

FOUO

Office of Special Counsel  
File Number DI-11-2808  
WOMACK ARMY MEDICAL  
CENTER  
(Redacted )

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DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
MANPOWER AND RESERVE AFFAIRS  
111 ARMY PENTAGON  
WASHINGTON, DC 20310-0111

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AMB:48

Special Counsel Carolyn N. Lerner  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505

RE: Whistleblower Investigation-Registered  
Nurses at the Department of the Army, Womack  
Army Medical Center, Fort Bragg, North Carolina  
(Office of Special Counsel File Number DI-11-  
2808)

Dear Ms. Lerner:

In accordance with Title 5, United States Code (USC), Section 1213(c) and (d), the enclosed report is submitted in response to your referral of information requesting an investigation of allegations and a report of findings in the above referenced case.

The Secretary of the Army (SA) has delegated his authority to me, as agency head, to review, sign, and submit to you the report required by Title 5, USC, Section 1213(c) and (d). [Tab A].

The Department of the Army (DA) has enclosed two versions of its Report. The first version of the Report contains the names and duty titles of military service members and civilian employees of the DA. This first version is for your official use only, as specified in Title 5, USC, Section 1213(e); we understand that, as required by that law, you will provide a copy of this first version of the Report to the whistleblower, the President of the United States, and the Senate and House Armed Services Committees for their review. Other releases of the first version of the Report may result in violations of the Privacy Act<sup>1</sup> and breaches of personal privacy interests.

The second version of the Report has been constructed to eliminate references to privacy-protected information and is suitable for release to all others as well as the regulations

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<sup>1</sup> The Privacy Act of 1974, Title 5, USC, Section 552a.

that require protection as noted above. We request that only the second version of the Report be made available on your web-site, in your public library, or in any other forum in which it will be accessible to persons not expressly entitled by law to a copy of the Report.

## INFORMATION INITIATING THE INVESTIGATION

In late July 2011, information about an anonymous complaint was provided to the Womack Army Medical Center (Womack AMC) Inspector General (IG) regarding the general allegation of a possible patient safety issue that nurses at the Womack AMC, Fort Bragg, North Carolina, were sleeping while on duty and alleged no time frame. The Womack IG Office relayed this information to the legal counsel for the Department of the Army Inspector General Office (DAIG). The DAIG contacted the Department of the Army Office of the General Counsel (OGC) about the allegation. OGC advised the DAIG to relay this information to the U.S. Army Medical Command (MEDCOM), Office of the Staff Judge Advocate (OSJA), and the Womack AMC Center Judge Advocate. There was also information that this complaint had been sent to the Office of Special Counsel as a possible whistleblower complaint.

OGC recommended that an immediate investigation be initiated by MEDCOM. In response, on July 29, 2011, [redacted] Acting Commanding Officer [redacted] Acting Commander, WAMC,<sup>2</sup> appointed [redacted] Investigating Officer [redacted], Troop Battalion, Womack AMC,<sup>3</sup> as an Investigating Officer (IO) [TAB B], under the provisions of AR 15-6, *Procedures for Investigating Officers and Board of Officers*,<sup>4</sup> [TAB C] with a mandate to investigate the general allegations that nurses were sleeping on duty at Womack AMC and to determine whether any corrective actions were taken by their supervisors. The IO was also instructed to consult with the Womack AMC IG for more specificity regarding the date time group, location, and identity of the nurses and witnesses.<sup>5</sup> [TAB B].

<sup>2</sup> Given the urgency of initiating an AR 15-6 investigation because of the allegations of potential threat to public health and safety, the AR 15-6 Appointing Authority became [redacted] Acting Commanding Officer [redacted] At that point in time, he was the Acting Commander because the Womack AMC Commander, [redacted] Commanding Officer [redacted] was on temporary duty travel (TDY).

<sup>3</sup> [redacted] Investigating Officer [redacted] was also the Chief, Department of Preventive Medicine (DOPM), Womack AMC.

<sup>4</sup> This footnote prescribes the citation convention that will be employed throughout this Report with a view to facilitating the reader's understanding of, and reference to, the specific document from which facts or assertions set forth herein are drawn. Tabs or Exhibits referenced in this Report are referenced as "[TAB x or Exhibit 'x']". Additionally, there are extensive references made to documents or information referenced as "ROI" or part of the record evidence gathered for the ROI. The term "ROI" refers to the Army Regulation (AR) 15-6 Report of Investigation (ROI) (and its exhibits) undertaken to investigate the allegations referred by the OGC to MEDCOM for investigation which comprised the initiation of the initial AR 15-6 investigation pursuant to appointment orders dated July 29, 2011, as well as the AR 15-6 investigation that was initiated on August 9, 2011 and "replaced" the July 29, 2011 appointment orders. References made to the memorandum that the Investigating Officer prepared to accompany the assembled ROI and its exhibits is referenced as "ROI". Hence, references identified as "Exhibits" are documents that were assembled as part of the ROI. References identified as "Tabs" that contain no reference to ROI documents were created or gathered after the ROI and are documents that were not included as part of the record documents for the ROI.

<sup>5</sup> AR 15-6 promulgates guidelines for Army administrative investigations. Army commands and organizations frequently appoint investigating officers under provisions of AR 15-6 to investigate all manner of allegations and concerns [TAB C].

Subsequently, by letter dated August 1, 2011, the OSC referred to the Secretary of the Army (SA) the specific allegations that form the basis of this investigation and this Report. The referral contained allegations submitted by an anonymous whistleblower. The whistleblower alleged the following:

1. Registered Nurses at Womack AMC slept while sitting in desk chairs at the nurses' station in the Post Anesthesia Care Unit (PACU) and the Neonatal Intensive Care Unit (NICU) during duty hours between 2:00 a.m. and 4:00 a.m. while they should have been caring for patients. The whistleblower alleged that the whistleblower observed nurses in these units sleeping at least 12 times during the past year, including an incident involving two nurses [Redacted] Registered Nurse #1 and [Redacted] Licensed Practical Nurse ) who were assigned on March 8, 2011, at 3:30 a.m. to monitor a critical care patient who had arrived from the operating room due to hemorrhaging after giving birth and appeared to be in distress.

2. Other observations were made of the following named nurses sleeping while on duty: [Redacted] Registered Nurse #2 on April 21, 2011; [Redacted] Registered Nurse #3 on April 6, 2011; [Redacted] Registered Nurse #4 on March 13, 2011; and [Redacted] Registered Nurse #5 on February 13, 2011.

3. These employees' supervisors were aware of these allegations but have taken no apparent action to correct the problem or prevent it from reoccurring. The named supervisors were Chief of the Operating Room Post Anesthesia Unit [Redacted] Chief, Surgical Nursing Service; Officer in Charge of PACU, [Redacted] Officer in Charge PACU; Officer in Charge of NICU [Redacted] Clinical Nurse Charge; Assistant Deputy of Patient Services [Redacted] Chief, Department of Nursing; Deputy Chief of Patient Services [Redacted] Deputy Commander; and Chief of Maternal-Child Health Division, [Redacted] Section Chief, Maternal Child Health.

The OSC found that these allegations constitute a substantial and specific danger to public health and safety under 5 U.S.C. § 1213(a)(1).

## CONDUCT OF THE INVESTIGATION

On August 5, 2011, the SA forwarded the OSC referral to the Commander, U.S. Army Medical Command (MEDCOM), and directed him to conduct an investigation into the allegations referred to the Secretary by the OSC. This referral was appropriate because MEDCOM provides healthcare oversight and control of all medical centers and medical treatment facilities and activities in the Army, with the exception of field units, as provided for under AR 40-1, *Composition, Mission, and Functions of the Army Medical Department*. [TAB D]. Additionally, on August 5, 2011, the OGC forwarded the SA's directive to the MEDCOM Office of the Staff Judge Advocate (SJA) to assist the MEDCOM commander in taking appropriate action and initiating the requested investigation.

The Secretary directed the MEDCOM Commander to initiate an investigation into the allegations referred to him by the OSC or direct that the investigation initiated on July 29, 2011,

by the Womack Army Medical Command, Acting Commander, be expanded to address any additional allegations contained in the OSC letter. In addition to the investigation, the SA directed that the Commander ensure that appropriate corrective action is initiated.

On August 9, 2011, [Redacted] Commanding Officer, Commander, Womack AMC, appointed [Redacted] Investigating Officer, Troop Battalion, Womack AMC, under the provisions of Army Regulation (AR) 15-6, *Procedure for Investigating Officers and Board of Officers*, [TAB C], to investigate the allegations forwarded by the OSC. [Tab E]. [Redacted] Commanding Officer directed that [Redacted] Investigating Officer (who had previously been appointed on July 29, 2011 as the Investigating Officer (IO) under the AR 15-6 appointing orders dated July 29, 2011, to investigate similar allegations made to the Womack AMC Inspector General (IG)), to disregard the previous appointment as the IO and authorized him to incorporate any relevant information obtained so far. [TAB E]. [Redacted] Commanding Officer then directed that [Redacted] Investigating Officer focus on the specific allegations provided in the OSC letter dated August 1, 2011 which stated:

The whistleblower alleged that Registered Nurses slept while sitting in desk chairs at the nurses' station in the Post Anesthesia Care Unit (PACU) and the Neonatal Intensive Care Unit (NICU) during duty house between 2:00 a.m. and 4:00 a.m. while they should have been caring for patients. The whistleblower has observed nurses in these units sleeping at least 12 times during the past year, including an incident on March 8, 2011, at 3:30 a.m. in which Registered Nurses [Redacted] Registered Nurse #1 and [Redacted] Licensed Practical Nurse were sleeping in the PACU nurses' station when they were to be monitoring a critical care patient who had arrived from the operating room due to hemorrhaging after giving birth. The patient appeared to be in distress. [Redacted] Registered Nurse #1 and [Redacted] Licensed Practical Nurse were sleeping approximately 12 feet away from the patient. Among the other nurses the whistleblower observed sleeping were [Redacted] Registered Nurse #2 on April 21, 2011, [Redacted] Registered Nurse #3 on April 6, 2011, [Redacted] Registered Nurse #4 on March 13, 2011, and [Redacted] Registered Nurse #5 on February 13, 2011. The whistleblower alleged that these employees' supervisors, Chief of the Operating Room, Post Anesthesia Unit [Redacted] Chief, Surgical Nursing Service; Officer in Charge of PACU [Redacted] Officer in Charge PACU; Officer in Charge of NICU [Redacted] Clinical Nurse Officer in Charge; Assistant Deputy of Patient Services [Redacted] Chief, Department of Nursing; Deputy Chief of Patient Services [Redacted] Deputy Commander; and Chief of Maternal-Child Health Division [Redacted] Section Chief, Maternal Child Health, were aware of these allegations but have taken no apparent action to correct the problem or prevent it from recurring.

He then directed that the scope of the investigation to include the following:

- a. Whether nurses in the PACU and the NICU slept on duty.
- b. Did management officials for the PACU and NICU at Womack AMC have knowledge of employees sleeping on duty as alleged? If so, did they fail to take appropriate action?
- c. If the allegations of sleeping on duty are substantiated, was any patient injured as a result?
- d. Do the acts of management officials in the PACU and NICU at Womack AMC constitute a substantial and specific danger to public health or safety?

For each of the five incidents alleged, the IO, [Redacted] Investigating Officer, answered the above four

specific questions in the ROI.

During the course of the investigation, Investigating Officer interviewed all Womack AMC nursing Evening Night Supervisors (ENS): Chief, Evening Night Supervisor, Evening Night Supervisor #2, Evening Night Supervisor #3, and Evening Night Supervisor #1; all nurses accused of sleeping on duty: Registered Nurse #1, Licensed Practical Nurse, Registered Nurse #2, Registered Nurse #3, Registered Nurse #4, and Registered Nurse #5; and all supervisory (nursing) personnel accused of not taking action to correct a problem: Chief, Surgical Nursing Service, Officer in Charge PACU, Clinical Nurse Officer in Charge, Chief, Department of Nursing, Deputy Commander, and Section Chief, Maternal Child Health.

In addition, Investigating Officer interviewed Chief, (OB/GYN) Chief, Department of Obstetrics and Gynecology to discuss the March 8, 2011 incident, and Officer in Charge MBU, a nursing supervisor formerly at Womack AMC, about the March 13, 2011 incident. Investigating Officer also gathered all relevant information and documentation from the Womack AMC Safety Office, Quality Safety Division (QSD), Risk Management, and Labor Management Employee Relations (LABOR MER) that they possessed regarding incidents occurring on the dates in the whistleblower's allegations (February 13, 2011; March 8, 2011; March 13, 2011; April 6, 2011; and April 21, 2011).

## BACKGROUND

To facilitate a better understanding of the facts and circumstances associated with the whistleblower's allegations to the OSC and to permit a more knowledgeable assessment of the testimonial and documentary evidence collected from all of the witnesses, it is important to understand in pertinent part MEDCOM's mission and functional relationships with supporting organizations.

### U.S. Army Medical Command (MEDCOM) Mission

The Surgeon General (TSG) of the U. S. Army serves in a dual role as both the U.S. Army Surgeon General and MEDCOM Commander. MEDCOM provides medical, dental, and veterinary capabilities to the Army and designated Department of Defense (DoD) activities. TSG is responsible for the development, policy direction, organization, and overall management of an integrated Army-wide health services system. [See Army Regulation 40-1, *Composition, Mission, and Functions of the Army Medical Department*, dated July 1, 1983, paragraph 1-6, [TAB D]]. Among many other functions, MEDCOM provides medical and dental care worldwide; coordinates Army health services for Army, civilian, and Federal health care resources in a given health service area; and conducts health care education, training and studies. The Commander, MEDCOM, directs all active duty Army health services activities involved in providing direct health care support within the prescribed geographical limits of responsibility; designates missions and levels of care to be provided by subordinate military treatment facilities; and determines manpower staffing standards and levels of staffing. [AR 10-87, Army Commands, Army Service Component Commands, and Direct Reporting Units, dated September 4, 2007 paragraphs 15-2d and 15-3d. [TAB F]].

In his role as Commander, MEDCOM, TSG exercises oversight and control of all medical centers and medical treatment facilities and activities in the U.S Army, with the exception of field units. Regional Medical Commands (RMCs) are major subordinate commands (MSCs) of MEDCOM and are multi-state command and control headquarters that allocate resources, oversee day-to-day management, and promote readiness among military treatment facilities in their geographic areas. [See AR 10-87 Chapter 15, [TAB F]]. Womack AMC is funded by and receives operational oversight and guidance from MEDCOM through the Northern Regional Medical Command.

### **Womack Army Medical Center**

Womack AMC [TAB O] is a general medical and surgical hospital located on Fort Bragg in near Fayetteville, North Carolina. It operates as part of the U.S. Army Medical Command. It provides health services for authorized members of the Armed Forces, retired personnel, their family members, and other such persons as may be authorized by Congress and the Department of Defense.

The facility is dedicated to the memory of an enlisted soldier, Private First Class Bryant H. Womack, who posthumously received the Medal of Honor for his actions as a combat medic in Korea.

It has 138 beds and is accredited by the Joint Commission. The health care complex provides in-patient and outpatient care, offering primary care (routine exams, tests and treatments), secondary care (inpatient care, surgery under general anesthesia), and tertiary care (sophisticated diagnosis/treatment). Some of the specialties include cardiology, hematology-oncology, pulmonology, obstetrics, orthopedics, and optometry. Womack AMC serves more than 200,000 eligible beneficiaries in the region, the largest beneficiary population in the Army. It offers graduate medical education (internships, residencies, etc.) for physicians. This medical center consists of three connecting buildings on 163 acres and has over 1 million square feet of space. It also exercises oversight and control of six off-site satellite primary care clinics to support Major Commands closer to their physical locations.

## **RULES AND REGULATIONS GOVERNING DISCIPLINE AND REPORTING OF MISCONDUCT**

The Army's Table of Penalties is a list of infractions committed most frequently by agency employees, along with the suggested range of penalties for each one. [TAB G]. The penalty are graduated in severity based on whether an employee has no previous record of misconduct, has a single previous incident of documented misconduct, has two previous incidents of documented misconduct, etc. It is contained in the Army's regulation that governs disciplinary actions, AR 690-700, Chapter 751, *Discipline*. [TAB H]. Under the Army's Table of Penalties for Various Offenses, the penalty for Sleeping on Duty where safety of personnel or property is not endangered is a written reprimand to 1 day suspension for a first offense. A second offense has a range of a 1 to 5 day suspension. [TAB G]. Although the whistleblower

alleges the potential for endangering patient safety, **Investigating Officer** found no evidence that any patient was injured as a result of this incident.

Additionally, pursuant to the Merit Systems Protection Board (MSPB) decision, *Douglas v. Veterans Administration*, 5 MSPR 280 (1981), supervisors are required to consider particular criteria in determining an appropriate penalty to impose for an act of employee misconduct. In the case of *Douglas v. Veterans Administration*, the MSPB held that it is management's burden to show the reasonableness of the remedy by showing that appropriate consideration was given to each of the applicable factors set forth in the decision. When determining what adverse action to take or what penalty to impose on an employee, these Douglas factors must be taken into consideration.

Not all of these factors will be pertinent in every case. It is the agency's responsibility to determine which factors apply. Some may weigh in the employee's favor while other factors may constitute aggravating circumstances that support a harsher penalty. The agency should indicate in its decision letter which Douglas factors were considered when making its final decision.

There are twelve "Douglas Factors" which must be considered in determining the appropriate penalty in disciplinary actions, to include the nature and seriousness of the offense, and consistency with and adequacy of alternative sanctions to deter misconduct, and the employee's past disciplinary record. These factors have been incorporated into the Army disciplinary process, and are provided as guidance in the Army's Civilian Personnel On Line web site PERMISS Article, Management-Employee Relations Program, Selecting Appropriate Action. [TAB I].

Lastly, at Womack AMC, there is a bargaining unit that represents the nurses, including those who were the subject of the alleged incidents. A Collective Bargaining Agreement between Headquarters XVII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, and American Federation of Government Employees, Local 1770, is applicable to the subject employees and contains provisions that address Disciplinary Actions (Article 38) and Grievance Procedures (Article 39). [TAB J].

## **OVERVIEW OF THE ALLEGATIONS, SUMMARY OF THE EVIDENCE OBTAINED FROM THE INVESTIGATION, AND AGENCY DISCUSSION**

### **Overview of the Allegations**

The whistleblower made the following allegations regarding five separate incidents of nurses at Womack AMC sleeping on duty and they should have been caring for their patients. These allegations were referred by OSC to the Secretary of the Army for investigation.

#### **OSC-Referred Allegation 1:**

On March 8, 2011 at 0330 Registered Nurses **Registered Nurse #1** and **Licensed Practical Nurse** were

sleeping in the PACU nurses station when they were to be monitoring a critical care patient who had arrived from the operating room due to hemorrhaging after giving birth. The patient appeared to be in distress. Registered Nurse #1 and Licensed Practical Nurse were sleeping approximately 12 feet away from the patient. This conduct constituted a substantial and specific danger to the public health and safety.

### OSC-Referred Allegation 2:

The following nurses were observed sleeping on duty: Registered Nurse #2 on April 21, 2011, Registered Nurse #3 on April 6, 2011, Registered Nurse #4 on March 13, 2011, and Registered Nurse #5 on February 13, 2011. These incidents constituted a substantial and specific danger to the public health and safety.

### OSC-Referred Allegation 3:

These employees' supervisors, Chief of Operating Room, Post Anesthesia Unit, Chief, Surgical Nursing Service; Officer in Charge (OIC) of PACU, Officer in Charge PACU; OIC of NICU, Chief, Surgical Nursing Service; Assistant Deputy of Patient Services, Chief, Department of Nursing; Deputy Chief of Patient Services, Deputy Commander; and Chief of Maternal-Child Health Division, Section Chief, Maternal Child Health, were aware of these allegations but have taken no apparent action to correct the problem or prevent it from recurring. The inaction by these employees' supervisors constituted a substantial and specific danger to public health and safety.

### Summary of the Evidence Obtained from the Investigation

Each witness interviewed in the context of the AR 15-6 investigation initiated to address the allegations referred to the SA by the OSC was asked to respond to an initial set of questions that were methodically developed by the Investigating Officer to solicit specific and concrete information: the Womack AMC Evening Night Supervisors (ENS) Chief, Evening Night Supervisor, Evening Night Supervisor #1, Evening Night Supervisor #3 were given a set of 36 questions. The same questions were also given to Chief, Surgical Nursing Service, Section Chief, Maternal Child Health, Section Chief of Maternal Child Health Nurses, and Clinical Nurse Officer in Charge, OIC of NICU. The nurses accused of sleeping on duty Registered Nurse #1, Licensed Practical Nurse, Registered Nurse #2, Registered Nurse #3, Registered Nurse #4, and Registered Nurse #5 were given a set of 14 questions. Additionally, all of the supervisory (nursing) personnel accused of not taking action to correct a problem (Deputy Commander, Chief, Department of Nursing, and Officer in Charge PACU) were given a set of 15 questions. The set of questions was expanded, as appropriate, in order to develop additional lines of relevant inquiry. The AR 15-6 Report of Investigation (ROI) and associated exhibits contain a thorough and detailed account of each incident alleged by the whistleblower and the corrective action taken for each alleged incident.

The IO investigated each of the allegations made by the whistleblower regarding nurses sleeping on duty. A reading of the AR 15-6 clearly reflects that each incident was investigated by the nursing supervisors in a thorough, detailed, and complete manner. All of the witnesses germane to the allegations were interviewed by the IO. All of the testimonial evidence and documentary evidence gathered by the IO during the AR 15-6 investigation supports the conclusion that no patient injury occurred. Further, all of the documentary and testimonial

evidence gathered for the AR 15-6 investigation and ROI itself clearly reflect that in each incident, corrective action was taken by management in accordance with AR 690-700, Chapter 751, the applicable collective bargaining agreement, and in consultation with LABOR MER regarding procedures for processing of adverse actions.

Finally, the ROI and its supporting record evidence support the conclusion that with respect to any of these alleged incidents, none of them posed or constituted a danger to the public health or safety.

### **Documentary and Testimonial Evidence From Womack AMC Supervisors**

The IO interviewed the four Evening Night Supervisors (ENS) to determine, among other matters, whether they had ever witnessed any nurses sleeping; been aware of any patient being injured as a result of nurses sleeping; witnessed any of the specific incidents alleged by the anonymous whistleblower; or if informed about the alleged incidents, how were they informed about the subject incidents.

**Chief, Evening Night Supervisor**, Chief, Evening Night Supervisor, testified that he was aware of only one of the alleged incidents (the March 8, 2011 one) but had personally never seen any nurses asleep on duty including the alleged incidents; that his role as an ENS was to write up any such incidents and forward these reports to the section chief. He emphasized that the ENS do not have administrative authority to take action or invoke punishment on any of the offending nurse. He stated that he was advised by **Evening Night Supervisor #2** about the March 8, 2011 incident in the morning report. Further, **Chief, Evening Night Supervisor** testified that as a result of such incidents, such misconduct has always been "prohibited" and that as a result, it was important to "re-educate" the staff that sleeping won duty is prohibited, and that such re-education was in fact performed by the supervisors. He stated that he was advised by **Evening Night Supervisor #2** about the March 8, 2011 incident in the morning report and that follow up action was taken as a result of that incident when **Deputy Commander** and **Chief, Department of Nursing** advised all of the staff that nursing personnel that sleeping is "unacceptable and supervisors must educate, enforce compliance, and punish those who sleep on duty." However, **Chief, Evening Night Supervisor** stated that he never was informed of the results of any such reported incidents including if disciplinary action was taken but that there should be some "feedback" to the Evening Night Supervisors as they are acting supervisors during some portion of duty time. Additionally, **Chief, Evening Night Supervisor** testified that there were some conflicting testimony between **Evening Night Supervisor #2** allegation and the statements from other witnesses but was unsure of the outcome of that matter since Privacy Act concerns affect the disclosure of such information. Lastly, **Chief, Evening Night Supervisor** was not aware of any patient ever having been injured as a result of a nurse sleeping on duty at Womack AMC.

**Evening Night Supervisor #1**, Evening Night Supervisor, testified that regarding the alleged subject incidents, she had also been made aware of the March 8, 2011 incident. She also testified that the normal practice is not to provide feedback to the ENS regarding a reported incident. However, in the past, though she had never witnessed any nurse sleeping, she had been called during the evening shift to be advised about such an incident of a nurse under her supervision, had received witness statements for that particular incident, that she took the appropriate action in her incident, and no patient was injured as a result of that instance. Regarding the March 8, 2011

incident, during an unrelated discussion to that incident, she had been informed by the appropriate supervisors in a general nature that they had taken action relative to the March 8, 2011 instance but was unaware of the specifics of what resulted from that incident. Evening Night Supervisor #1 emphasized that there is a "zero tolerance" by all levels of nursing supervisors with respect to nurses sleeping on duty. Lastly, Evening Night Supervisor #1 was not aware of any patient ever having been injured as a result of a nurse sleeping on duty on Womack AMC.

The IO also interviewed Evening Night Supervisor #2, another Evening Night Supervisor, who testified that she witnessed and reported all of the incidents that were the subject of the whistleblower's allegations. She testified that she prepared and forwarded memoranda for record for each of the incidents to their supervisors, but is not aware of any actions that may have been taken in response to those reported incidents. Further, she stated that she included these incidents in the morning report and was "counseled" by Chief Evening Night Supervisor and Chief Department of Nursing not to bring up such matters in the morning reports. She indicated that she advised Chief Department of Nursing of this "counseling." Regarding the March 8, 2011 incident, she testified that the subject patient was injured as a result of the nurses sleeping when the patient's transfusion was delayed for two to three hours "due to the nurses sleeping" and in that patient's treatment for pain. Further, regarding the other alleged incidents, she was unsure if any patients were injured as a result of the nurses sleeping on duty during those instances. Evening Night Supervisor #2 also stated the following:

"We are not holding our nurses to the state standard. If caught according to Board of Nursing they are dismissed. Unsure why ours are not dismissed. I feel Union is part of the issue. 'Just because their eyes are closed doesn't mean they are asleep.' There should be no tolerance for this."<sup>6</sup>

The final ENS that the IO interviewed was Evening Night Supervisor #3. Evening Night Supervisor #3 testified that she was not aware of any of the alleged incidents or any other incidents of nurses sleeping on duty until Evening Night Supervisor #2 advised of such incidents nor was she aware of disposition of any actions taken as a result of their occurrence. Lastly, Evening Night Supervisor #3 was not aware of any patient ever having been injured as a result of a nurse sleeping on duty on Womack AMC.

The IO also interviewed the supervisors in the Nursing chain of command/supervision who were not ENS. Their testimony, summarized below, reflects that each of these management officials took seriously their mission of delivering excellent medical care to their patients and to protect the health and safety of these patients. Further, when advised of alleged misconduct, specifically in the instant case involving allegations of nurses sleeping on duty, they did not shy away from taking a methodical, deliberative, and well reasoned approach to developing the facts necessary for them to take the appropriate disciplinary and other corrective actions as warranted by the facts and circumstances. The documentary and testimonial evidence gathered by the IO reflects that they are dedicated professional health care professionals.

Deputy Commander, Deputy Commander for Patient Services and Nursing,<sup>7</sup> testified

<sup>6</sup> The agency has addressed the issue that Evening Night Supervisor #2 raised regarding the relationship between the state Board of Nursing and Army nursing personnel at pages 20-21.

<sup>7</sup> Deputy Commander is the more senior nurse by position, and is responsible for the nursing practice at Womack AMC.

that she was aware of only one of the alleged incidents, the March 8, 2011 incident. Deputy Commander stated that during the 0700 morning report, Evening Night Supervisor #2 told the nursing leadership that the staff had been sleeping on duty in the NICU and PACU (the March 8, 2011 incident was in the PACU). Further, she testified that Chief (OB/GYN) attending physician and Chief, Department of Obstetrics & Gynecology, verified to her what Evening Night Supervisor #2 had conveyed about the PACU nurses. Chief, Surgical Nursing Service, the PACU Section Supervisor took immediate action and discussed the options for appropriate actions for this incident with the Labor Relations staff and the union. As a result, Deputy Commander testified that the two PACU nurses identified as sleeping on duty were disciplined. However, because Evening Night Supervisor #2 only told the Nursing leadership about the NICU nurses sleeping on duty and did not provide Deputy Commander with memorandum for record or written statement as she had asked Evening Night Supervisor #2 to provide to her, Deputy Commander instructed Section Chief, Maternal Child Health Section Supervisor Maternal Child Section (MCS) to discuss sleeping with the MCH section leaders and "re-educate" the staff on this unacceptable behavior. Deputy Commander stated that she took this action since she did not have any written documentation to take action on any specific individuals. Further testimony from Deputy Commander revealed that there had been a change to the reporting procedure after she arrived at Womack AMC. She testified that prior to her arrival, the ENS supervisors would report such incidents to the DCPS and the Assistant DCN, Chief, Department of Nursing. This procedure was changed in order for the ENS to report critical information to include employee behaviors to the section leaders. Deputy Commander testified that she was not aware of any of the other alleged incidents. Lastly, Deputy Commander testified that she was not aware of any patient ever having been injured as a result of a nurse sleeping on duty on Womack AMC.

Testimony from Chief, Department of Nursing, Chief, Department of Nursing, disclosed that she has never seen any nurses sleeping on duty but that she was made aware of the PACU incident (the March 8, 2011 incident) by Evening Night Supervisor #2 and that Chief, Surgical Nursing Service advised her that appropriate action had been taken in that incident. Though Evening Night Supervisor #2 made her aware of the NICU incident, she was not aware of the final actions taken in that instance. However, she said that she was made aware of the other alleged incidents by Evening Night Supervisor #2 whereby "we all discussed as a group and guidance was given to all." Additionally, Chief, Department of Nursing testified that all nursing section supervisors and section officers in charge were given the directive to inform all of their staff that sleeping on duty was a "safety issue" and unacceptable, that such behavior will not be "tolerated", and that any such incident would result in appropriate action being taken against the offender. Lastly, the IO specifically asked Chief, Department of Nursing to respond to Evening Night Supervisor #2 testimony to him that Chief, Department of Nursing had told her not to report incidents of nurses sleeping in the morning report and not to provide her with a method to report incidents of nurses sleeping on duty. Chief, Department of Nursing responded that she could "not recall telling Evening Night Supervisor #2 not to report sleeping incidents at morning report. I have informed her please give the section Supervisor any actions pertaining to their sections for actions." Lastly, Chief, Department of Nursing also testified that there is no specific feedback given to an individual who reports a nurse sleeping on duty and "the staff may be told in general terms that action was taken. Lastly, Chief, Department of Nursing testified that she was not aware of any patient ever having been injured as a result of a nurse sleeping on duty on Womack AMC.

Chief, Surgical Nursing Service, Chief, Surgical Nursing Service, testified that she was aware of the alleged incident at the PACU involving Registered Nurse #1 and Licensed Practical Nurse. She was the Deciding Official in the proposed action taken against them. She stated that following consultation with

Labor Management Employee Relations (Labor MER), [Redacted: Chief, Surgical Nursing Service] stated that her decision to mitigate the 5 day suspension to a Letter of Warning for both nurses was based on a careful and full consideration of [Redacted: Registered Nurse #1] oral reply and [Redacted: Licensed Practical Nurse] written and oral replies, along with the "Douglas Factors". She decided to give each of them a Letter of Warning though she also had considered a Letter of Reprimand and a suspension as well. [Redacted: Chief, Surgical Nursing Service] testified that as result of the reported incidents in the morning report, the staff was advised that sleeping on duty is unauthorized and appropriate actions will be taken. She also testified that she was not aware of the other alleged incidents. Lastly, [Redacted: Chief, Surgical Nursing Service] testified that she was not aware of any patient ever having been injured as a result of a nurse sleeping on duty on Womack AMC. In addition to [Redacted: Chief, Surgical Nursing Service] testimony, it should be noted that the ROI includes copies of the disciplinary case file on the subject two nurses.

The IO interviewed [Redacted: Section Chief, Maternal Child Health], Section Chief, Maternal Child Health, Nursing. [Redacted: Section Chief, Maternal Child Health] testified that though she was aware of all of the incidents except of the one involving [Redacted: Registered Nurse #2], she was involved in two of the alleged incidents regarding [Redacted: Registered Nurse #3] and [Redacted: Registered Nurse #4]. She advised that statements were received from witnesses to both alleged incidents. Based on conflicting statements between [Redacted: Evening Night Supervisor #2] and the other two witnesses regarding [Redacted: Registered Nurse #3], no action was taken against [Redacted: Registered Nurse #3] due to the lack of substantiating evidence. Based on conflicting statements from [Redacted: Evening Night Supervisor #2] and the other witness to the incident involving [Redacted: Registered Nurse #4], [Redacted: Registered Nurse #4] received a verbal warning/counseling and the rest of the staff were "re-educated" that sleeping on duty will not be tolerated. Lastly, [Redacted: Section Chief, Maternal Child Health] also testified that she was not aware of any patient ever having been injured as a result of a nurse sleeping on duty on Womack AMC.

[Redacted: Clinical Nurse Officer in Charge], Clinical Nurse Officer in Charge, also provided testimony regarding the alleged incidents. [Redacted: Clinical Nurse Officer in Charge] never witnessed any nurses sleeping on duty and was only aware of two of the alleged incidents, specifically the one involving [Redacted: Registered Nurse #3] and the other involving [Redacted: Registered Nurse #5]. She testified that she investigated these incidents with her supervisor [Redacted: Section Chief, Maternal Child Health]. [Redacted: Clinical Nurse Officer in Charge] stated that regarding [Redacted: Evening Night Supervisor #2] allegations that [Redacted: Registered Nurse #3] and [Redacted: Registered Nurse #5] were sleeping on duty, she received an email from [Redacted: Evening Night Supervisor #2] regarding [Redacted: Registered Nurse #3] but she never received anything in writing from [Redacted: Evening Night Supervisor #2] on [Redacted: Registered Nurse #5]. Relative to the allegation against [Redacted: Registered Nurse #3], [Redacted: Clinical Nurse Officer in Charge] received statements from two other witnesses who contradicted what [Redacted: Evening Night Supervisor #2] had alleged. As a result, she counseled [Redacted: Registered Nurse #3] and advised her that sleeping on duty was not acceptable though [Redacted: Registered Nurse #3] denied sleeping on duty. Relative to the allegations against [Redacted: Registered Nurse #5], [Redacted: Clinical Nurse Officer in Charge] testified that she spoke to each of the other nurses on duty during [Redacted: Registered Nurse #5] shift that night and they corroborated [Redacted: Registered Nurse #5] denial of sleeping on duty. [Redacted: Clinical Nurse Officer in Charge] testified that on several occasions she actually made "surprise appearances during the nightshifts at various times to see if anyone was sleeping. I never caught anyone." Further, she stated that since she these two incidents involving nurses under her supervision, she has "stepped up my presence on nightshift, and continue to do so randomly." Additionally, [Redacted: Clinical Nurse Officer in Charge] stated that she has incorporated the issue of sleeping on duty into her staff meetings, referring to the union contract that addresses taking "proper breaks" and stressing that sleeping on duty is not acceptable performance. Lastly, [Redacted: Clinical Nurse Officer in Charge] also testified that she was not aware of any patient ever having been injured as a result of a nurse sleeping on duty on Womack AMC and that no babies were "injured or put in danger at any time in the incident involving [Redacted: Registered Nurse #3] and [Redacted: Registered Nurse #5]."

[Redacted] Officer in Charge MBU (Prior OIC, MBU) was also interviewed by the IO regarding the alleged subject incidents. [Redacted] Officer in Charge MBU testified that she was responsible for determining what action to take regarding an alleged incident involving [Redacted] Registered Nurse #4 in the reported incident of sleeping on duty that occurred on March 13, 2011. Upon receiving the allegation from [Redacted] Evening Night Supervisor #2 she testified that she discussed the allegation with another witness who provided a contrary statement to [Redacted] Evening Night Supervisor #2 allegation against [Redacted] Registered Nurse #4 and provided evidence that [Redacted] Registered Nurse #4 was not asleep. As a result, [Redacted] Officer in Charge MBU counseled all of her staff including [Redacted] Registered Nurse #4 that sleeping on duty is not allowed and will not be tolerated. Further, [Redacted] Officer in Charge MBU testified that she was not aware of any patient ever having been injured as a result of a nurse sleeping on duty on Womack AMC.

Additionally, the IO interviewed [Redacted] Officer in Charge PACU, [Redacted] Officer in Charge PACU, [Redacted] Officer in Charge PACU, [Redacted] Licensed Practical Nurse testified that she had proposed the five day suspension she proposed for [Redacted] Registered Nurse #1 and [Redacted] concerning the alleged sleeping on duty incident that occurred on March 8, 2011. As reported to [Redacted] Officer in Charge PACU by [Redacted] Evening Night Supervisor #2, that incident involved their sleeping on duty while a critical care patient was in the PACU after arriving from the operating room due to hemorrhaging after giving birth and was awaiting a blood transfusion. IT was also alleged that they were sleeping about a 12 feet from the patient who appeared to be in distress and was moaning in pain. Upon being advised of the incident, [Redacted] Officer in Charge PACU prepared a package for Labor MER personnel to review and assist her in proposing the appropriate disciplinary action against them. [Redacted] Officer in Charge PACU testified that with respect to this incident, the patient was not injured, the nurses' sleeping on duty did not cause any delay in care with regard to the transfusion, but that providing the patient with pain medication may have been delayed by their sleeping on duty.

In addition to [Redacted] Officer in Charge PACU testimony, it should be noted that the ROI includes copies of the disciplinary case file on the subject two nurses. Included in the subject files is a memorandum for record (MFR) wherein [Redacted] Officer in Charge PACU documented the incident that was brought to her attention when [Redacted] Evening Night Supervisor #2, the ENS on duty at the time, discovered the two nurses asleep. In this MFR, [Redacted] Officer in Charge PACU indicates that she received a call from [Redacted] Evening Night Supervisor #2 at 0430 March 8, 2011. [Redacted] Officer in Charge PACU included the following paragraphs in the MFRs for both disciplinary files:

"After hours the ENS represents the Deputy Commander Patient Services and Chief, Department of Nursing. The ENS is responsible for all in activities and management of the delivery of nursing care. Additionally, they indirectly supervise and evaluate nursing activities and facility personnel according to AMEDD and WAMC regulations, department policy, and professional standards.

Both employees engaged in gross professional misconduct while caring for a patient in a vulnerable state. While the employees were sleeping, they effectively made themselves unavailable to observe the patient or respond to the patient's needs. It was observed by the ENS the patient was tachycardia and moaning, both are symptoms of pain. The employees were unavailable to immediately respond to the patient in pain and delayed treatment."

It is obvious that the Nursing Department at Womack AMC values the supervisory role

and responsibility of the ENS and takes appropriate action when an ENS presents an allegation of a nurse sleeping on duty. There can be no compromise on medical care for Womack patients, day or night.

**Officer in Charge**  
**PACU** Notice of Proposed Suspension for 5 days for both nurses contained the following paragraph that reflects the charge specification and her consideration of the seriousness of the charge:

**“Charge: Sleeping on Duty Where Safety of Personnel is Endangered**

**Specification:** On or about 8 March 2011, at Fort Bragg, North Carolina, **Evening Night Supervisor #2** observed you sleeping on duty at the PACU. **Evening Night Supervisor #2** observed you sleeping with the lights off and wrapped in blankets. During this time a PACU patient, in your care prior to being transported to the Intensive Care Unit (ICU), was observed to be moaning in pain, with a heart rate of 122 bpm.

...I believe such conduct is unacceptable and inappropriate. Your failure to provide appropriate care to patients has had an adverse impact on the mission of the PACU Department. Sleeping while recovering a patient waiting transportation to ICU could easily have resulted in death or serious bodily harm to patients under your care. I consider your actions and conduct to be detrimental to the efficiency of the organization. It is therefore, for the efficiency of the service, that I am proposing your suspension.”

Lastly, the IO interviewed **Chief (OB/GYN)**. **Chief (OB/GYN)**. The IO received **Chief (OB/GYN)** testimony and also reviewed an email that **Doctor #1** had sent to **Chief (OB/GYN)** advising him about an incident that had occurred with one of his patients on March 8, 2011. **Doctor #1** email to **Chief (OB/GYN)** indicated that he was the treating physician for a patient who had had her baby delivered a few hours earlier by the midwife service and was hemorrhaging. He was called to evaluate and treat her. In so doing, **Chief (OB/GYN)** performed a procedure on her and requested that she receive a transfusion. He ordered the patient moved from the operating room to the PACU at 0115 with orders to send for the appropriate blood so she could receive a transfusion. In an effort to determine if the blood for the transfusion was ready for the patient, both **Doctor #1** and **Evening Night Supervisor #2** attempted to call the PACU for a status report on the requested blood from the assigned nurses, **Registered Nurse #1** and **Licensed Practical Nurse**. The phone was not answered when they called and **Evening Night Supervisor #2** advised **Doctor #1** of this situation. Hence, **Evening Night Supervisor #2** walked to the PACU and found both **Registered Nurse #1** and **Licensed Practical Nurse** asleep, lights off, blankets piled on the desk for comfort. **Evening Night Supervisor #2** advised **Doctor #1** that she had to arouse the two nurses who then attended to his patient and transferred her as planned, to the MICU where **Doctor #1** performed the transfusions. The mother /patient did well and was sent home postpartum day 3. **Doctor #1** email concluded with the following:

“Obviously, for two PACU nurses to deliberately take naps while caring

for a sick patient is an egregious violation of patient safety. I never want to be the one to throw the first stone, but please feel free to communicate my profound displeasure about this incident to the Commander and his staff.”

Chief (OB/GYN) statement to the IO reflects that he is not aware of any incidents where a patient was injured as result of nurses sleeping on duty, including in the incident described above to him. Additionally, Chief (OB/GYN) testified that he has never personally witnessed a nurse sleeping on duty.

### Summary of Investigation into Incidents Described In the OSC Referred Allegations

Generally, although the whistleblower alleges the potential for endangering patient safety, Investigating Officer found no evidence that any patient was injured as a result of this incident.

**March 8, 2011.** Registered Nurse #1 and Licensed Practical Nurse were called in late in the evening of March 7, 2011 to cover post operative patients in the PACU. The Nursing Evening Night Supervisor #2 found Registered Nurse #1 and Licensed Practical Nurse asleep at 0352 on March 8, 2011 in the PACU nurses' station while monitoring a critical care patient. Evening Night Supervisor #2 awoke them and reported the incident of sleeping and submitted a MFR to their supervisors for appropriate action. Both Registered Nurse #1 and Licensed Practical Nurse denied sleeping when interviewed by the IO. Officer in Charge PACU the PACU nursing OIC, initiated corrective action by notifying them of a proposed 5-Day Suspension on March 28, 2011. However, “after careful and full consideration of all of the facts, and the relevant ‘Douglas Factors,’ Chief, Surgical Nursing Services, in a Decision Memorandum dated May 19, 2011, decided to reduce the 5-Day Suspension to a Letter of Warning dated May 18, 2011, which was placed in each of their official personnel files for period of 6 months. Based on the evidence, the IO concluded there is no evidence that any patient was injured or that actions by management constituted a danger to public health or safety. However, the IO did conclude that pain medication was delayed.

**April 21, 2011.** Investigating Officer did not find any incident involving Registered Nurse #2 sleeping while on duty on April 21, 2011; however, he did determine during the investigation that an incident involving Registered Nurse #2 sleeping on duty did occur on April 21, 2010. In reference to this incident, Investigating Officer determined that at 0255 on April 21, 2010, Registered Nurse #2 was seated at a computer completing a report for the 4 South charge nurse. He was next to Registered Nurse #7. At 0300, the Nursing Evening Night Supervisor #2 noted Registered Nurse #2 eyes were closed. Registered Nurse #2 was woken up and verbally counseled that this was unacceptable. Registered Nurse #2 admitted to having fallen asleep during the investigation. Based on this incident, the Clinical OIC, Clinical Nurse #2, initiated corrective actions, to include counseling and a letter of reprimand. On June 9, 2010, Registered Nurse #2 received a letter of reprimand that was incorporated into his employee folder for a period of 6 months.

**April 6, 2011.** At 0345 on April 6, 2011, Registered Nurse #3 was seated in the dark at the nurses' station in the NICU. The Evening Night Supervisor #2, stated that Registered Nurse #3 was seated upright in a chair with her eyes closed. When asked by Evening Night Supervisor #2, Registered Nurse #3, “do you need to get

up and walk around?" Registered Nurse #3 said, "No." Two other nurses present at the NICU that night, Registered Nurse #6 and Registered Nurse #5, provided written statements contrary to Evening Night Supervisor #2 account, stating that Registered Nurse #3 was awake because they both could hear the keyboard clicking as she typed a progress report. The NICU Clinical Nurse Officer in Charge spoke with Registered Nurse #3 and the other two nurses who provided statements. Clinical Nurse Officer in Charge then counseled Registered Nurse #3 that sleeping was not allowed while on duty and it would not be tolerated. Clinical Nurse Officer in Charge then submitted a Memorandum for Record to her supervisor, Section Chief, Maternal Child Health, about the incident, stating that Registered Nurse #3 denied that she was sleeping and that two other nurses in the NICU had also stated that Registered Nurse #3 was not asleep. Section Chief, Maternal Child Health evaluated the contradictory accounts between Evening Night Supervisor #2 and the NICU nurses on duty and concurred with taking no disciplinary action due to the lack of substantiation of the charge. Registered Nurse #3 was verbally counseled. Based on the evidence, the IO concluded there is no evidence that any patient was injured or that actions by management constituted a danger to public health or safety.

**March 13, 2011.** At 0420 on March 13, 2011, Registered Nurse #4 was seated in the Mother Baby Unit computer room with the lights off. According to the Evening Night Supervisor #2 Registered Nurse #4 back was against the wall and her eyes were closed. Evening Night Supervisor #2 then tapped her on her shoulder and told her to get up and walk around. Registered Nurse #4 denied sleeping, advising that "she had just closed her eyes." A Charge Nurse gave a statement advising that she had spoken to Registered Nurse #4, asking her how to use the fax option on the copy machine as the normal fax machine wasn't working. Registered Nurse #4 had responded that she did not know how to do it, but that another employee might. Charge Nurse noted that while she was still at the copier trying to figure out the fax option, Evening Night Supervisor #2 came into the documentation room and told Registered Nurse #4 that she needed to get up and walk around. Investigating Officer determined that "[t]his indicates that Registered Nurse #4 had been actively engaged in duties very close in time to the arrival of Evening Night Supervisor #2 and had not been sleeping." Nursing supervisor, Officer in Charge MBU, reviewed the contradictory accounts and informed Section Chief, Maternal Child Health. Based on the contradictory accounts and LABOR MER guidance, both Officer in Charge MBU and Section Chief, Maternal Child Health agreed that no action would be taken outside of restating to all staff that sleeping on duty was inappropriate and would not be tolerated. Based on the evidence, the IO concluded there is no evidence that any patient was injured or that actions by management constituted a danger to public health or safety.

**February 13, 2011.** At 0400 on February 13, 2011, Registered Nurse #5 was asleep sitting in front of the computer at the nursing station. The Evening Night Supervisor #2 tapped her on the shoulder and asked if she needed to walk around and offered her a cup of coffee. Registered Nurse #5 agreed to both. Registered Nurse #5 denies she was asleep. The NICU Clinical Nurse Officer in Charge spoke with Registered Nurse #5 and all others working in the NICU that night. She then spoke with Registered Nurse #5 and advised that sleeping on duty was unacceptable. Section Chief, Maternal Child Health advised during the 15-0 investigation that Registered Nurse #5 was verbally admonished to not repeat behavior for a first incident of sleeping on duty, but no documentation was recorded by either Clinical Nurse Officer in Charge or Section Chief, Maternal Child Health. According to Section Chief, Maternal Child Health, this incident was not documented based on guidance from LABOR MER that prior to taking punitive action, all staff must be informed that they could not sleep on duty. After this incident, all staff in Section Chief, Maternal Child Health section was educated regarding sleeping on duty and leaving the hospital without approved leave. Section Chief, Maternal Child Health then advised all supervisors in writing to document all events in writing to ensure that progressive discipline would be allowable. Based on the evidence, the IO concluded there is no evidence that any patient was injured or that actions by management constituted a danger to public health or safety.

In reference to the allegations regarding no corrective action being taken by nursing supervisors after becoming aware of the issue regarding staff members sleeping on duty, the IO, <sup>Investigating Officer</sup> found that when Womack AMC management officials became aware of this issue, senior nursing leaders, <sup>Deputy Commander</sup>, Deputy Commander for Patient Services and <sup>Chief, Department of Nursing</sup>, Chief Department of Nursing, instructed subordinate nursing supervisors to inform their staffs that sleeping on duty was a safety issue and unacceptable behavior. He further found that on each occurrence, nursing supervisors at all levels took appropriate action in accordance with AR 690-700, Chapter 751, the bargaining unit agreement, and LABOR MER guidance regarding the proper procedures for processing adverse actions.

After a thorough investigation, interviewing all nursing staff involved in the incidents alleged by the whistleblower, <sup>Investigating Officer</sup> found that no incident resulted in patient injury. A reading of the AR 15-6 ROI clearly reflects that the investigation was very methodical, detailed, and complete in its scope and content. After interviewing all witnesses in this case and reviewing all LABOR MER documentation provided regarding each incident, <sup>Investigating Officer</sup> found that the progressive disciplinary actions taken by management were appropriate, in no case did management fail to act to correct the problems or prevent a recurrence, and no incident resulted in patient injury. He concluded that the acts of management in NICU, PACU or other inpatient wards do not constitute a danger to public health or safety.

After reviewing and analyzing each alleged incident, the IO found that three bargaining unit nurses were unequivocally found sleeping at the nurses' stations in Womack AMC by <sup>Evening Night Supervisor #2</sup> Evening Night Supervisor. Three additional nurses were found with eyes closed. In the incidents where <sup>Evening Night Supervisor #2</sup> reported that she found the nurse with eyes closed, other nurses working stated that they saw the nurse awake and working immediately preceding <sup>Evening Night Supervisor #2</sup> arrival at the workstation. For each event, <sup>Investigating Officer</sup> found that nursing supervisors took appropriate actions to correct those who slept on duty, prevent recurrence and prevent occurrence in the rest of the care team. He found that penalties varied and were based on input from the Evening Night Supervisor, other witnesses, the nurses accused, and input from LABOR MER. Penalties were provided to those nurses confirmed to be found sleeping in accordance with AR 690-700, Chapter 751, Table of Penalties and the collective bargaining agreement. <sup>Investigating Officer</sup> surmised that in all cases, supervisors took appropriate action to correct for the incident and educated the remainder of their staff that sleeping on duty would not be tolerated, and that no incident resulted in injury to any patient.

## Agency Discussion

### OSC-Referred Allegation 1:

The whistleblower alleged that on March 8, 2011 at 0330 Registered Nurses <sup>Registered Nurse #1</sup> and <sup>Licensed Practical Nurse</sup> were sleeping in the PACU nurses station when they were to be monitoring a critical care patient who had arrived from the operating room due to hemorrhaging after giving birth. The patient appeared to be in distress. <sup>Registered Nurse #1</sup> and <sup>Licensed Practical Nurse</sup> were sleeping approximately 12 feet away from the patient. The whistleblower <sup>turner</sup> alleged that these employees' supervisors were aware of these allegations but have taken no apparent action to correct the problem. This conduct constituted a substantial and specific danger to the public

health and safety.

**Army Findings as to Allegation 1:** The allegation was substantiated as to the fact that both <sup>Registered Nurse</sup> ~~Registered Nurse #1~~ and <sup>Licensed Practical Nurse</sup> ~~Licensed Practical Nurse~~ were found sleeping in the PACU. The allegation that these nurses' supervisors took no corrective action is unsubstantiated. Statements taken by <sup>Officer in Charge PACU</sup> ~~Officer in Charge PACU~~ the PACU Officer in Charge establish that she took corrective action immediately. As a result of <sup>Officer in Charge PACU</sup> ~~Officer in Charge PACU~~ actions, ultimately, both <sup>Registered Nurse #1</sup> ~~Registered Nurse #1~~ and <sup>Licensed Practical Nurse</sup> ~~Licensed Practical Nurse~~ received a Letter of Warning which was placed in their official personnel files. This punishment was reduced from 5-Day Suspensions recommended by <sup>Officer in Charge PACU</sup> ~~Officer in Charge PACU~~ to a Letters of Warning after <sup>Chief, Surgical Nursing Service</sup> ~~Chief, Surgical Nursing Service~~ Chief of the Operating Room, Post Anesthesia Care Unit, reviewed the entire packet and considered the "Douglas" Factors as required under AR 690-700, Chapter 751, the bargaining unit agreement, and LABOR MER guidance. A preponderance of the evidence, as set forth in the AR 15-6 ROI, leads to the conclusion that no patient was injured during this incident and that the actions by management did not constitute a danger to public health or safety.

### OSC-Referred Allegation 2:

In addition, the whistleblower observed the following nurses sleeping on duty: <sup>Registered Nurse #2</sup> ~~Registered Nurse #2~~ on April 21, 2011, <sup>Registered Nurse #3</sup> ~~Registered Nurse #3~~ on April 6, 2011, <sup>Registered Nurse #4</sup> ~~Registered Nurse #4~~ on March 13, 2011, and <sup>Registered Nurse #5</sup> ~~Registered Nurse #5~~ on February 13, 2011. The whistleblower further alleged that these employees' supervisors were aware of these allegations but have taken no apparent action to correct the problem. This conduct constituted a substantial and specific danger to the public health and safety. These incidents constituted a substantial and specific danger to the public health and safety.

**Army Findings as to Allegation 2:** Two of the allegations of nurses sleeping were substantiated and resulted in disciplinary action being taken against them, and two of the allegations were unsubstantiated due to insufficient evidence following an investigation which presented conflicting statements between the Evening Night Supervisor (ENS) and the statements from the other nurses on duty as well as the accused nurses. No disciplinary action was taken on those instances because the nursing supervisors determined that there was insufficient evidence to substantiate the allegation based on conflicting statements of witnesses to the alleged incidents.. In all of the incidents alleged by the whistleblower, the allegations that these nurses' supervisors took no corrective action are unsubstantiated. Statements taken by the nursing supervisors in each case establish that corrective action was taken immediately following the report by the ENS, <sup>Evening Night Supervisor #2</sup> ~~Evening Night Supervisor #2~~. In each case, the accused nurse was counseled and statements were taken by all witnesses to the incident. A preponderance of the evidence, as set forth in the AR 15-6 ROI, leads to the conclusion that no patient was injured during this incident and that the actions by management did not constitute a danger to public health or safety.

### OSC-Referred Allegation 3:

The whistleblower further alleged that these employees' supervisors, Chief of Operating Room, Post Anesthesia Unit, <sup>Chief, Surgical Nursing Service</sup> ~~Chief, Surgical Nursing Service~~ Officer in Charge (OIC) of PACU, <sup>Officer in Charge PACU</sup> ~~Officer in Charge PACU~~ OIC of NICU, <sup>Clinical Nurse Officer in Charge</sup> ~~Clinical Nurse Officer in Charge~~ Assistant Deputy of Patient Services, <sup>Chief Department of Nursing</sup> ~~Chief Department of Nursing~~ Deputy Chief of Patient Services, <sup>Deputy Commander</sup> ~~Deputy Commander~~ and Chief of Maternal-Child Health Division, <sup>Section Chief, Maternal Child Health</sup> ~~Section Chief, Maternal Child Health~~ were aware of these allegations but have taken no apparent action to correct the problem or prevent it from recurring. The inaction by these employees'

supervisors constituted a substantial and specific danger to public health and safety.

**Army Findings as to Allegation 3:** The allegation is unsubstantiated. Following a thorough and complete investigation which gathered statements from all witnesses to the alleged incidents of nurses sleeping while on duty, as well as, documentary evidence of e-mails and disciplinary files obtained by LABOR MER, Investigating Officer [REDACTED] found that in each incident, nursing supervisors at all levels took appropriate action in accordance with AR 690-700, Chapter 751, the bargaining unit agreement, and LABOR MER guidance for the processing of adverse actions. A preponderance of the evidence, as set forth in the AR 15-6 ROI, leads to the conclusion that no patient was injured during this incident and that the actions by management did not constitute a danger to public health or safety.

**Discussion:** The AR 15-6 investigation initiated by the Army in response to the OSC referral of allegations in this case found that there were several incidents where nurses were found sleeping while on duty; however, the investigation also found that in each incident, the nursing supervisors investigated the allegations, counseled the nurses accused of sleeping, and took corrective action in accordance with the collective bargaining agreement and LABOR MER guidance. There were several incidents that were unsubstantiated due to conflicting statements between the Evening Night Supervisor that alleged sleeping and the other nurses on the floor who provided statements contrary to the Evening Night Supervisor.

The conclusions reached by the IO, Investigating Officer [REDACTED] in his AR 15-6 Report of Investigation (ROI), are supported by the statements of the witnesses and documentation gathered during the investigation. A review of the ROI reveals a thorough, meticulous and well-reasoned review of the facts and testimony of all witnesses to the allegations made by the whistleblower. Based on his evaluation of all of the evidence, Investigating Officer [REDACTED] reached the following conclusions:

1. When Womack AMC management officials (nursing supervisors) became aware of a staff member sleeping on duty, senior nursing leaders instructed subordinate nursing supervisors to inform their staffs that sleeping on duty was a safety issue and unacceptable behavior.
2. In each incident, nursing supervisors at all levels took appropriate action in accordance with AR 690-700, Chapter 751, the bargaining unit agreement, and in consultation with LABOR MER, the appropriate procedures for processing adverse actions.
3. No incident resulted in patient injury, and the acts of management in the NICU, PACU and other inpatient wards did not constitute a danger to public health or safety.

Based on the above conclusions, Investigating Officer [REDACTED] found that a major reason why the whistleblower may have made the allegations to OSC is because they may not have been aware of the corrective actions taken in each instance. Consequently, this lack of knowledge may have precipitated the whistleblower to present the allegations to OSC for investigation since after each incident was reported as part of the morning report, not all of the nursing supervisory staff was aware of final disposition or actions taken. As a result of this conclusion, Investigating Officer [REDACTED] recommended that all nursing supervisors (to include Evening Night Supervisors) get a final report on disposition of all "misconduct" cases, if permissible under the applicable local

collective bargaining agreement and any statutes, rules and regulations governing disciplinary actions.

In line with the above conclusions and recommendations, the discussion of the evidence previously presented in the Army narrative report overwhelmingly supports a finding that although there were confirmed incidents of nurses sleeping on duty during the 2:00 a.m. to 4:00 a.m. shifts at Womack AMC, each incident was investigated and corrective action was taken, to include counseling, education, and appropriate disciplinary action in accordance with Army Regulation and the collective bargaining agreement. The evidence also establishes that each time an incident occurred, the nursing supervisors interviewed all witnesses to the alleged incident and then consulted with the LABOR MER prior to taking final action.

### VIOLATIONS OR APPARENT VIOLATIONS OF LAW, RULE, OR REGULATION

The Army investigation revealed several instances where nurses had been found sleeping on duty. In those instances appropriate disciplinary action was taken against the offenders by their supervisors. There were other instances where the allegations of sleeping while on duty were not substantiated. The Army investigation found no other violations or apparent violations of law, rule, or regulation in this matter.

The appropriate disciplinary action for each alleged incident of sleeping on duty was subject to the requirements of the Army's Table of Penalties and the consideration of the twelve "Douglas Factors" which must be considered in determining the appropriate penalty in disciplinary actions, to include: nature and seriousness of the offense, employee's past disciplinary record, Agency's Table of Penalties, and consistency with and adequacy of alternative sanctions to deter misconduct. Pursuant to AR 690-700, Chapter 751, Table of Penalties for Various Offenses, Category A, Behavioral Offenses For Which Progressive Discipline is Appropriate, Offense #3, the penalty for Sleeping on Duty where safety of personnel or property is not endangered is a written reprimand to 1 day suspension for a first offense. A second offense has a range of a 1 to 5 day suspension. [TAB G]. Although the whistleblower alleges the potential for endangering patient safety, Investigating Officer found no evidence that any patient was injured as a result of this incident. Hence, the alleged misconduct that merited disciplinary action resulted in a finding of a violation of the Army's Table of Penalties.

It should be noted that OGC requested that Womack AMC address the issue raised by Evening Night Supervisor #2 regarding the relationship between the State Board of Nursing and disciplinary actions against Army nursing personnel. Clinical Performance Improvement Officer, Clinical Performance Improvement Officer, Quality Management Division, Headquarters, MEDCOM, provided the following comments on

<sup>8</sup> In his statement, Clinical Performance Improvement Officer described the responsibility of his office: "The U.S. Army MEDCOM QMD exercises broad oversight responsibility for implementation of the Army Medical Department (AMEDD) Clinical Quality Management Program (CQMP) as delegated by The Surgeon General of the Army (TSG). In pertinent part, the QMD provides corporate-level clinical quality management (CQM) guidance within the AMEDD to include policy on credentialing, performance-based privileging, outcomes management (OM), medical staff appointment, and accreditation processes. QMD administers the corporate AMEDD Patient Safety (PS) and Risk Management (RM)

that matter:

“A State Board of Nursing provides the licensing requirements to practice nursing in a particular state. Once a nurse is an Army employee, she or she will practice according to established clinical guidelines and standard operating procedures at a particular Military Treatment Facility (MTF) and Army policies. A State Board of Nursing does not dictate the actions of a federal agency regarding corrective or disciplinary actions. With regard to adverse actions and reporting to a state licensing board, The Surgeon General of the Army (TSG) is the sole authority for making decisions on whom and what to report, based on the information and the recommendation of the MTF Commander. If a local MTF takes an adverse practice action against a non-privileged provider, such as a nurse, it will be done in accordance with Army Regulation 40-68,<sup>9</sup> and all documentation will be forwarded to this Headquarters, U.S. Army Medical Command, Quality Management Division. There the documentation would be reviewed in accordance with AR 40-68 to determine if further action is warranted before making a recommendation to TSG. Any decision regarding disciplinary action, to include dismissal, is a personnel action, which is outside the purview of the Quality Management Division.” [TAB K, Statement of Clinical Performance Improvement Officer paragraph 3].

### CORRECTIVE ACTIONS UNDERTAKEN

In those instances where allegations of nurses sleeping on duty were substantiated appropriate disciplinary action was taken against the offenders by their supervisors. Actions taken were to correct those who slept on duty, prevent recurrence and prevent occurrence in the rest of the care team. Penalties varied and were based upon the specific facts gathered surrounding each alleged incident, input from Nursing Evening Night Supervisor, other witnesses, as well as input from LABOR MER. Penalties were applied to these bargaining unit employees in accordance with the applicable Army regulation, AR 690-700, Chapter 751, and the local collective bargaining unit agreement. In all cases supervisors took action to correct for the incident and educated the remainder of their staff that sleeping on duty was not to be tolerated. In no case did management fail to act to correct the problems or prevent recurrence.

The following specific disciplinary corrective actions were taken in response to the alleged incidents referred by the OSC to the SA for action:

1. **April 21, 2010** Registered Nurse #2 -- He received a letter of reprimand on 9 June 2010 for Sleeping on Duty which was incorporated into his Employee Folder for six (6) months

---

Programs that include but are not be limited to: risk assessment, risk avoidance, safety practices, incident monitoring/management, adverse privileging/practice actions, sentinel events (SEs), and malpractice claims. QMD also implements the administrative procedures related to reporting adverse privileging/practice actions to appropriate national, professional, and State licensure, certification, and registration agencies according to DOD guidance. These responsibilities are found in Army Regulation 40-68, Clinical Quality Management, dated 26 February 2004.” [TAB K, Statement of Clinical Performance Improvement Officer paragraph 1].

<sup>9</sup>Extract portions from AR 40-68, *Clinical Quality Management, dated February 26, 2004*, are found at TAB L.

from date of receipt of the reprimand. There is no evidence that any training to the nursing staff resulted from this incident.

2. **February 13, 2011** Registered Nurse #5 -- She received a verbal counseling (for this first documented sleeping incident). Per guidance from LABOR MER, no documented records were kept of this incident because the nursing staff had to be counseled regarding sleeping on duty. Per Section Chief, Maternal Child Health as a result of this incident, the section was educated regarding sleeping on duty and leaving the hospital on duty without approved leave. In addition, all nursing supervisors were told in writing to document all events in the writing to ensure that progressive disciplinary actions could be taken.

3. **March 8, 2011** Registered Nurse #1 and Licensed Practical Nurse Officer in Charge PACU Both ultimately received letters of warning placed in their personnel files. Officer in Charge PACU had recommended a 5-Day Suspension for both of them, but that disciplinary action was reduced by Chief, Surgical Nursing Service Chief of the Operating Room, Post Anesthesia Care Unit to a written letter of warning based on a review of the entire packet and consideration of the "Douglas factors."

4. **March 13, 2011** Registered Nurse #4 -- Upon investigation of the incident, Officer in Charge MBU and Section Chief, Maternal Child Health found insufficient evidence based on conflicting statements to take disciplinary action outside of restating to all staff that sleeping on duty is inappropriate and will not be tolerated.

5. **April 6, 2011** Registered Nurse #3 -- Clinical Nurse Officer in Charge OIC of the NICU counseled Registered Nurse #3 that sleeping was not allowed while on duty and it would not be tolerated. However, upon investigation of the incident, Section Chief, Maternal Child Health found insufficient evidence based on conflicting statements to take disciplinary action.

Additionally Commanding Officer Womack AMC, approved the recommendation of the Investigating Officer to the extent "Nursing supervisors (including Evening and Nights Supervisors) will be made aware of the result of misconduct cases on a 'need to know' basis as much as the Law, Regulations, Policies, and Privacy will allow." The Center Judge Advocate notified the servicing Civilian Personnel Advisory Center (CPAC), Labor-MER officials, and Fort Bragg labor attorneys of the Commander's directive in the DA Form 1574. [TABs M and N].

No additional corrective actions are required in this matter because the investigation revealed that all appropriate actions to investigate, counsel, educate and discipline were undertaken following each alleged incident.

## CONCLUSION

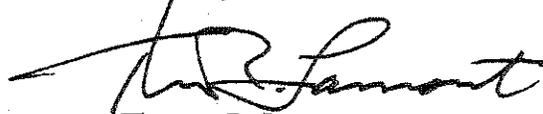
The Department of the Army takes very seriously its responsibility to address, in a timely and thorough fashion, the concerns of the OSC. In this case, the Army conducted a thorough and comprehensive investigation in response to the OSC's referral. This investigation revealed that with respect to each of the whistleblower's allegations concerning nurses sleeping on duty, and contrary to the whistleblower's assertions, supervisors and the appropriate management officials were made aware of each of the incidents involving nurses within their supervisory chain and that they all took the appropriate investigatory actions to determine the facts of the alleged incidents. In turn, contrary to the whistleblower's allegations otherwise, they all took the appropriate and fully justified disciplinary and/or corrective actions, supported by the evidence they gathered, to correct the problem or prevent it from recurring. As a result of their actions, some of the alleged incidents of nurses sleeping on duty were substantiated while some were unsubstantiated. Further, contrary to the whistleblower's assertions, there was no evidence, either documentary or testimonial, that indicated that any patient had been injured. In one instance, however, there was evidence that with respect to the reported incident on 8 March 2011, delivery of pain medication was delayed but the patient suffered no serious discomfort.

The investigation determined that the actions taken by the nursing supervisors were within the scope of appropriate disciplinary authority in accordance with Army regulation and the collective bargaining agreement in effect. Therefore, these supervisors neither abused their authority nor created a potential for a substantial and specific danger to the public health and safety of the patients at Womack AMC. Further, correction actions were taken in each instance, to include appropriate disciplinary actions when warranted, in accordance with law, rule and/or regulation.

I am satisfied that this is the correct outcome in this matter. Accordingly, the Army has made no referral of the alleged criminal violation to the Attorney General pursuant to Title 5, U.S.C. § 1213(d)(5)(d).

This letter, with enclosures, is submitted in satisfaction of my responsibilities under Title 5, U.S.C. § 1213(c) and (d). Please direct any further questions you may have concerning this matter to (b) (6), at (b) (6).

Sincerely,



Thomas R. Lamont  
Assistant Secretary of the Army  
(Manpower and Reserve Affairs)

**Army Report Documents**  
**Womack Army Medical Center**  
**Fort Bragg, North Carolina**  
**OSC File Number DI-11-2808**

<b><u>Tab/Exhibit</u></b>	<b><u>Description</u></b>
<b>TAB A</b>	Secretary of the Army (SA) delegation to the Assistant Secretary of the Army (Manpower & Reserve Affairs) his authority, as agency head, to review, sign, and submit to Office of Special Counsel the report required by Title 5, USC, Sections 1213(b), (c), and (d), dated March 18, 2011
<b>TAB B</b>	Appointment Memorandum for <span style="background-color: #cccccc;">Investigating Officer</span> WAMC, dated July 29, 2011
<b>TAB C</b>	Army Regulation (AR) 15-6, <i>Procedures for Investigating Officers and Boards of Officers</i> , dated October 2, 2006
<b>TAB D</b>	Army Regulation (AR) 40-1, <i>Composition, Mission, and Functions of the Army Medical Department</i> , dated July 1, 1983
<b>TAB E</b>	Appointment Memorandum for <span style="background-color: #cccccc;">Investigating Officer</span> WAMC, dated August 9, 2011
<b>TAB F</b>	Army Regulation (AR) 10-87, <i>Army Commands, Army Service Component Commands, and Direct Reporting Units</i> (extract)
<b>TAB G</b>	Army's Table of Penalties
<b>TAB H</b>	Army Regulation (AR) 690-700, Chapter 751, <i>Discipline</i>
<b>TAB I</b>	Army's Civilian Personnel On Line web site PERMISS Article, Management-Employee Relations Program, Selecting Appropriate Action
<b>TAB J</b>	Headquarters XVII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, and American Federation of Government Employees, Local 1770 (collective bargaining agreement extract)

**TAB K** Statement of ~~Clinical Performance Improvement Officer~~ Clinical Performance Improvement Officer  
Quality Management Division, dated October 4, 2011.  
Headquarters, MEDCOM

**TAB L** Army Regulation (AR) 40-68, Clinical Quality Management, dated February 26, 2004 (extract)

**TAB M** DA Form 1574, Appointing Authority approval of AR 15-6 investigation

**TAB N** Executive Summary, AR 15-6 Investigation concerning alleged patient safety issues related to nurses sleeping on duty, dated August 18, 2011

**TAB O** Organizational Charts of Womack AMC

**TAB P** Witness Listing for Army Report – DI-11-2808 (*copy only in unredacted Army Report version*)





SECRETARY OF THE ARMY  
WASHINGTON

MAR 18 2011

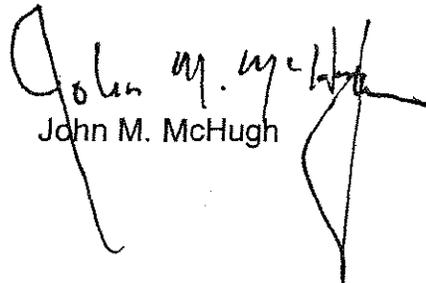
MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY  
(MANPOWER AND RESERVE AFFAIRS)

SUBJECT: Delegation of Certain Authority Under Title 5, United States Code,  
Section 1213

In accordance with Title 10, United States Code, Section 3013(f), I hereby delegate to you certain authority conferred upon me as the head of the Department of the Army by Title 5, United States Code, Section 1213. Specifically, you are authorized to review, sign and submit written reports setting forth the findings of investigations into information and any related matters transmitted to me by The Special Counsel in accordance with Title 5, United States Code, Sections 1213. This authority may not be further delegated.

Although not a limitation on your authority to act in my behalf, in those cases in which your proposed decisions or actions represent a change in precedent or policy; are of significant White House, Congressional, Department or public interest; or have been, or should be, of interest or concern to me, for any reason, you will brief me prior to decision or action, unless precluded by the exigencies of the situation.

This delegation shall remain in effect for three years from the date of its execution, unless earlier rescinded in writing by me.

  
John M. McHugh

CF:  
Office of the Army General Counsel







DEPARTMENT OF THE ARMY  
WOMACK ARMY MEDICAL CENTER  
FORT BRAGG, NORTH CAROLINA 28310

REPLY TO  
ATTENTION OF

MCXC-CO

JUL 29 2011

MEMORANDUM FOR [REDACTED] Investigating Officer, Troop Battalion, WAMC, Fort Bragg, NC 28310

SUBJECT: Appointment of AR 15-6 Investigating Officer – Patient Safety Issue

1. You are hereby appointed as an investigating officer pursuant to AR 15-6 to conduct an informal investigation into the circumstances surrounding allegations received by the detailed WAMC Inspector General (IG) that a patient safety issue recently arose at Womack Army Medical Center (WAMC) with nurses sleeping on duty. The scope of your investigation will include the following:

a. Whether nurses have been sleeping on duty at Womack Army Medical Center and, if so, whether such sleeping affected patient safety. Consult with the IG for specificity regarding the date time group, location, and identity of nurses and witnesses. If personnel were sleeping, distinguish whether the incidents occurred in authorized sleep rooms for on call personnel or during authorized breaks, vice during times of patient care.

b. Determine whether corrective action was taken by supervisors if you determine they knew about alleged incidents of sleeping on duty.

c. Any related issue arising during the course of your investigation. If at any point you feel the scope of investigation needs to be expanded to other issues, notify the Commander through the WAMC Office of the Center Judge Advocate (OCJA).

2. Before beginning your investigation, contact the WAMC OCJA in person or at [REDACTED] (b) (6) to arrange a briefing on legal issues pertinent to the investigation. [REDACTED] (b) (6) or [REDACTED] (b) (6) will serve as your primary legal advisor during the investigation, review your findings and recommendations when complete, and provide a written legal review of the findings and recommendations prior to your submitting them to me. In addition, contact [REDACTED] (b) (6), IG, at [REDACTED] (b) (6) for a list of potential witnesses, incident location(s), and incident timeframe(s).

3. You will make specific findings and recommendations with regard to the issues listed above. If, during your investigation, you suspect that military personnel you intend to interview may have violated any provision of the Uniform Code of Military Justice (UCMJ) or any other criminal law, you must advise them of their rights under the UCMJ, Article 31 as documented on DA Form 3881. In addition, provide Privacy Act statements / advisement to witnesses as necessary. Witnesses' statements should be sworn and recorded on DA Form 2823.

4. During the course of your investigation, you may find it necessary to interview civilian employees. Generally speaking, civilian employees are required to cooperate with official investigations. There are some exceptions:

a. Civilian employees who are members of a bargaining unit have a right to union representation at any interview with management if they reasonably believe that the interview could result in a disciplinary action against them. Should a bargaining unit employee seek to invoke this right, simply reschedule the

TAB B

MCXC-CO

SUBJECT: Appointment of AR 15-6 Investigating Officer – Patient Safety Issue

interview for at least 24 hours later in order to allow the employee to arrange for union representation. You have no obligation to arrange representation for the employee, only an obligation to permit the employee the opportunity to secure representation. The Civilian Personnel Advisory Center can tell you whether any particular employee you wish to interview is a member of the bargaining unit.

b. Civilian employees who reasonably believe that information they provide during an official investigation may be used against them in a criminal prosecution cannot be required to cooperate without a grant of immunity. Should any civilian employee you attempt to interview decline to cooperate for any reason, suspend the interview and seek guidance from your legal advisor on how to proceed.

c. If the matter you are investigating involves a grievance, a personnel practice or policy or other conditions of employment, you may be required to notify the union of any interviews you have scheduled with bargaining unit employees and afford the union the opportunity to be present. Check with your legal advisor to determine if this rule applies in your case and how to proceed if it does.

d. You have no authority to compel the cooperation of contractor employees. If you find it necessary to interview contractor employees, you must contact the contracting officer's representative for the applicable contract to request cooperation.

5. Prepare the report of your proceedings on DA Form 1574 and submit the original and one copy to me through the WAMC OCJA within 30 calendar days of your receipt of the memorandum. Submit any requests for delay to me in writing. Include with your report all documentary evidence, sworn statements, and other information or evidence you considered in the following order:

a. DA Form 1574 with findings and recommendations (your findings and recommendations may be in memorandum format separate from the DA Form 1574, but you must also complete DA Form 1574);

b. This letter of appointment as Exhibit A;

c. An executive summary of the facts as Exhibit B;

d. An index of exhibits as Exhibit C; and

e. All remaining exhibits labeled in successive order (D, E, F, etc.).

6. If in the course of your investigation, you discover that the completion of the investigation requires examining the conduct or performance of duty of, or may result in findings or recommendations adverse, to, a person senior to you, in rank or grade; you should suspend your investigation and consult with your legal advisor on how to proceed. An investigating authority may not, absent military necessity, investigate someone senior in rank.

7. Point of contact for this memorandum is the undersigned.

Acting Commanding Officer





Army Regulation 15-6

Boards, Commissions, and Committees

# Procedures for Investigating Officers and Boards of Officers

Headquarters  
Department of the Army  
Washington, DC  
2 October 2006

UNCLASSIFIED

*Tbc*

# **SUMMARY of CHANGE**

AR 15-6

Procedures for Investigating Officers and Boards of Officers

This rapid action revision, dated 2 October 2006--

- o Clarifies the distinction between levels of appointing authorities for hostile fire death investigations and friendly fire death investigations (para 2-1a(3)).
- o Permits the general court-martial convening authority to delegate appointing authority to the special court-martial convening authority in hostile fire death investigations (para 2-1a(3)).

This regulation, dated 30 September 1996--

- o Is a complete revision of the earlier regulation dated 24 August 1977.
- o Updates policies and procedures concerning the procedures for investigating officers and boards of officers.

Boards, Commissions, and Committees

Procedures for Investigating Officers and Boards of Officers

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER  
General, United States Army  
Chief of Staff

Official:

  
JOYCE E. MORROW  
Administrative Assistant to the  
Secretary of the Army

**History.** This publication is a rapid action revision. The portions affected by this rapid action revision are listed in the summary of change.

**Summary.** This regulation establishes procedures for investigations and boards of officers not specifically authorized by any other directive.

**Applicability.** This regulation applies to the Active Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve, unless otherwise stated. During mobilization,

chapters and policies contained in this regulation may be modified by the proponent.

**Proponent and exception authority.**

The proponent of this regulation is The Judge Advocate General. The Judge Advocate General has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. The Judge Advocate General may delegate this approval authority, in writing, to a division chief within the proponent agency or its direct reporting unit or field operating agency in the grade of colonel or the civilian equivalent. Activities may request a waiver to this regulation by providing justification that includes a full analysis of the expected benefits and must include formal review by the activity's senior legal officer. All waiver requests will be endorsed by the commander or senior leader of the requesting activity and forwarded through higher headquarters to the policy proponent. Refer to AR 25-30 for specific guidance.

**Army management control process.**

This regulation does not contain management control provisions.

**Supplementation.** Supplementation of

this regulation and establishment of command and local forms are prohibited without prior approval from HQDA (DAJA-AL), Washington, DC 20310-2212.

**Suggested improvements.** The proponent agency of this regulation is the Office of The Judge Advocate General. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to HQDA (DAJA-AL), Washington, DC 20310-2212.

**Distribution.** This publication is available in electronic media only and is intended for command level A for the Active Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve.

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\*This regulation supersedes AR 15-6 dated 30 September 1996.

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## Chapter 1 Introduction

### 1-1. Purpose

This regulation establishes procedures for investigations and boards of officers not specifically authorized by any other directive. This regulation or any part of it may be made applicable to investigations or boards that are authorized by another directive, but only by specific provision in that directive or in the memorandum of appointment. In case of a conflict between the provisions of this regulation, when made applicable, and the provisions of the specific directive authorizing the investigation or board, the latter will govern. Even when not specifically made applicable, this regulation may be used as a general guide for investigations or boards authorized by another directive, but in that case its provisions are not mandatory.

### 1-2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

### 1-3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary.

### 1-4. Responsibilities

Responsibilities are listed in chapter 2.

### 1-5. Types of investigations and boards

*a. General.* An administrative fact-finding procedure under this regulation may be designated an investigation or a board of officers. The proceedings may be informal (chap 4) or formal (chap 5). Proceedings that involve a single investigating officer using informal procedures are designated investigations. Proceedings that involve more than one investigating officer using formal or informal procedures or a single investigating officer using formal procedures are designated a board of officers.

*b. Selection of procedure.*

(1) In determining whether to use informal or formal procedures, the appointing authority will consider these among other factors:

(a) Purpose of the inquiry.

(b) Seriousness of the subject matter.

(c) Complexity of issues involved.

(d) Need for documentation.

(e) Desirability of providing a comprehensive hearing for persons whose conduct or performance of duty is being investigated. (See paras 1-8, 4-3, and 5-4a.)

(2) Regardless of the purpose of the investigation, even if it is to inquire into the conduct or performance of a particular individual, formal procedures are not mandatory unless required by other applicable regulations or directed by higher authority.

(3) Unless formal procedures are expressly required, either by the directive authorizing the board or by the memorandum of appointment, all cases to which this regulation applies will use informal procedures.

(4) In determining which procedures to use, the appointing authority will seek the advice of the servicing judge advocate (JA).

(5) Before opening an investigation involving allegations against general officers or senior executive service civilians, the requirements of Army Regulation (AR) 20-1, subparagraph 8-3i(3) must be met.

*c. Preliminary investigations.* Even when formal procedures are contemplated, a preliminary informal investigation may be advisable to ascertain the magnitude of the problem, to identify and interview witnesses, and to summarize or record their statements. The formal board may then draw upon the results of the preliminary investigation.

*d. Concurrent investigations.* An administrative fact finding procedure under this regulation, whether designated as an investigation or a board of officers, may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency, consistent with subparagraph *b(5)* above. Appointing authorities, investigating officers, and boards of officers will ensure that procedures under this regulation do not hinder or interfere with a concurrent investigation directed by higher headquarters, a counterintelligence investigation or an investigation being conducted by a criminal investigative. In cases of concurrent or subsequent investigations, coordination, coordination with the other command or agency will be made to avoid duplication of investigative effort, where possible.

### 1-6. Function of investigations and boards

The primary function of any investigation or board of officers is to ascertain facts and to report them to the appointing authority. It is the duty of the investigating officer or board to ascertain and consider the evidence on all sides of each

issue, thoroughly and impartially, and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority.

#### **1-7. Interested persons**

Appointing authorities have a right to use investigations and boards to obtain information necessary or useful in carrying out their official responsibilities. The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual.

#### **1-8. Respondents**

In formal investigations the appointing authority may designate one or more persons as respondents in the investigation. Such a designation has significant procedural implications. (See chap 5, sec II, in general, and para 5-4a, in particular.) Respondents may not be designated in informal investigations.

#### **1-9. Use of results of investigations in adverse administrative actions**

*a.* This regulation does not require that an investigation be conducted before adverse administrative action, such as relief for cause, can be taken against an individual. However, if an investigation is conducted using the procedures of this regulation, the information obtained, including findings and recommendations, may be used in any administrative action against an individual, whether or not that individual was designated a respondent, and whether formal or informal procedures were used, subject to the limitations of *b* and *c* below.

*b.* The Office of Personnel Management and Army Regulations establish rules for adverse actions against Army civilian personnel and establish the procedural safeguards. In every case involving contemplated formal disciplinary action against civilian employees, the servicing civilian personnel office and labor counselor will be consulted before the employee is notified of the contemplated adverse action.

*c.* Except as provided in *d* below, when adverse administrative action is contemplated against an individual (other than a civilian employee, see *b* above), including an individual designated as a respondent, based upon information obtained as a result of an investigation or board conducted pursuant to this regulation, the appropriate military authority must observe the following minimum safeguards before taking final action against the individual:

(1) Notify the person in writing of the proposed adverse action and provide a copy, if not previously provided, of that part of the findings and recommendations of the investigation or board and the supporting evidence on which the proposed adverse action is based.

(2) Give the person a reasonable opportunity to reply in writing and to submit relevant rebuttal material.

(3) Review and evaluate the person's response.

*d.* There is no requirement to refer the investigation to the individual if the adverse action contemplated is prescribed in regulations or other directives that provide procedural safeguards, such as notice to the individual and opportunity to respond. For example, there is no requirement to refer an investigation conducted under this regulation to a soldier prior to giving the soldier an adverse evaluation report based upon the investigation because the regulations governing evaluation reports provide the necessary procedural safeguards.

*e.* When the investigation or board is conducted pursuant to this regulation but the contemplated administrative action is prescribed by a different regulation or directive with more stringent procedural safeguards than those in *c* above, the more stringent safeguards must be observed.

## **Chapter 2 Responsibilities of the Appointing Authority**

### **2-1. Appointment**

*a. Authority to appoint.* The following people may appoint investigations or boards to inquire into matters within their areas of responsibility.

(1) Except as noted in subparagraph 2-1a(3) below, the following individuals may appoint a formal investigation or board (chap 5) after consultation with the servicing judge advocate (JA) or legal advisor (LA):

(a) Any general court-martial (GCM) or special court-martial convening authority, including those who exercise that authority for administrative purposes only.

(b) Any general officer.

(c) Any commander or principal staff officer in the grade of colonel or above at the installation, activity, or unit level.

(d) Any State adjutant general.

(e) A Department of the Army civilian supervisor permanently assigned to a position graded as a general schedule

(GS)/general management, grade 14 or above and who is assigned as the head of an Army agency or activity or as a division or department chief.

(2) Except as noted in subparagraph 2-1a(3), the following individuals may appoint an informal investigation or board (chap 4):

- (a) Any officer authorized to appoint a formal board.
- (b) A commander at any level.
- (c) A principal staff officer or supervisor in the grade of major or above.

(3) Only a general court-martial convening authority may appoint a formal investigation or board (chap 5) or an informal investigation or board (chap 4) for incidents resulting in property damage of \$1,000,000 or more, the loss or destruction of an Army aircraft or missile, an injury and/or illness resulting in, or likely to result in, permanent total disability, the death of one or more persons, and the death of one or more persons by fratricide/friendly fire.

(a) For investigations of a death or deaths involving a deployed force(s), from what is believed to be hostile fire, the general court-martial convening authority may delegate, in writing, appointing/approval authority to a subordinate commander exercising special court-martial convening authority. This authority may not be further delegated.

(b) If evidence is discovered during a hostile fire investigation that indicates that the death(s) may have been the result of fratricide/friendly fire, the investigating officer will immediately suspend the investigation and inform the appointing authority and legal advisor. At this time the general court-martial convening authority will appoint a new investigation into the fratricide/friendly fire incident. Any evidence from the hostile fire investigation may be provided to the investigating officer or board conducting the fratricide/friendly fire investigation.

(4) Appointing authorities who are general officers may delegate the selection of board members to members of their staffs.

(5) When more than one appointing authority has an interest in the matter requiring investigation, a single investigation or board will be conducted whenever practicable. In case of doubt or disagreement as to who will appoint the investigation or board, the first common superior of all organizations concerned will resolve the issue.

(6) Appointing authorities may request, through channels, that persons from outside their organizations serve on boards or conduct investigations under their jurisdictions.

*b. Method of appointment.* Informal investigations and boards may be appointed orally or in writing. Formal boards will be appointed in writing but, when necessary, may be appointed orally and later confirmed in writing. Any written appointment will be in the form of a memorandum of appointment. (See figs 2-1 through 2-5.) Whether oral or written, the appointment will specify clearly the purpose and scope of the investigation or board and the nature of the findings and recommendations required. If the appointment is made under a specific directive, that directive will be cited. If the procedures of this regulation are intended to apply, the appointment will cite this regulation and, in the case of a board, specify whether it is to be informal or formal. (Refer to chaps 4 and 5.) Any special instructions (for example, requirement for verbatim record or designation of respondents in formal investigations) will be included.

*c. Who may be appointed.* Investigating officers and board members shall be those persons who, in the opinion of the appointing authority, are best qualified for the duty by reason of their education, training, experience, length of service and temperament.

(1) Except as provided in paragraph 5-1e, only commissioned officers, warrant officers, or Department of the Army civilian employees permanently assigned to a position graded as a GS-13 or above will be appointed as investigating officers or voting members of boards.

(2) Recorders, legal advisors, and persons with special technical knowledge may be appointed to formal boards in a nonvoting capacity. (See para 5-1.)

(3) An investigating officer or voting member of a board will be senior to any person whose conduct or performance of duty may be investigated, or against whom adverse findings or recommendations that may be made, except when the appointing authority determines that it is impracticable because of military exigencies. Inconvenience in obtaining an investigating officer or the unavailability of senior persons within the appointing authority's organization would not normally be considered military exigencies.

(a) The investigating officer or board president will, subject to the approval of the appointing authority, determine the relative seniority of military and civilian personnel. Actual superior/subordinate relationships, relative duty requirements, and other sources may be used as guidance. Except where a material adverse effect on an individual's substantial rights results, the appointing authority's determination of seniority shall be final (see para 2-3c).

(b) An investigating officer or voting member of a board who, during the proceedings, discovers that the completion thereof requires examining the conduct or performance of duty of, or may result in findings or recommendations adverse to, a person senior to him or her will report this fact to the board president or the appointing authority. The appointing authority will then appoint another person, senior to the person affected, who will either replace the investigating officer or member, or conduct a separate inquiry into the matters pertaining to that person. Where necessary, the new investigating officer or board may be furnished any evidence properly considered by the previous investigating officer or board.

(c) If the appointing authority determines that military exigencies make these alternatives impracticable, the appointing authority may direct the investigating officer or member to continue. In formal proceedings, this direction will be

written and will be an enclosure to the report of proceedings. If the appointing authority does not become aware of the problem until the results of the investigation are presented for review and action, the case will be returned for new or supplemental investigation only where specific prejudice is found to exist.

(4) Specific regulations may require that investigating officers or board members be military officers, be professionally certified, or possess an appropriate security clearance.

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*(Appropriate letterhead)*

OFFICE SYMBOL DATE

MEMORANDUM FOR: *(President)*

SUBJECT: Appointment of Board of Officers

1. A board of officers is hereby appointed pursuant to AR 735-5 and AR 15-6 to investigate the circumstances connected with the loss, damage, or destruction of the property listed on reports of survey referred to the board and to determine responsibility for the loss, damage, or destruction of such property.
2. The following members are appointed to the board:  
  
MAJ Robert A. Jones, HHC, 3d Bn, 1st Inf Bde, 20th Inf Div, Ft Blank, WD 88888 Member (President)  
  
CPT Paul R. Wisniewski, Co A, 2d Bn, 3d Inf Bde, 20th Inf Div, Ft Blank, WD 88888 Member  
  
CPT David B. Braun, Co C, 1st Bn, 3d Inf Bde, 20th Inf Div, Ft Blank, WD 88888 Member  
  
CPT John C. Solomon, HHC, 2d S & T Bn, DISCOM 20th Inf Div, Ft Blank, WD 88888 Alternate member (see AR 15-6, para 5-2c)  
  
ILT Steven T. Jefferson, Co B, 2d Bn, 2d Inf Bde, 20th Inf Div, Ft Blank, WD 88888 Recorder (without vote)
3. The board will meet at the call of the President. It will use the procedures set forth in AR 735-5 and AR 15-6 applicable to formal boards with respondents. Respondents will be referred to the board by separate correspondence.
4. Reports of proceedings will be summarized (the findings and recommendations will be verbatim) and submitted to this headquarters, ATTN: ABCD-AG-PA. Reports will be submitted within 3 working days of the conclusion of each case. The Adjutant General's office will furnish necessary administrative support for the board. Legal advice will be obtained, as needed, from the Staff Judge Advocate's office.
5. The board will serve until further notice.

*(Authority Line)*

*(Signature block)*

CF: *(Provide copy to board personnel)*

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Figure 2-1. Sample memorandum for appointment of a standing board of officers using formal procedures

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(Appropriate letterhead)

OFFICE SYMBOL DATE

MEMORANDUM FOR: (President of standing board)

SUBJECT: Referral of Respondent

1. Reference memorandum, this headquarters, dated (day-month-year), subject: Appointment of Board of Officers.
2. (Enter rank, name, SSN, and unit) is hereby designated a respondent before the board appointed by the referenced memorandum. The board will consider whether (enter name of respondent) should be held pecuniarily liable for the loss, damage, or destruction of the property listed on the attached report of survey. The correspondence and supporting documentation recommending referral to a board of officers are enclosed.
3. (Enter rank, name, branch, and unit) is designated counsel for (enter name of respondent).
4. For the consideration of this case only, (enter rank, name, and unit) is designated a voting member of the board, vice (enter rank, name, and unit).

(Authority line)  
Encl

(Signature block)

CF: (Provide copy to board personnel, counsel, and respondent)

Figure 2-2. Sample memorandum for referral of a respondent to a standing board

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(Appropriate letterhead)

OFFICE SYMBOL DATE

MEMORANDUM FOR: (Officer concerned)

SUBJECT: Appointment as a Board of Officers to Investigate Alleged Corruption and Mismanagement

1. You are hereby appointed a board of officers, pursuant to AR 15-6, to investigate allegations of (enter subject matter to be investigated, such as corruption and mismanagement in the office of the Fort Blank Provost Marshal). The scope of your investigation will include (mention specific matters to be investigated, such as whether military police personnel are properly processing traffic tickets, whether supervisory personnel are receiving money or other personal favors from subordinate personnel in return for tolerating the improper processing of traffic tickets, and so forth). Enclosed herewith is a report of proceedings of an earlier informal investigation into alleged improper processing of traffic tickets that was discontinued when it appeared that supervisory personnel may have been involved.
2. As the board, you will use formal procedures under AR 15-6. (Enter duty positions, ranks, and names) are designated respondents. Additional respondents may be designated based on your recommendations during the course of the investigation. Counsel for each respondent, if requested, will be designated by subsequent correspondence.
3. (Enter rank, name, branch, and unit) will serve as legal advisor to you, the board. (Enter rank, name, duty position, and unit), with the concurrence of (his)(her) commander, will serve as an advisory member of the board. The office of the adjutant general, this headquarters, will provide necessary administrative support. The Fort Blank Resident Office, Criminal Investigation Division Command (CIDC), will provide technical support, including preserving physical evidence, if needed.
4. Prepare the report of proceedings on DA Form 1574 and submit it to me within 60 days.

(Signature of appointing authority)

CF: (Provide copy to all parties concerned)

Figure 2-3. Sample memorandum for appointment of a single officer as a board of officers, with legal advisor and advisory member, using formal procedures

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(Appropriate letterhead)

OFFICE SYMBOL DATE

MEMORANDUM FOR: (Officer concerned)

SUBJECT: Appointment of Investigating Officer

1. You are hereby appointed an investigating officer pursuant to AR 15-6 and AR 210-7, paragraph 4-3, to conduct an informal investigation into complaints that sales representatives of the Fly-By-Night Sales Company have been conducting door-to-door solicitation in the River Bend family housing area in violation of AR 210-7. Details pertaining to the reported violations are in the enclosed file prepared by the Commercial Solicitation Branch, Office of the Adjutant General, this headquarters (Encl).
2. In your investigation, all witness statements will be sworn. From the evidence, you will make findings whether the Fly-By-Night Sales Company has violated AR 210-7 and recommend whether to initiate a show cause hearing pursuant to AR 210-7, paragraph 4-5, and whether to temporarily suspend the company's or individual agents' solicitation privileges pending completion of the show cause hearing.
3. Submit your findings and recommendations in four copies on DA Form 1574 to this headquarters, ATTN: ABCD-AG, within 7 days.

(Authority line)

Encl

(Signature block)

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Figure 2-4. Sample memorandum for appointment of an investigating officer under AR 15-6 and other directives

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(Appropriate letterhead)

OFFICE SYMBOL DATE

MEMORANDUM FOR: (Officer concerned)

SUBJECT: Appointment as Investigating Officer

1. You are hereby appointed an investigating officer pursuant to AR 15-6 and AR 380-5, paragraph 10-8, to investigate the circumstances surrounding the discovery of a CONFIDENTIAL document in a trash can in the office of the 3d Battalion S-3 on 31 August 1987. A preliminary inquiry into the incident proved inconclusive (see enclosed report).
2. In your investigation, use informal procedures under AR 15-6. You will make findings as to whether security compromise has occurred, who was responsible for any security violation, and whether existing security procedures are adequate.
3. This incident has no known suspects at this time. If in the course of your investigation you come to suspect that certain people may be responsible for the security violation, you must advise them of their rights under the UCMJ, Article 31, or the Fifth Amendment, as appropriate. In addition, you must provide them a Privacy Act statement before you solicit any (further) personal information. You may obtain assistance with these legal matters from the office of the Staff Judge Advocate.
4. Submit your findings and recommendations on DA Form 1574 to the Brigade S-2 within 10 days.

(Authority line)

(Signature block)

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Figure 2-5. Sample memorandum for appointment of an investigating officer in a case with potential Privacy Act implications

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## 2-2. Administrative support

The appointing authority will arrange necessary facilities, clerical assistance, and other administrative support for investigating officers and boards of officers. If not required by another directive, a verbatim transcript of the proceedings may be authorized only by The Judge Advocate General (TJAG) or the GCM convening authority in his or her sole discretion. However, before authorization, the GCM convening authority will consult the staff judge advocate (SJA). A contract reporter may be employed only for a formal board and only if authorized by the specific directive under which the board is appointed. A contract reporter will not be employed if a military or Department of the Army

(DA) civilian employee reporter is reasonably available. The servicing JA will determine the availability of a military or DA civilian employee reporter.

### **2-3. Action of the appointing authority**

*a. Basis of decision.* Unless otherwise provided by another directive, the appointing authority is neither bound nor limited by the findings or recommendations of an investigation or board. Therefore, the appointing authority may take action less favorable than that recommended with regard to a respondent or other individual, unless the specific directive under which the investigation or board is appointed provides otherwise. The appointing authority may consider any relevant information in making a decision to take adverse action against an individual, even information that was not considered at the investigation or board (see para 1-9c and d). In all investigations involving fratricide/friendly fire incidents (see AR 385-40), the appointing authority, after taking action on the investigation, will forward a copy of the completed investigation to the next higher Army headquarters for review.

*b. Legal review.* Other directives that authorize investigations or boards may require the appointing authority to refer the report of proceedings to the servicing JA for legal review. The appointing authority will also seek legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action (see para 1-9), or will be relied upon in actions by higher headquarters. The JA's review will determine—

- (1) Whether the proceedings comply with legal requirements.
- (2) What effects any errors would have.
- (3) Whether sufficient evidence supports the findings of the investigation or board or those substituted or added by the appointing authority (see para 3-10b).
- (4) Whether the recommendations are consistent with the findings.

*c. Effect of errors.* Generally, procedural errors or irregularities in an investigation or board do not invalidate the proceeding or any action based on it.

(1) *Harmless errors.* Harmless errors are defects in the procedures or proceedings that do not have a material adverse effect on an individual's substantial rights. If the appointing authority notes a harmless error, he or she may still take final action on the investigation.

(2) *Appointing errors.* Where an investigation is convened or directed by an official without the authority to do so (see para 2-1a), the proceedings are a nullity, unless an official with the authority to appoint such an investigation or board subsequently ratifies the appointment. Where a formal board is convened by an official authorized to convene an informal investigation or board but not authorized to convene formal investigations, any action not requiring a formal investigation may be taken, consistent with paragraph 1-9 and this paragraph.

(3) *Substantial errors.*

(a) Substantial errors are those that have a material adverse effect on an individual's substantial rights. Examples are the failure to meet requirements as to composition of the board or denial of a respondent's right to counsel.

(b) When such errors can be corrected without substantial prejudice to the individual concerned, the appointing authority may return the case to the same investigating officer or board for corrective action. Individuals or respondents who are affected by such a return will be notified of the error, of the proposed correction, and of their rights to comment on both.

(c) If the error cannot be corrected, or cannot be corrected without substantial prejudice to the individual concerned, the appointing authority may not use the affected part of that investigation or board as the basis for adverse action against that person. However, evidence considered by the investigation or board may be used in connection with any action under the Uniform Code of Military Justice (UCMJ), civilian personnel regulations, AR 600-37, or any other directive that contains its own procedural safeguards.

(d) In case of an error that cannot be corrected otherwise, the appointing authority may set aside all findings and recommendations and refer the entire case to a new investigating officer or board composed entirely of new voting members. Alternatively, the appointing authority may take action on findings and recommendations not affected by the error, set aside the affected findings and recommendations, and refer the affected portion of the case to a new investigating officer or board. In either case, the new investigating officer or board may be furnished any evidence properly considered by the previous one. The new investigating officer or board may also consider additional evidence. If the directive under which a board is appointed provides that the appointing authority may not take less favorable action than the board recommends, the appointing authority's action is limited by the original recommendations even though the case subsequently is referred to a new board which recommends less favorable action.

(4) *Failure to object.* No error is substantial within the meaning of this paragraph if there is a failure to object or otherwise bring the error to the attention of the legal advisor or the president of the board at the appropriate point in the proceedings. Accordingly, errors described in (3) above may be treated as harmless if the respondent fails to point them out.

## Chapter 3 General Guidance for Investigating Officers and Boards

### Section I Conduct of the Investigation

#### 3-1. Preliminary responsibilities

Before beginning an informal investigation, an investigating officer shall review all written materials provided by the appointing authority and consult with the servicing staff or command judge advocate to obtain appropriate legal guidance.

#### 3-2. Oaths

*a. Requirement.* Unless required by the specific directive under which appointed, investigating officers or board members need not be sworn. Reporters, interpreters, and witnesses appearing before a formal board will be sworn. Witnesses in an informal investigation or board may be sworn at the discretion of the investigating officer or president. The memorandum of appointment may require the swearing of witnesses or board members.

*b. Administering oaths.* An investigating officer, recorder (or assistant recorder), or board member is authorized to administer oaths in the performance of such duties, under UCMJ, Art. 136 (for military personnel administering oaths) and Section 303, Title 5, United States Code (5 USC 303) (for civilian personnel administering oaths) (see fig 3-1 for the format for oaths).

#### 3-3. Challenges

Neither an investigating officer nor any member of a board is subject to challenge, except in a formal board as provided in paragraph 5-7. However, any person who is aware of facts indicating a lack of impartiality or other qualification on the part of an investigating officer or board member will present the facts to the appointing authority.

#### 3-4. Counsel

Only a respondent is entitled to be represented by counsel (see para 5-6). Other interested parties may obtain counsel, at no expense to the Government, who may attend but not participate in proceedings of the investigation or board which are open to the public. The proceedings will not be unduly interrupted to allow the person to consult with counsel. When a civilian employee is a member of an appropriate bargaining unit, the exclusive representative of the unit has the right to be present whenever the employee is a respondent or witness during the proceedings if requested by the employee and if the employee reasonably believes that the inquiry could lead to disciplinary action against him or her (see para 3-8).

#### 3-5. Decisions

A board composed of more than one member arrives at findings and recommendations as provided in section II of this chapter. A formal board decides challenges by a respondent as provided in paragraph 5-7. The investigating officer or president decides administrative matters, such as time of sessions, uniform, and recess. The legal advisor or, if none, the investigating officer or president decides evidentiary and procedural matters, such as motions, acceptance of evidence, and continuances. The legal advisor's decisions are final. Unless a voting member objects to the president's decision on an evidentiary or procedural matter at the time of the decision, it too is final. If there is such an objection, a vote will be taken in closed session, and the president's decision may be reversed by a majority vote of the voting members present.

#### 3-6. Presence of the public and recording of proceedings

*a. The public.* Proceedings of an investigation or board are normally open to the public only if there is a respondent. However, if a question arises, the determination will be made based on the circumstances of the case. It may be appropriate to open proceedings to the public, even when there is no respondent, if the subject matter is of substantial public interest. It may be appropriate to exclude the public from at least some of the proceedings even though there is a respondent, if the subject matter is classified, inflammatory, or otherwise exceptionally sensitive. In any case, the appointing authority may specify whether the proceedings will be open or closed. If the appointing authority does not specify, the investigating officer or the president of the board decides. If there is a respondent, the servicing JA or the legal advisor, if any, will be consulted before deciding to exclude the public from any portion of the proceedings. Any proceedings that are open to the public will also be open to representatives of the news media.

*b. Recording.* Neither the public nor the news media will record, photograph, broadcast, or televise the board proceedings. A respondent may record proceedings only with the prior approval of the appointing authority.

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Preliminary Matters

PRES: This hearing will come to order. This board of officers has been called to determine \_\_\_\_\_

When RESP is without counsel: \_\_\_\_\_

PRES: \_\_\_\_\_, you may, if you desire, obtain civilian counsel at no expense to the Government for this hearing. If you do not obtain civilian counsel, you are entitled to be represented by a military counsel designated by the appointing authority. Do you have counsel?

RESP: No (Yes).

*If RESP has counsel, the RCDR should identify that counsel at this point for the record. If RESP does not have counsel, the PRES should ask this question:*

PRES: Do you desire to have military counsel?

RESP: Yes (No).

*If RESP answers "yes," the PRES should adjourn the hearing and ask the appointing authority to appoint counsel for RESP (see para 5-6b). If counsel is supplied, the RCDR should identify that counsel for the record when the board reconvenes.*

*A reporter and an interpreter, if used, should be sworn.*

RCDR: The reporter will be sworn.

RCDR: Do you swear (or affirm) that you will faithfully perform the duties of reporter to this board, (so help you God)?

REPORTER: I do.

RCDR: The interpreter will be sworn.

RCDR: Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now in hearing, (so help you God)?

INTERPRETER: I do.

RCDR: The board is appointed by Memorandum of Appointment, Headquarters, \_\_\_\_\_, dated \_\_\_\_\_. Have all members of the board read the memorandum of appointment? (If not, the memorandum of appointment is read aloud by RCDR or silently by any member who has not read it.)

*When RESP has been designated by a separate memorandum of appointment, the same procedure applies to that memorandum of appointment.*

RCDR: May the memorandum of appointment be attached to these proceedings as Enclosure I?

PRES: The memorandum of appointment will be attached as requested.

RCDR: The following members of the board are present:

The following members are absent:

*RCDR should account for all personnel of the board, including RESP and COUNSEL, if any, as present or absent at each session. RCDR should state the reason for any absence, if known, and whether the absence was authorized by the appointing authority.*

PRES: \_\_\_\_\_, you may challenge any member of the board (or the legal advisor) for lack of impartiality. Do you desire to make a challenge?

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Figure 3-1. Suggested procedure for board of officers with respondents

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RESP (COUNSEL): No. (The respondent challenges \_\_\_\_\_.)

*If RESP challenges for lack of impartiality, the LA, PRES, or next senior member, as appropriate, determines the challenge. See paragraph 5-7. If sustaining a challenge results in less than a quorum, the board should recess until additional members are added. See paragraph 5-2b.*

*RCDR swears board members, if required. PRES then swears RCDR, if required.*

RCDR: The board will be sworn.

*All persons in the room stand while RCDR administers the oath. Each voting member raises his or her right hand as RCDR calls his or her name in administering the following oath:*

RCDR: Do you, Colonel \_\_\_\_\_, Lieutenant Colonel \_\_\_\_\_, Major \_\_\_\_\_, swear (affirm) that you will faithfully perform your duties as a member of this board; that you will impartially examine and inquire into the matter now before you according to the evidence, your conscience, and the laws and regulations provided; that you will make such findings of fact as are supported by the evidence of record; that, in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such recommendations as are appropriate and warranted by your findings, according to the best of your understanding of the rules, regulations, policies, and customs of the service, guided by your concept of justice, both to the Government and to individuals concerned, (so help you God)?

MEMBERS: I do.

*The board members lower their hands but remain standing while the oath is administered to LA and to RCDR, if required.*

PRES: Do you, \_\_\_\_\_, swear (or affirm) that you will faithfully perform the duties of (legal advisor) (recorder) of this board, (so help you God)?

LA/RCDR: I do.

*All personnel now resume their seats.*

*PRES may now give general advice concerning applicable rules for the hearing.*

RCDR: The respondent was notified of this hearing on \_\_\_\_\_ 19\_\_\_\_\_.

*RCDR presents a copy of the memorandum of notification with a certification that the original was delivered (or dispatched) to RESP (para 5-5) and requests that it be attached to the proceedings as Enclosure\_\_\_\_\_.*

PRES: The copy of the memorandum of notification will be attached as requested.

#### **Presentation of Evidence by the Recorder**

*RCDR may make an opening statement at this point to clarify the expected presentation of evidence.*

*RCDR then calls witnesses and presents other evidence relevant to the subject of the proceedings. RCDR should logically present the facts to help the board understand what happened. Except as otherwise directed by PRES, RCDR may determine the order of presentation of facts. The following examples are intended to serve as a guide to the manner of presentation, but not to the sequence.*

RCDR: I request that this statement of (witness) be marked Exhibit\_\_\_\_\_ and received in evidence. This witness will not appear in person because\_\_\_\_\_.

LA (PRES): The statement will (not) be accepted.

*RCDR may read the statement to the board if it is accepted.*

RCDR: I request that this (documentary or real evidence) be marked as Exhibit\_\_\_\_\_ and received in evidence.

*A foundation for the introduction of such evidence normally is established by a certificate or by testimony of a witness indicating its authenticity. LA (PRES) determines the adequacy of this foundation. If LA (PRES) has a reasonable basis to believe the evidence is what it purports to be, he or she may waive formal proof of authenticity.*

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Figure 3-1. Suggested procedure for board of officers with respondents—Continued

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RCDR: The recorder and respondent have agreed to stipulate \_\_\_\_\_.

Before LA (PRES) accepts the stipulation, he or she should verify that RESP joins in the stipulation.

LA (PRES): The stipulation is accepted.

If the stipulation is in writing, it will be marked as an exhibit.

RCDR conducts direct examination of each witness called by RCDR or at the request of PRES or members. RESP or COUNSEL may then cross-examine the witness. PRES and members of the board may then question the witness, but PRES may control or limit questions by board members.

RCDR: The board calls \_\_\_\_\_ as a witness.

A military witness approaches and salutes PRES, then raises his or her right hand while RCDR administers the oath. A civilian witness does the same but without saluting. See MCM, Rules for Court-Martial 807, for further guidance with regard to oaths.

RCDR: Do you swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth, (so help you God)?

If the witness desires to affirm rather than swear, the words "so help you God" will be omitted.

WITNESS: I do.

The witness then takes the witness chair. RCDR asks every witness the following question no matter who called the witness.

RCDR: What is your full name (grade, branch of service, organization, and station) (and address)?

Whenever it appears appropriate and advisable to do so, the board should explain the rights of a witness under Article 31 of the UCMJ or the Fifth Amendment to the Constitution. See paragraph 3-6c(5).

If the report of proceedings will be filed in a system of records under the witness's name, the board must advise that witness in accordance with the Privacy Act. See paragraph 3-7e. Normally, this requirement applies only to RESP.

RCDR then asks questions to develop the matter under consideration.

RCDR: The recorder has no further questions.

RESP (COUNSEL) may cross-examine the witness. RCDR may then conduct a redirect examination.

RCDR: Does the board have any questions?

Any board member wishing to question the witness should first secure the permission of PRES.

If RCDR and RESP (COUNSEL) wish to ask further questions after the board has examined the witness, they should seek permission from the PRES. PRES should normally grant such requests unless the questions are repetitive or go beyond the scope of questions asked by the board.

When all questioning has ended, PRES announces:

PRES: The witness is excused.

PRES may advise the witness as follows:

PRES: Do not discuss your testimony in this case with anyone other than the recorder, the respondent, or his or her counsel. If anyone else attempts to talk with you about your testimony, you should tell the person who originally called you as a witness.

Verbatim proceedings should indicate that the witness (except RESP) withdrew from the room.

Unless expressly excused from further attendance during the hearing, all witnesses remain subject to recall until the proceedings have ended. When a witness is recalled, the RCDR reminds such witness, after he or she has taken the witness stand:

RCDR: You are still under oath.

The procedure in the case of a witness called by the board is the same as outlined above for a witness called by RCDR.

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Figure 3-1. Suggested procedure for board of officers with respondents—Continued

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RCDR: I have nothing further to offer relating to the matter under consideration.

#### Presentation of Respondent's Evidence

RESP (COUNSEL): The respondent has (an) (no) opening statement.

*RESP presents his or her stipulations, witnesses, and other evidence in the same manner as did RCDR. RCDR administers oath to all witnesses and asks the first question to identify the witness.*

*Should the RESP be called to the stand as a witness, the RCDR will administer the oath and ask the following preliminary questions, after which the procedure is the same as for other witnesses:*

RCDR: What is your name, (grade, branch of service, organization, and station) (address, position, and place of employment)?

RESP: \_\_\_\_\_

RCDR: Are you the respondent in this case?

RESP: Yes.

*The board may advise RESP of his or her rights under Article 31 of the UCMJ, or the Fifth Amendment of the Constitution. See paragraph 3-6c(5).*

*If the report of proceedings will be filed in a system of records under RESP's name, the board must advise RESP in accordance with the Privacy Act. See paragraph 3-7e.*

*When RESP has concluded his or her case, RESP announces:*

RESP (COUNSEL): The respondent rests.

RCDR: The recorder has no further evidence to offer in this hearing. Does the board wish to have any witnesses called or recalled?

PRES: It does (not).

#### Closing Arguments and Deliberations

PRES: You may proceed with closing arguments. RCDR: The recorder (has no) (will make an) opening argument.

*RCDR may make the opening argument and, if any argument is made on behalf of RESP, the rebuttal argument. Arguments are not required (see para 5-9). If no argument is made, RESP or RCDR may say:*

RESP (COUNSEL)/RCDR: The (respondent) (recorder) submits the case without argument.

PRES: The hearing is adjourned.

*Adjourning the hearing does not end the duties of the board. It must arrive at findings based on the evidence and make recommendations supported by those findings. See chapter 3, section II. Findings and recommendations need not be announced to RESP, but in certain proceedings, such as elimination actions, they customarily are. RCDR is responsible for compiling the report of proceedings and submitting properly authenticated copies thereof to the appointing authority. See chapter 3, section III.*

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#### Legend

PRES: President of the board of officers.

LA: Legal Advisor

LA(PRES): Legal Advisor, if one has been appointed; otherwise the board President.

RCDR: Recorder (junior member of the board if no recorder has been appointed). (If the board consists of only one member, that member has the responsibilities of both PRES and RCDR.)

RESP: Respondent.

RESP (COUNSEL): Respondent or respondent's counsel, if any.

Figure 3-1. Suggested procedure for board of officers with respondents—Continued

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### 3-7. Rules of evidence and proof of facts

*a. General.* Proceedings under this regulation are administrative, not judicial. Therefore, an investigating officer or board of officers is not bound by the rules of evidence for trials by courts-martial or for court proceedings generally. Accordingly, subject only to the provisions of *c* below, anything that in the minds of reasonable persons is relevant and material to an issue may be accepted as evidence. For example, medical records, counseling statements, police reports, and other records may be considered regardless of whether the preparer of the record is available to give a statement or testify in person. All evidence will be given such weight as circumstances warrant. (See para 3-5 as to who decides whether to accept evidence.)

*b. Official notice.* Some facts are of such common knowledge that they need no specific evidence to prove them (for example, general facts and laws of nature, general facts of history, location of major elements of the Army, and organization of the Department of Defense (DOD) and its components), including matters of which judicial notice may be taken. (See Military Rules of Evidence (MRE) 201, sec II, part III, Manual for Courts-Martial, United States (MCM).)

*c. Limitations.* Administrative proceedings governed by this regulation generally are not subject to exclusionary or other evidentiary rules precluding the use of evidence. The following limitations, however, do apply:

(1) *Privileged communications.* MRE, section V, part III, MCM, concerning privileged communications between lawyer and client (MRE 502), privileged communications with clergy (MRE 503), and husband-wife privilege (MRE 504) apply. Present or former inspector general personnel will not be required to testify or provide evidence regarding information that they obtained while acting as inspectors general. They will not be required to disclose the contents of inspector general reports of investigations, inspections, inspector general action requests, or other memoranda, except as disclosure has been approved by the appropriate directing authority (an official authorized to direct that an inspector general investigation or inspection be conducted) or higher authority. (See AR 20-1, para 3-6.)

(2) *Polygraph tests.* No evidence of the results, taking, or refusal of a polygraph (lie detector) test will be considered without the consent of the person involved in such tests. In a formal board proceeding with a respondent, the agreement of the recorder and of any respondent affected is required before such evidence can be accepted.

(3) *"Off the record" statements.* Findings and recommendations of the investigating officer or board must be supported by evidence contained in the report. Accordingly, witnesses will not make statements "off the record" to board members in formal proceedings. Even in informal proceedings, such statements will not be considered for their substance, but only as help in finding additional evidence.

(4) *Statements regarding disease or injury.* A member of the Armed Forces will not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he or she has suffered. Any such statement against his or her interest is invalid (10 USC 1219) and may not be considered on the issue of the origin, incurrence, or aggravation of a disease or injury that the member concerned has suffered. A statement made and signed voluntarily by a soldier is not a statement that the soldier was "required to sign" within the meaning of this paragraph.

(5) *Ordering witnesses to testify.*

(a) No military witnesses or military respondents will be compelled to incriminate themselves, to answer any question the answer to which could incriminate them, or to make a statement or produce evidence that is not material to the issue and that might tend to degrade them (see UCMJ, Art. 31).

(b) No witnesses or respondents not subject to the UCMJ will be required to make a statement or produce evidence that would deprive them of rights against self-incrimination under the Fifth Amendment of the U.S. Constitution.

(c) A person refusing to provide information under (a) or (b) above must state specifically that the refusal is based on the protection afforded by UCMJ, Art. 31, or the Fifth Amendment. The investigating officer or board will, after consultation with the legal advisor or, if none has been appointed, the servicing JA, unless impractical to do so, decide whether the reason for refusal is well taken. If it is not, the witness may be ordered to answer.

(d) Whenever it appears appropriate and advisable, an investigating officer or board will explain their rights to witnesses or respondents. A soldier, for example, who is suspected of an offense under the UCMJ, such as dereliction of duty, will be advised of his or her rights under UCMJ, Art. 31, before being asked any questions concerning the suspected offense. The soldier will be given a reasonable amount of time to consult an attorney, if requested, before answering any such questions. No adverse inference will be drawn against soldiers who invoke that right under UCMJ, Art. 31. It is recommended that the procedure for explaining rights set forth on DA Form 3881 (Rights Warning Procedure/Waiver Certificate) be used.

(e) The right to invoke UCMJ, Art. 31, or the Fifth Amendment is personal. No one may assert the right for another person, and no one may assert it to protect anyone other than himself or herself. An answer tends to incriminate a person if it would make it appear that person is guilty of a crime.

(f) In certain cases the appropriate authority may provide a witness or respondent a grant of testimonial immunity

and require testimony notwithstanding UCMJ, Art. 31, or the Fifth Amendment. Grants of immunity will be made under the provisions of AR 27-10, chapter 2.

(6) *Involuntary admissions.* A confession or admission obtained by unlawful coercion or inducement likely to affect its truthfulness will not be accepted as evidence. The fact that a respondent was not advised of his or her rights under UCMJ, Art. 31, or the Fifth Amendment, or of his or her right to a lawyer does not, of itself, prevent acceptance of a confession or admission as evidence.

(7) *Bad faith unlawful searches.* If members of the Armed Forces acting in their official capacity (such as military police acting in furtherance of their official duties) conduct or direct a search that they know is unlawful under the Fourth Amendment of the U.S. Constitution, as applied to the military community, evidence obtained as a result of that search may not be accepted or considered against any respondent whose personal rights were violated by the search. Such evidence is acceptable only if it can reasonably be determined by the legal advisor or, if none, by the investigating officer or president that the evidence would inevitably have been discovered. In all other cases, evidence obtained as a result of any search or inspection may be accepted, even if it has been or would be ruled inadmissible in a criminal proceeding.

### 3-8. Witnesses

#### a. General.

(1) Investigating officers and boards generally do not have authority to subpoena witnesses to appear and testify. An appropriate commander or supervisor may, however, order military personnel and Federal civilian employees to appear and testify. Other civilians who agree to appear may be issued invitational travel orders in certain cases (see Joint Travel Regulations (JTR), vol 2, para C6000.11). The investigating officer or board president normally will inform witnesses of the nature of the investigation or board before taking their statements or testimony. The investigating officer or board president, assisted by the recorder and the legal advisor, if any, will protect every witness from improper questions, unnecessarily harsh or insulting treatment, and unnecessary inquiry into his or her private affairs. (See para 3-2 as to placing witnesses under oath.)

(2) During an investigation under this regulation, the exclusive representative of an appropriate bargaining unit has the right to be present whenever a civilian employee of the unit is a respondent or witness during the proceedings if requested by the employee and if the employee reasonably believes that the inquiry could lead to disciplinary action against him or her. Unless required by the collective bargaining agreement, there is no requirement to advise the employee of this right. If the employee requests the presence of the exclusive representative, a reasonable amount of time will be allowed to obtain him or her. The servicing civilian personnel office and labor counselor will be consulted before denying such a request.

b. *Attendance as spectators.* Witnesses other than respondents normally will not be present at the investigation or board proceedings except when they are testifying. In some cases, however, it is necessary to allow expert witnesses to hear evidence presented by other witnesses in order that they may be sufficiently advised of the facts to give informed testimony as to the technical aspects of the case. In such instances, the report of proceedings will indicate that the expert witnesses were present during the testimony of the other witnesses.

#### c. Taking testimony or statements.

(1) If a board is formal, or if the appointing authority has directed a verbatim record (see para 2-2), witnesses' statements will be elicited by questions and answers. However, narrative testimony may be used.

(2) In informal proceedings, statements of witnesses may be obtained at informal sessions in which they first relate their knowledge and then summarize those statements in writing. A tape recorder may be used to facilitate later preparation of written statements, but the witness will be informed if one is used. The investigating officer or board will assist the witness in preparing a written statement to avoid inclusion of irrelevant material or the omission of important facts and circumstances. However, care must be taken to ensure that the statement is phrased in the words of the witness. The interviewer must scrupulously avoid coaching the witness or suggesting the existence or nonexistence of material facts. The witness may be asked to read, correct, and sign the final statement.

(3) Whether the witness swears to the statement is within the discretion of the investigating officer or president. If the statement is to be sworn, use of DA Form 2823 (Sworn Statement) is recommended. If the witness is unavailable or refuses to sign, the person who took the statement will note, over his or her own signature, the reasons the witness has not signed and will certify that the statement is an accurate summary of what the witness said.

(4) Whether the proceeding is formal or informal, to save time and resources, witnesses may be asked to confirm written sworn or unsworn statements that have first been made exhibits. The witnesses remain subject to questioning on the substance of such statements.

(5) Although the direct testimony of witnesses is preferable, the investigating officer or board may use any previous statements of a witness as evidence on factual issues, whether or not the following conditions exist:

- (a) Proceedings are formal or informal.
- (b) Witness is determined to be unavailable.
- (c) Witness testifies.
- (d) Prior statements were sworn or unsworn.

(e) Prior statements were oral or written.

(f) Prior statements were taken during the course of the investigation.

d. *Discussion of evidence.* An investigating officer or board may direct witnesses who are subject to Army authority, and request other witnesses, not to discuss their statements or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is appropriate to eliminate possible influence on the testimony of witnesses still to be heard. Witnesses may not be precluded from discussing any relevant matter with the recorder, a respondent, or counsel for a respondent.

e. *Privacy Act statements.*

(1) *When required.* A Privacy Act statement (AR 340-21) will be provided to a witness if the report of proceedings will be filed in a system of records from which it can be retrieved by reference to the name or other personal identifier of that witness. Unless otherwise informed by the appointing authority, an investigating officer or board may presume that the report of proceedings will be retrievable by the name of each person designated as a respondent, but that the report will not be retrievable by the name of any other witness. If any question arises as to the need for a Privacy Act statement, the investigating officer or board will consult the legal advisor, if any, or the servicing JA.

(2) *Method of providing statement.* Appendix B provides guidance for preparing Privacy Act statements. The statement may be written or oral, but it must be provided before taking the witness's testimony or statement. A written statement will be attached to the report of proceedings as an enclosure. An oral statement will be noted in the report either as part of a verbatim transcript or as an enclosure, in the form of a certificate by the officer who provided the Privacy Act statement.

(3) *Copy of the statement.* Anyone to whom this requirement applies is entitled to a copy of the Privacy Act statement in a form suitable for retention. Providing a respondent a copy of the part of the report of proceedings (see para 5-10) that includes the statement satisfies this requirement. Any other witness who is provided a Privacy Act statement will, on request, be furnished a copy of the statement in a form suitable for retention.

### **3-9. Communications with the appointing authority**

If in the course of the investigation or board something happens that could cause the appointing authority to consider enlarging, restricting, or terminating the proceedings, altering the composition of the fact-finding body or otherwise modifying any instruction in the original appointment, the investigating officer or president of the board will report this situation to the appointing authority with recommendations.

## **Section II**

### **Findings and Recommendations**

#### **3-10. Findings**

a. *General.* A finding is a clear and concise statement of a fact that can be readily deduced from evidence in the record. It is directly established by evidence in the record or is a conclusion of fact by the investigating officer or board. Negative findings (for example, that the evidence does not establish a fact) are often appropriate. The number and nature of the findings required depend on the purpose of the investigation or board and on the instructions of the appointing authority. The investigating officer or board will normally not exceed the scope of findings indicated by the appointing authority. (See para 3-9.) The findings will be necessary and sufficient to support each recommendation.

b. *Standard of proof.* Unless another directive or an instruction of the appointing authority establishes a different standard, the findings of investigations and boards governed by this regulation must be supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion. The weight of the evidence is not determined by the number of witnesses or volume of exhibits, but by considering all the evidence and evaluating such factors as the witness's demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indications of veracity.

c. *Form.* Findings will be stated to reflect clearly the relevant facts established by the evidence and the conclusions thereon of the investigating officer or board. If findings are required on only one subject, normally they will be stated in chronological order. If findings are required on several distinct subjects, they normally will be stated separately for each subject and chronologically within each one. If the investigation or board is authorized by a directive that establishes specific requirements for findings, those requirements must be satisfied.

#### **3-11. Recommendations**

The nature and extent of recommendations required also depend on the purpose of the investigation or board and on the instructions of the appointing authority. Each recommendation, even a negative one (for example, that no further action be taken) must be consistent with the findings. Investigating officers and boards will make their recommendations according to their understanding of the rules, regulations, policies, and customs of the service, guided by their concept of fairness both to the Government and to individuals.

### 3-12. Deliberation

After all the evidence has been received (and arguments heard, if there is a respondent), the investigating officer or board members will consider it carefully in light of any instructions contained in the original appointment and any supplemental instructions. These deliberations will (and if there is a respondent, must) be in closed session, that is, with only voting members present. Nonvoting members of the board do not participate in the board's deliberations but may be consulted. The respondent and the respondent's counsel, if any, will be afforded the opportunity to be present at such consultation. The board may request the legal advisor, if any, to assist in putting findings and recommendations in proper form after their substance has been adopted by the board. A respondent and counsel are not entitled to be present during such assistance.

### 3-13. Voting

A board composed of more than one voting member arrives at its findings and recommendations by voting. All voting members present must vote. After thoroughly considering and discussing all the evidence, the board will propose and vote on findings of fact. The board will next propose and vote on recommendations. If additional findings are necessary to support a proposed recommendation, the board will vote on such findings before voting on the related recommendation. Unless another directive or an instruction by the appointing authority establishes a different requirement, a majority vote of the voting members present determines questions before the board. In case of a tie vote, the president's vote is the determination of the board. Any member who does not agree with the findings or recommendations of the board may include a minority report in the report of proceedings, stating explicitly what part of the report he or she disagrees with and why. The minority report may include its own findings and/or recommendations.

## Section III Report of Proceedings

### 3-14. Format

*a. Formal.* If a verbatim record of the proceedings was directed, the transcript of those proceedings, with a completed DA Form 1574 (Report of Proceedings by Investigating Officer/Board of Officers) as an enclosure, and other enclosures and exhibits will constitute the report. In other formal boards, a completed DA Form 1574, with enclosures and exhibits, will constitute the report.

*b. Informal.* In an informal investigation or board, the report will be written unless the appointing authority has authorized an oral report. Written reports of informal investigations will use DA Form 1574; however, its use is not required unless specifically directed by the appointing authority. Every report—oral or written, on DA Form 1574 or not—will include findings and, unless the instructions of the appointing authority indicate otherwise, recommendations.

### 3-15. Enclosures

In written reports, all significant letters and other papers that relate to administrative aspects of the investigation or board and that are not evidence will be numbered consecutively with roman numerals and made enclosures, including such items as these:

*a.* The memorandum of appointment or, if the appointment was oral, a summary by the investigating officer or board including date of appointment, identification of the appointing authority and of all persons appointed, purpose of the investigation or board, and any special instructions.

*b.* Copies of the notice to any respondent (see para 5-5).

*c.* Copies of other correspondence with any respondent or counsel.

*d.* Written communications to or from the appointing authority (see para 3-8).

*e.* Privacy Act statements (see para 3-8e).

*f.* Explanation by the investigating officer or board of any unusual delays, difficulties, irregularities, or other problems encountered.

### 3-16. Exhibits

*a. General.* In written reports, every item of evidence offered to or received by the investigation or board will be marked as a separate exhibit. Unless a verbatim record was directed, statements or transcripts of testimony by witnesses will also be exhibits. Exhibits will be numbered consecutively as offered in evidence (even if not accepted), except that those submitted by each respondent will be lettered consecutively (and further identified by the name of the respondent, if more than one). Exhibits submitted but not admitted in evidence will be marked "Not admitted."

*b. Real evidence.* Because attaching real evidence (physical objects) to the report is usually impractical, clear and accurate descriptions (such as written statements) or depictions (such as photographs) authenticated by the investigating officer, recorder, or president may be substituted in the report. In any case, the real evidence itself will be preserved, including chain of custody, where appropriate, for use if further proceedings are necessary. The exhibit in the report will tell where the real evidence can be found. After final action has been taken in the case, the evidence will be disposed of as provided in AR 190-22, where applicable.

*c. Documentary evidence.* When the original of an official record or other document that must be returned is an exhibit, an accurate copy, authenticated by the investigating officer, recorder, or president, may be used in the written report. The exhibit in the report will tell where the original can be found.

*d. Official notice.* Matters of which the investigating officer or board took official notice (para 3-6b) normally need not be recorded in an exhibit. If, however, official notice is taken of a matter over the objection of a respondent or respondent's counsel, that fact will be noted in the written report of proceedings, and the investigating officer or board will include as an exhibit a statement of the matter of which official notice was taken.

*e. Objections.* In a formal board, if the respondent or counsel makes an objection during the proceedings, the objection and supporting reasons will be noted in the report of proceedings.

### **3-17. Authentication**

Unless otherwise directed, a written report of proceedings will be authenticated by the signature of the investigating officer or of all voting members of the board and the recorder. Board members submitting a minority report (see para 3-13) may authenticate that report instead. If any voting member of the board or the recorder refuses or is unable to authenticate the report (for example, because of death, disability, or absence), the reason will be stated in the report where that authentication would otherwise appear.

### **3-18. Safeguarding a written report**

*a.* When the report contains material that requires protection but does not have a security classification, the report will be marked "For Official Use Only" as provided by AR 25-55.

*b.* No one will disclose, release, or cause to be published any part of the report, except as required in the normal course of forwarding and staffing the report or as otherwise authorized by law or regulation, without the approval of the appointing authority.

### **3-19. Submission**

A written report of proceedings will be submitted, in two complete copies, directly to the appointing authority or designee, unless the appointing authority or another directive provides otherwise. If there are respondents, an additional copy for each respondent will be submitted to the appointing authority.

### **3-20. Action of the appointing authority**

The appointing authority will notify the investigating officer or president of the board if further action, such as taking further evidence or making additional findings or recommendations, is required. Such additional proceedings will be conducted under the provisions of the original appointing memorandum, including any modifications, and will be separately authenticated per paragraph 3-16. If applicable, the appointing authority will ensure that the provisions of paragraph 1-8 have been satisfied. (See para 2-3 for further guidance.)

## **Chapter 4 Informal Investigations and Boards of Officers**

### **4-1. Composition**

Informal procedures may be used by a single investigating officer or by a board of two or more members. (One officer is not designated a board unless procedures are formal.) All members are voting members. Appointment of advisory members or a legal advisor is unnecessary because persons with special expertise may be consulted informally whenever desired. The senior member present acts as president. There is no recorder. The president prescribes the duties of each member. A quorum is required only when voting on findings and recommendations. (See para 3-13.)

### **4-2. Procedure**

An informal investigation or board may use whatever method it finds most efficient and effective for acquiring information. (See chap 3 for general guidance.) A board may divide witnesses, issues, or evidentiary aspects of the inquiry among its members for individual investigation and development, holding no collective meeting until ready to review all the information collected. Although witnesses may be called to present formal testimony, information also may be obtained by personal interview, correspondence, telephone inquiry, or other informal means.

### **4-3. Interested persons**

Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation or board. No respondents will be designated and no one is entitled to the rights of a respondent. The

investigating officer or board may still make any relevant findings or recommendations, including those adverse to an individual or individuals.

## Chapter 5 Formal Boards of Officers

### Section I General

#### 5-1. Members

*a. Voting members.* All members of a formal board of officers are voting members except as provided elsewhere in this paragraph, in other applicable directives, or in the memorandum of appointment.

*b. President.* The senior voting member present acts as president. The senior voting member appointed will be at least a major, except where the appointing authority determines that such appointment is impracticable because of military exigencies. The president has the following responsibilities:

(1) *Administrative.* The president will—

(a) Preserve order.

(b) Determine time and uniform for sessions of the board.

(c) Recess or adjourn the board as necessary.

(d) Decide routine administrative matters necessary for efficient conduct of the business of the board.

(e) Supervise the recorder to ensure that all business of the board is properly conducted and that the report of proceedings is submitted promptly. If the board consists of only one member, that member has the responsibilities of both the president and the recorder.

(2) *Procedural.*

(a) When a legal advisor has been appointed, the legal advisor rules finally on matters set forth in paragraph *d* below.

(b) When a legal advisor has not been appointed, the president will rule on evidentiary and procedural matters. The ruling on any such matter (other than a challenge) may be reversed by majority vote of the voting members present. (See para 3-5.) If the president determines that he or she needs legal advice when ruling on evidentiary and procedural matters, he or she will contact the legal office that ordinarily provides legal advice to the appointing authority and ask that a JA or a civilian attorney who is a member of the Judge Advocate Legal Service be made available for legal consultation. When a respondent has been designated, the respondent and counsel will be afforded the opportunity to be present when the legal advice is provided.

*c. Recorder.* The memorandum of appointment may designate a commissioned or warrant officer as recorder. It may also designate assistant recorders, who may perform any duty the recorder may perform. A recorder or assistant recorder so designated is a nonvoting member of the board. If the memorandum of appointment does not designate a recorder, the junior member of the board acts as recorder and is a voting member.

*d. Legal advisor.*

(1) A legal advisor is a nonvoting member. He or she rules finally on challenges for cause made during the proceedings (except a challenge against the legal advisor (see para 5-7c)) and on all evidentiary and procedural matters (see para 3-5), but may not dismiss any question or issue before the board. In appropriate cases, the legal advisor may advise the board on legal and procedural matters. If a respondent has been designated, the respondent and counsel will be afforded the opportunity to be present when legal advice is provided to the board. If legal advice is not provided in person (for example, by telephone or in writing), the right to be "present" is satisfied by providing the opportunity to listen to or read the advice. The right to be present does not extend to general procedural advice given before the board initially convened, to legal advice provided before the respondent was designated, or to advice provided under paragraph 3-12.

(2) A JA or a civilian attorney who is a member of the Judge Advocate Legal Service may be appointed as legal advisor for a formal board of officers under the following circumstances:

(a) TJAG authorizes the appointment.

(b) Another directive applicable to the board requires the appointment.

(c) The appointing authority is a GCM convening authority.

(d) The appointing authority is other than a GCM convening authority, and a JA is assigned to his or her organization or a subordinate element thereof under an applicable table of organization and equipment or tables of distribution and allowances; or the appropriate GCM convening authority authorizes appointment of a legal adviser.

(3) Appointment of a legal advisor under this paragraph will occur only after consultation with the SJA of the GCM jurisdiction concerned. The SJA will then be responsible for providing or arranging for the legal advisor.

*e. Members with special technical knowledge.* Persons with special technical knowledge may be appointed as voting

members or, unless there is a respondent, as advisory members without vote. Such persons need not be commissioned or warrant officers. If appointed as advisory members, they need not participate in the board proceedings except as directed by the president. (See para 3-12 with regard to participation in the board's deliberations.) The report of proceedings will indicate the limited participation of an advisory member.

## 5-2. Attendance of members

*a. General.* Attendance at the proceedings of the board is the primary duty of each voting member and takes precedence over all other duties. A voting member must attend scheduled sessions of the board, if physically able, unless excused in advance by the appointing authority. If the appointing authority is a GCM convening authority or a commanding general with a legal advisor on his or her staff, the authority to excuse individual members before the first session of the board may be delegated to the SJA or legal advisor. The board may proceed even though a member is absent, provided the necessary quorum is present (see *d* below). If the recorder is absent, the assistant recorder, if any, or the junior member of the board will assume the duties of recorder. The board may then proceed at the discretion of the president.

*b. Quorum.* Unless another directive requires a larger number, a majority of the appointed voting members (other than nonparticipating alternate members) of a board constitutes a quorum and must be present at all sessions. If another directive prescribes specific qualifications for any voting member (for example, component, branch, or technical or professional qualifications), that member is essential to the quorum and must be present at all board sessions.

*c. Alternate members.* An unnecessarily large number of officers will not be appointed to a board of officers with the intention of using only those available at the time of the board's meeting. The memorandum of appointment may, however, designate alternate members to serve on the board, in the sequence listed, if necessary to constitute a quorum in the absence of a regular member. These alternate members may then be added to the board at the direction of the president without further consultation with the appointing authority. A member added thereby becomes a regular member with the same obligation to be present at all further proceedings of the board. (See subpara *a* above.)

*d. Member not present at prior sessions.* A member who has not been present at a prior session of the board, such as an absent member, an alternate member newly authorized to serve as a member, or a newly appointed member, may participate fully in all subsequent proceedings. The member must, however, become thoroughly familiar with the prior proceedings and the evidence. The report of proceedings will reflect how the member became familiar with the proceedings. Except as directed by the appointing authority, however, a member who was not available (because of having been excused or otherwise) for a substantial portion of the proceedings, as determined by the president, will no longer be considered a member of the board in that particular case, even if that member later becomes available to serve.

## 5-3. Duties of recorder

*a. Before a session.* The recorder is responsible for administrative preparation and support for the board and will perform the following duties before a session:

(1) Give timely notice of the time, place, and prescribed uniform for the session to all participants, including board members, witnesses, and, if any, legal advisor, respondent, counsel, reporter, and interpreter. Only the notice to a respondent required by paragraph 5-5 need be in writing. It is usually appropriate also to notify the commander or supervisor of each witness and respondent.

(2) Arrange for the presence of witnesses who are to testify in person, including attendance at Government expense of military personnel and civilian government employees ordered to appear and of other civilians voluntarily appearing pursuant to invitational travel orders. (See para 3-8a.)

(3) Ensure that the site for the session is adequate and in good order.

(4) Arrange for necessary personnel support (clerk, reporter, and interpreter), recording equipment, stationery, and other supplies.

(5) Arrange to have available all necessary Privacy Act statements and, with appropriate authentication, all required records, documents, and real evidence.

(6) Ensure, subject to security requirements, that all appropriate records and documents referred with the case are furnished to any respondent or counsel.

(7) Take whatever other action is necessary to ensure a prompt, full, and orderly presentation of the case.

*b. During the session.* The recorder will perform the following duties during the session:

(1) Read the memorandum of appointment at the initial session or determine that the participants have read it.

(2) Note for the record at the beginning of each session the presence or absence of the members of the board and, if any, the respondent and counsel.

(3) Administer oaths as necessary.

(4) Execute all orders of the board.

(5) Conduct the presentation of evidence and examination of witnesses to bring out all the facts.

*c. After the proceedings.* The recorder is responsible for the prompt and accurate preparation of the report of

proceedings, for the authentication of the completed report, and, whenever practicable, the hand-carried delivery of the report, including delivery to the appointing authority or designee.

## Section II Respondents

### 5-4. Designation

*a. General.* A respondent may be designated when the appointing authority desires to provide a hearing for a person with a direct interest in the proceedings. The mere fact that an adverse finding may be made or adverse action recommended against a person, however, does not mean that he or she will be designated a respondent. The appointing authority decides whether to designate a person as a respondent except where designation of a respondent is—

- (1) Directed by authorities senior to the appointing authority; or
- (2) Required by other regulations or directives or where procedural protections available only to a respondent under this regulation are mandated by other regulations or directives.

*b. Before proceedings.* When it is decided at the time a formal board is appointed that a person will be designated a respondent, the designation will be made in the memorandum of appointment.

*c. During the proceedings.*

(1) If, during formal board proceedings, the legal advisor or the president decides that it would be advisable to designate a respondent, a recommendation with supporting information will be presented to the appointing authority.

(2) The appointing authority may designate a respondent at any point in the proceedings. A respondent so designated will be allowed a reasonable time to obtain counsel (see para 5-6) and to prepare for subsequent sessions.

(3) If a respondent is designated during the investigation, the record of proceedings and all evidence received by the board to that point will be made available to the newly designated respondent and counsel. The respondent may request that witnesses who have previously testified be recalled for cross-examination. If circumstances do not permit recalling a witness, a written statement may be obtained. In the absence of compelling justification, the proceedings will not be delayed pending the obtaining of such statement. Any testimony given by a person as a witness may be considered even if that witness is subsequently designated a respondent.

### 5-5. Notice

The recorder will, at a reasonable time in advance of the first session of the board concerning a respondent (including a respondent designated during the proceedings), provide that respondent a copy of all unclassified documents in the case file and a letter of notification. In the absence of special circumstances or a different period established by the directive authorizing the board, a "reasonable time" is 5 working days. The letter of notification will include the following information:

- a.* The date, hour, and place of the session and the appropriate military uniform, if applicable.
- b.* The matter to be investigated, including specific allegations, in sufficient detail to enable the respondent to prepare.
- c.* The respondent's rights with regard to counsel. (See para 5-6.)
- d.* The name and address of each witness expected to be called.
- e.* The respondent's rights to be present, present evidence, and call witnesses. (See para 5-8a.)
- f.* (Only if the board involves classified matters.) The respondent and counsel may examine relevant classified materials on request and, if necessary, the recorder will assist in arranging clearance or access. (See AR 380-67.)

### 5-6. Counsel

*a. Entitlement.* A respondent is entitled to have counsel and, to the extent permitted by security classification, to be present with counsel at all open sessions of the board. Counsel may also be provided for the limited purpose of taking a witness's statement or testimony, if respondent has not yet obtained counsel. An appointed counsel will be furnished only to civilian employees or members of the military.

*b. Who may act.*

(1) *Civilian counsel.* Any respondent may be represented by civilian counsel not employed by and at no expense to the Government. A Government civilian employee may not act as counsel for compensation or if it would be inconsistent with faithful performance of regular duties. (See 18 USC 205.) In addition, a DA civilian employee may act as counsel only while on leave or outside normal hours of employment, except when acting as the exclusive representative of the bargaining unit pursuant to 5 USC 7114(a)(2)(B). (See para 3-4.)

(2) *Military counsel for military respondents.* A military respondent who does not retain a civilian counsel is entitled to be represented by a military counsel designated by the appointing authority. A respondent who declines the services of a qualified designated counsel is not entitled to have a different counsel designated.

(3) *Military counsel for civilian respondents.* In boards appointed under the authority of this regulation, Federal civilian employees, including those of nonappropriated fund instrumentalities, will be provided a military counsel under

the same conditions and procedures as if they were military respondents, unless they are entitled to be assisted by an exclusive representative of an appropriate bargaining unit.

*c. Delay.* Whenever practicable, the board proceedings will be held in abeyance pending respondent's reasonable and diligent efforts to obtain civilian counsel. However, the proceedings will not be delayed unduly to permit a respondent to obtain a particular counsel or to accommodate the schedule of such counsel.

*d. Qualifications.* Counsel will be sufficiently mature and experienced to be of genuine assistance to the respondent. Unless specified by the directive under which the board is appointed, counsel is not required to be a lawyer.

*e. Independence.* No counsel for a respondent will be censured, reprimanded, admonished, coerced, or rated less favorably as a result of the lawful and ethical performance of duties or the zeal with which he or she represents the respondent. Any question concerning the propriety of a counsel's conduct in the performance of his or her duty will be referred to the servicing JA.

## **5-7. Challenges for cause**

*a. Right of respondent.* A respondent is entitled to have the matter at issue decided by a board composed of impartial members. A respondent may challenge for cause the legal advisor and any voting member of the board who does not meet that standard. Lack of impartiality is the only basis on which a challenge for cause may be made at the board proceedings. Any other matter affecting the qualification of a board member may be brought to the attention of the appointing authority. (See para 3-3.)

*b. Making a challenge.* A challenge will be made as soon as the respondent or counsel is aware that grounds exist; failure to do so normally will constitute a waiver. If possible, all challenges and grounds will be communicated to the appointing authority before the board convenes. When the board convenes, the respondent or counsel may question members of the board to determine whether to make a challenge. Such questions must relate directly to the issue of impartiality. Discretion will be used, however, to avoid revealing prejudicial matters to other members of the board; if a challenge is made after the board convenes, only the name of the challenged member will be indicated in open session, not the reason for believing the member is not impartial.

*c. Deciding challenges.* The appointing authority decides any challenge to a board of officers composed of a single member and may decide other challenges made before the board convenes. Otherwise, a challenge is decided by the legal advisor or, if none or if the legal advisor is challenged, by the president. If there is no legal advisor and the president is challenged, that challenge is decided by the next senior voting member.

*d. Procedure.* Challenges for lack of impartiality not decided by the appointing authority will be heard and decided at a session of the board attended by the legal advisor, the president or the next senior member who will decide the challenge, the member challenged, the respondent and his or her counsel, and the recorder. The respondent or counsel making the challenge may question the challenged member and present any other evidence to support the challenge. The recorder also may present evidence on the issue. The member who is to decide the challenge may question the challenged member and any other witness and may direct the recorder to present additional evidence. If more than one member is challenged at a time, each challenge will be decided independently, in descending order of the challenged members' ranks.

*e. Sustained challenge.* If the person deciding a challenge sustains it, he or she will excuse the challenged member from the board at once, and that person will no longer be a member of the board. If this excusal prevents a quorum (see para 5-2b), the board will adjourn to allow the addition of another member; otherwise, proceedings will continue.

## **5-8. Presentation of evidence**

*a. Rights of respondent.* Except for good cause shown in the report of proceedings, a respondent is entitled to be present, with counsel, at all open sessions of the board that deal with any matter concerning the respondent. The respondent may—

- (1) Examine and object to the introduction of real and documentary evidence, including written statements.
- (2) Object to the testimony of witnesses and cross-examine witnesses other than the respondent's own.
- (3) Call witnesses and otherwise introduce evidence.
- (4) Testify as a witness; however, no adverse inference may be drawn from the exercise of the privilege against self-incrimination. (See para 3-7c(5).)

*b. Assistance.*

(1) Upon receipt of a timely written request, and except as provided in (4) below, the recorder will assist the respondent in obtaining documentary and real evidence in possession of the Government and in arranging for the presence of witnesses for the respondent.

(2) Except as provided in subparagraph (4) below, the respondent is entitled to compulsory attendance at Government expense of witnesses who are soldiers or Federal civilian employees, to authorized reimbursement of expenses of other civilian witnesses who voluntarily appear in response to invitational travel orders, and to official cooperation in obtaining access to evidence in possession of the Government, to the same extent as is the recorder on behalf of the Government. If the recorder, however, believes any witness's testimony or other evidence requested by the respondent is irrelevant or unnecessarily cumulative or that its significance is disproportionate to the delay, expense, or difficulty

in obtaining it, the recorder will submit the respondent's request to the legal advisor or president (see para 3-5), who will decide whether the recorder will comply with the request. Denial of the request does not preclude the respondent from obtaining the evidence or witness without the recorder's assistance and at no expense to the Government.

(3) Nothing in this paragraph relieves a respondent or counsel from the obligation to exercise due diligence in preparing and presenting his or her own case. The fact that any evidence or witness desired by the respondent is not reasonably available normally is not a basis for terminating or invalidating the proceedings.

(4) Evidence that is privileged within the meaning of paragraph 3-7c(1) will not be provided to a respondent or counsel unless the recorder intends to introduce such evidence to the board and has obtained approval to do so.

#### **5-9. Argument**

After all evidence has been received, the recorder and the respondent or counsel may make a final statement or argument. The recorder may make the opening argument and, if argument is made on behalf of a respondent, the closing argument in rebuttal.

#### **5-10. After the hearing**

Upon approval or other action on the report of proceedings by the appointing authority, the respondent or counsel will be provided a copy of the report, including all exhibits and enclosures that pertain to the respondent. Portions of the report, exhibits, and enclosures may be withheld from a respondent only as required by security classification or for other good cause determined by the appointing authority and explained to the respondent in writing.

## **Appendix A References**

### **Section I Required Publications**

Military Rules of Evidence are found in the Manual for Courts-Martial, United States.

#### **AR 20-1**

Inspector General Activities and Procedures. (Cited in paras 1-5 and 3-7.)

#### **AR 25-55**

The Department of the Army Freedom of Information Act Program. (Cited in para 3-18.)

#### **AR 27-10**

Military Justice. (Cited in para 3-7 and app B.)

#### **AR 195-5**

Evidence Procedures. (Cited in para 3-16.)

#### **AR 340-21**

The Army Privacy Program. (Cited in para 3-8 and app B.)

#### **AR 380-67**

The Department of the Army Personnel Security Program. (Cited in para 5-5.)

#### **JTR, vol. 2**

(Cited in para 3-7.) (Available at <https://secureapp2.hqda.pentagon.mil/perdiem>.)

#### **MCM 2005**

See Military Rules of Evidence contained therein. (Cited in para 3-7.)

#### **MRE 201**

Judicial notice of adjudicative facts.

#### **MRE 502**

Lawyer-client privilege.

#### **MRE 503**

Communications to clergy.

#### **MRE 504**

Husband-wife privilege.

#### **UCMJ, Art. 31**

Compulsory self-incrimination prohibited

#### **UCMJ, Art. 136**

Authority to administer oaths and act as notary. (Cited in paras 1-3, 2-3, 3-2, and 3-7.) (Available from [www.army.mil/references/UCMJ](http://www.army.mil/references/UCMJ).)

#### **UCMJ, Art. 138**

Complaints of wrongs

### **Section II**

#### **Related Publications**

A related publication is a source of additional information. The user does not have to read it to understand this regulation. United States Code is found at [www.gpoaccess.gov/uscode](http://www.gpoaccess.gov/uscode).

#### **AR 210-7**

Commercial Solicitation on Army Installations

**AR 380-5**  
Department of the Army Information Security Program

**AR 385-40**  
Accident Reporting and Records

**AR 600-8-14**  
Identification Cards for M

**AR 600-37**  
Unfavorable Information

**AR 735-5**  
Policies and Procedures for Property Accountability

**5 USC 303**  
Oaths to witnesses

**5 USC 7114**  
Representation rights and duties

**10 USC 933**  
Conduct unbecoming an officer and a gentleman

**10 USC 1219**  
Statement of origin of disease or injury: limitations

**10 USC 3012**  
Department of the Army: seal

**18 USC 205**  
Activities of offices and employees in claims against and other matters affecting the Government

**U.S. Constitution, amend. 5**  
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

### **Section III**

#### **Prescribed Forms**

The following forms are available on the APD Web site ([www.apd.army.mil](http://www.apd.army.mil)) unless otherwise stated.

**DA Form 1574**  
Report of Proceedings by Investigating Officer/Board of Officers. (Cited in para 3-14.)

### **Section IV**

#### **Referenced Forms**

**DA Form 2823**  
Sworn Statement

**DA Form 3881**  
Rights Warning Procedure/Waiver Certificate

## **Appendix B**

### **Guidance for Preparing Privacy Act Statements**

#### **B-1. General**

a. The Privacy Act requires that, whenever personal information is solicited from an individual and the information

will be filed so as to be retrievable by reference to the name or other personal identifier of the individual, he or she must be advised of the following information:

- (1) The authority for soliciting the information.
- (2) The principal purposes for which the information is intended to be used.
- (3) The routine uses that may be made of the information.
- (4) Whether disclosure is mandatory or voluntary.
- (5) The effect on the individual of not providing all or part of the information.

b. Each Privacy Act statement must be tailored to the matter being investigated and to the person being asked to provide information. The servicing JA will be consulted for assistance in preparing Privacy Act statements, as necessary.

## **B-2. Content**

a. *Authority.* If a specific statute or executive order authorizes collection of the information, or authorizes performance of a function that necessitates collection of the information, the Privacy Act statement will cite it as the authority for solicitation. For example, if a commander appoints an investigating officer to inquire into a UCMJ, Art. 138, complaint under the provisions of AR 27-10, the statutory authority for solicitation of the information would be 10 USC 938. Regulations will not be cited as the authority. If no specific statute or executive order can be found, the authority to cite is 10 USC 3012.

b. *Principal purposes.* The statement of principal purposes will consist of a short statement of the reason the investigation is being conducted. The following examples apply to particular types of investigations:

(1) Administrative elimination proceeding under AR 635-200: "The purpose for soliciting this information is to provide the commander a basis for a determination regarding your retention on active duty and, if a determination is made not to retain you on active duty, the type of discharge to award."

(2) Investigation of a UCMJ, Art. 138, complaint: "The purpose for soliciting this information is to obtain facts and make recommendations to assist the commander in determining what action to take with regard to (your) (complainant's) UCMJ, Art 138, complaint."

(3) Investigation of a security violation: "The purpose for soliciting this information is to determine whether the security violation under investigation resulted in a compromise of national defense information, to fix responsibility for the violation, and to determine whether to change existing security procedures."

(4) Flying evaluation board pursuant to AR 600-107: "The purpose for soliciting this information is to provide the commander a basis for a determination regarding your flying status."

c. *Routine uses.* In order to advise an individual of what routine uses may be made of solicited information, it is necessary to identify the system of records in which the report of proceedings will be filed. The routine uses will be summarized from the system notice and from the routine uses of general applicability in AR 340-21. The routine use statement may be introduced as follows: "Any information you provide is disclosable to members of the Department of Defense who have a need for the information in the performance of their duties. In addition, the information may be disclosed to Government agencies outside of the Department of Defense as follows: (list of routine uses external to the Department of Defense)."

d. *Routine uses. Disclosure mandatory or voluntary; the effect of not providing information.*

Providing information is voluntary unless the individual may be ordered to testify. The following statement can be used in most situations:

(1) Respondent or other individual warned of his or her rights under the UCMJ, Art. 31, or the Fifth Amendment: "Providing the information is voluntary. There will be no adverse effect on you for not furnishing the information other than that certain information might not otherwise be available to the commander for his or her decision in this matter."

(2) Individual who may be ordered to testify: "Providing the information is mandatory. Failure to provide information could result in disciplinary or other adverse action against you under (the UCMJ or Army regulations) (civilian personnel regulations)."

2. *UCMJ, Art. 31 rights advisement.* If during the proceeding it is determined to advise an individual of his or her rights under the UCMJ, Art. 31, or the Fifth Amendment, after he or she has been told it is mandatory to provide information, the advising official must be certain that the individual understands that such rights warning supersedes this portion of the Privacy Act statement.

## **Glossary**

### **Section I Abbreviations**

#### **AR**

Army regulation

#### **DA**

Department of the Army

#### **DOD**

Department of Defense

#### **GCM**

general court-martial

#### **GS**

general schedule

#### **JA**

judge advocate

#### **LA**

legal advisor

#### **MCM**

Manual for Courts-Martial, United States, 2005

#### **MRE**

Military Rules of Evidence

#### **SJA**

staff judge advocate

#### **TJAG**

The Judge Advocate General

#### **UCMJ**

Uniform Code of Military Justice

#### **USC**

United States Code

### **Section II**

#### **Terms**

##### **Adverse administrative action**

Adverse action taken by appropriate military authority against an individual other than actions taken pursuant to the UCMJ or MCM.

##### **Military exigency**

An emergency situation requiring prompt or immediate action to obtain and record facts.

### **Section III**

#### **Special Abbreviations and Terms**

This section contains no entries.

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