

ADMINISTRATIVE INVESTIGATIONS

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OUTLINE OF INSTRUCTION

I. REFERENCES.

- A. 10 U.S.C. § 1034 [Military Whistleblower Act].
- B. 10 U.S.C. §§ 1501-1513 [Missing Persons Legislation].
- C. 37 U.S.C. §§ 551-59 and 5 U.S.C. 5561-69 [The Missing Persons Act].
- D. Pub. L. 102-484, div. A, title X, § 1072, Oct. 23, 1992, 106 Stat. 2508 (10 U.S.C. § 113, note) [Family Presentation Requirements in Fatality Cases].
- E. DoDD 7050.6, Military Whistleblower Protection, 23 June 2000.
- F. DoDI 1300.18, Military Personnel Casualty Matters, Policies, and Procedures, 18 Dec 00.
- G. DoDI 2310.4, Repatriation of Prisoners of War (POW), Hostages, Peacetime Government Detainees and Other Missing or Isolated Personnel, 21 Nov 00.
- H. DoDI 2310.5, Accounting for Missing Persons, 31 Jan 00.
- I. AFPCI 36-26, Boards of Inquiry for Personnel Missing Under Hostile Conditions.
- J. DODI 6055.7, Accident Investigation, Reporting, and Record Keeping, 3 October 2000.
- K. AR 15-6, Procedure For Investigating Officers and Boards of Officers, 11 May 1988 (w/ change 1, 30 Sep 96).
- L. AR 20-1, Inspector General Activities and Procedures, 29 March 2002.

- M. AR 27-10, Military Justice, 6 September 2002.
- N. AR 385-40, Accident Reporting and Records, 1 December 1994.
- O. AR 600-20, Army Command Policy, 13 May 2002.
- P. AR 600-8-1, Army Casualty Operations/Assistance/Insurance, Chapter 8, 20 Oct 94.
- Q. AR 600-34, Fatal Training/Operational Accident Presentations to the Next of Kin, 2 January 2003.
- R. AR 623-105, Officer Evaluation Reporting System, 1 April 1998.
- S. AR 623-205, Noncommissioned Officer Evaluation Reporting System, 15 May 2002.
- T. DA PAM, 385-40, Army Accident Investigations and Reporting, 1 November 1994.

II. R.C.M. 303 PRELIMINARY INQUIRY.

- A. If a commander receives information that a member of his or her command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander is required to make or cause to be made a preliminary inquiry into the charges or suspected offenses. Not the same as an Article 32 (UCMJ) investigation.
- B. The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of MPI/CID.
- C. The commander should gather all reasonably available evidence on:

1. Guilt or innocence;
 2. Aggravation; and
 3. Extenuation and Mitigation.
- D. A person who is an "accuser" under Article 1(9), UCMJ, may not convene a special or general courts-martial [R.C.M. 504(c)(1)]. Therefore, any commander who is a special or general courts-martial convening authority should appoint another officer in the command to conduct the preliminary inquiry and prefer charges, if necessary.

III. AR 15-6 INVESTIGATIONS.

- A. **FUNCTION.** To ascertain facts, make recommendations and report them to the appointing authority
- B. **APPLICABILITY.** Investigations or boards appointed under a specific regulation or directive (e.g., AR 635-200) may make AR 15-6 applicable. In case of conflicting provisions, the more specific regulation overrules AR 15-6. Even when not specifically applicable, AR 15-6 may be used a guide but its provisions are not binding.
- C. **TYPES: FORMAL OR INFORMAL.**
1. **Formal.**
 - a) Generally used to provide a hearing with extensive due process rights: include president with voting members, recorder, notice to respondent with right to counsel, challenges for cause, entitlement to be present at all open sessions, put on evidence, cross-examine witnesses, make argument.
 - b) Example: An administrative separation board conducted under AR 635-200 is also a formal AR 15-6.

2. Informal.

- a) May be used to investigate individual conduct. Para 1-6: “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.” Para 1-4b(2): Even if the purpose of the investigation is to inquire into the conduct or performance of a particular individual, formal procedures not mandatory unless required by other regulations or by higher authority.
- b) Great flexibility. One IO, proceedings not open to the public, statements taken at informal sessions, no right to counsel unless required by Art. 31(b), UCMJ; no right to cross-examine, etc.

D. APPOINTING AN INFORMAL 15-6.

- 1. Authority. Includes a commander at any level or a principal staff officer or supervisor in grade of major or above. Change 1 authorizes GS-14 agency head or division chief to appoint either formal or informal. Appropriate appointing authority can ratify.
- 2. Method. May be oral but not recommended; written memorandum of appointment preferred. Should specify purpose and scope of investigation and nature of findings and recommendations required. [Model appointment memorandum at Appendix A.] The appointment directive is important. You should work with your Judge Advocate in drafting it.
- 3. Who should be the Investigating Officer? Break the Duty Roster Mindset!
 - a) Commissioned/Warrant Officer/GS-13, senior to soldier whose conduct is under investigation; **best qualified** by reason of education, training, experience, length of service and temperament.
 - b) Change 1 requires IO to **consult with OSJA for legal guidance before beginning informal investigation**. IO should continue to consult with OSJA during the entire investigation process, including the development of findings and recommendations.

E. SPECIAL CASES.

1. Only a GCMCA can appoint AR 15-6 if:
 - a) Property damage of \$1M or more;
 - b) Loss or destruction of Army aircraft or missile;
 - c) Injury or illness resulting in, or likely to result in, death or permanent total disability.
2. Investigation into fratricide/friendly fire incident must be forwarded after action to next higher Army HQs for review.

F. CONDUCTING THE INVESTIGATION.

1. The investigating officer should immediately set a briefing with the advising legal advisor for the command to understand the rules and legal concerns for AR 15-6 investigations and to set up an investigation plan. Make sure the Investigating Officer gets an Investigating Officer Handbook with checklist [Appendix A].
2. Investigation Plan.
 - a) Purpose of the Investigation. What is the timeline? See Appointment Memorandum at Appendix B.
 - b) Facts Known.
 - c) Potential Witnesses.
 - d) Physical and Documentary Evidence.
 - e) Possible Criminal or Counter-Intelligence implications? Article 31 warnings?

- f) Any civilian employees as witnesses? Weingarten rights.
- g) Regulations and Laws involved.
- h) Order of interviewing witnesses.
- i) Chronology.

G. FINDINGS AND RECOMMENDATIONS.

1. Findings.

- a) Clear concise statement of fact readily deduced from evidence in record. Includes negative findings. Should not exceed scope of appointment. Should refer back to evidence gathered in the investigation such as Statement of LTC __, or Photograph 1 at TAB C.
- b) Standard is preponderance of the evidence: more likely than not; greater weight of evidence than supports a contrary conclusion. Weight not determined by number of witnesses but by considering all evidence and factors such as demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indications of credibility.
- c) Investigating Officer should work with the legal advisor to develop the findings based on the record of investigation facts and the commander's appointment memorandum.

2. Recommendations.

- a) Must be consistent with findings. Make sure they make sense and are supported by the record of investigation.
- b) The recommendations can be negative, e.g., no further action taken.

- c) Beware of making mental health evaluation recommendations without evidence in the ROI.

H. ACTION BY APPOINTING AUTHORITY.

1. Options.

- a) Approve as is.
- b) Disapprove, and/or return for additional investigation. May consider all relevant information, even information not considered by IO. Unless otherwise provided by another directive, appointing authority is not bound by findings or recommendations; may take action less favorable than recommended.
- c) Substitute Findings and Recommendations.

2. Legal review. The approval authority must obtain a legal review prior to taking action in the following cases.

- a) The incident being investigated resulted in death or serious bodily injury;
- b) Where findings & recommendations may result in adverse administrative action or will be relied upon by higher HQs.

I. ADVERSE ADMINISTRATIVE ACTION.

1. No adverse administrative action may be taken by a commander based on an informal AR 15-6 investigation until the following.

- a) **Notice** is given to the subject of the investigation of the allegations against him or her. The subject is given a copy of the investigation subject to any required redactions.

- b) The subject is given a **reasonable opportunity to rebut** the allegations.
 - c) The **Commander must consider the subject's rebuttal** to the investigation, if submitted in a timely manner, **before taking any adverse action**.
2. The federal courts have routinely upheld adverse administrative actions (based upon AR 15-6 investigation) taken against service members if the subject received notice, a chance to rebut the allegations, and the commander considered the rebuttal prior to the adverse action taking place.

IV. ACCIDENT INVESTIGATIONS.

- A. AR 385-40, Accident Reporting and Records, 1 Nov 94.
- B. SAFETY INVESTIGATIONS. There are two types of safety investigation reports, limited use reports and general use reports.
 - 1. Limited Use Safety Accident Investigation Reports.
 - a) These are close-hold, internal communications of DA whose SOLE purpose is prevention of subsequent DA accidents.
 - b) Required for all flight and fratricide/friendly fire accidents. They also may be used for accidents involving other complex weapon systems, equipment, or military-unique items, and military unique equipment/operations/exercises when the determination of causal factors is vital to the national defense with approval of Cdr, US Army Safety Center (USASC).
 - c) These reports cannot be used as evidence or to obtain evidence for disciplinary action, in determining the misconduct or line-of-duty status of any person, before any evaluation board, or to determine liability in administrative claims for or against the government.

- d) Witnesses may be given the option of making their statement under a promise of confidentiality if they are unwilling to make a complete statement without such a promise and the investigation board believes it is necessary to obtain a statement from a witness.

2. General Use Safety Accident Investigation Reports.

- a) These reports are prepared to record data concerning all recordable DA accidents not covered by the limited use safety accident investigations.
- b) Intended for accident prevention purposes also and cannot be used for administrative or disciplinary actions.
- c) Promises of confidentiality cannot be made that information will be treated as exempt from mandatory disclosure in response to a request under the FOIA.

C. COLLATERAL ACCIDENT INVESTIGATION.

- 1. AR 385-40, para. 1-8.
- 2. This type of investigation is prepared:
 - a) For all Class A accidents (Army accident resulting in a total cost of property damage of \$1 M or more; an Army aircraft or missile is destroyed, missing, or abandoned; or an injury and/or occupational illness results in a fatality or permanent total disability);
 - b) As directed by the SJA under the claims regulation;
 - c) On accidents where there is a potential claim or litigation for or against the government or government contractor; or
 - d) On accidents with a high degree of public interest or anticipated disciplinary or adverse administrative action.

3. These investigations are used to obtain and preserve all available evidence for use in litigation, claims, disciplinary action, or adverse administrative action. Such investigations often parallel safety investigation facts.
 - a) Investigators must work with their legal advisor on obtaining facts, e.g., names of witnesses (but not witness statements), and physical evidence from the safety investigation team.
 - b) Only factual information may be made available to the collateral investigation; Safety Board experts are prohibited from giving their opinions of what caused the accident to collateral investigators.

V. FAMILY PRESENTATIONS IN FATAL TRAINING/OPERATIONAL ACCIDENTS.

A. CONGRESSIONAL REQUIREMENT.

1. Pub. L. 102-484, div. A, title X, § 1072, Oct. 23, 1992, 106 Stat. 2508 (10 U.S.C. § 113, note).
 - a) Requires the Service Secretaries to ensure that fatality reports and records pertaining to members of the Armed Forces who die in the line of duty are made available to family members.
 - b) Within a reasonable period of time after the family members are notified of the death, but not more than 30 days after the date of notification, the Secretary must:
 - (1) In any case under investigation, inform the family members of the names of the agencies conducting the investigation and of the existence of any reports by such agencies that have been or will be issued; and
 - (2) Furnish, if the family members desire, a copy of any completed investigative report to the extent such reports may be furnished consistent with the Privacy Act and the Freedom of Information Act.

B. ARMY IMPLIMENTATION.

1. AR 600-34, Fatal Training/Operational Accident Presentations to the Next of Kin, 2 January 2003.
2. Key definitions.
 - a) *Fatal training accidents* include those accidents associated with non-combat military exercises or training activities that are designed to develop a soldier's physical ability or to maintain or increase individual/collective combat and/or peacekeeping skills.
 - b) *Fatal operational accidents* are those deaths associated with active duty military exercises or activities occurring in a designated war zone or toward designated missions related to current war operations or Military Operations Other Than War, contributing directly or indirectly to the death.
 - c) *Primary Next of Kin.* The legal next of kin. That person of any age most closely related to the individual according to the line of succession. Seniority, as determined by age, will control when the persons are of equal relationship.
 - d) Family member.
 - (1) Spouse.
 - (2) Unmarried child of a sponsor, including an adopted child, step child, foster child, ward, who either: (1) has not passed his/her 21st birthday; (2) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is (or was at the time of the member's or former member's death) in fact dependent on the sponsor for over one-half of his/her support; (3) has not passed his/her 23rd birthday, is enrolled in a full-time course of study in an institution of higher learning and is in fact dependent on the sponsor for over one-half of his/her support.

- (3) A parent or parent-in-law of a sponsor who is in fact dependent on the sponsor for one-half of his/her support and residing in the sponsor's household.

3. Presentations are required for:

- a) All fatal training/operational accidents investigated under AR 15-6, AR 385-40, and AR 600-34.
- b) Special interest cases or cases in which there is probable high public interest, as determined by TAG;
- c) All suspected cases of Friendly Fire; and
- d) In general, fatal accidents that are hostile, but do not occur as a result of engagement with the enemy.

- (1) "in action."

- (2) *In action* characterizes death as having been the direct result of hostile action, sustained in combat or related thereto, or sustained going to or returning from a combat mission provided that the occurrence was directly related to hostile action.

4. Updates to PNOK. If the appointing/approval authority grants an extension of the 30-day requirement to complete the collateral investigation, the approval authority is responsible for the release of status information from the investigation to the PNOK.

- a) The approving authority's legal office must review each update to ensure that it contains no admission of liability, waiver of any defense, offer of compensation or any statement that might jeopardize the Army's litigation posture.
- b) The update is then given to the Casualty and Memorial Affairs Operation Center (CMAOC) who will instruct the Casualty Affairs Officer (CAO) on its delivery to the PNOK.

5. Preparing the presentation to the PNOK.
 - a) Once the investigation is complete, TAG contacts the collateral investigation appointing/approval authority to coordinate appointment of the briefer who is “most often the deceased soldier’s colonel or brigade level commander.”
 - b) Within 24-hours of completion of the investigation, the CAO must inform the PNOK that the Army is prepared to discuss the results of the investigation with the family. Presentations are offered to adult PNOK (18 years of age or older); for PNOK under 18, the adult custodian must decide the PNOK’s ability to receive a face-to-face briefing.
 - (1) In single-family presentation cases, the CMAOC coordinates the written statement of offer (SOO) to provide a presentation through the CAO for delivery to the PNOK.
 - (2) Accident presentations requiring the offer of multiple family presentations will be officially offered via a formal letter of offer (LOO) mailed to the PNOK within 24 hours following the collateral investigation report.
 - (a) The CAO then follows up with the PNOK to arrange for the presentation date and forward the preferred dates (primary and secondary) to the CMAOC.
 - (b) The CMOAC must develop a proposed presentation schedule for all PNOK, accommodating family preferences to every extent possible.
 - (3) The SOO/LOO must:
 - (a) Inform the PNOK that the collateral investigation is complete.

- (b) Provide a timeframe for the presentation (usually between 21-25 days from the date the collateral investigation was approved). The goal for multiple briefings is to schedule them within a 3-day window.
 - (c) Identify the briefer, and provide the name of the CAO with instructions for accepting or declining and scheduling the presentation.
- c) Briefing Team.
 - (1) At a minimum, the briefing team must consist of the briefer, the family's CAO, and a chaplain from the mishap unit.
 - (2) The briefer must consider including the SJA or legal advisor or PAO representative when it is apparent that a family has invited, or may invite, the local media or a family legal representative will attend the presentation.
 - (a) The CAO must work with the PNOK to obtain a list of people the PNOK intends to invite to the presentation to enable the presentation team to determine the family's intent to invite media or legal representation.
 - (b) NOTE: The Army is prohibited from putting conditions or limitations upon those whom the family wishes to invite to the presentation.
 - (3) The briefer must also consider including an interpreter if the PNOK or other attending family members do not understand English.
- d) Duties and responsibilities prior to the briefing.

- (1) The briefer must prepare and conduct training sessions and rehearsals for the presentation team.
- (2) The briefer must obtain a summarized copy of the autopsy report and provide it to the briefer for delivery to the PNOK at the time of the presentation.
 - (a) If the PNOK does not wish to receive an autopsy report, it won't be left with the PNOK.
 - (b) Otherwise, the briefer must explain that the autopsy does not contain graphics but is very detailed and is provided in a sealed envelope. The briefer must also recommend that when they are ready to review the report, they do so in the presence of a medical person able to explain the terminology.
 - (c) There is no intent for the autopsy report to be opened or discussed during the presentation.
- (3) The CAO must provide a written summary of the current health and well being of the family, describing their emotional, mental, and physical health; the family's relationship with friends and other significant support groups; the current living arrangements; and any outstanding issues the family has with benefits and entitlements.
- (4) The CAO must conduct a reconnaissance of the area where the presentation will be conducted and recommend a hotel in the vicinity for the presentation team.
 - (a) The CAO must also make hotel and transportation arrangements for the briefing team.

- (b) Family members are generally responsible for arranging their own transportation to the briefing location. The policy prohibits the briefing team from traveling with the PNOK family members in a privately owned vehicle.

6. Conducting the Family Presentation.

- a) The briefer's primary responsibility is to meet personally with the PNOK and deliver a thorough open explanation of the releasable facts and circumstances surrounding the accident. At a minimum, the briefer must provide the following.
 - (1) An explanation of the unit's mission which highlights the soldier's significant contributions to the mission and the Army;
 - (2) An accurate account of the facts and circumstances leading up to the accident, the sequence of events that caused the accident, and a very clear explanation of primary and contributing factors causing the accident as determined by the collateral investigation.
 - (3) Actions taken at the unit level to correct any deficiencies.
- b) The most favored choice for the presentation is the PNOK's home.
- c) Style of presentation.
 - (1) Dialogue with no notes but with maps and diagrams of training areas. This works best for a briefer who is intimately familiar with the accident and investigation.
 - (2) Bullet briefing charts. These work well as they tend to help the briefer stay focused. Charts must be reviewed and approved in advance by the SJA.

- (3) Simple notes and an executive summary. Written materials must be reviewed and approved by the SJA and copies should be left with the PNOK if requested.
 - d) If a family presentation must proceed with a legal representative present, but without Army legal advice, the briefer must inform the PNOK that the presentation is strictly intended to provide information to the family. If the attorney has a list of questions for the family to ask, the briefer must offer to take the questions back to the servicing SJA to obtain complete answers. The SJA may then follow up directly with the PNOK.
- 7. Completion of Family Presentation. Within two weeks of the presentation, the briefer must submit an AAR through the appointing authority and MACOM to the TAG.
- 8. SJA Requirements.
 - a) The OSJA is required to review the presentation to ensure that it contains no admission of liability, waiver of any defense, offer of compensation, or any other statement that might jeopardize the Army's litigation posture. This may include review of briefing charts, notes, and executive summaries.
 - b) The SJA or legal advisor must provide a non-redacted copy of the collateral investigation report to CMAOC.
 - c) The regulation is not intended to provide the PNOK with information not otherwise releasable under the Privacy Act or the Freedom of Information Act.
 - (1) The SJA must redact the collateral investigation report and prepare the required number of copies. At a minimum, the briefer, each team member, and each PNOK will be given a redacted copy.

- (2) The SJA also must prepare a letter to accompany the redacted version of the report delivered to the family and will explaining, in general terms, the reasons for the redactions.
9. Release of the Collateral Investigation. The collateral investigation will be released in the following order:
 - a) PNOK and other family members designated by the PNOK;
 - b) Members of Congress, upon request; and
 - c) Members of the public and media.

VI. PERSONNEL MISSING AS A RESULT OF HOSTILE ACTION.

A. Background.

1. The Missing Persons Act. Congress first enacted the Missing Persons Act in 1942 (current version codified at 37 U.S.C. §§ 551-59 and 5 U.S.C. 5561-69). The Act provided for payment of pay and allowances to missing service members, and it was not intended to be a law to account for missing persons.
2. DOD Personnel Missing as a Result of Hostile Action. In 1996, Congress passed legislation to account for persons missing as a result of hostile action (current version codified at 10 U.S.C. §§ 1501-1513). Among other provisions, the law and subsequent DOD instruction provide certain family members with due process rights.
 - a) The due process rights afforded certain individuals implement the holding in McDonald v. McLucas, 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974).

- b) In McDonald, plaintiffs argued that the Missing Persons Act and then-current Department of Defense (DOD) implementing policy violated the Due Process Clause of the Fifth Amendment because, among other things, no notice was given to the primary next-of-kin (PNOK) regarding the pendency of a status review nor any opportunity to be heard before a finding of death was made.

- c) The court found that plaintiff's had a property interest, protected by the Fifth Amendment, in the continuation of entitlements to pay and allowances granted to them under the Missing Persons Act. Therefore, the U.S. Constitution required the Services to provide such persons with notice and an opportunity to be heard before declaring that a service member in a missing status is dead.

B. Definitions.

- 1. Applicability. The statutory provisions on accounting for personnel missing as a result of hostile action apply to the following.
 - a) Members of the armed forces on active duty, or in the Reserve component performing official duties:
 - (1) Who become involuntarily absent as a result of a hostile action or under circumstances suggesting that the involuntary absence is a result of a hostile action; and
 - (2) Whose status is undetermined or who is unaccounted for.

 - b) The law requires the Secretary of Transportation to prescribe procedures for determining the status of personnel who are members of the Coast Guard. To the maximum extent practicable, the procedures must be similar to the procedures prescribed by the Secretary of Defense (*see* 10 U.S.C. 1510). The DoD makes its implementing guidance (Reference I.E.) applicable to the Coast Guard when operating as a Military Service of the Department of the Navy.

- c) Any other person who is a citizen of the U.S. and a civilian officer or employee of the DOD or an employee of a contractor of the DoD, as determined by the Undersecretary of Defense for Policy:
 - (1) Who serves in direct support of, or accompanies, the armed forces in the field under orders and becomes involuntarily absent as a result of a hostile action or under circumstances suggesting that the involuntary absence is a result of a hostile action; and
 - (2) Whose status is undetermined or who is unaccounted for.
- 2. Hostile Action. Acts of an opposing force, or friendly action in response thereto, resulting in the involuntary absence of persons described in subparagraph A, above, while engaged in an operational environment, or while going to or returning therefrom. For example, a friendly aircraft lost enroute to a target as a result of a mechanical malfunction, not the result of enemy fire, would be deemed to have been lost as a result of hostile action.
- 3. Missing Status. The status of a missing person who is determined to be absent in any of the following categories.
 - a) Missing. Defined as a person who is not present at his or her duty location due to apparent involuntary reasons and whose location is unknown.
 - b) Missing in Action. Defined as the involuntary absence of a person whose location is unknown; and
 - (1) The absence is a result of a hostile action; or
 - (2) The absence is under circumstances suggesting it is a result of a hostile action.

- c) Interned in a Foreign Country. A person is interned if he or she is definitely known to have been taken into custody of a nonbelligerent foreign power as the result of and for reasons arising out of any armed conflict in which the Armed Forces of the U.S. are engaged.
 - d) Captured. A person is captured if he or she has been seized as the result of action of an unfriendly military or paramilitary force in a foreign country.
 - e) Beleaguered. A person is beleaguered if a member of an organized element that has been surrounded by a hostile force to prevent escape of its members.
 - f) Besieged. A person is besieged if a member of an organized element that has been surrounded by a hostile force for the purpose of compelling it to surrender.
 - g) Detained in a foreign country against that person's will. A person is detained if he or she is prevented from proceeding or is restrained in custody for alleged violation of international law or other reason claimed by the Government or group under which the person is being held.
4. Missing Person. A missing person is a person who is in a missing status.
5. Accounted For. With respect to a person in a missing status:
- a) The person is returned to U.S. control alive;
 - b) The person's remains are recovered and, if not identifiable through visual means, are identified as those of the missing person by a practitioner of an appropriate forensic science; or
 - c) Credible evidence exists to support another determination of the person's status (such as when a person's remains have been destroyed and are, thus, unrecoverable).

6. Primary Next of Kin. A person who has been designated (in the following priority) as the surviving spouse, blood relative, adoptive relative or, if none of the above, a person standing in loco parentis.

7. Immediate Family Member.
 - a) The spouse;

 - b) A natural child, adopted child, stepchild, or illegitimate child (if acknowledged by the person or parenthood has been established by a court);

 - c) A biological parent, unless legal custody of the person by the parent was terminated by reason of court decree or otherwise under law and not restored;

 - d) A biological or adoptive brother or sister, if at least 18 years of age;

 - e) Any other blood relative or adoptive relative, including adoptive parents if the relative was given sole legal custody by a court decree or otherwise under law before the person attained the age of 18 and such custody was not terminated before that time.

C. Initial Report of Missing Persons.

1. Initial Duty Status (DODI 1300.18).
 - a) When a commander suspects that a person may be missing, the DoD requires that the Services place the person in an interim status called "Duty Status-Whereabouts Unknown" or "DUSTWUN." This is usually done within 24 hours of the person's whereabouts becoming unknown.

- b) This status is used when the commander suspects that a person's absence is involuntary but insufficient evidence prevents deciding the status of a person. This category serves to avoid placing a person in a missing status prematurely. The DUSTWUN status is useful during armed conflict when hostilities prevent an immediate capability to determine the service member's true status or search and rescue efforts are ongoing to determine the service member's true status.
- c) DUSTWUN is a temporary status only (not a missing category) and must be followed by a report/message revoking the initial casualty report of DUSTWUN in accordance with Service policy.
- d) If it is determined that a member is absent as a result of hostile action, the commander may only recommend a missing status. **Only the Service Secretary (or his delegee) may make the determination of actual status.** In such cases, DUSTWUN designation continues until the Secretary concerned determines the status.

2. Preliminary Assessment (10 U.S.C. § 1502; DODI 2310.5, Encl. 3).

- a) When an immediate commander (defined as a commander of a unit, facility or area to which a person is assigned) receives information showing that the whereabouts and status of a person covered by the Act are uncertain and that the absence may be involuntary, the commander must make a preliminary assessment of the circumstances.
- b) If the circumstances of the involuntary absence are questionable, for example, whether the absence resulted from hostile action, the commander must submit a preliminary assessment and recommendation. If the commander concludes that the person is missing, the commander must:
 - (1) Recommend that the person be placed in a missing status; and

- (2) Transmit a report containing the recommendation to the Secretary concerned no later than 10 days after receiving the information. The Service Secretary may extend this time limit for an additional 10 days on a case-by-case basis, but only on a showing of good cause.
 - (a) The report is generally made on DD Form 2812, "Commander's Preliminary Assessment and Recommendation Regarding Missing Person." This form is not always required. For instance, if evidence is obtained through news coverage or diplomatic channels, that evidence may be sufficient to enable a commander to make a preliminary assessment regarding the person's whereabouts and status and whether the absence of the person is involuntary.
 - (b) If recommending that a person be placed in a missing status, the commander must transmit an advisory copy of the preliminary assessment and recommendation to the Theater Component Commander having jurisdiction over the missing person.

3. Casualty Notification and Assistance.

- a) The desires of the military member, expressed in the record of emergency data concerning whom not to notify, should be honored, unless in the judgment of the commander, official notification by the Military Service should be made.
- b) Initial notification for personnel in a DUSTWUN or Missing Category.
 - (1) Initial notification is generally made in person by a service member:
 - (a) To PNOK; and

- (b) If the casualty occurred as a result of hostile action or terrorist activity, also to parents who are the secondary NOK.
- (2) All facts and circumstances known at the time of the initial notification must be provided to the NOK.
- c) Follow-on Notification and Casualty Assistance.
 - (1) For those service members who are determined to be deceased or missing, a casualty assistance representative must be appointed who is required to contact the NOK within 24 hours of the initial notification to set up a time to meet with the NOK.
 - (2) NOK of those in a DUSTWUN status must be kept informed of the progress in determining the service member's actual status. Casualty assistance is not provided unless the member's actual status is determined to be deceased or missing.

D. Initial Boards of Inquiry. (10 U.S.C. § 1503, DODI 2310.5, Encl. 4.)

- 1. Receipt by Service Secretary of a Commander's preliminary assessment recommending a person be placed in a missing status.
 - a) Secretary must review the preliminary assessment and, not later than 10 calendar days after receipt, appoint a board to conduct an inquiry into the whereabouts and status of the person.
 - b) An initial board of inquiry is not always required. For example, if the evidence regarding a covered person may be received through news coverage or discovered through diplomatic channels, it may be sufficient to enable the Secretary to make a status determination. Receipt of additional evidence could require the Secretary to appoint an initial board, such as cessation of hostilities without the return of the person.

- c) The Secretary may appoint a single board to inquire into the whereabouts and status of two or more persons where it appears that their absence is factually related.

2. Composition of the Board.

- a) The board must consist of at least one person who has experience with, and understanding of, military operations or activities similar to the operation or activity in which the person disappeared. The person must be:

- (1) A military officer, in the case of an inquiry regarding a service member;
- (2) A civilian, in the case of an inquiry regarding a civilian employee of the DOD or a DOD contractor; or
- (3) At least one military officer and a civilian, in the case of an inquiry regarding one or more service members and one or more civilian DOD employees or DOD contractors. The ratio of service members to civilians should be roughly proportional to the ratio of number of service members and civilians subject to the board of inquiry.

- b) Security Clearance. A member may be appointed to the board only if he or she has a sufficient security clearance to afford access to all information relating to the whereabouts and status of the person(s) covered by the board of inquiry.

- c) Legal Advisor.

- (1) The Secretary must assign a judge advocate to the Board, or appoint an attorney, who has expertise in the law relating to missing persons, the determination of death of such persons, and the rights of family members and dependents of such persons.

- (2) Duties of the legal advisor include advising the Board on questions of law or procedure pertaining to the Board, instructing the Board on governing statutes and directives, and monitoring (observing) the deliberations of the Board.

3. Duties of the Board. The Board's duties include:

- a) Collecting, developing, and investigating all facts and evidence relating to disappearance or whereabouts and status of the person;
- b) Collecting appropriate documentation of the facts and evidence covered by the Board's investigation;
- c) Analyzing facts and evidence, making findings that are supported by a preponderance of the evidence based on that analysis, and drawing conclusions as to the current whereabouts and status of the person; and
- d) Recommending to the Service Secretary that:
 - (1) The person be placed in a missing status;
 - (2) The person be declared deserted, absent without leave, or dead; or
 - (3) The person is accounted for, such as when credible evidence exists to support a determination that a person's remains have been destroyed and are unrecoverable.

4. Board Proceedings. The board must:

- a) Collect, record, and safeguard all facts, documents, statements, photographs, tapes, messages, maps, sketches, reports, and other information relating to the whereabouts and status of the person(s);
- b) Gather information relating to actions taken to find the person(s);

- c) Arrive at its findings and recommendations by majority vote and ensure that its findings are supported by a preponderance of the evidence;
 - d) Maintain a record of its proceedings; and
 - e) Close the proceedings to the public, including the PNOK, other immediate family members, and any previously designated person of the missing person (i.e., a person designated by the missing person to receive information on the whereabouts and status of the missing person).
5. Counsel for Missing Person. Each person named in the inquiry is entitled to a counsel. If the absence or missing status of two or more persons may be factually related, one counsel may represent all such persons, unless a conflict results.
- a) The missing person's counsel represents the interests of the missing person and not those of any member of the person's family or other interested parties.
 - b) To be appointed, a person must:
 - (1) Be a judge advocate;
 - (2) Be a graduate of an accredited law school or a member of the bar of a Federal court or the highest court of a State; or
 - (3) If other than a judge advocate, be a member of the bar of a Federal court or of the highest court of a State.
 - c) The person must also:
 - (1) Be certified as competent to perform his or her duties by The Judge Advocate General of the Service for which he or she is a member or, if a civilian, the Secretary concerned who appointed the Board;

- (2) Have a security clearance that affords counsel access to all information relating to the whereabouts and status of the person; and
 - (3) Have expertise in the law relating to missing persons, the determination of the death of such persons, and the rights of family members and dependents.
- d) Access. The missing person's counsel:
 - (1) Must have access to all facts and evidence the Board considers;
 - (2) Observe all official activities of the Board during the proceedings; and
 - (3) Monitor (observe) the Board deliberations.
- e) A missing person's counsel must also assist the Board in ensuring all appropriate information about the case is collected, logged, filed, and safeguarded. The NOK and previously designated person have the right to submit information to the missing person's counsel.
- f) Independent Review. The missing person's counsel must conduct an independent review of the Board's report. This review is made an official part of the Board's record and accompanies the report to the Secretary for final decision.

6. Board Report.

- a) The Board must submit a report within 30 calendar days of its appointment using DD Form 2811, Report of Proceedings by Initial/Subsequent Board of Inquiry or Further Review Board, to prepare its report.
- b) The report must include:

- (1) A discussion of the facts and evidence the Board considered and the recommendation with respect to each person the report covers;
 - (2) Disclosure of whether the Board reviewed classified documents and information or used them otherwise in forming its recommendation; and
 - (3) The missing person's counsel's independent review of the Board's report.
- c) An initial Board of inquiry may not recommend that a person be declared dead unless:
- (1) Credible evidence exists to suggest that the person is dead;
 - (2) The U.S. possesses no credible evidence that suggests that the person is alive; and
 - (3) Representatives of the U.S.:
 - (a) Have completely searched the area where the person was last seen (unless, after making a good faith effort to obtain access to the area, the representatives are not granted access); and
 - (b) Have examined the records of the Government or entity having control over the area where the person was last seen (unless, after making a good faith effort to obtain access to the records, the representatives are not granted access).
- d) If the Board recommends that a missing person be declared dead, the Board must include in their report:
- (1) A detailed description of the location where the death occurred;

- (2) A statement of the date on which the death occurred;
 - (3) A description of the location of the body, if recovered; and
 - (4) If the body was recovered and is not identifiable through visual means, a certification by a forensic pathologist that the body is that of the missing person.
- e) Disclosure of Report. The report may not be made public, except to PNOK, other members of the immediate family, and any other previously designated person, until one year after the date on which the report is submitted. Classified portions may not be made available to the public or the NOK.

7. Secretary Determination.

- a) The Secretary must review the report within 30 calendar days of receipt and determine whether the report is complete and free of error. If incomplete, the Secretary may return the report to the Board for further action.
- b) If the Secretary determines the report is complete and free of administrative error, he or she will determine the status of the missing person(s), including whether the person(s) shall be declared:
 - (1) Missing;
 - (2) Deserted;
 - (3) Absent without leave; or
 - (4) Dead.

8. Report to Family Members and Other Interested Persons. No later than 30 calendar days after the date the Secretary determines status, the Secretary must provide the PNOK, immediate family, and other previously designated person:

- a) An unclassified summary of the unit commander's preliminary assessment and recommendation and the Board report (including the names of the members);
- b) Notice that the U.S. will conduct a subsequent inquiry into the whereabouts and status of the missing person(s) upon the earlier of:
 - (1) On or about one year after the date of the first official notice of the disappearance; or
 - (2) Information becomes available that may result in a change in status.

9. Extensions. The Secretary may grant extensions of the times periods, but only on a case-by-case basis for good cause and only for a period not in excess of the period for which the extension is granted.

E. Subsequent Boards of Inquiry. (10 U.S.C. § 1504, DODI 2310.5, Encl. 5.)

1. Requirement to Conduct Subsequent Boards of Inquiry.

- a) If, during the year following the date of the transmission of a commander's initial report credible information becomes available that may result in a change of the person's status the Secretary must appoint a subsequent board of inquiry to inquire into the information.

- b) In the absence of such information, the Secretary must appoint a subsequent Board of inquiry to inquire into the whereabouts and status of a missing person on or about one year after the date of the transmission of a commander's initial report on the person. One board may be appointed for two or more persons if their absence or missing status appears to be factually related.

2. Board Composition.

- a) The board must be composed of at least three members as follows:
 - (1) Officers in the grade of major or lieutenant commander or above in the case of a Board that will inquire into the whereabouts and status of a service member(s).
 - (2) If the Board will inquire into the whereabouts and status of one or more DOD civilian employees or contractors (and no service member), not less than three DOD employees whose rate of annual pay is equal to or greater than the rate of annual pay payable to a GS-13 and service members, as the Secretary concerned considers advisable.
 - (3) If the Board will inquire into the whereabouts and status of both, the Board must include at least one officer in the grade of major or lieutenant commander or above and at least one DOD employee in the grade of GS-13 or above. Ratios must be roughly proportionate to the ratio of persons being considered.
- b) The Board must include at least one member who has an occupational specialty similar to that of one or more of the persons covered by the inquiry and an understanding of and expertise in the type of official activities that one or more such persons were engaged in at the time such person or persons disappeared.
- c) The Secretary must designate one member as president of the Board, who must have a proper security clearance.

- d) The Board must have, for purposes of providing legal counsel to the Board, a judge advocate assigned or an attorney appointed by the Secretary who has expertise in the law relating to missing persons.

3. Duties of the Board.

- a) The Board must review the commander's preliminary assessment and recommendation and the report of the initial Board of inquiry.
- b) The Board must also collect and evaluate any document, fact, or other evidence with respect to the whereabouts and status of the person that has become available since the determination of the status of the person during the initial Board process. Considering the evidence, the Board must determine, by a preponderance of the evidence:
 - (1) Whether the status of the person should be continued or changed; or
 - (2) If appropriate, whether the person is accounted for (such as when credible evidence exists to support a determination that the person's remains have been destroyed and are unrecoverable).
- c) Report. The Board must submit a report to the Secretary describing their findings and conclusions, together with a recommendation for determination by the Secretary.

4. Counsel for Missing Person.

- a) Counsel must be appointed to represent each person the subsequent Board of inquiry covers. When circumstances permit, counsel should be the same individual who represented the missing person during the initial Board. The qualifications, rights, and duties of the counsel are the same as those for the initial Board.

- b) The missing person's PNOK and other previously designated person shall have the right to submit information to the missing person's counsel relative to the disappearance and status of the missing person.
- c) The missing person's counsel must submit a written review of the Board's report, which becomes part of the official record.

5. Attendance of Family Members and Certain Other Interested Persons at Proceedings.

- a) The missing person's PNOK, other immediate family members, and any other previously designated person must be given notice not less than 60 calendar days before the first meeting of the Board that they may attend the proceedings. The person must then notify the Secretary of their intent, if any, to attend the proceedings not later than 21 calendar days after the date on which they received notice.
- b) Persons attending the proceedings of the Board may:
 - (1) If PNOK or designated person, attend with private counsel;
 - (2) Have access to the case resolution file and unclassified reports relating to the case;
 - (3) Be afforded the opportunity to present information at the proceedings that such individual considered relevant; and
 - (4) Have the opportunity to submit in writing an objection to any recommendation of the Board regarding the status of the missing person, provided:
 - (a) A letter of intent is submitted to the president not later than 15 calendar days after the date on which the recommendations are made; and

- (b) The written objections are submitted to the president not later than 30 calendar days after the date on which the recommendations are made. Timely objections will be made part of the report.
 - c) Family members, including the PNOK, are not entitled to reimbursement for any costs.
- 6. Board Recommendation. The Board must make a recommendation as to the current whereabouts and status of each missing person, based on the findings that are supported by a preponderance of the evidence. The prerequisites for recommending that a person be declared dead are the same as those for the initial Board of inquiry.
- 7. Board Report. The Board must submit a report to the Secretary concerned. Board report requirements are the same as those for an initial Board of inquiry.
- 8. Action by the Secretary. No later than 30 days after receipt of the Board report, the Secretary must review the report, along with the report of the missing person's counsel and objections, if any, to the report submitted to the president by the PNOK, other family members, and any previously designated person. If the Secretary determines the report is complete and free of administrative error, the Secretary must determine the status of each person the report covers.
- 9. Report to Family Members and Other Interested Persons.
 - a) No later than 60 days after the date the Secretary determines the missing person's status, the Secretary must provide the report (without classified portions) to the PNOK, other immediate family members, and any designated person.
 - b) These individuals are also informed that the U.S. will conduct a further review board into the whereabouts and status of the person if the U.S. Government receives information in the future that may change the status of the person.

10. Extensions. The Secretary may grant extensions of the times periods, but only on a case-by-case basis for good cause and only for a period not in excess of the period for which the extension is granted.
- F. Further review boards. (10 U.S.C. § 1505, DODI 2310.5, Encl. 6.)
1. Discovery or Receipt of New Information.
 - a) When the Director, Defense Prisoner of War/Missing in Action Office (DPMO) receives information from a U.S. intelligence agency or other Federal Government element relating to a missing person, the Director must:
 - (1) Ensure that the information is added to the missing person's case resolution file; and
 - (2) Notify the following of the information:
 - (a) The missing person's counsel;
 - (b) The PNOK and any previously designated person;
 - (c) The appropriate Service Casualty/Mortuary Affairs Office;
 - (d) The Secretary concerned or his designee.
 - (3) The Director, with the advice of the missing person's counsel, must decide whether the information is significant enough to require a review by a further review board.
 - (4) If the Director decides to appoint a review board, he or she notifies the Secretary concern, who must appoint the Board.

2. Composition of the Board. The composition of the review Board and the duties of the legal advisor are the same as for the subsequent Board. Additionally, the Secretary must designate a president who has a security clearance that affords him or her access to all relevant information.
3. Duties of the Board. The Board must:
 - a) Review the commander's preliminary assessment and recommendation, the report of the initial Board of inquiry and the report of the subsequent Board of inquiry;
 - b) Collect and evaluate any document, fact, and other evidence that has become available since the subsequent Board of inquiry's determination of status, and draw conclusions as to the whereabouts and status of the person;
 - c) Decide whether, by a preponderance of the evidence, the status of the person should be continued or changed or, if appropriate, whether the person is accounted for; and
 - d) Submit to the Secretary a report describing the findings and conclusions of the further review Board, together with a recommendation for a determination concerning the whereabouts and status of the person.
4. Counsel for the Missing Person.
 - a) The Secretary must appoint a counsel for the missing person with the same qualifications as those for the missing person's counsel for the initial and subsequent Boards of inquiry, and notify the PNOK and any designated person of the appointment.
 - b) The PNOK and any designated person have the right to submit information to the counsel relative to the disappearance or status of the missing person.
 - c) The missing person's counsel must review the board report, which is made part of the record.

5. Attendance by Family Members. PNOK, other immediate family members, and any previously designated person may attend the proceedings of the Board. The notification procedures and rights and obligations of personnel are the same as those prescribed for the subsequent Board of inquiry.
6. Recommendation on Status. The Board's recommendation regarding status must be based on a preponderance of the evidence. A majority vote determines the Board's findings and recommendations. The prerequisites for a further review board recommending that a person be declared dead are the same as those for initial and subsequent Boards.
7. Action by the Secretary Concerned. Actions the Secretary takes following receipt of the report are the same as those for a subsequent Board of inquiry.
8. Report to Family Members. Actions the Secretary must take to provide the Board's report to family members and the time by which those actions must be accomplished are the same as those for a subsequent Board.

G. Judicial review. (10 U.S.C. § 1508)

1. The law provides that the PNOK or other previously designated person of a missing person who is declared dead by an initial, subsequent, or further Board may obtain judicial review in a U.S. district court of that finding.
2. Judicial review may be obtained only on the basis of a claim that there is information that could affect the status of the missing person's case that was not adequately considered during the administrative review process.

H. Release of information. (DODI 2310.5.)

1. The Secretary must, upon request, release the contents of a missing person's case resolution file to the PNOK, other immediate family members, and any other previously designated person.

2. Classified information, debriefing reports, or information protected by the Privacy Act or by other applicable laws and regulations may be made available, for official use only, to personnel within the DOD possessing the appropriate security clearance and having a valid need to know.

VII. INSPECTOR GENERAL INVESTIGATIONS. AR 20-1, Inspector General Activities and Procedures, 29 Mar 02.

A. TWO TYPES OF IG INVESTIGATIVE MECHANISMS.

1. Investigative inquiries. Informal fact-finding process to gather information needed to resolve allegations or issues when investigative techniques are appropriate but circumstances do not merit an IG investigation. Inquiries conducted into “improprieties.” If inquiry develops evidence to substantiate misconduct, inquiry ends---matter may be referred to CID, or commander may appoint AR 15-6 investigation, or, in rare instances, it may become an IG investigation. Only substantiated inquiries need to have a written legal review.
2. Investigations. Fact-finding examination by detailed IG into allegations, issues, or adverse conditions to provide the directing authority a sound basis for decisions and actions. Normally addresses allegations of wrongdoing by an individual. IG must obtain written directive by appointing authority. Written legal review required. Verbal notification required of the commander/supervisor of nature of allegations against the subject/suspect, and verbal notification of the results to commander/supervisor. Should not contain recommendations for adverse action against suspect/subject.
3. IGs should not normally investigate when substantiation of allegations are likely to establish criminal misconduct or likely to result in adverse action against individual.

B. Benefits. Trained, thorough investigators; keeps matter in-house, at least to start with; useful when there is no skilled, sufficiently senior AR 15-6 IO available.

C. Disadvantages. Restrictions on releasing reports of investigation; cannot use evidence for adverse action without TIG authorization; may be necessary to duplicate IG work with AR 15-6 to obtain usable evidence.

D. Release of IG Records.

1. IG records are available within DA for those having need for the record "in the official performance of their duties." AR 20-1, para. 3-6.
2. IG investigations and inquiries may be reviewed by HQDA command and promotion boards.
3. Records of unsubstantiated IG complaints will normally be retained for three years after the case is closed (longer in some circumstances in cases against senior officials).

E. Special reporting and investigating requirements.

1. Allegations against field grade officers and senior NCOs. IGs must report to TIG any Inspector General Action Request (IGAR) containing an allegation against a MSG, SGM, and CSM, or any officer in the grade of MAJ through COL within 2 working days after receipt, if the allegation resulted in the initiation of an IG investigation or investigative inquiry or a command-directed action such as an AR 15-6 investigation, commander's inquiry, or referral to USACIDC.
2. Allegations against GO, BG selectee, SES or equivalent.
 - a) All must be reported to DAIG. Investigation by DAIG or (rarely) DODIG.
 - b) All allegations, whether eventually substantiated or unsubstantiated, are maintained in database, for use during background checks.
 - c) A General Officer may receive a Memorandum of Reprimand based upon a DAIG Investigation (ROI). The reprimand must be authorized by the SA, US of A, CSA, VCSA, or TIG. AR 20-1, para. 3-3.

3. Adverse comments: If unfavorable information is obtained which may result in an adverse comment in the ROI and the individual is not informed of unfavorable information during investigation, the IG must advise the individual of the substance of the investigation before it is completed and provide an opportunity to comment on unfavorable information.

VIII. LINE OF DUTY DETERMINATIONS/INVESTIGATIONS.

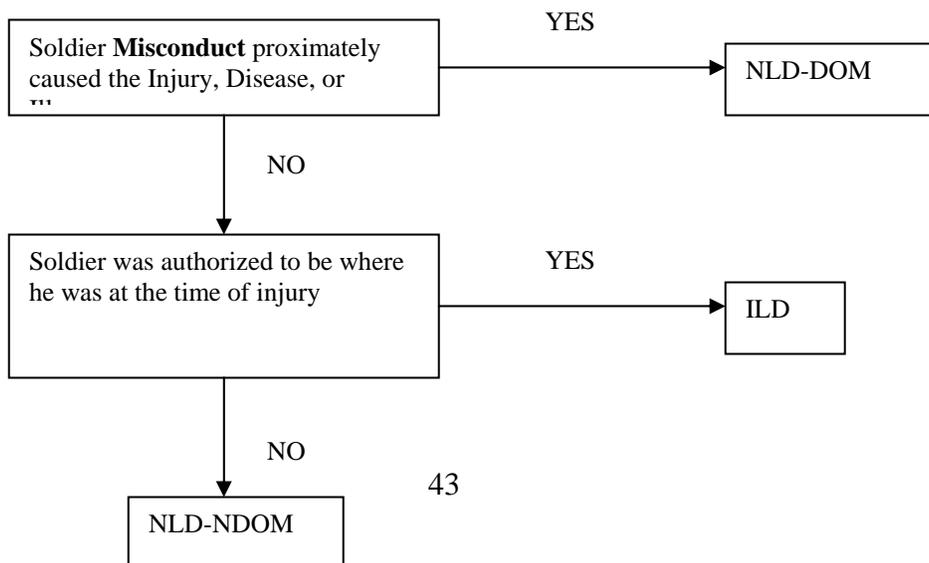
A. Two-step analysis:

1. Did the service member's misconduct proximately cause the injury, illness, or disease?
2. What was the service member's status?

B. Three possible outcomes:

1. Not in Line of Duty-Due to Own Misconduct (NLD-DOM).
2. In Line of Duty (ILD).
3. Not in Line of Duty-Not Due to Own Misconduct (NLD-NDOM).

C. Chart:



Examples:

1. **In Line of Duty**. Soldier is injured in car crash. Crash is caused by another driver's negligence. Soldier is considered to be in the line of duty.
2. **Not in Line of Duty Not Due to Own Misconduct**: Soldier is AWOL (while mentally sound), but otherwise doing nothing wrong. While walking down the street, soldier is hit by a car that jumps the curve and seriously injured. Soldier is considered to be not in the line of duty, but not due to own misconduct. **NOTE: NLOD-NDOM may also be based on an EPTS condition, not aggravated by service, in the case of an RC soldier (para. 41-8e(2)).**
3. **Not in Line of Duty Due to Own Misconduct**: Soldier gets drunk at a party and attempts to drive home but is involved in an accident on the way. Soldier is considered to be not in the line of duty due to own misconduct.

D. Impact of LOD Determinations.

1. **In Line of Duty (ILD)**. Soldier may be entitled to:
 - a) Army Disability Retirement or Separation Compensation.
 - b) DVA Compensation and Hospitalization Benefits.
 - c) Incapacitation Pay (ARNG/USAR).
2. Not in Line of Duty - Not Due to Own Misconduct (NLD-NDOM) and Due to Own Misconduct (NLD-DOM):

- a) If on active duty, soldier is denied disability retirement or separation compensation.
 - b) If disabled after leaving AD, soldier may be denied DVA disability or hospitalization benefits.
 - c) May be denied civil service preference.
 - d) ARNG/USAR soldiers may be denied incapacitation pay.
3. Not in Line of Duty-Due to Own Misconduct (NLD-DOM):
- a) Days lost > 1 added to service obligation.
 - b) Days lost > 1 may be excluded from computations for pay and allowances.
 - c) May result in loss of pay where disease (not injury) immediately follows intemperate use of drugs (includes alcohol).

E. Procedures.

1. Presumptive Finding of In Line of Duty – No investigation is required when:
- a) A disease does not involve a factor cited at paragraph C below.
 - b) Injury is clearly incurred as the result of enemy action or terrorist attack.
 - c) Death by natural causes **or** death occurs while a passenger on a common commercial carrier or military aircraft.
2. Informal Investigation **by the Unit Commander:**

- a) No misconduct is suspected.
- b) No negligence is suspected.
- c) Formal investigation is not required.
- d) At a minimum, the MTF representative and commander must sign a DA Form 2173. Supporting exhibits should be attached.
- e) SPCMCA is appointing and approving authority. SPCMCA should approve informal investigation in writing “By Authority of the Secretary of the Army.”
- f) **KEY:** Informal investigation can **only** result in an ILD determination.

3. Formal Investigation. Appointing Authority (SPCMCA) must conduct a formal Investigation through an Investigating Officer (IO) when any of the following factors are present:

- a) Strange or doubtful circumstances.
- b) Injury or death involving alcohol or drug abuse.
- c) Self-inflicted injuries or suicide.
- d) Injury or death incurred while AWOL.
- e) Training death of a USAR/ARNG soldier.
- f) Injury or death of a USAR or ARNG member while traveling to or from authorized training or duty.
- g) Injury or death occurring while en route to final acceptance in the Army.

- h) USAR/ARNG soldier serving active duty tour of 30 days or less is disabled by disease.
- i) In connection with an appeal of an unfavorable finding of alcohol or drug abuse.
- j) A valid request for formal investigation is made (e.g., requested by the Physical Disability Agency).

4. Evidentiary standards and presumptions:

- a) Soldier is presumed ILD **UNLESS** refuted by substantial evidence contained in the investigation.
- b) A finding or determination must be supported by a greater weight of evidence than supports any different conclusion.
- c) A reasonable person must be convinced of the truth or falseness of a fact considering equally direct and indirect evidence.
- d) **KEY:** Must use the rules in Appendix F.
- e) The general guidance contained in AR 15-6 applies unless AR 600-8-1 provides more specific or different guidance.

5. Other Services.

- a) When a member of another service is injured, dies, or incurs a disease under circumstances warranting a Line of Duty investigation, the MTF Commander will notify the nearest command of the parent service.
- b) If the parent service requests an investigation, the Army will conduct one and forward it to the parent command.

F. Procedural Due Process Requirements.

1. During Evidence Collection
 - a) Soldier not required to make a statement against interest.
 - b) Soldier must be advised that he or she does not have to make a statement against interest.
 - c) If soldier is not informed of right not to make statement, or is forced to make statement, it cannot be used in making the LOD determination (10 USC § 1219).

2. Regarding Adverse Findings
 - a) IO must provide soldier with written notice of proposed adverse finding, a copy of the investigation, and the supporting evidence.
 - b) IO must issue warning regarding making statements against interest
 - c) IO must give a reasonable opportunity to reply in writing and to offer rebuttal.
 - d) If IO receives a response, it must be considered before findings are finalized. If IO does not receive a response, the IO may proceed to finalize the findings

3. Final Approving Authority (GCMCA or Field Grade Designee) Decision
 - a) Final approving authority either approves or disapproves the finding under the authority of the Secretary of the Army.
 - b) The report must be forwarded to the service member through his command.
 - c) The transmittal letter must notify the service member of his right not to make a statement against interest and of his appellate rights.

4. Appellate Rights

- a) The service member may appeal in writing within 30 days after receipt of the notice of adverse finding.
- b) The service member's appeal is to the final approving authority.
- c) The final approving authority may only change the finding to "in line of duty," based on substantial new evidence.

G. Judge Advocate Involvement/Considerations.

1. Advising the IO.

2. Understanding the Evidentiary Standards (para. 39-5)

- a) "Substantial evidence" and evidence with a "greater weight than supports any different conclusion" must support LD findings and determinations.
- b) Evidence can be direct or indirect but must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.
- c) In order to support a NLOD-DOM finding, the evidence must show that the injury or disease was proximately caused by the member's intentional misconduct or willful negligence.
- d) Balancing the ILD presumption with specific rules.

3. Legal Review on Behalf of the Command.

- a) Have requirements been complied with?
- b) Is there error?

- c) Are findings supported by substantial evidence?
- d) Are potential claims involved? NOTE: COORDINATE ALL VEHICLE ACCIDENT CASES WITH AFFIRMATIVE CLAIMS SECTION.

4. The Legal Assistance Perspective.

H. Special Considerations.

1. Cases Involving Death.

- a) AR 600-8-1, 18 September 1986, paragraph 41-12, states that line of duty determinations will not be made in cases involving death. That rule now applies only with regard to deaths that occurred before 10 September 2001.
- b) Memorandum, Office of the Assistant Secretary of Defense (Force Management Policy), 1 May 2002, subject: Survivor Benefit Plan (SBP) Annuities when Member Dies on Active Duty, now requires the services to make line of duty determinations in all cases involving deaths that occurred on or after 10 September 2001.

2. Cases Involving Suicide or Attempted Suicide.

- a) AR 600-8-1, 18 September 1986, paragraph 41-11, requires that in all cases of suicide or attempted suicide, a mental health officer will render an opinion as to the self-destructive behavior and whether the service member was **mentally sound or unsound** at the time of the incident.
- b) A member may not be held responsible for his or her self-destructive acts if, as a result of mental defect, disease, or derangement, the member was unable to comprehend the nature of such acts or to control his or her actions.

- c) Mental unsoundness will not cause a suicide or attempted suicide to be in line of duty if the mental condition existed prior to service and was not aggravated by service.
- d) AR 600-8-1, 18 September 1986, paragraph 41-11, requires that in all cases of suicide, a mental health officer complete a psychological autopsy. IAW memorandum, The Assistant Secretary of Defense (Health Affairs), 4 June 2001, subject: Psychological Autopsies, full-blown psychological autopsies are no longer required in suicide cases when the manner of death has been determined with certainty. A mental soundness assessment is always required, as explained above.

I. PERSCOM Authority.

- 1. UP AR 600-8-1, 18 September 1986, paragraph 38-3, the Commanding General, U.S. Total Army Personnel Command (formerly U.S. Army Military Personnel Center), acts for the Secretary of the Army on all line of duty cases and appeals and for all exceptions to the procedures described in that regulation.
- 2. UP AR 600-8-1, 18 September 1986, paragraph 41-17, the Commanding General, U.S. Total Army Personnel Command, or his designee, may change a finding made under that regulation.
- 3. NOTE: THE INVESTIGATION AND YOUR LEGAL REVIEW WILL BE SCRUTINIZED AT PERSCOM. BE THOROUGH IN YOUR REVIEW.

J. Top Ten Line of Duty Questions Asked of a JA.

- 1. Is there a line of duty regulation?
- 2. Are line of duty determinations made in death cases?
- 3. Is a suicide or attempted suicide presumed to be in line of duty? What specific determinations are necessary?

4. Is there more than one appeal opportunity when a finding of not in line of duty is contemplated?
 5. Are there potential claims ever associated with vehicle accidents? Could a claim ever result from a one-vehicle accident involving only the soldier?
 6. Can the injury or disease of a reserve component soldier ever be incurred in line of duty when the soldier is not on active duty?
 7. What will be the number designation of the new line of duty regulation?
 8. When is an injury or disease not in line of duty – not due to own misconduct?
- K. Will a soldier be required to reimburse the Army for hospital costs associated with the treatment of an injury that was the result of his or her own misconduct?

IX. MILITARY WHISTLEBLOWER PROTECTION ACT.

- A. Title 10, U.S. Code, sec. 1034; DoDD 7050.6, Military Whistleblower Protection, 23 Jun 00; AR 20-1, Inspector General Activities and Procedures, 29 Mar 02; and AR 600-20, Army Command Policy, 13 May 02).
- B. No person may:
1. Restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.
 2. Take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a protected communication (described in subparagraph B, below), made to a member of Congress, an IG, a member of a DoD audit, inspection, investigation, or law enforcement organization, an Equal Opportunity Office, or to the service member's chain of command or supervisor.

- C. A “protected communication” is a communication in which a soldier complains of, or discloses information that the soldier reasonably believes constitutes evidence of, any of the following:
 - 1. A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination; or
 - 2. Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety.

- D. Authority to Investigate and Act on Complaints of Reprisal.
 - 1. TIG has limited the authority to MACOM and higher level IGs to investigate allegations of individuals taking or threatening to take unfavorable personnel actions or withholding or threatening to withhold favorable personnel actions as reprisal against a member of the Armed Forces for making or preparing a protected communications. (AR 20-1, paragraph 8-9c(1))
 - 2. If a soldier makes a reprisal allegation, the IG must contact DAIG Assistance Division within 2 days. Based on the coordination with DAIG, the DAIG will formally advise IG, DoD of the complaint.
 - 3. The IG, DoD is the final approval authority for cases involving allegations of whistleblower reprisal.

X. EQUAL OPPORTUNITY COMPLAINTS.

- A. AR 600-20, Appendix E.

- B. Reports to GCMCA. Must be reported within 72 hours to the GCMCA. The commander must also provide a progress report to the GCMCA 20 days after the date on which the investigation commenced and 14 days thereafter until complete.

- C. Timelines for investigation. The commander to whom the complaint is referred must conduct an investigation, either personally or through appointment of an investigating officer, within 14 calendar days or three MUTA 4 weekend drill periods for Reserve components after receipt of the complaint.
1. If, due to extenuating circumstances, it is impossible to conduct a completed investigation within this time period, the commander may obtain an extension from the next higher commander for usually not more than 30 calendar days or two MUTA 4 drill periods for Reserve components. Any additional extensions must be approved in writing by the first general officer in the chain of command.
 2. Failure to adhere to the above prescribed timelines will result in automatic referral of the complaint to the next higher echelon commander for investigation and resolution.
- D. Written feedback.
1. The commander must provide written feedback to the complainant not later than 14 calendar days or the end of the third MUTA 4 period for Reserve components after receiving the complaint and then provide updates every 14 calendar days or three MUTA 4 drill periods until final resolution. Feedback must be consistent with the Privacy Act and FOIA.
 2. Written feedback to alleged perpetrator. The commander must also provide written feedback to the alleged perpetrator on the outcome of the investigation and subsequent actions to be taken by the chain of command. Feedback must be consistent with the Privacy Act and FOIA.
- E. Appeals. The complainant or alleged perpetrator may file an appeal within 7 calendar days or at the next MUTA 4 drill period for Reserve components following notification of the results of investigation. The commander then has 3 calendar days or one MUTA 4 drill period for Reserve components to refer the appeal to the next higher unit commander. The appellate commander then has 14 calendar days or three MUTA 4 periods for Reserve components to review the case, act on the appeal, and provide written feedback to the complainant on the results of the appeal
- F. Final resolution. Complaints not resolved at brigade level may be appealed to the GCMCA. Decisions at this level are final.

- G. Complaints from non-TPU Reservists. If the complainant is a reservist serving in the IRR or not assigned to a unit the complaint procedures are the same as for active duty personnel. Upon receiving a complaint from members of the IRR or IMA, from soldiers performing ADSW or TTAD, or from any reservist not a member of a troop program unit, commanders must make every attempt to resolve the complaint prior to the completion of the soldiers AD tour.
1. If not resolved prior to REFRAD, the timelines will be modified. The Active or reserve component commander has 30 calendar days from the filing of the complaint to notify the complainant of the results of the investigation/actions taken to resolve the complaint.
 2. The complainant and subject have 30 calendar days from notification of the results of investigation to file an appeal.
 3. Notification of the final decision must be provided to the complainant and subject within 30 calendar days of the receipt of the appeal.
- H. Complaints from non-TPU members filed after the AD tour has ended. If the complaint is filed after the AD tour has ended, the complainant will file a sworn complaint on DA Form 7279-R to AR-PERSCOM EOA. The complaint will then be forwarded to the appropriate commander of the subject of the complaint active duty unit for investigation. The timelines are the same as in subparagraph 5, above.

XI. OTHER INVESTIGATIONS/OTHER SERVICES.

1. Reports of Survey: AR 735-5, 31 January 1998, *Policies and Procedures for Property Accountability*.
2. Flying Evaluation Boards: AR 600-105, 15 December 1994, *Aviation Service of Rated Army Officers*.
3. Conscientious Objection; AR 600-43, 15 May 1998, *Conscientious Objection*.
4. Information Security: AR 380-5, 25 February 1988, *Department of the Army Information Security Program*.

B. Air Force:

1. Accident/Mishap Investigation Boards. AFI 51-503, *Aircraft, Missile, Nuclear, and Space Accident Investigations*, 1 December 1998.
2. Safety Investigation Boards. AFI 91-204, *Safety Investigations and Reports*, 29 November 1999.
3. Information Security. AFI 31-401, *Information Security Management*, 1 January 1999.
4. Line of Duty. AFI 36-2910, *Line of Duty (Misconduct) Investigations*, 15 August 1994.
5. Reports of Survey. AFMAN 23-220, *Reports of Survey for Air Force Property*, 1 July 1996.
6. Conscientious Objectors. AFI 36-3204, *Procedures for Applying as a Conscientious Objector*, 15 July 1994.

C. Navy

1. Aviation accident investigations. *Naval Aviation Safety Program*, OPNAV 3750.6Q.
2. Safety Investigations. Afloat, *Navy Occupational Safety and Health (NAVOSH) Program Manual for Forces Afloat*, OPNAVINST 5100.19 D. Ashore, *Navy Occupational Safety and Health (NAVOSH) Program Manual*, OPNAVINST 5100.23 E.
3. Line of duty. JAGINST 5800.7C (Manual of the Judge Advocate General) 0221-0241.
4. Loss of property. JAGINST 5800.7C (Manual of the Judge Advocate General) 0250.

APPENDIX A

OTJAG

Investigating Officer Handbook

ARMY REGULATION 15-6

INVESTIGATION GUIDE

FOR

INFORMAL INVESTIGATIONS

JANUARY, 1997

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INTRODUCTION

1. PURPOSE:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are applicable to formal investigations. It may also be used by legal advisors responsible for advising investigating officers. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. This guide includes the changes implemented by Change 1 to AR 15-6. Many of those changes are significant; consequently, the information in the guide based on the changes is italicized.

2. DUTIES OF AN INVESTIGATING OFFICER: The primary duties of an investigating officer are:

- a. to ascertain and consider the evidence on all sides of an issue,
- b. to be thorough and impartial,
- c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority, and
- d. to report the findings and recommendations to the appointing authority.

3. AUTHORITY:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that usually have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is designated.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as reports of survey and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6 or these procedures, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contains time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, or DA civilian employees paid under the General Schedule, Level 13 (GS 13), or above may be investigating officers. The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, *the appointing authority should select the best qualified person for the duty based on their education, training, experience, length of service, and temperament.*

PRELIMINARY MATTERS

1. Appointing authority.

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations:

- any general court-martial convening authority, including those who have such authority for administrative purposes only,

- any general officer,

- a commander at any level,

- a principal staff officer or supervisor in the grade of major or above,

- any state adjutant general, and

- a DA civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.

b. *Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of \$1,000,000, the loss or destruction of an Army aircraft or missile, an injury or illness resulting in, or likely to result in, total disability, or the death of one or more persons.*

2. Appointment procedures. Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

3. Obtaining assistance. The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers should always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. In serious or complex investigations for which a legal review is mandatory, this requirement should be included in the appointment letter. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer. NOTE: *Complex and sensitive cases include*

those involving a death or serious bodily injury, those in which findings and recommendations may result in adverse administrative action, and those that will be relied upon in actions by higher headquarters.

4. Administrative matters. As soon as the investigating officer receives appointing orders, he or she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received, whether verbal or written. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology should be part of the final case file.

5. Concurrent investigations. *An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency to avoid duplication of effort wherever possible. If available, the results of other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer. Additionally, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct.*

CONDUCTING THE INVESTIGATION

1. Developing an investigative plan.

a. The investigating officer's primary duty is to gather evidence, and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of (1) an understanding of the facts required to reach a conclusion, and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The investigating officer should begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required.

2. Obtaining documentary and physical evidence.

a. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.

b. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to back these findings up with documentary evidence as it is to document adverse findings. All too frequently an investigating officer who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect. The report of

investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the finding of no fault, no loss, or no wrongdoing is supported by the evidence.

3. Obtaining witness testimony.

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically should be documented in a memorandum for record.

b. Witness statements should be taken on DA Form 2823. Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.)

d. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the investigating officer should discuss this matter with the local Labor Counselor. Commanders and supervisors, however, have the authority to order military personnel and to direct Federal employees to appear and testify. Civilian witnesses who are not Federal employees may agree to appear, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained and only after coordinating with the legal advisor or appointing authority.

4. Rights Advise ment.

a. All soldiers suspected of criminal misconduct must first be advised of their rights. DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a Report of Survey, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

5. Scheduling witness interviews. The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed

with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews; it is not mandatory.

- When planning who to interview, work from the center of the issue outward. Identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the interviews of key witnesses to be as complete as possible, avoiding the "backtracking" described above.

- Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant to the inquiry.

- Any information that is relevant should be collected regardless of the source; however, investigating officers should collect the best information available from the most direct source.

- It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

- At some point, there will be no more witnesses available with relevant and useful information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

6. Conducting witness interviews. Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The following suggestions may be helpful:

- Prepare for the interview. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

- Ensure the witness's privacy. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

- Focus on relevant information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and useful to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be material and relevant to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

- Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use. Additionally, the tape should be safeguarded, even after the investigation is completed.

- Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.

7. Rules of Evidence: Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules.

- The information must be relevant and material to the matter or matters under investigation.

- Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

- The result of polygraph examinations may be used only with the subject's permission.

- Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

- "Off-the-record" statements are not acceptable.

- An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

8. Standard of Proof. Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence that, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

CONCLUDING THE INVESTIGATION

1. Preparing Findings and Recommendations. After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

- **Facts:** To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be provided.

- **Findings:** A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that will become part of the report. Exhibits should be numbered in the order they are discussed in the findings.

- **Recommendations:** Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

2. Preparing the Submission to the Appointing Authority. After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet in the following order:

- appointing order,
- initial information collected,
- rights warning statements,
- chronology, and
- exhibits (with an index).

3. LEGAL REVIEW:

a. AR 15-6 does not require that all informal investigations receive legal review. *The appointing authority, however, must get a 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, or will be relied on in actions by higher headquarters.* Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

- whether the investigation complies with requirements in the appointing order and other legal requirements,
- the effects of any errors in the investigation,
- whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and

- whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

CHECKLIST FOR INVESTIGATING OFFICERS

1. Preliminary Matters:

a. Has the appointing authority appointed an appropriate investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

c. Has the initial legal briefing been accomplished?

2. Investigative Plan.

a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?

b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?

c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

3. Conducting the Investigation.

a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?

b. Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?

c. Is routine coordination with the legal advisor being accomplished?

4. Preparing Findings and Recommendations.

a. Is the evidence assembled in a logical and coherent fashion?

b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?

c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?

d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?

e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

5. Final Action.

a. Was an appropriate legal review conducted?

b. Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved?

c. Have the necessary taskers been prepared to implement the recommendations?

APPENDIX B

Sample AR 15-6 Informal Investigation Appointment Memorandum

AFVA-JA (15-6)
March 2002

15

MEMORANDUM FOR: MAJ Frederick Factfinder, DISCOM Plans Officer, 46th Infantry Division (M), Fort Wahoo, Virginia 22330

SUBJECT: Investigating Officer Appointment, G Company, 123d Forward Support Battalion Sex Harassment Complaint

1. Appointment. You are hereby appointed an investigating officer pursuant to Army Regulation (AR)15-6, Procedure for Investigating Officers and Boards of Officers, and Army Regulation 600-20, Command Policy, Chapter 6 (Equal Opportunity Program in the Army), to conduct an informal investigation into allegations of gender discrimination, and unfair treatment of female soldiers as to promotions and extra duty. A copy of an anonymous 6-Boss line message received on 8 March 1999 is enclosed. This investigation is your primary duty and takes precedence over all other duties assigned.
2. Legal Orientation. Before you begin your investigation, you must receive a briefing from the Office of the Staff Judge Advocate, Administrative Law Section. Captain Cheever J. Loophole is your legal advisor. You must have your legal briefing completed no later than 16 March 2002. Call 287-9426 to schedule an appointment. You will consult with Captain Loophole regarding all aspects of this investigation, including developing an investigation plan, determining whether witnesses need to be advised of their rights under the UCMJ, Article 31 or the Fifth Amendment, special procedures for interviewing Department of the Army civilian employees, and preparing findings and recommendations. Captain Loophole will provide you with a 46th Division Investigating Officer's Guide and several forms and regulations necessary for you to complete your investigation.
3. Procedures. You are to conduct this investigation using the informal procedures outlined in Chapter 4, AR 15-6. No individual has been named as a respondent. You will swear all witnesses prior to their interview. You are to thoroughly document all witness interviews in writing, preferably on a DA Form 2823 (Sworn Statement). You will interview all witnesses in person, if practical. If in the course of your investigation you come to suspect that certain people may have committed criminal conduct, you must advise them of their rights under Article 31, UCMJ, or the Fifth Amendment, U.S. Constitution, as appropriate. You will document all witness waivers of their Article 31 or Fifth Amendment rights on a DA Form 3881 (Rights Warning Procedure/Waiver Certificate). In addition, you may need to provide a witness with a Privacy Act statement before you solicit any information. You are to maintain a daily written chronology of your actions on this investigation. You are strongly encouraged to consult your legal advisor if you have any questions regarding these procedures.
4. Report of Investigation. The report of investigation must include, but is not limited to, findings on the following issues.
 - a. Whether the G Company, 123d FSB chain of command fairly treats female soldiers, including if any member of the chain of command has violated any regulations, laws or command policies in the treatment of female soldiers. You must designate which regulations, laws and/or command policies were violated, if any.

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b. Whether any female members of G Company, 123d FSB, were subjected to any form of sexual harassment by the chain of command or non-commissioned officers in violation of federal law and AR 600-20, chapter 6, in the past twelve months. Provide specific examples of any such harassment, if it exists within G Company.

c. Whether any female members of G Company, 123d FSB, were unfairly denied promotion opportunities under AR 600-8-19, Enlisted Promotions and Reductions, and the equal opportunity policy of AR 600-20, Change 4, paragraph 6-3 in the past twelve months. Give concrete examples, if you find such conduct.

d. Whether any female members of G Company, 123 FSB, were unfairly assigned extra duties in the past twelve months. You will examine whether the command runs the duty roster in accordance with AR 220-45, Duty Rosters; whether any assigned "extra training" is conducted in compliance with AR 600-20, paragraph 4-6, and AR 27-10, Military Justice, paragraph 3-3c; and whether any "extra duty" assigned as nonjudicial (Article 15) punishment complies with AR 27-10, paragraph 3-19(b)(5). Give concrete examples, if you find such conduct.

e. Determine if the G Company, 123d FSB officers and noncommissioned officers have exhibited improper attitudes and/or conduct towards female soldiers in the command. Give concrete examples, if you find such conduct.

5. Provide me with recommendations to resolve any issues or problems raised by your findings. You will consult with your legal advisor in developing your findings and recommendations. Submit your findings and recommendations on a DA Form 1574 (Report of Proceedings by an Investigating Officer/Board of Officers) to the Brigade S-1 no later than 25 March. Submit any requests for modification of this suspense or the scope of your investigation to me, through your legal advisor.

6. Expert Assistance. You may consult with the 123d FSB Equal Opportunity Advisor, and the 46th Division Equal Opportunity Officer in determining whether gender discrimination exists in G Company, 123d FSB.

7. Criminal Misconduct. If you determine through your investigation that possible criminal conduct has occurred, immediately notify your legal advisor before proceeding any further with your investigation.

PAUL E. BRAVEHEART
COL, AR
Commanding