph 3-33b reiterates that CTR NCOERs are optional; neither paragraph 3-2c nor table 3-10 characterize a CTR NCOER as mandatory; and while there is certain guidance limiting the authority of the rater and reviewer (i.e., paragraph 2-13c(1)(c) states that the reviewer may not direct the rater or senior rater to change an evaluation believed to be honest), there is no limitation which precludes a superior official from deciding whether to render a CTR NCOER. Accordingly, even if a rater were to submit an CTR NCOER for consideration by the rating chain, the senior rater or reviewer can exercise their inherent authority as superior officials and decline to render a CTR NCOER because it is optional.
4. Based on the facts you provided, there is no legal objection for any member of the rating chain to exercise their authority and decline to render a CTR NCOER.
5. POC is the undersigned at ^{(b)(6)} [redacted]

^{(b)(6)} [redacted]
^{(b)(6)} [redacted]
Assistant Command Judge Advocate

B-6a





DEPARTMENT OF THE ARMY
OFFICE OF THE INSPECTOR GENERAL
1700 ARMY PENTAGON
WASHINGTON, DC 20310-1700

REPLY TO
ATTENTION OF:

SAIG-ZXL

6 December 2007

MEMORANDUM FOR Commander, U.S. Army Human Resource Command, ATTN: Office of the Command Judge Advocate, (b)(6)

SUBJECT: Interpretation of AR 635-205, para. 3-33, in support of an Office of Special Counsel Report

1. The SAIG, in conjunction with the Army General Counsel's office, is preparing a report for ASA-MRA's signature to the Office of Special Counsel regarding a reprisal complaint. SAIG requests this interpretation of para. 3-33 of AR 635-205, *Noncommissioned Officer Evaluation Reporting System*, 15 May 2002, to support preparation of this report.
2. Do all members of a Soldier's rating chain possess the option to not render a Complete-the-Record evaluation report, in particular the reviewer? Paragraph 3-33a provides that "[a]t the option of the *rater*, a Complete-the-Record Report may be submitted on an NCO who is about to be considered by a DA centralized board for promotion, school, or CSM selection, . . ." (italics added). Paragraph 3-33b provides that "Complete-The-Record Reports are optional." The appropriate excerpt of AR 635-205 is enclosed.
3. Background: In September 2005, a Soldier alleged to the IG that her reviewer, the brigade commander, reprised against her by refusing to render her requested Complete-the-Record NCOER for consideration of her file for MSG, a board for which all evaluations were to reach HRC by 15 September 2005. One IG working this case noted in his case notes that:

I contacted Mr. Don E. Brown, Enlisted Records and Evaluation Center, Fort Benjamin Harrison, Indiana, proponent for AR 623-205 and asked for a reading on who had the option on submission/completion of a complete-the-record NCOER. On 27 September 2005, Mr. Brown responded via email that "In accordance with AR 623-205, Chap 3, Para 33, there is no provision for the Senior Rater to have the option of approving or disapproving the submission of a Complete-the-Record NCOER.

It is unknown why the response pertained to a senior rater's option when the brigade commander was actually the NCOER reviewer. A second IG who began working the case at a later date stated in his case notes that a (b)(6) and (b)(6) at Human Resources Command told him that "a complete the record report was optional" (presumably for all rating chain members, but the case notes provided no further elaboration).

Bbb

SUBJECT: Interpretation of AR 635-205, para. 3-33, in support of an Office of Special Counsel/Secretary of Army Inspector General (SAIG) Report

4. You rendered me an opinion informally on 7 June 2007 (enclosed), but I now request it formally as the SAIG/Army OGC report is nearing completion. Your opinion will be an exhibit to the report, which should be presented to ASA MRA within the next week. Thank you for your assistance. I am the POC at (b)(6) or (b)(6)

Encl

(b)(6)

Deputy Legal Counsel

[REDACTED]
From: [REDACTED]
nt: Thursday, June 07, 2007 9:45 AM
Cc: [REDACTED]
Subject: RE: Interpretation of AR 635-200 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Yes, Ma'am, I believe we are right and they were wrong.

VR,

[REDACTED]
Asst. Command Judge Advocate
703-325-6756

-----Original Message-----

From: [REDACTED]
Sent: Thursday, June 07, 2007 9:31 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Interpretation of AR 635-200 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

Here's the deal - we're working an Office of Special Counsel referral investigation with OGC.

A civilian IG claimed to the OSC that his IG supervisor failed to order investigation to an allegation against a reviewer who declined to issue a complete-the-record NCOER (after the rater and SR had drafted it and submitted to reviewer), allegedly in reprisal for that NCO's protected communication. The civilian IG based his allegation in part on [REDACTED] interpretation of the applicable AR (see below). Years later, we at DAIG are reviewing this allegation. I agree with your interpretation that the fact that this NCOER is optional means that it is optional for all the NCOER players to make this call, not just the rater.

OGC wants me to obtain from HRC a specific rebuttal of the [REDACTED] assertion below - something like [REDACTED] "was wrong and we are right." If that's what you're giving me in your message below, then I'm fine with it.
Peggy

-----Original Message-----

From: [REDACTED]
Sent: Thursday, June 07, 2007 9:06 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Interpretation of AR 635-200 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

No Ma'am, I hadn't, but while I agree there is no specific provision for an option to dis/approve an optional report, the fact that it is optional gives the SR the option not to complete it if s/he believes it is not appropriate at that time.

Does this help?

Bbc

[redacted]
Asst. Command Judge Advocate
[redacted]

---Original Message---

From: [redacted]
Sent: Thursday, June 07, 2007 8:32 AM
To: [redacted]
Subject: RE: Interpretation of AR 635-200 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

[redacted] - You received this, correct? [redacted]

-----Original Message-----

From: [redacted]
Sent: Friday, June 01, 2007 1:28 PM
To: [redacted]
Subject: FW: Interpretation of AR 635-200 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

[redacted] - one follow up question - the IG initially looking into this matter put the following in his report:

"I contacted [redacted] Enlisted Records and Evaluation Center, Fort Benjamin Harrison, Indiana, proponent for AR 623-205 and asked for a reading on who had the option on submission/completion of a complete-the-record NCOER. On 27 September 2005, [redacted] responded via email that "In accordance with AR 623-205, Chap 3, Para 33, there is no provision for the Senior Rater to have the option of approving or disapproving the submission of a Complete-the-Record NCOER." (quoted from the old IG report)

My thought is that your interpretation trumps [redacted] Would you agree?
Thanks, [redacted]

From: [redacted]
Sent: Wednesday, May 30, 2007 11:24 AM
To: [redacted]
Subject: Interpretation of AR 635-200 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

[redacted] asked that I look into your request w/r/t AR 635-200 and whether a "complete the record" NCOER is optional for the Senior Rater. I opine that it is ultimately up to the SR as to whether an optional NCOER is completed.

AR 635-200 (dtd. 15 May 02 (assuming the NCOER rating period falls within this timeframe)) para. 3-2 states that NCOERs may be optional, and para. 3-27 further confirms that Complete the Record NCOERs are optional (para. 3-33). In that they are optional, any senior member of the rating chain (e.g. SR over Rater, and Reviewer over SR) can opt not to submit the NCOER. Thus, in this case, without more facts, it would appear that if the SR decides that a Complete the Record NCOER is not warranted, it is an optional NCOER, it does not have to be submitted.

I hope this helps. Please let me know if there is anything further I can do to help.

VR,

(b)(6)
Captain, Judge Advocate
Assistant Command Judge Advocate
US Army Human Resources Command

Voice: (b)(6)
Fax: (703) 325-3191

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED

Caveats: FOUO

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Caveats: FOUO

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Classification: UNCLASSIFIED
Caveats: NONE

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Caveats: FOUO

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