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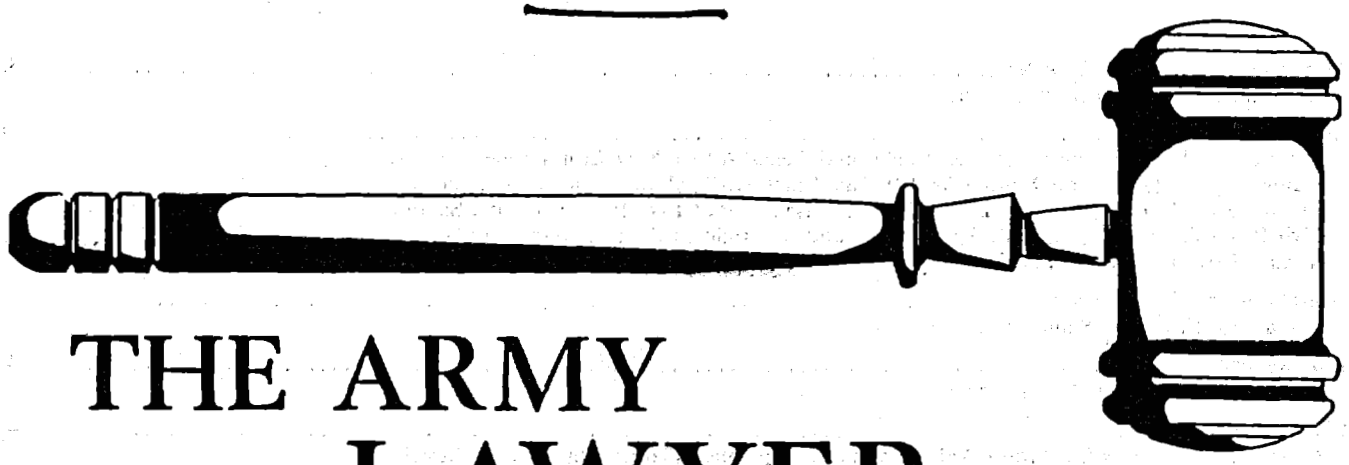

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REPLY TO
ATTENTION OF

DAJA-IM

28 August 1989

MEMORANDUM FOR ALL STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Management of Automated Legal Research (ALR) Services -- Policy Memorandum 89-4

1. For several years, many Army law offices have had access to ALR services such as those provided by Westlaw and Lexis. Properly conducted legal research services have proven to be a cost-effective resource.

2. However, like any other resource, ALR is subject to misuse and abuse. Most ALR services bill the Army a minimum of $70 per hour plus telecommunication charges. Depending on the service used and materials accessed, the cost may be much higher. If not properly managed, these costs can place an unnecessary burden on the office budget.

3. One example of inefficient use of ALR is routinely downloading case materials to a printer or personal computer disk when such materials are already accessible in the office law library. Beginning an on-line search without previously developing a search strategy is also wasteful. A thorough search strategy should be written down before the ALR system is accessed. The strategy should include identifying the legal issue to be researched, the database (the group of documents to be searched), and the search terms (the combination of words to be entered for the search).

4. Most ALR services provide user's guides, training materials, and on-site instruction, either free or at very reasonable rates, to familiarize attorneys and paralegals with their system. Some services offer fill-in-the-blanks forms to help plan a search strategy.

5. I expect Army law office managers to take the lead, by precept and by example, in assuring that our use of ALR is efficient and effective.

William K. Suter

WILLIAM K. SUTER
Major General, USA
Acting The Judge Advocate General

The Disputes Process—A Management Tool: Advice for Contracting Personnel

Brigadier General John L. Fugh
Assistant Judge Advocate General for Civil Law
and
Lieutenant Colonel James F. Nagle
Chief, Logistics and Contract Law Team,
Contract Law Division, OTJAG

Introduction [1]

The disputes process is an integral part of the procurement process, but one that has historically been regarded as the sole province of lawyers. As soon as the final decision is issued and an appeal docketed at the Armed Services Board of Contract Appeals (ASBCA) or the U.S. Claims Court, many contracting officers, chiefs of contracting offices, and principal assistants responsible for contracting (PARC's) mentally transfer the case to the litigators and no longer take primary responsibility for its resolution. Although the case involves their contract and budget, they view the matter with the detachment of spectators. They realize that they will be tasked to do certain jobs, but still consider themselves primarily onlookers.

That approach is wrong and costly, because disputes drain the command's budget and time and can adversely affect its prestige. Furthermore, a loss may provide a precedent that will act as a millstone to the government's procurement process. Finally, contracting managers often fail to recognize the opportunities such cases present to obtain extensive and objective appraisals of their command's strengths and weaknesses, establish favorable precedents, and educate their people.

Although this article will focus on disputes, the same rationale and concerns apply equally to protests. Protests have now become more judicialized than ever before. Automatic data processing equipment (ADPE) protests are normally handled by the General Services Board of Contract Appeals (GSBCA) pursuant to the same, albeit expedited, rules for discovery and hearings that it uses for contract disputes. [2] The General Accounting Office (GAO) protest procedure is also adopting more and more of the trappings of full litigation, with fact-finding conferences and discovery rights. [3] Furthermore, the automatic stay provisions of the Competition in Contracting Act (CICA) mandate that such protests be given the greatest scrutiny and be avoided if at all possible. Consequently, although the word "dispute" will be used throughout this article, the word "protest" could normally be substituted.

Evaluation

Managers must fully evaluate the dispute to determine whether it should be in the disputes process. Often the contracting personnel, engineers, or lawyers have made mistakes but are reluctant to tell their bosses, or they have gotten into such an adversarial relationship with the contractor that they do not recognize the merits of the contractor's claim. Be assured that the other side will not hesitate to expose mistakes—such as late approvals, defective specifications, or improper inspections—in the most exaggerated manner and that the judge will not fail to appreciate the validity of the contractor's claim.

Certainly, it is not possible for the PARC to scrutinize all the details behind each and every final decision. Nevertheless, some experienced contracts manager, such as the chief of the contracting office, should examine the case with objectivity. These people already have a wealth of things to occupy their time, but this is one of those "pay me now or pay me later" deals. Time spent in resolving all or part of a dispute before it gets into the appeal process is time well-spent.

Have your lawyers involved as early as possible in the process. The contracting officer (CO) is required by FAR §§ 1.602-2(c) and 33.211(a)(2) to obtain legal advice in the process of deciding a contract dispute. Government attorneys who provide that advice ordinarily are knowledgeable and experienced in government contract law and disputes procedures. In some situations, the legal adviser to the CO may also be the attorney who represents the agency before a board of contract appeals if the contractor appeals an adverse final decision.

Don't wait until the appeal is filed, however, to get the lawyers involved. Call in the lawyers whenever a disagreement is brewing—when the contractor submits a claim, when the contracting officer is going to reject goods or services, when the contractor alleges a government delay, or when a competitor alleges unduly restrictive specifications.

Have the lawyers review the final decision and help write it. The Air Force, for example, requires that all final decisions be reviewed by the Office of the Chief Trial Attorney of the Air Force. Don't limit this review to the decision document itself, but review *all* the background facts. This full participation allows the lawyers to act as spokespersons with higher command or Department of Justice lawyers or congressional staffers regarding the appeal. Lawyers are not merely technical

[1] This article developed from a speech that Brigadier General Fugh delivered at the Army Principal Assistant Responsible for Contracting (PARC) Conference in Charlottesville, Virginia, on May 23, 1989.

[2] 40 U.S.C. § 759(f) (Supp. V 1987).

[3] 4 C.F.R. Part 21 (1988).

experts. They often have astute business judgment, a keen sense of political reality, and can be effective and articulate negotiators and spokespersons for your positions. Furthermore, they often know a great deal about the judge who will hear the case. They will know whether that judge has been receptive to similar arguments before.

An extensive legal review, therefore, is prudent to complement the managerial review. Conducted early enough, this legal review can often avoid the dispute entirely. The lawyers can provide the contracting officer with workable alternatives to steer the command around pitfalls and to assume the best possible posture for quick and successful litigation.

Such a managerial and legal appraisal should include not only the merits of the case, but should encompass other issues that affect the advisability of pursuing the matter.

Risk

What is the risk of loss, 100%—50%? Don't view the case as an indivisible whole. Often the claim can be broken into discrete parts, with liability clear on some of those parts. If several separate claims are "dogs," settle them to preserve your assets for those matters really in dispute.

Cost

Four types of cost are involved: 1) the dollar value of the claim; 2) the cost of the litigation; 3) any interest that accrues; and 4) any attorney's fees that may be assessed.

The command's budget will not only pay any judgment that is ordered, but will also pay the freight on much of the costs of litigation, such as depositions of the appellant's witnesses; copies of depositions of government witnesses; TDY expenses; reproduction costs; and the expenses of responding to interrogatories, requests for production of documents, and requests for admissions. Now, however, those two expenses (the judgment and litigation costs) are joined by two others.

Many of today's contracting personnel began in procurement before 1970. In those days, it was much less important to the government how long a dispute dragged on or how hard the appellant litigated. If we denied a claim for $50,000 and had to pay the full amount after a five-year appeal, we only had to pay $50,000—not a dime in interest and certainly no attorney's fees. All that has changed. Now interest routinely accrues, and the Equal Access to Justice Act affords small businesses the ability to have the government pay their attorney's fees if the government's position was not substantially justified. Often the combination of interest and attorney's fees dwarfs the size of the matter originally in dispute.

Interest on Contractors' Claims

Simple interest is calculated based on Treasury rates in effect for each segment of the overall period from the date the contracting officer received a valid claim until payment thereof. [4] Therefore, a favorable disposition of a contractor's claim results in simple interest accruing from the CO's receipt of the claim until payment. A favorable disposition could involve a final judgment in a Board of Contract Appeals (BCA) or the U.S. Claims Court or a settlement between the government and contractor prior to a BCA or court decision.

Attorney's Fees

FAR 31.205-33(d) makes unallowable the costs of prosecuting a claim against the government. The Equal Access to Justice Act (EAJA) [5] provides certain "parties" with limited resources the opportunity to litigate unreasonable governmental action when finances would normally deter such action. This act provides that agencies conducting an "adversary adjudication" will award to a "prevailing party" other than the United States, reasonable fees and other expenses (in-house as well as outside assistance) incurred by that party during the proceedings, unless the position of the agency is found to be "substantially justified." This means that eligible "parties" who prevail over the government in certain civil actions brought by or against the government may be awarded reasonable attorney fees and other expenses, unless: 1) the government acted reasonably during the conduct of a genuine dispute, or 2) special circumstances make an award unjust. The EAJA allows recovery of fees and expenses incurred both before and after its effective date if the action was pending on the effective date or initiated thereafter.

A "prevailing party" under the EAJA does not include: 1) any individual whose net worth exceeds $2 million, or 2) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization with a new worth exceeding $7 million or with more than 500 employees. In determining the eligibility of applicants, the net worth and number of employees for affiliated entities may be aggregated.

The 1985 amendments to the Act expressly provide BCA's with authority to award attorneys fees and other expenses. In addition, the new legislation makes this section retroactive, thus allowing recovery by contractors who previously sought but were unable to obtain relief from a board. The amended Act also clarifies the standard for awarding attorneys fees. The original Act provided that fees would not be awarded if the government's position was "substantially justified." The Act now provides the following:

> Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record as a whole, which was made in the adversary adjudication for which fees and other expenses are sought.

Consequently, it is not just the position of the litigators that must be substantially justified. The position of the contracting officer and the supporting staff—

[4] 41 U.S.C. § 611 (1982); FAR 52.233-1, para. (g).

[5] 5 U.S.C. § 504 (1982), *as amended by* Pub. L. No. 99-80, 99 Stat. 183 (1985).

inspectors and auditors, for example—from the beginning of the dispute must also be substantially justified. [6]

Time and Effort

Closely connected to the cost of litigation is the time that the command's personnel will work on the appeal either at their home station or on TDY. Such time-consuming efforts deprive the command of their services for their normal duties and can tie up key personnel—the procuring contracting officer, administrative contracting officer, contract specialists, engineers, quality assurance representatives, or inspectors—for weeks at a time and can severely hamper the command's performance. Consult with your lawyers to identify the likely witnesses and determine how long any hearing is expected to last.

Evaluation Conclusion

Evaluation of all these factors may force management to decide that a particular claim is not worth fighting. A $100,000 claim with only a fifty-fifty chance of government victory and an expensive and lengthy litigation process would be a prime candidate for settlement.

Certainly, some cases must be litigated regardless of the effort and money involved: a principle must be established or a point must be made to the contracting community that certain behavior will not be tolerated. There is nothing wrong with that decision as long as it is a decision made after considering all the facts—not just those presented when the final decision was issued, but those that evolve as the case proceeds.

Monitoring and Participating in the Litigation

Understand that facts change drastically as the appeal is processed. A case may have been a confusing mass of facts, figures, and allegations when first submitted by a small business. That same case may be transformed into a formidable claim through the use of expert witnesses, knowledgeable accountants, and experienced counsel. Similarly, a government "clear winner" may disintegrate as contemporaneous records surface that contradict the memories of some employees. As the case develops and its strengths and weaknesses become clearer, reevaluate your initial appraisal. Work with your staff judge advocate or chief counsel to ensure that command resources are not being spent on a case that should clearly be settled.

Command Resources

Despite how expensive and time-consuming these appeals and protests are, if we must do them, we should do them well. Remember that a loss will not affect only your command. It may set a bad precedent that will adversely affect all procurement. Consequently, don't relegate appeals and protests to the back burner, far behind the responsibility to award contracts. Use the command resources to pull the facts together. Take steps immediately to preserve all evidence. Have the involved personnel commit the facts to paper. Remember, the case may not come to hearing until years later. Don't lose institutional memory. Furnish witnesses for preparation, deposition, and trial. Suggest items for discovery to the trial attorney. For example, problems on a contract may not have started until the contractor's quality control manager quit or a new piece of equipment was used. Disclosing this to the trial attorneys may enable them to focus on this weak point early to force a settlement.

Work closely with the trial attorney, because the discovery process may reveal matters that mean nothing to the trial attorney, but are important to the command. The trial attorney may receive internal company documents that show product substitution or inadequate inspection. Such information may require rejecting previously accepted items or increasing inspection if the contract is ongoing. It may also require notifying other appropriate offices, such as the Procurement Fraud Division, OTJAG; and the Defense Contract Audit Agency.

Make sure you see copies of all the pleadings that are filed and all the depositions, especially of the other side's witnesses. Have them evaluated as part of your continuing appraisal of the case and use them to educate the trial attorney on technical aspects.

Let us know if you are unhappy with your representation. If you disagree with the trial attorney's method of proceeding, don't let this fester and ruin the attorney-client relationship. Tell us so we can evaluate the situation and either change it or explain why such a tactic is necessary.

Settlement [7]

The submission of a proper claim imposes upon the contracting officer several duties. Initially, FAR 33.204 requires the contracting officer to try to resolve the claim through negotiation. FAR 33.210 authorizes contracting officers to decide or settle all claims arising under, or relating to, a contract, except for claims involving fraud or for penalties or forfeitures prescribed by statute for determination by another federal agency. The contracting officer can do this through binding contract modifications. One technique the contracting officer can use is alternative dispute resolution (ADR).

Alternative Dispute Resolution

Alternative dispute resolution is the process of resolving disputes by consent of the parties rather than submitting the dispute to the formal process of the Contract Disputes Act [8] (final decision—ASBCA or

[6] In bid protests, the GSBCA and GAO will also grant attorney's fees, but are not bound by Equal Access to Justice Act's limits. Their authority comes from a section of the Competition in Contracting Act (31 U.S.C. § 3554(c)(1) (Supp. V 1987)), and they can and have granted attorney's fees and protest costs to large conglomerates. Additionally, attorney's fees and protest costs have been granted in excess of the EAJA's normal $75 per hour cap.

[7] For a detailed discussion of this subject, see the Report to the Administrative Conference of the United States Recommending that Government Contracting Officers Should Make Greater Use of ADR Techniques in Resolving Contract Disputes, prepared by BG (ret.) Richard J. Bednar.

[8] 41 U.S.C. §§ 601-13 (1982).

Claims Court). Some of the techniques involve settlement judges, disputes panels agreed to by the parties at the start of the contract, non-binding arbitration, or mini-trials.

Alternative dispute resolution is an idea whose time has come. Disputes are taking far too long to resolve once they are appealed to the ASBCA and the Claims Court. Waiting three, four, or more years for a decision is not unusual. In the meantime, interest is accruing and, if the government loses, we are often required to pay attorney's fees under the Equal Access to Justice Act. The external pressure from Congress (bills were introduced last Congress and are expected to be reintroduced this Congress), the Office of Management and Budget, the American Bar Association, and the Administrative Conference of the United States means that ADR techniques will be required.

Consequently, even though the Army settles approximately eighty percent of its cases, we must consider any technique that offers us the possibility of resolving an additional one, five, or ten percent of the cases, or of doing a better or a faster job of resolving the cases we already settle. The success of ADR cannot be measured simply by how many cases are settled. If so, then the easiest way to achieve "success" would be to "cave in" on settlement. Instead, success must be measured by determining whether government personnel are making the best use of the government's time and financial resources to achieve results that are in the government's best interests.

FAR § 33.204 includes the following suggestion relative to ADR:

> In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences.

This suggestion recognizes the benefits of an objective evaluation by those not directly involved in creating or perpetuating the dispute. Many cases are settled even after appeal, because the government and contractor counsel provide a new and detached assessment of the case. Sometimes, particular individuals can be so enmeshed in the dispute that their positions become nonnegotiable and unchangeable. For example, the contracting officer and the contractor may have developed such an adversarial relationship that no settlement is possible. [9] In such cases, a detached informed appraisal is well worth the effort.

In addition to FAR 33.204's reference to an objective evaluation, FAR 33.211(a) requires the CO to: 1) review the facts pertinent to the claim; 2) secure assistance from legal and other advisers; 3) coordinate with the contract administration officer and others as appropriate; and 4) prepare a written decision.

The contracting officer's authority and opportunity to settle the claim does not end with the final decision and the filing of an appeal. The CO retains settlement authority even during litigation at the board of contract appeals. The CO's authority to settle claims, however, does not extend to cases where litigation has commenced in a court, because federal law grants the Attorney General sole authority to settle cases being litigated in the courts. [10] Nevertheless, the CO can and usually does strongly influence the outcome by ensuring the CO's position is known and understood. Consequently, the contracting officer must keep abreast of the case as it winds its way through the appeals process to determine when settlement is in the government's best interests.

Use the Process as an Educational Tool

Don't just view the process as an ordeal that has to be endured. Remember, many disputes arise from government claims in which the government has decided to initiate and pursue the matter. Furthermore, the disputes process can be the best possible educational tool for your personnel to learn how to perform their jobs and what to avoid. Let your command see what types of documents must normally be released during the discovery process. Make sure they realize that the standard Freedom of Information Act exemptions for internal government memoranda do not apply. Matters that are internal government communications, such as DF's, memos, trip reports, routine telephone records, and audits, will be routinely released, regardless of whether they help or hurt the government's case. Make sure they know that their handwritten comments in the margin of documents are also releasable. Let them see the concrete problems of trying to remember a 1987 telephone conversation with the contractor when they did not immediately memorialize it in a memorandum.

Many ASBCA hearings are held near the installation. These hearings are open to the public. Find out from the trial counsel which witnesses will be examined on which day: for example, the auditor on Wednesday morning, the engineer on Wednesday afternoon, and the contract specialist on Thursday morning. Send some of your people to observe.

Hearings are as informal as may be reasonable and appropriate. Evidence will be received in the sound discretion of the hearing officer, or if it is admissible under the Federal Rules of Evidence. The hearing officer will be a member of the board serving as an administrative judge or a duly authorized hearing examiner. Parties may be represented by attorneys. In addition, the contractor may appear in person or may be represented by a corporate officer or partnership member. A verbatim transcript of the hearing and arguments will be made unless waived by the board. Post-hearing briefs may be submitted upon terms set by the hearing officer. Get copies of the briefs and those portions of the transcript that you believe would be valuable to train your personnel or to evaluate how your command performed.

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[9] Often, however, the dispute is not really between the contracting officer and the contractor. Although the contracting officer always signs the final decision, the dispute is often really between the contractor and the engineers, information management people, or other technical experts or auditors. For instance, in many defective specification or differing site condition cases, the contracting officer relies heavily on the government engineers.

[10] 28 C.F.R. §§ 0.160–0.169 (1988).

The Decision

Read the decision carefully, especially if you lost. View such decisions as the report of a super inspector general. The judge is a total outsider who has been able to pick and choose among all the pertinent facts presented by the contractor and the government and has examined all the documents. Examining the decision will give you an excellent appraisal of what your command is doing right or wrong in the contract administration area. Normally, if any problems exist, they will surface there. Highlight those aspects that your managers should review, including the relevant portions of the transcripts, and send the decision to them as an action document.

Conclusion

Recognize that the disputes process can be expensive and time-consuming. Evaluate thoroughly and objectively whether a case should be in that process. Appraise the risks and the costs. If you decide to settle it—fine. If you decide to litigate, then litigate to win! Commit the necessary resources—time, effort, money, and personnel.

Don't view the case as the sole province of the trial attorneys. Be an active participant who is constantly aware of the case's progress. Remember, your command's money is normally on the line.

Don't view the disputes process as any ordeal that must be endured. View it as an opportunity to demonstrate how well the command performed, to educate your personnel in the harshest of real world environments, and to create a precedent that will benefit government contracts.

Disciplining Substance Abusing Employees

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Introduction

In 1973 Congress enacted the Rehabilitation Act, [1] which requires the reasonable accommodation of all handicapped federal employees, including employees handicapped by drug and alcohol abuse. [2] The Act made it difficult to take effective adverse action against employees for misconduct or unsatisfactory job performance resulting from alcohol- or drug-related incidents. If employees faced with possible adverse action [3] claimed to have a handicap based on alcohol or drug abuse and also claimed that the substance abuse caused their misconduct or poor performance, they had to be "accommodated" before any adverse action could be taken. [4] Recent decisions of the Merit Systems Protection Board (MSPB) have changed past practice and have given management more flexibility in taking adverse action against substance abusing employees. It is now much harder for employees to establish a substance abuse defense, and federal supervisors have a wider range of options to consider when faced with employee misconduct resulting from alcohol- or drug-related incidents. Additionally, the ability of undeserving employees to hide behind the cloak of handicap discrimination has been dramatically limited.

This article will examine past practice in the area of handicap accommodation for substance abuse and will explain how that practice has been changed by a trilogy of recent MSPB decisions: *McCaffrey v. United States*

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[1] Rehabilitation Act of 1973, 29 U.S.C. § 791 (1982). *See also* Drug Abuse Office and Treatment Act, 42 U.S.C. § 290ee-1 (1982); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, 42 U.S.C. § 290dd-1 (1982).

[2] The board has held that alcohol and drug abuse are handicaps under the Rehabilitation Act. Ruzek v. General Services Administration, 7 M.S.P.R. 437 (1981). In *Ruzek* the board ruled that federal agencies must treat employees suffering from alcoholism or drug abuse the same way they deal with employees having other handicapping conditions. A handicapped person is one who has a record of, or is regarded as having, a physical or mental impairment which substantially limits one or more of his major life activities. 29 C.F.R. § 1613.702 (1987). A "qualified handicapped person" is a handicapped person who can, with or without reasonable accommodation, perform the essential functions of his position without endangering the health of himself or others. *Id. See also* Ziemba v. Department of the Navy, 7 M.S.P.R. 28 (1981).

[3] "Adverse action," as used in this article, refers to any adverse personnel action taken against a federal employee for cause that is appealable to the Merit Systems Protection Board (MSPB). This includes disciplinary actions for misconduct under 5 U.S.C. Ch. 75, such as an employee who is removed for introducing drugs onto a military installation, and performance-based personnel actions under 5 U.S.C. Ch. 43, such as a reduction in grade for failure to meet standards in a critical job element. "Adverse action," as used in this article, does not refer to other appealable adverse actions that are not based on cause, such as reduction-in-force actions under 5 C.F.R. part 351.

[4] *Ruzek*, 7 M.S.P.R. 437 (1981). Federal Personnel Manual 792-2, subchapter 1-2. *But see* Federal Personnel Manual Letter 792-16 (interpreting the President's Executive Order No. 12564 (1986) entitled "Drug Free Workplace" and authorizing discipline short of removal for drug abusers even while they are being rehabilitated). The agency must offer the employee rehabilitation assistance and treatment, if necessary, before initiating disciplinary action. In *Ruzek* the MSPB ruled that rehabilitation is mandated before discipline may be imposed where the performance or misconduct problems are "related" to alcohol or drugs. This holding has now been modified by Brinkley v. Veterans Administration, 37 M.S.P.R. 682 (1988). The problems now must be "caused" by the addictive condition before rehabilitative efforts are mandated.

Postal Service, [5] *Brinkley v. Veterans Administration*, [6] and *Hougens v. United States Postal Service*. [7] This article will discuss the new standards of proof for the affirmative defense of substance abuse-related handicap discrimination and will provide practical tips for addressing this issue when representing an agency at MSPB proceedings.

Prior Practice

The Rehabilitation Act prohibits federal agencies from discriminating in the hiring, promotion, or placement of qualified handicapped persons. [8] The Act also requires federal agencies to offer "reasonable accommodation" to qualified handicapped employees. [9] Drug addiction and alcoholism have been held to be "handicaps" under the law, [10] and employees with those conditions must, therefore, be "reasonably accommodated."

Prior to the most recent line of cases, employees facing adverse action could assert the defense of handicap discrimination based on alcohol or drug abuse by merely presenting evidence that they had an alcohol or drug problem. [11] Once the employees showed that they had a problem with alcohol or drugs and were therefore "handicapped" under the Rehabilitation Act, the adverse actions against them had to be stayed until they were offered rehabilitation, regardless of the seriousness of the misconduct or the magnitude of the unsatisfactory performance. [12] The only recognized exception was for "public safety" and was difficult to establish. [13] Thus, in *Green v. Department of the Air Force*, [14] the court required the rehabilitation of a nurse who became addicted to drugs, stole them from the Air Force hospital at which she worked, and used them while on duty. The *Green* board did not apply the "public safety" exception because the nurse "did not pose a high risk to the patients in her care." [15]

Rehabilitation usually took the form of participation in an agency drug and alcohol treatment program. If the employee successfully completed the treatment program, the stayed action would be cancelled. Only if the employee failed in the rehabilitative efforts could the adverse action proceed. Before the board, the agency had to demonstrate that the employee had been given a reasonable opportunity for rehabilitation. [16] Whether the employee had failed the program, moreover, was an issue of fact the employee could litigate before the MSPB. [17] If some relapse during the rehabilitation was considered normal, the employee might even be able to continue the abuse of drugs or alcohol after enrollment in the program. The end result was that the agency might continue to have a problem employee throughout the treatment period. [18]

Not surprisingly, the issue of "handicap accommodation" was frequently raised in adverse action cases involving alcohol or drugs. Employees had everything to gain and nothing to lose by claiming to have a substance abuse problem. At worst, the employees would get a temporary reprieve on their punishment while they participated in agency-provided treatment programs. At best, they could escape punishment for their misconduct and wholly avoid the adverse consequences of their poor job performance.

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[5] 36 M.S.P.R. 224 (1988).

[6] 37 M.S.P.R. 682 (1988).

[7] 38 M.S.P.R. 135 (1988).

[8] *See supra* note 1.

[9] *See supra* note 3 and accompanying text. A detailed discussion of what constitutes reasonable accommodation in the case of an alcoholic or drug addict is beyond the scope of this article. Reasonable accommodation, however, includes, at a minimum, participation in an agency-sponsored treatment program. One court of appeals has recently held that inpatient treatment must be offered employees undergoing rehabilitation. Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989).

[10] *Ruzek*, 7 M.S.P.R. 437 (1981).

[11] The showing required appeared to be little more than an assertion by the employee. *See, e.g.*, Downing v. Dep't of the Navy, 16 M.S.P.R. 388 (1982) (employee only had to show he had a "drinking problem" to show he suffered from an alcohol condition within the meaning of the Rehabilitation Act); Avritch v. Dep't of the Navy, 27 M.S.P.R. 542 (1985) (employee not required to produce medical diagnosis to establish alcoholism under Rehabilitation Act).

[12] *See, e.g.*, Carr v. Dep't of the Air Force, 32 M.S.P.R. 665 (1987); *Ruzek*, 7 M.S.P.R. 437 (1981).

[13] *See, e.g.*, Kulling v. Dep't of Transportation, 24 M.S.P.R. 56 (1984). The board has not been liberal in applying the "public safety exception." *Compare* Green v. Dep't of the Air Force, 31 M.S.P.R. 152 (1976), *overruled by* Brinkley v. Veterans Administration, 37 M.S.P.R. 682 (1988) (civilian nurse who was drug addict could not be removed before rehabilitative efforts were made despite the risk that the nurse's addiction might endanger the health and safety of her patients) *with* Kulling v. Dep't of Transportation, 24 M.S.P.R. 56 (1984) (air traffic controller who was a drug abuser could be removed without previous accommodation due to overriding concern for public safety in air traffic control). When employees cannot remain on the job pending rehabilitation, they are said not to be "qualified handicapped persons," because they cannot perform the job without endangering themselves or others, even with accommodation. *See supra* note 3 and accompanying text.

[14] 31 M.S.P.R. 152 (1976), *overruled by* Brinkley v. Veterans Administration, 37 M.S.P.R. 682 (1988).

[15] *Id.*

[16] *See Carr*, 32 M.S.P.R. 665 (1987).

[17] *See, e.g., id.*

[18] Normally, an agency would be unable to remove an employee with a drug and alcohol problem prior to attempting rehabilitation, regardless of the extent to which the substance abuse problem might affect the employee's judgment and adversely affect job performance. The only exception previously recognized was where the employee's retention posed a grave risk to public safety. *See supra* note 13 and accompanying text.

Past practice was seriously flawed. First, the employees could easily "prove" that they were handicapped because of alcohol or drugs. By means of little more than a self-serving assertion that they had a problem, undeserving individuals could secure protection from adverse action under the umbrella of the Rehabilitation Act, unless the agency could rebut their assertions. Second, undeserving employees could attribute almost any misconduct or poor performance to substance abuse. The nexus requirement was easily met. [19] Finally, employees would often remain in positions in which they could not perform during treatment; this arrangement adversely affected mission accomplishment. [20]

McCaffrey v. United States Postal Service

McCaffrey v. United States Postal Service, [21] the first of the drug and alcohol trilogy, remedied one major shortcoming of prior practice. In *McCaffrey* the MSPB ruled that, in order to raise the affirmative defense of handicap discrimination, employees must introduce expert testimony to establish that they are "addicted" to alcohol or drugs. The board expressly overruled several earlier cases which held that the employee only had to show the existence of an alcohol or drug problem to establish the defense. [22] Additionally, the board emphasized that testimony from the employee or the employee's family, friends, or co-workers would generally be insufficient by itself to prove the affirmative defense. The expert testimony does not have to be from a doctor; it could, for example, be provided by an agency employee assistance counselor. Nevertheless, lay evidence alone is insufficient.

The board reasoned that the Rehabilitation Act [23] was intended to provide assistance to those individuals who lost the ability to control their behavior because of the long term effects of substance abuse; it was not intended to protect those who occasionally misuse alcohol or drugs. [24] Accordingly, the MSPB instructed administrative judges to distinguish between mere users, who might have been intoxicated at the time of their misconduct, and abusers, who are addicted to drugs or alcohol and therefore have a handicapping condition.

McCaffrey prevents undeserving employees who are not alcoholics or addicts from escaping the consequences of their actions. The board has dramatically heightened the employees' burden of production; employees who do not come forward with an expert witness will not prevail. This new rule does not, however, eliminate the agency's responsibility to identify and offer help to employees with a drug or alcohol problem. An employee's denial of addiction or alcoholism can itself be a symptom of drug or alcohol dependency. [25] The *McCaffrey* decision materially improves past practice by eliminating many frivolous contentions of handicap discrimination based on substance abuse. Problem employees will no longer be able to blame alcohol or drugs for their problems unless they are genuinely addicted.

Brinkley v. Veterans Administration

A second major shortcoming in substance abuse handicap caselaw was remedied in *Brinkley v. Veterans Administration*. [26] *Brinkley* held that employees who allege handicap discrimination based on substance abuse must affirmatively show that the handicapping condition caused the misconduct or unsatisfactory performance at issue. In theory, the causation requirement was not new; employees always had to show that their problems were related to drug or alcohol abuse. [27] *Brinkley*, however, gave the requirement teeth. Previously, the employee could show causation with little more than a self-serving assertion. [28] The board in *Brinkley* carefully examined all the facts and circumstances and concluded that, even

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[19] While the law has always required proof of a nexus between the misconduct or unsatisfactory job performance and the handicap of alcohol or drug abuse, the necessary showing in drug and alcohol cases was slight to nonexistent. McGilberry v. Defense Mapping Agency, 18 M.S.P.R. 560 (1984); Corral v. Dep't of the Navy, 33 M.S.P.R. 209 (1987) (uncontradicted testimony of employee that his misconduct was caused by alcohol held sufficient proof of nexus).

[20] *See supra* note 18 and accompanying text.

[21] 36 M.S.P.R. 224 (1988).

[22] The board expressly overruled Downing v. Dep't of the Navy, 16 M.S.P.R. 388 (1982) (board did not require the employee to show more than the existence of a drinking problem to show that he was handicapped) and Avritch v. Dep't of the Navy, 27 M.S.P.R. 542 (1985) (board did not require the employee to present more than mere "lay" evidence to show that he was handicapped). *See supra* note 11 and accompanying text. In *McCaffrey* the board said it will now require the employees to personally present evidence concerning their pattern of drug use and its effect on them. Additionally, the board will require testimony from experts as to whether that pattern along with other symptoms demonstrated by the employee constitutes the handicap of drug abuse. *McCaffrey* involved drug abuse, but there is no reason to believe that the board would apply a different standard for a case involving alcohol abuse.

[23] *See supra* note 2.

[24] The MSPB found support for this distinction in the Narcotic Addict Rehabilitation Act of 1966, 28 U.S.C. § 2901(a) (1982); 42 U.S.C. § 3411(a) (1982), where addict is defined as "any individual who habitually uses any narcotic drug . . . so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of such narcotic drug as to have lost the power of self-control with reference to his addiction."

[25] In Terry v. Dep't of the Navy, 39 M.S.P.R. 565 (1989), the employee had enrolled in a drug treatment program but had denied being addicted to drugs. The board held that this was sufficient to put the agency on notice of the employee's claim of a handicapping condition.

[26] 37 M.S.P.R. 682 (1988).

[27] *See supra* notes 9 and 19.

[28] *See* Corral v. Dep't of the Navy, 33 M.S.P.R. 209 (1987) (employee's uncontroverted testimony coupled with a pattern of Monday and Friday absences was sufficient evidence to show handicap of alcohol abuse).

assuming he had a handicapping condition, [29] Mr. Brinkley failed to show that he was so impaired by drug use at the time of his misconduct that he lacked control over his actions. The board declined to speculate about possible connections. It appears, therefore, that the *Brinkley* board overruled, *sub silentio*, cases in which causation was established by little more than the testimony of the employee. [30] From now on, employees who show they are handicapped due to alcohol or drug abuse will bear the evidentiary burden of also showing a direct connection between their handicap and the alleged misconduct or poor performance. The *Brinkley* decision really does no more than bring substance abuse handicap cases in line with the causation standard applied in other mental and physical handicap cases. [31] As the board explained, the Rehabilitation Act "does not prohibit an Agency from discharging or otherwise disciplining an employee for misconduct when the adverse action is . . . based solely on the conduct itself." [32] The MSPB made it quite clear that handicap discrimination law will no longer shield drug or alcohol abusers from the disciplinary consequences of their actions unless there is a causal connection between the handicap and the misconduct.

Hougens v. United States Postal Service

Hougens v. United States Postal Service [33] completes the trilogy of cases that close the door on abuse of the handicap discrimination defense. *Hougens* allows management, for the first time, to take some disciplinary action against employees who are legitimately handicapped due to alcohol or drugs, even where the strict standards of *McCaffrey v. United States Postal Service* [34] and *Brinkley v. Veterans Administration* [35] are satisfied.

The board recognized that retaining alcoholics or drug addicts in their present jobs or detailing them temporarily at their current grade and pay level pending rehabilitation may impose an undue hardship on the agency. Accordingly, the board stated that in "a major departure from its previous precedent . . . [the Board] now holds that an agency may impose reasonable discipline for any act of misconduct, short of removal, while at the same time affording the abusing employee an opportunity to rehabilitate." [36]

The *Hougens* board also ruled that Mr. Hougens was not a qualified handicapped person and that the agency therefore had no obligation to offer him any accommodation prior to the imposition of discipline. The Rehabilitation Act only protects "qualified" handicapped employees from discrimination. A qualified handicapped person is one who can perform the essential functions of the position, with or without accommodation. [37] In *Hougens* the MSPB ruled that, in some cases, employees who abuse drugs or alcohol are not qualified handicapped persons because their misconduct, standing alone, disqualifies them for their position. [38] The board explained that an otherwise "qualified" individual with a handicap is one who, despite the handicap, has the requisite physical, mental, emotional, and moral qualifications to perform the duties of his or her position. Misconduct will disqualify employees from their position if the misconduct strikes at the core of the job or the agency's mission, or is so egregious or notorious that it hampers the employees' ability to perform their duties or to represent the agency. [39] Under these circumstances the

[29] The hearing in *Brinkley* was held prior to the MSPB's decision in *McCaffrey*, 36 M.S.P.R. 224 (1988). The administrative judge found that Brinkley was handicapped and cited Downing v. Dep't of the Navy, 16 M.S.P.R. 388 (1982), which was overruled by *McCaffrey*. *See supra* note 22 and accompanying text. The MSPB did not need to reach the question of whether Brinkley had a handicapping condition under the standard announced in *McCaffrey* because of their finding that Brinkley failed to show that his handicapping condition, if it existed, caused his misconduct. Brinkley, a pharmacist technician was removed for larceny of Darvon tablets. The board concluded that Brinkley failed to show that he was under the influence of drugs at the time of the larceny. The evidence indicated that Brinkley stole the tablets for future use.

[30] *See supra* note 19. The board expressly overruled Green v. Dep't of the Air Force, 31 M.S.P.R. 152 (1986), in which causation was presumed. 37 M.S.P.R. 682 (1988) n.4.

[31] *See, e.g.*, Ensinger v. Dep't of the Air Force, 36 M.S.P.R. 430 (1988) (no nexus between misconduct and post traumatic stress disorder); Curry v. Dep't of the Air Force, 35 M.S.P.R. 301 (1987) (no nexus between misconduct and epilepsy), Conti v. Dep't of the Army, 34 M.S.P.R. 272 (1987) (no nexus between poor performance and vision impairment).

[32] 37 M.S.P.R. 682 (1988).

[33] 38 M.S.P.R. 135 (1988).

[34] 36 M.S.P.R. 224 (1988).

[35] 38 M.S.P.R. 135 (1988).

[36] 38 M.S.P.R. 135 (1988). Army regulations have not yet caught up to this change in the law. Army Reg. 600-85, Personnel-General: Alcohol and Drug Abuse Prevention and Control Program, para. 5-5a(1) (21 Oct. 1988) [hereinafter AR 600-85] requires an automatic stay of disciplinary actions for misconduct and unsatisfactory performance for ninety days for employees who are currently enrolled in and satisfactorily progressing in the Army Alcohol and Drug Abuse Prevention and Control Program, unless retention in a duty status might result in damage to government property or personal injury to the employee or others. It has been proposed that AR 600-85 be changed to give management the greater flexibility envisioned by the drug and alcohol trilogy.

[37] 29 C.F.R. § 1613.702. *See also* Ziemba v. Dep't of the Navy, 7 M.S.P.R. 28 (1981).

[38] Mr. Hougens was charged with recklessly endangering the lives of four persons when he fired a pistol in their direction while leaving a bar. Mr. Hougens also violated the agency's firearms policy by carrying a weapon without a state or local permit.

[39] The board relied on Copeland v. Philadelphia Police Dep't, 840 F.2d 1139 (3d Cir. 1988), and on Spragg v. Campbell, 466 F. Supp. 658 (D. S.D. 1979). The board in *Copeland* ruled that Philadelphia's discharge of a policeman for marijuana use did not violate the Rehabilitation Act because a police officer's marijuana use would "cast doubt upon the integrity of the police force." Section 504 of the Rehabilitation Act prohibits handicap discrimination among activities receiving federal assistance. Because *Copeland* was not a federal employee, MSPB precedents prohibiting discipline pending rehabilitation were not controlling. *See supra* note 4 and accompanying text. The *Spragg* decision involved a federal employee, but predated the Civil Service Reform Act and the establishment of the MSPB.

employees are no longer "qualified handicapped" persons.

New Standards of Proof

Employees have the burden of proof in establishing the affirmative defense of handicap discrimination. To establish the defense in alcohol or drug cases, employees must show the following:

1) They must demonstrate that they are alcoholics or drug addicts, as distinguished from merely being drug or alcohol users. This must be demonstrated by their own testimony and must be supported by the testimony of experts.

2) They must show that the misconduct or unsatisfactory performance for which the adverse action was imposed occurred while they were under the influence of drugs or alcohol, or that it occurred as a direct result of drugs or alcohol.

3) They must prove that they are "qualified handicapped" persons and can perform the essential functions of their position without endangering their own health or that of another. Addicts or alcoholics can commit misconduct that is so serious as to disqualify them from being able to perform the essential functions of their positions. In these circumstances, the employees cannot establish handicap discrimination and the agency has no duty to accommodate.

The new burden of proof that has emerged from the drug and alcohol trilogy dramatically changes past practice and constitutes a substantial burden to employees who seek to shield themselves from adverse actions by claiming a drug or alcohol handicap. A bona fide alcoholic or drug addict will face the uphill battle of proving causation. The drug or alcohol abuse must directly cause the misconduct or unsatisfactory performance. Drug addicts who steal government property to support their drug habits are probably afforded no protection, unless they can show that the drug or alcohol abuse vitiated their intent to steal. [40] Alcoholics who never drink on duty but fail to meet critical job elements are likewise not protected. While a clear understanding of the new causation requirement will be developed on a case-by-case basis, the MSPB has signalled its clear intent to eliminate the use of "drug or alcohol abuse" as an excuse. Only if a bona fide alcohol or drug addiction is the real cause of misconduct or unacceptable performance can an employee effectively use the substance abuse handicap defense.

Perhaps the most far reaching change brought about by the "trilogy" is that a drug or alcohol abuse handicap is now only a partial defense. It does not prevent all disciplinary action. The defense only forecloses the harshest penalty of removal. Under *Hougens*, other reasonable penalties short of removal can be imposed while the abusing employee is given a concurrent opportunity to rehabilitate. Thus, the agency is now able to deal effectively with an addicted employee in a sensitive position. Previously, all discipline was stayed pending rehabilitation, except in cases involving clear danger to public safety. [41] Under prior law, a nurse who had a drug abuse problem could not be removed or suspended until rehabilitative efforts failed. [42] Now, if retention in the current position would not be reasonable or would constitute an undue hardship to the agency, the nurse can be reassigned to a less sensitive position not involving patient care, even if this results in a reduction in grade. [43]

Practice Pointers

What should management do when confronted with an employee who engages in misconduct and claims to be a substance abuser? Managers should continue to refer such employees to their agency's employee assistance program. Soon thereafter, managers should contact the problem employee's counselor to determine if the employee is a bona fide alcoholic or drug addict. If the employee is not an alcoholic or drug addict, but has simply misused alcohol or drugs, appropriate disciplinary action should be initiated without delay. The employee will be unable to successfully claim handicap discrimination when appealing the adverse action, unless the employee can enlist the support of an expert. If the agency's drug and alcohol counselor determines that the employee is a bona fide alcoholic or drug addict, management should consider whether there is a causal connection between the misconduct and the substance abuse problem. If the police report or supervisor's observation shows that the employee was under the influence of alcohol or drugs at the time of the offense, the causation element is likely met. If not, the agency should determine whether the handicap was the immediate cause of the misconduct (the alcoholic's tardiness the morning after a night of heavy drinking), or whether the causal link is tenuous (the alcoholic fails to complete a long term assignment). Next, the agency must consider whether the employee engaged in misconduct that is so serious as to disqualify the employee from the position. If so, the employee is not a "qualified handicapped person" and is entitled to no accommodation whatsoever. [44] Lastly, if a bona fide handicap exists and

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[40] *See Brinkley*, 37 M.S.P.R. 682 (1988).

[41] *See supra* note 18 and accompanying text.

[42] Green v. Dep't of the Air Force, 31 M.S.P.R. 152 (1976), *overruled by Brinkley*, 37 M.S.P.R. 682 (1988).

[43] Even under prior law, management had the authority to detail employees on a temporary basis during rehabilitation, while retaining them in their current grade and pay level. That procedure, however, might not be reasonable or might constitute undue hardship to the agency. *Hougens*, 38 M.S.P.R. 135 (1988).

[44] From an analytical viewpoint, determining whether an employee is a qualified handicapped person is the threshold issue. From a practical standpoint, however, the problem employee should always be referred to the Employee Assistance Program first. The board might disagree with the agency and conclude that the employee's conduct did not disqualify the employee from the position, in which case the agency's litigation posture is seriously undermined if it proceeded directly to removal without offering any rehabilitation. Alternatively, as in the *Hougens* case itself, management might not desire the harsh penalty of removal and would prefer to rehabilitate the employee and return him or her to duty, albeit in a position of lesser responsibility.

actually caused the misconduct or performance problem, management must answer this question: Can we leave this employee in this job for a period of rehabilitation without undue disruption or interference with mission accomplishment? If so, the employee must be left in his or her current job while being rehabilitated. If not, management must determine what is the least severe form of discipline, short of removal, that will satisfy the agency's interest in preventing disruption in the workplace and ensuring mission accomplishment. This discipline may then be initiated immediately, with rehabilitation of the employee to proceed contemporaneously. As previously noted, [45] however, Army supervisors are required to follow the Army regulation that requires an automatic stay of disciplinary actions for misconduct and unsatisfactory performance for ninety days for employees who are enrolled in and satisfactorily progressing in the Army Alcohol and Drug Abuse Prevention and Control Program, unless retention in a duty status might result in damage to government property or personal injury to the employee or others. If rehabilitation ultimately fails, appropriate disciplinary action can be commenced at that time. If the rehabilitation is successful, no further adverse action is permitted.

Conclusion

Management can now be far more aggressive in seeking adverse action against problem employees who occasionally misuse alcohol or drugs, while protecting the statutory rights of individuals genuinely handicapped by a substance abuse problem. [46]

[45] *See supra* note 36.

[46] *See McCaffrey*, 36 M.S.P.R. 224 (1988).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Competence Issues

In the recent case of *United States v. Freeman* [1] the Navy-Marine Corps Court of Military Review announced a decision that may have far-reaching ramifications. The Navy court drew a distinction between an accused's competence to *assist* in his or her defense and an accused's competence to *conduct* the defense. [2]

Contrary to his pleas, Private Freeman was convicted of assault by intentionally inflicting grievous bodily harm, assault consummated by a battery, and two specifications of disrespect to his superior noncommissioned officer. At trial Private Freeman waived his right to counsel and requested to proceed pro se. Despite some unusual behavior in connection with the charges against him, [3] a psychiatric examination concluded that Private Freeman "did not have a mental disease or defect, and had sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense." [4] After a very cursory discussion with the accused, the military judge granted Private Freeman's request to represent himself. [5]

The Navy court attacked the adequacy of the mental examination and rebuked its adoption by the military judge. The court gave little weight to the perfunctory language in the psychiatric board's report, which stated that Private Freeman could "*conduct* or cooperate intelligently" in his defense. The court noted that "an accused may be sufficiently competent to stand trial with the assistance of counsel but lack the capacity to stand

[1] 28 M.J. 789 (N.M.C.M.R. 1989).

[2] Two cases containing similar issues are pending before the Army Court of Military Review: United States v. Streater, ACMR 8900151 (A.C.M.R. brief filed 31 July 1989); United States v. Mix, ACMR 8800256 (A.C.M.R. brief filed 30 Mar. 1989).

[3] An example of Private Freeman's strange conduct is that the apparent provocation for his alleged misconduct was his concern for the welfare of his family at Camp Pendleton, California. One of the purported victims testified, however, that Private Freeman "didn't have family aboard the base . . . and never did." *Freeman*, 28 M.J. at 794.

[4] *Id.* at 795.

[5] *Id.* at 791-92.

trial without the benefit of counsel." [6] The Navy court also articulated a heightened standard for establishing an accused's competence to waive his or her right to counsel. The court suggested that the following questions be posed to the psychiatric board:

1. At what level of education does the accused read?

2. At what level of maturity does the accused operate?

3. Does the accused have a reasonably accurate awareness of his surroundings to appreciate the nature of a criminal trial and the possible consequences?

4. Is the accused able to understand and use relevant information rationally?

5. Can the accused coherently communicate relevant information to others and present comprehensible arguments to support his positions?

6. Does the accused suffer from any physical or mental infirmities that would negatively impact on his ability to function at an adverserial setting?

7. Does the accused suffer from any delusions or hallucinations that would impair his ability to comprehend the proceeding?

8. Is the accused presently oriented to the three planes of reality?

9. Is it likely that the accused will have periods where he slips in and out of reality?

10. Can the accused focus and concentrate his attention on a criminal trial for an extended period of time without being easily distracted? [7]

In cases where there is a question about an accused's competence for self-representation, all parties involved should ensure that the aforementioned determinations are made. Defense counsel should actively involve themselves in the resolution of this issue; they remain responsible for the client until self-representation is approved and they are formally dismissed. Captain Harry C. Wallace, Jr.

Statute of Limitations: Five, Three, or Two Years?

Your client has been charged with committing sodomy and indecent acts on "divers occasions from on or about 1 December 1984 until 31 December 1987." The summary court-martial convening authority received the charges on 1 September 1989. One of your first thoughts is to check the statute of limitations defense. Turning to article 43, UCMJ, [8] you note that a five-year statute of limitations now applies to these offenses under the Uniform Code of Military Justice. Problem resolved? Not necessarily.

On 14 November 1986, article 43, UCMJ, was revised to apply a five-year statute of limitations to virtually all UCMJ offenses. [9] This revision, however, is not retroactive. [10] Thus, the former two-year and three-year statutes of limitations still apply to offenses committed before 14 November 1986. [11]

This issue received recent attention by the appellate courts in *United States v. Prater* [12] and *United States v. Lee*. [13] In each of these cases the accused pleaded guilty to specifications alleging a "continuing offense," even though a portion of the time span of the charged conduct reached beyond the statute of limitations under the previous version of article 43. In both cases, the defense of statute of limitations was not mentioned at trial. In *Prater* the Army Court of Military Review found error because the accused did not knowingly waive the statute of limitations defense. [14] Because the accused adequately identified and pleaded guilty to some of the continuing offenses within the statute of limitations, the Army court opted to narrow the time period of the offenses in its affirmance and reassessed the sentence. [15] In *Lee*, however, the Court of Military

[6] *Id.* at 792. *Freeman* is consistent with the rule of law in several civilian jurisdictions. *See* Westbrook v. Arizona, 384 U.S. 150 (1966) (although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive counsel and conduct his own defense); Evans v. Raines, 800 F.2d 884 (9th Cir. 1986) (standard arguably higher—separate evaluation ordered); United States v. Wright, 627 F.2d 1300, 1312 n.88 (D.C. Cir. 1980) ("the requirement of a particularized competency finding [regarding accused's waiver of a defense] is analogous to the trial court's duty to find specifically whether a defendant competently waived his right to counsel") (construing *Westbrook*); State v. Lafferty, 749 P.2d 1239, 1248 (Utah 1988) ("mere finding of competence [to stand trial], without more, does not automatically enable an accused to waive the constitutional right to assistance of counsel and to conduct his or her own defense"); *see also* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 506(d) [hereinafter R.C.M.] (for waiver to be effective, military judge must find that accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding).

[7] *Freeman*, 28 M.J. at 796.

[8] Uniform Code of Military Justice art. 43, 10 U.S.C. § 843 (Supp. V 1987) [hereinafter UCMJ].

[9] The offenses of absence without leave or missing movement in time of war, as well as crimes punished by death, may be tried at anytime without limitation. UCMJ art. 43(a). In addition, periods in which an accused is absent without authority or fleeing from justice are excluded in computing the statute of limitations. UCMJ art. 43(c).

[10] *See* United States v. Jones, 26 M.J. 1009, 1012 (A.C.M.R. 1988) (citing National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-61, § 805(c), 100 Stat. 3816, 3908 (1986)).

[11] Under the previous version of UCMJ article 43, a three-year statute of limitations applied to the offense of desertion in peace and to offenses punishable under UCMJ articles 119-132. All other offenses had a two-year statute of limitations.

[12] 28 M.J. 818 (A.C.M.R. 1989).

[13] USCMA Dkt. No. 61,876/AR (C.M.A. 19 July 1989) (summary disposition).

[14] *Prater*, 28 M.J. at 821. *See also* R.C.M. 907(b)(2).

[15] *Id.*

Appeals declined to affirm the findings of guilty, because it was not evident from the record that any of the continuing offenses to which the accused pleaded guilty were actually committed within the statute of limitations. [16]

Turning back to the initial hypothetical, it should now be evident that your client has a statute of limitations defense to the indecent acts committed before 14 November 1986, as well as to any sodomy committed before 1 September 1986. [17]

Whether this impacts appreciably on your defense strategy is for you and your client to decide. At a minimum, if your client intends to plead guilty, you should know exactly what offenses your client is criminally liable for and ensure he or she is prepared to *knowingly* waive this defense at trial.

On 14 November 1991, the five-year statute of limitations will, for practical purposes, become the only statute applicable for all UCMJ offenses. That will virtually eliminate this complicated analysis. Until then, defense counsel must be aware of both versions of article 43. Captain Jeffrey J. Fleming.

Accused's Rehabilitative Potential in the Army: No Longer Proper Opinion Testimony

A recent Court of Military Appeals decision, *United States v. Ohrt*, [18] further defines the court's position on what is proper opinion testimony concerning the accused's potential for rehabilitation pursuant to Rule for Courts-Martial 1001(b)(5). [19] As indicated in the closely related case of *United States v. Horner*, [20] trial defense counsel must preserve the issue for appeal by proper and timely objection. [21] The *Horner* decision taught us that opinion testimony on rehabilitative potential must have an adequate foundation and must be based on an assessment of the accused's character and potential, not on the commander's view of the severity of the offense. [22] The courts continue to apply the principles of the *Horner* decision. [23]

In *Ohrt* the Court of Military Appeals distinguished potential for rehabilitation from potential for retention in the service. [24] The court's reasoning is twofold. First, opinion testimony on whether the accused should be retained in the service is, in essence, an opinion about an appropriate sentence. It is a recommendation for a punitive discharge, and the appropriateness of any punishment must be decided by the court-martial, not by a witness. [25] Second, R.C.M. 1001(b)(5) was not designed to give the prosecutor an opportunity to influence court members to punish the accused by imposing a punitive discharge. [26] The punitive discharge is a badge of dishonor that can be adjudged where appropriate, with or without regard to whether an accused has rehabilitative potential. [27]

It is clear from the *Ohrt* decision that opinion testimony suggesting that the accused be punitively discharged is inadmissible, no matter how it is worded or expressed. It is also clear that the court views rehabilitative potential as one factor that, together with the evidence presented in aggravation by the government and the extenuation and mitigation presented by the defense, should be considered by the court-martial in arriving at an appropriate sentence for the accused. Trial defense counsel should object to this type of opinion testimony and preserve the issue for appeal. Captain Jay S. Eiche.

Challenges for Cause: Substantial Doubt as to Impartiality

The Court of Military Appeals has consistently urged military judges to grant challenges for cause liberally. [28]

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[16] *See Lee*, USCMA Dkt. No. 61,876/AR (C.M.A. 19 July 1989) (summary disposition).

[17] *See Jones*, 26 M.J. at 1012. The alleged offenses span the period 1 December 1984 to 31 December 1987. For indecent acts occurring before 14 November 1986, a two-year statute applies; for the others, a five-year statute applies. Thus, for the indecent acts occurring before 14 November 1986, the cut-off is 1 September 1987; for the others, it is 14 November 1986 (the effective date of the new statute). Because 14 November 1986 is the earlier of the two cut-off dates, that becomes the critical date with respect to the entire span of indecent acts alleged.

With regard to the sodomy offenses, the old three-year rule applied to the offenses occurring before 14 November 1986; thus, the cut-off date for those offenses is 1 September 1986, and that becomes the determinative date because it is earlier than 14 November 1986.

[18] 28 M.J. 301 (C.M.A. 1989).

[19] R.C.M. 1001(b)(5).

[20] 22 M.J. 294 (C.M.A. 1986); *see generally* DAD Note, *United States v. Horner Revisited*, The Army Lawyer, Aug. 1989, at 19.

[21] *See* United States v. Peterson, 26 M.J. 906, 908 (A.C.M.R. 1988); United States v. Smith, 23 M.J. 714, 716 (A.C.M.R. 1986), *pet. denied*, 25 M.J. 201 (C.M.A. 1987); *see generally* R.C.M. 801(g).

[22] *Horner*, 22 M.J. at 296.

[23] *See, e.g.*, United States v. Scott, 27 M.J. 889, 891 (A.C.M.R. 1989).

[24] *Ohrt*, 28 M.J. at 304.

[25] *Id.* at 305.

[26] *Id.* at 306.

[27] *Id.*

[28] *See* United States v. Glenn, 25 M.J. 278, 279 (C.M.A. 1987); United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987); United States v. Smart, 21 M.J. 15, 21 (C.M.A. 1985); United States v. Miller, 19 M.J. 159, 164 (C.M.A. 1985); *see generally* UCMJ art. 41.

A challenge for cause, however, need not be granted "upon the mere assertion of the challenger." [29] The difficulty has been, therefore, to determine the appropriate threshold necessary to sustain a challenge. The starting point for any analysis respecting challenges for cause is found in R.C.M. 912(f)(1)(A)-(N). The focus of this note will be on R.C.M. 912(f)(1)(N), which states that an individual "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."

Any challenge under this provision must first raise a question of substantial doubt as to the fairness of the court-martial process. Thus, the trial defense counsel must initially create at least a presumption of substantial doubt. This presumption may then be rebutted by further voir dire on the part of the trial counsel or the military judge. [30] Trial defense counsel may then argue that the presumption of substantial doubt has not been sufficiently rebutted and that the risk of any error is likely to prejudice the accused. [31]

The above described situation was recently presented in *United States v. Reichardt*. [32] In that case the prospective court member who was challenged was the victim of a similar offense. [33] Arguably, as a victim of that offense, the member could have harbored undue prejudice against someone accused of committing a similar crime. Additionally, the member could have gained information about that type of offense and impermissibly offered this information during deliberations, without the adversarial protection of either an oath or cross-examination. [34] These two concerns had, in the past, formed the predicate for appellate litigation with respect to the propriety of a denial of a challenge for cause under similar circumstances. [35] As such, a presumption of substantial doubt was asserted.

In *Reichardt* the military judge conducted his own voir dire in an effort to overcome the presumption of doubt as to fairness. The military judge obtained answers that appeared to rehabilitate the court member. [36] The military judge then concluded that "unless there is a disagreement by either counsel," the responses given by the member were sincere, and no bias was detected. [37] In the absence of rebuttal, the military judge denied the challenge for cause.

Self-serving statements or disclaimers of bias "are insufficient as a matter of law" as a basis to deny a challenge for cause unless the rehabilitating statements were "delivered in a manner indicative of truthfulness." [38] This latter indicia of truthfulness is usually measured by the presence of equivocating statements. [39] The courts will also look at the situation to determine if most people in the same position would be prejudiced. [40] In *Reichardt* the Court of Military Appeals found no equivocal answers and also relied upon the favorable impression that the member made upon the military judge. [41] In the absence of any

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[29] R.C.M. 912(f)(3) analysis, app. 21, at A21-54.

[30] *See Smart*, 21 M.J. at 20 ("military judge either should have excused [the member] or should have assured that the record contained answers which adequately rehabilitated him").

[31] Counsel should also note that denial of a challenge for cause may impact upon the accused's ability to freely exercise another important codal right, the single peremptory challenge. *See* UCMJ art. 41(b); United States v. Harris, 13 M.J. 288, 292 (C.M.A. 1982).

[32] 28 M.J. 113 (C.M.A. 1989).

[33] The challenged member's wife was assaulted and her purse containing an automated bank teller machine card was stolen. Subsequently, with the use of the automated teller card, funds were withdrawn from a joint account. The accused in *Reichardt* also used an automated teller card to effect his larceny. *Id.* at 114.

[34] In the case of an automated teller theft, the member could offer his own experiences with respect to any administrative inconveniences that may or may not have occurred because of the policy of his bank. *See* Dep't of Army, Pam. 27-9, Military Judges' Benchbook, paras. 2-30 and 2-38 (C1, 15 Feb. 1985) (instructing members to begin deliberations with a full and free discussion).

[35] *Cf. Smart*, 21 M.J. 15 (C.M.A. 1985) (in a court-martial involving an alleged robbery, two members had also been victims of robberies themselves); United States v. Towers, 24 M.J. 143 (C.M.A. 1987) (involved the propriety of allowing a member who possessed expert knowledge regarding child sexual abuse in a court-martial involving those allegations). *Towers*, however, is not entirely applicable, because the members' life experiences were professionally developed and not the result of a being a victim as in *Reichardt*.

[36] The defense counsel asked the member the following question: "But, having been the victim in a similar case, do you feel that you would have sympathy for the victim in this case more than an average soldier, say, and therefore, feel strongly about harsh punishment?" The member responded: "I don't think so, ma'am." The member also indicated that there were no administrative difficulties as a result of the theft against him that would raise "any kind of grievous thoughts during the course of [the] proceedings." Finally, the member indicated that he honestly believed he could be fair. *Reichardt*, 28 M.J. at 114-15.

[37] *Id.* at 115.

[38] *Smart*, 21 M.J. at 19; *Miller*, 19 M.J. at 164; *Harris*, 13 M.J. at 291.

[39] In *Smart* one member indicated that he could be fair, but he refused to totally disregard his own experiences and would not consider a sentence of no punishment. 21 M.J. at 16-17, 19-20. Contrast this with the absolutely unequivocal answers of the member in United States v. Porter, 17 M.J. 377, 378 (C.M.A. 1984), who stated that the fact that he was the victim of a prior theft would "in no way" affect his judgment.

[40] Despite unequivocal and sincere responses, the trauma of a particular event may preclude a fair consideration. *Smart*, 21 M.J. at 20.

[41] Although there was no substantial evidence in the record to suggest that the member was not impartial, the member's responses were not entirely without some level of doubt. *See supra* note 36. Furthermore, trial defense counsel made no further effort to test the member's responses, nor was there any counterveiling expression of intuition offered against what was stated by the military judge.

competing explanations or any suggestion of a present risk of error, the court held that the military judge had no reason to grant a challenge for cause. [42]

In order to achieve success on appeal, trial defense counsel must ensure that the record adequately reflects any appearance of doubt as to a challenged court member's impartiality. Captain Ralph L. Gonzalez.

[42] The court in *Reichardt* also considered and rejected a per se rule of disqualification when the challenged member has been a victim of a similar offense. A simple application of a rule of disqualification for victims of similar crimes, however, is difficult. There is substantial room for argument about what constitutes "a similar crime" and who is a "victim."

Trial Defense Service Note

The New G.I. Bill: The Trojan Horse of the 1980's?

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Introduction

It is almost 1500 hours at the 82d Airborne Division Trial Defense Service Field Office. The article 15 and administrative elimination clients start to sign in for counseling. They are a disheveled lot: many soldiers arrive with camouflage-covered faces. Those soldiers having previous experience with the military justice system sit with blank stares and await their turn. Others pace nervously as they contemplate their first brush with the military justice system.

Eventually, those soldiers with administrative elimination packets are called in for counseling. Without fail, at some point during the first few minutes the soldier asks the Trial Defense Service attorney: "Do I still get my college fund?" or "Will I get my $1200 back from the G.I. Bill?" Inevitably, the answer the attorney gives is "No." With this short exchange, the soldier's dreams of college are crushed. The college fund that is both praised and cursed is the Montgomery G.I. Bill, a complicated and often misunderstood educational assistance program.

The sponsors announced that the Montgomery G.I. Bill would provide educational assistance benefits to help keep service members in the Armed Forces. [1] In actuality, however, the Montgomery G.I. Bill has resulted in unfair treatment of service members and is at least arguably unconstitutional. This article will review the statutory provisions of the Montgomery G.I. Bill and suggest remedies to correct the Montgomery G.I. Bill's shortcomings.

Department of Veterans' Affairs (VA) officials estimated that as of July 1988, eighty-three percent of new Armed Forces recruits were enrolling in the Montgomery G.I. Bill. [2] The figure for Army recruits was over ninety percent. [3] In fact, the program has become so popular that Congress approved a plan that allows recruits who entered active duty from July 1, 1985, through June 30, 1988, and who did *not* enroll in the program to have a "second chance" to enroll. [4] This decision could affect about 300,000 service members, including approximately 45,000 soldiers. [5] These statistics clearly illustrate the acceptance of the Montgomery G.I. Bill by soldiers in the United States Army. Unfortunately, many participants never receive any benefits.

The Statutory Requirements of the Montgomery G.I. Bill

Individuals who enlist in the United States Army are *automatically* enrolled in the Montgomery G.I. Bill. [6] Their pay is then reduced by $100 a month for the first twelve months of service. Recruits who *do not want* to be enrolled in the program must affirmatively disenroll. [7] Once enrolled, a soldier's pay reverts to the Treasury as if the soldier never received the $1200. [8] In return for their $1200 "contribution," the soldier can receive up to

[1] 38 U.S.C. § 1401 (1) (Supp. V 1987); *see also* Pub. L. No. 98-525, 1984 U.S. Code Cong. & Admin. News 4174.

[2] Army Times, Sept. 26, 1988, at 4, col. 4.

[3] Army Times, July 11, 1988, at 12, col. 1.

[4] 38 U.S.C. § 1418 (Supp. V 1987); *see also* Army Times, Oct. 24, 1988, at 4, col. 1; Army Times, Dec. 5, 1988, at 6. President Reagan signed this bill into law. The bill authorized the "second-chance" enrollment period to start December 1, 1988, and last through 30 June 1989. *See* Paraglide, Feb. 9, 1989, at 8A; Weekly Bulletin, Headquarters 82d Airborne Division, 12 Jan. 1989, Number 2.

[5] *Id.* The Congressional Budget Office originally predicted that only 5% of service members who did not enroll when they enlisted would sign-up. Estimates now predict up to 10% may take the second chance and enroll.

[6] 38 U.S.C. § 1411 (Supp. V 1987).

[7] 38 U.S.C. § 1411(b) & (c)(1) (Supp. V 1987).

[8] 38 U.S.C. § 1411(b) (Supp. V 1987).

$10,800 in education benefits. [9] For example, soldiers who enlist for more than three years will receive $300.00 a month for 36 months. [10] These benefits can be used to attend college or vocational schools, or to take part in on-the-job training.

Before participants in the Montgomery G.I. Bill can receive these education benefits, they must fulfill three strict requirements. First, the soldiers must receive an honorable discharge. Next, they must have earned a secondary school diploma (or an equivalency certificate) *before* the completion of their military service. [11] Finally, the soldiers must have served a specific time on active duty. This time period is determined by the length of their enlistment. Soldiers who enlisted for three years or more must serve thirty-six months on continuous active duty. [12]

The Montgomery G.I. Bill contains several provisions that enable soldiers to qualify for educational benefits without serving their entire enlistment. Soldiers discharged for a service-connected disability or for hardship do not have to fulfill the entire service requirement. [13] Additionally, soldiers discharged for the convenience of the government must complete at least thirty months of continuous active duty to qualify for benefits (for an enlistment obligation of three years or more). [14] Finally, those soldiers who are discharged due to a reduction in force can receive a month of benefits for every month of active service if they fail to fulfill either the twenty- or thirty-month option. [15]

The end result is that many soldiers, unless they are discharged from the Army with an honorable discharge and serve three years on active duty, will receive no benefits from the Montgomery G.I. Bill. Further, the soldiers will also forfeit their $1200 contribution to the program. [16] Ironically, even soldiers discharged with honorable discharges who decide not to go to school cannot get their contribution refunded. Yet, the survivors of soldiers who die on active duty before even qualifying for the benefits will receive the $1200. [17]

The most severe part of the Montgomery G.I. Bill is the forfeiture provision. Every soldier who is administratively discharged is potentially affected by this provision. The obvious question for such soldiers is: "Can they take my money?" To answer this question it is necessary to first ascertain whether or not soldiers have a recognizable *right* to their pay.

Soldiers' Right to Their Pay

Soldiers are entitled to receive pay according to their pay grade and years of service as long as they are on active duty in a pay status and not prohibited by law from receiving such pay. [18] This entitlement to pay and other allowances ends on the termination of enlistment. [19] A soldier's right to his or her Montgomery G.I. Bill contribution is contingent on whether or not the soldier's contribution vests in the soldier prior to the time it is transferred to the Treasury.

Vesting means "to give an immediate, fixed right of present or future enjoyment." [20] For example, when a pension payment by the terms of the pension agreement becomes *due*, the pensioner has a *vested right* to it. [21] Likewise, in 1961 the United States Supreme Court said that soldiers are *entitled* to the statutory pay and allowances of their grade and status, however "ignoble" their service may be, unless: 1) they are absent without leave or have deserted; or 2) their pay is ordered forfeited as punishment imposed by a duly constituted court-martial, in which case only future, and not accrued, pay may be ordered forfeited. [22]

Even stronger language underscoring soldiers' right to their pay is found in *United States v. Larionoff*. [23]

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[9] 38 U.S.C. §§ 1413, 1415 (Supp. V 1987).

[10] 38 U.S.C. § 1415 (Supp. V 1987); *see also* Army Times, Oct. 31, 1988, at 10, col. 1; Flocke, *The New Montgomery G.I. Bill*, Soldiers, Mar. 1988, at 50.

[11] 38 U.S.C. § 1411(a)(2) (Supp. V 1987).

[12] 38 U.S.C. § 1411(a)(1)(A)(i) (Supp. V 1987). If the soldier enlisted for less than three years, he or she must serve 24 months of continuous active duty.

[13] 38 U.S.C. § 1411(a)(1)(A)(ii) (Supp. V 1987). *See* Army Times, Oct. 17, 1988, at 19, col. 1. Disability or hardship discharges with less than six months service will qualify for a month of benefits for each month served.

[14] 38 U.S.C. § 1411(a) (Supp. V 1987). If the enlistment was for less than three years, the soldier must serve twenty months.

[15] Army Times, Oct. 31, 1988, at 10, col. 1.

[16] Department of Veterans' Benefits Circular 22-85-6, July 1985, § 6. The Veterans' Administration regulations deny the refund of any contribution unless they meet these requirements. *See* 38 U.S.C. § 1411(b) (Supp. V 1987).

[17] Army Times, Oct. 31, 1988, at 10, col. 1. This rule applies retroactively to service members who have died since July 1, 1985. *See* 38 U.S.C. § 1417 (Supp. V 1987).

[18] Army Reg. 37-104-3, Financial Administration: Military Pay and Allowances Procedures, Joint Uniform Military Pay System—Army (JUMPS-Army), para. 3-1 (3 Mar. 1988) [hereinafter AR 37-104-3].

[19] McEniry v. United States, 7 Cl. Ct. 622 (1985).

[20] Blacks's Law Dictionary 1401 (5th ed. 1979).

[21] 60 Am. Jur. 2d *Pensions and Retirement Funds* § 173 (1964).

[22] Bell v. United States, 366 U.S. 396 (1961).

[23] 431 U.S. 864 (1977).

> No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. . . . It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light. [24]

Based on the language of *Bell*, *Larionoff*, and the applicable regulations, a soldier's basic pay *vests* at the end of each pay period. Because the monthly allotment contributed by a soldier to the Montgomery G.I. Bill is deducted from the soldier's basic pay due for services performed, it is hardly logical to state that once such pay reverts to the Treasury, it was *never* received by, or within the control of, the soldier. [25] The Montgomery G.I. Bill therefore contains an absurd legal fiction. [26]

Consider this question: Why does the family of a deceased soldier have a *right* to the refund of the soldier's Montgomery G.I. Bill contribution, if the statute states that the soldier never *received* the pay? While it may clearly be the *morally* correct action to return the $1200 to the family of a soldier who dies on active duty, is there really a recognizable *legal* principle that would allow such an action? If the survivors have a *right* to the refund of the contribution, then soldiers who contribute $1200 should also have a right to a refund.

If soldiers have a vested right to their pay, then soldiers' contributions from their pay to the Montgomery G.I. Bill represent legitimate property interests. Therefore, the forfeiture of this interest to the Federal Government is a deprivation of property that must be analyzed with respect to the due process clause of the fifth amendment to the Constitution.

The Constitutionality of the Montgomery G.I. Bill

The fifth amendment to the United States Constitution states: "No person shall be . . . deprived of life, liberty, or property, without due process of law." [27] The applicability of the fifth amendment to the Montgomery G.I. Bill hinges on the meaning of the term "property".

It is clear that statutes or regulations can create a "property" interest in government entitlements. [28] It is only those entitlements that rise to the level of a property interest that are protected by the fifth amendment's procedural safeguards. [29]

In order to implicate due process protections, a governmental body must deprive, or threaten to deprive, an individual of a protected interest through fundamentally unfair procedures. [30] With respect to participants in the Montgomery G.I. Bill, it must first be determined if such soldiers are entitled to due process protections and then what protections are required.

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. [31]

Accordingly, because soldiers on active duty are entitled to receive pay, [32] they have a property interest in their pay. Similarly, veterans who begin receiving VA educational benefits have a constitutionally protected property interest in the continued receipt of those benefits. [33]

In recognition of this interest, federal and state courts have forced the VA to grant a hearing before reducing, suspending, or terminating benefits. [34] The application of these principles to the Montgomery G.I. Bill indicates that the protection of an entitlement to education should be afforded even greater scrutiny, given the unique status of education. Courts have long found that, because education is a "necessity of modern life," the abandonment of an opportunity for education is clearly a serious deprivation. [35]

Soldiers who voluntarily contribute $1200 from their pay to the Montgomery G.I. Bill have a property interest in their contributions and also in their expectation of educational benefits because they *paid* for that expectation. [36] The question therefore becomes: "What protections are required before the government can take

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[24] *Id.* at 879 (citations omitted).

[25] 38 U.S.C. § 1411(b) (Supp. V 1987).

[26] *Id.*

[27] U.S. Const. amend. V.

[28] Board of Regents v. Roth, 408 U.S. 564 (1972).

[29] Matthews v. Eldridge, 424 U.S. 319 (1976).

[30] Christian v. Village of Maywood, 656 F. Supp. 367 (N.D. Ill. 1987).

[31] *Roth*, 408 U.S. at 577.

[32] AR 37-104-3, para. 3-1.

[33] Mathes v. Hornbarger, 821 F.2d 439 (7th Cir. 1987).

[34] *See, e.g.*, Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980). The court upheld an injunction requiring the Veterans' Administration to provide pre-termination interviews before reduction of benefits to certain recipients of educational benefits.

[35] Brown v. Board of Education, 347 U.S. 483, 493 (1954); *see also* Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980).

[36] *See Roth*, 408 U.S. 564 (1972).

the soldier's property?" In judicial proceedings in the military, the Uniform Code of Military Justice states that no forfeiture may extend to any pay or allowances accrued *before* the date on which the sentence is approved. [37]

Constitutional analysis, as articulated in *Matthews v. Eldridge* [38] and its progeny, requires a balancing of three factors to determine whether additional safeguards must be implemented to protect soldiers' property interests currently endangered by the Montgomery G.I. Bill: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of such an interest through current procedures; and 3) the government's interest in the current process, including the burden of instituting new safeguards.

The Private Interest Affected by the Official Action

Soldiers enrolled in the Montgomery G.I. Bill stand to lose not only the $1200 they contributed to the program, but also $10,800 in benefits. Without a doubt, the $1200 loss represents a significant property interest, as it is about 1/7th of a first-year soldier's basic pay. [39] Furthermore, the educational benefits are often the soldier's primary reason for enlisting in the military. [40] These points clearly illustrate the private interest that is threatened by the present separation process.

The Risk of an Erroneous Deprivation of Such an Interest Through Current Procedures

Most soldiers fail to receive the benefits of the Montgomery G.I. Bill because they are administratively discharged from the Army *before* they fulfill their service obligation and because they receive less than an honorable discharge. Administrative separations of enlisted personnel are governed by Army Regulation 635-200. [41] This article focuses on involuntary administrative separations.

All soldiers being separated from the Army are entitled to written notification explaining the basis for their discharge as well as the least favorable characterization of service they could receive. [42] Soldiers also have the right to consult with counsel, to receive copies of the supporting documents, and to object to the separation action in writing. [43] The soldier has seven duty days to accomplish these actions and forward his statements to the separation authority. Unless a soldier has six or more years active duty service, or is being recommended for a discharge under other than honorable conditions (OTH), he or she *does not* have the right to present a case in person before an administrative separation board. [44]

The Army's own regulations regarding the possible characterizations of service mislead commanders who initiate separation actions. For example, paragraph 3-6 states:

> Both the honorable and general discharge entitle a soldier to full Federal rights and benefits provided by law. However, a discharge under other than honorable conditions or a bad conduct discharge may or may not deprive the soldier of veterans' benefits administered by the Veterans' Administration; a determination by that agency is required in each case. A Dishonorable Discharge deprives the soldier of all veterans' benefits and may deprive him or her of civil rights. [45]

This language incorrectly represents the availability of benefits under the Montgomery G.I. Bill.

Thus, the real victims of the administrative separation procedure are those soldiers with less than six years of service. Commanders can effectively blunt a soldier's ability to contest the elimination action by recommending a general discharge. Because the soldier has fewer than six years of service and is not being recommended for a discharge under other than honorable conditions, the soldier does not have a right to a board hearing. The seven-day period to object in writing to an action can hardly be considered a *meaningful* or an *effective* opportunity to fight a separation or argue for a higher characterization of service. [46] As a result of this process,

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[37] UCMJ art. 57.

[38] 424 U.S. 319 (1976).

[39] United States Army Finance and Accounting Center Military Pay Table, 1 Jan. 1989.

[40] Army Times, Apr. 4, 1988, at 8, col. 1.

[41] Army Reg. 635-2300, Personnel Separations: Enlisted Personnel (15 June 1989) [hereinafter AR 635-200].

[42] AR 635-200, chap. 2, sec. II.

[43] *Id.*

[44] *Id.* at para. 2-2 (d); *see also* AR 635-200, chap. 3, sec. III. Based on unofficial statistics maintained by the 82d Airborne Division G1/AG Personnel Actions Branch (PAB), the inability of soldiers to upgrade their recommended discharge characterization to an honorable discharge is readily apparent. During calendar year 1988, based on chapters logged in by PAB, 41 discharges pursuant to AR 635-200, Chapter 9, were received: of those, 34 were general discharges and only 7 were honorable discharges; 75 discharges pursuant to AR 635-200, Chapter 13, were received: of those, 72 were general discharges and only 3 were honorable discharges; and finally, 397 discharges pursuant to AR 635-200, Chapter 14, were received: of those, 4 were honorable discharges, 6 were under other than honorable conditions, and 387 were general discharges. In the 82d Airborne Division the overwhelming majority of those individuals eliminated do not have a right to a board hearing and are enrolled in the Montgomery G.I. Bill. Each of these soldiers arguably has a property interest in the $1200 plus interest forfeited to the government.

[45] AR 635-200, para. 3-6.

[46] *See, e.g.*, May v. Gray, 708 F. Supp. 716 (E.D.N.C. 1988). In this case, a soldier with less than six years of active military service tested positive on a urinalysis test. The soldier eventually requested a court-martial; in response, the commander started an administrative separation procedure. The soldier requested copies of the scientific tests that served as the basis for the pending administrative separation. These requests were denied. The soldier succeeded in enjoining the commander from separating him. The court noted that the Army's action threatened the soldier's reputation and constitutional rights, because he was denied due process of law. The court also stated that it did not see why enlisted personnel with less than six years of service received fewer protections than those who served over six years. *See also* The Fayetteville Times, Dec. 8, 1988, at 2-B, col. 2.

young soldiers are not only discharged from the United States Army, but also end up forfeiting their $1200.

The potential for abuse in this process is evident; the effectiveness of AR 635-200 (from the command's point of view) is measured by how quickly the unit can move from notification of the soldier to the actual separation. [47] Most commanders conscientiously adhere to the requirements of AR 635-200. Far too often, however, a soldier is presented with a packet composed of suspicious counseling statements concerning questionable misconduct. While the contents may be technically correct, the best interests of the Army may not be served by separating the soldier from the service. Yet, once an elimination packet is created, it is unusual for the soldier's submissions to the separation authority to have any effect. A high risk of erroneous deprivation certainly exists in the current separation process for those soldiers with under six years of service who are recommended for a general discharge.

The Government's Interest in the Current Process, Including the Burden of Instituting New Safeguards

The third prong of constitutional analysis requires an examination of the government's interest in the current process and the burden of instituting additional safeguards. The obvious remedy to the deficiencies noted in the separation process is to make a hearing available to any soldier who stands to be deprived of a recognizable property interest. This option will be discussed below. Additional safeguards, such as providing a hearing, are costly and add time to the separation process. Nevertheless, unless some action is taken to provide soldiers with additional due process, the result could be even more costly to the government.

Pursuant to recent legislation, veterans can now sue in a federal court to contest decisions affecting their individual benefits. [48] Furthermore, cases dealing with general VA rules and regulations can be heard in the federal court system. [49] It is entirely foreseeable that former soldiers, who forfeited their $1200, could qualify as a class and sue the VA. If the United States Army continues to administer the Montgomery G.I. Bill as it has in the past, the government is risking exorbitant litigation and settlement costs.

Remedies

There are several options available to the Department of the Army that would eliminate the constitutional and practical problems resulting from the current administration of the Montgomery G.I. Bill. It may be necessary to implement a combination of these options.

Make a Hearing Available to Participants in the Montgomery G.I. Bill Who Are Facing Administrative Separation

Fundamental fairness would suggest that each soldier being involuntarily separated from the service who possesses a requisite property interest should receive either a board hearing or be refunded their $1200. The predictable response by the Army would be that providing a hearing for those soldiers with a recognizable property interest would be *fiscally* and *administratively* impractical. Yet, pursuant to the Civil Service Reform Act of 1987, the soldier's counterparts in the civil service who are discharged for cause have the *right* to a hearing. [50]

It has been estimated that the Montgomery G.I. Bill will not cost the government any money until after 1992. [51] Statisticians also predict that only a little more than one-half of the soldiers who enrolled in the Montgomery G.I. Bill will actually use the benefits. [52] It is clear that the Montgomery G.I. Bill is going to be a large revenue raiser for the Federal Government. The Federal Government *owes* soldiers the chance to argue their case in a meaningful, personal manner before they forfeit their money.

The Department of the Army could make a streamlined board procedure available that would not be as costly or time-consuming as the current procedures used for soldiers with over six years of service. In *May v. Gray,* [53] a United States District Court opinion, the

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[47] AR 635-200, para. 1-7; *see also* 82d Abn. Div. Pam. 635-1, Division Administrative Elimination Pamphlet, 1 May 1984 (processing time for administrative separation NOT referred to an administrative discharge review board should be 15 days from notification to separation).

[48] The New York Times, Oct. 19, 1988, at A14, col. 5; Army Times, Oct. 31, 1988, at 9, col. 1. The Veterans' Judicial Review Act, Pub. L. No. 100-6-89, effectively overrules 38 U.S.C. § 211(a), as interpreted in numerous cases such as Marozan v. United States, 825 F.2d 1469 (7th Cir. 1988), which foreclosed judicial review of benefits determinations except for those with properly framed constitutional questions.

[49] *Id.*; *see also* ABA Journal, Dec. 1, 1988, at 118; Army Times, Feb. 6, 13, and 27, 1989. The new Court of Veterans' Appeals will review veterans' appeals that have exhausted the review process through to the Board of Veterans' Appeals. The soldier has 120 days to file a notice of appeal with the new court. Decisions made by the Court of Veterans' Appeals regarding laws or regulations will be appealable to the U.S. Court of Appeals for the Federal Circuit. This law also abolished the $10 limit on the amount a veteran can pay an attorney to represent him or her before the VA once the Board of Veterans' Appeals issues a statement intending to deny the claim. Once that point is reached, "reasonable" attorneys' fees are allowed.

[50] *See* 5 U.S.C. § 7513(d) (Supp. V 1987). "An employee against whom an action is taken under this section is entitled to appeal to the Merit System Protection Board under section 7701 of this title." It should be noted that an "employee" does not mean an individual working in a probationary status. In the military, based on AR 635-200, para. 2-2(d), a soldier with less than six years of active service is apparently in a probationary status since he is not entitled to a board. *See* Department of the Navy v. Egan, 108 S. Ct. 818 (1988), for a good explanation of a civilian employee's rights.

[51] Flocke, *The New Montgomery G.I. Bill*, Soldiers, Mar. 1988, at 50. According to Rep. Montgomery, the monthly $100 pay reduction should save the government about $318 million, plus 6% interest after the next few years.

[52] Army Times, Mar. 28, 1988, at 14, 16, col. 1. The National Center for Education Statistics reports approximately 60% of high school graduates attend college. Further, many soldiers reenlist and either decide to make the Army a career or later fail to use their benefits after their enlistment ends.

[53] 708 F. Supp. 716 (E.D.N.C. 1988).

court noted that it failed to understand why soldiers with six years of service are entitled to much greater due process than those with less than six years of service. At the very least, this case signals that the United States Army can no longer ignore the rights of soldiers with fewer than six years of service. This decision is even more revolutionary when one considers that the soldier in *May v. Gray* did not claim a property interest outside his employment in the military. Thus, a soldier being processed for separation with a property interest in the Montgomery G.I. Bill has an even stronger argument for entitlement to a board hearing.

Refund the $1200 to Soldiers Enrolled in the Montgomery G.I. Bill Who Are Administratively Separated and Receive at Least a General Discharge

A second option is an amendment to the Montgomery G.I. Bill allowing the refund of the $1200 under certain conditions. Certainly, those soldiers who fulfill the requirements of the Montgomery G.I. Bill, leave the Army, and then decide not to go to school should be refunded their $1200. Interestingly, the predecessor to the Montgomery G.I. Bill, the Post-Vietnam Era Veterans' Assistance Program (VEAP) allowed enrolled soldiers who were discharged from active duty under conditions *other* than dishonorable to be refunded their contributions on the date of their discharge or within sixty days from their notice of discharge, whichever was later. [54] Soldiers could also qualify for benefits with a general discharge.

In the Montgomery G.I. Bill Congress has done an about-face by saying that, not only is a general discharge insufficient to entitle a soldier to benefits, but also that a general discharge is insufficient to entitle a soldier to the return of his or her $1200. Many of the senior noncommissioned officers currently advising commanders enlisted during the VEAP era and therefore erroneously believe that a general discharge is sufficient for a soldier to receive educational benefits.

If the Army's fear is that all soldiers receiving general discharges don't deserve to receive their $1200 refund due to *serious* misconduct, then the command should process those soldiers who are so undeserving for a discharge under other than honorable conditions. The current situation results in all recipients of general discharges being ineligible for educational benefits. Those soldiers who are being processed for separation for minor actions are thrown in with soldiers who have engaged in more serious misconduct.

The refund of the $1200 contribution would still enable the government to realize the interest earned on the contributions while they were held by the Treasury. Also, there is some evidence that the Montgomery G.I. Bill is overcapitalized. [55] Therefore, the fear that the refunds would destroy the program may be without basis. At the very least, those soldiers who earn an honorable discharge and fulfill their service obligation should be refunded their $1200.

Increase the Soldier's Comprehension of the Requirements of the Montgomery G.I. Bill

In spite of congressional assurances to the contrary, it is clear that a vast majority of recruits do not understand the ramifications of enrolling in the Montgomery G.I. Bill. Most of the soldiers presently being discharged enlisted between 1985 and 1987 and therefore were subject to the enrollment procedures of several years ago when counseling on education benefits was less emphasized. As a result, soldiers now frequently exhibit complete ignorance regarding the operation of the Montgomery G.I. Bill when they seek counseling on their elimination action. [56] It is apparent that during the enrollment process, soldiers have not had the provisions of the Montgomery G.I. Bill clearly explained to them.

As a personal example, when the 113th Judge Advocate Officer Basic Course inprocessed through Fort Lee, VA, in July of 1987, the inprocessing clerks attempted to enroll the basic course students in the Montgomery G.I. Bill. The emphasis was placed on *signing* the documents rather than explaining them. If this was the procedure used for judge advocates, what realistic chance do regular Army recruits have to understand the "gamble" inherent in their enrollment in the Montgomery G.I. Bill? In fact, at some military facilities those recruits who did not enroll were removed from their training group and held back to explain their decision. [57]

A concerted, organized effort by the Department of the Army to increase comprehension of the enrollment process is especially important at this time. The recent decision to allow soldiers a "second chance" to enroll in the Montgomery G.I. Bill program and the emphasis placed on the Montgomery G.I. Bill to increase enlistment could result in future problems. Once again, with this new open period, the Army is telling its commanders that "the Montgomery G.I. Bill is an entitlement that will place a college education within the reach of many of our troopers." [58]

The pressure exerted on recruits to enroll may also be laying the foundation for future lawsuits. If there is fraud or false representation of a material fact in the

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[54] 38 U.S.C. §§ 1601, 1625 (Supp. V 1987).

[55] *See also* Army Times, Jul. 11, 1988 at 12. col. 1; Army Times, Sept. 5, 1988, at 12, col. 2; Army Times, Mar. 28, 1988, at 16, col. 2. In the spring of 1988, the Defense Department Board of Actuaries estimated only 50% of the educational benefits will be used.

[56] Random questioning of soldiers receiving administrative elimination counseling at the Trial Defense Service Field Office, 82d Airborne Division, Fort Bragg, North Carolina.

[57] Description of Montgomery G.I. Bill enrollment process at Fort Dix, New Jersey, in 1986.

[58] Weekly Bulletin, Headquarters, 82d Airborne Division, 12 Jan. 1989.

enlistment process, rescission of the enlistment contract is recognized as a remedy. [59] Because military employment is considered to be more than a statutory relationship, it is not inappropriate to examine enlistment contracts in light of traditional contract principles. [60] The lesson the United States Army should learn from these theories is that a clear understanding of the ramifications of enrolling must be conveyed to the recruits prior to the time they enroll in the program.

Strengthen the Rehabilitative Transfer Requirement of AR 635-200 to Encourage Transfers Rather Than Separations

The final option proposed is to make it harder for commanders to waive rehabilitative transfer pursuant to AR 635-200. [61] According to the regulation, the separation authority may waive the rehabilitative transfer requirement any time on or before the date the separation authority approves or disapproves the separation. Specifically, the separation authority must determine that further duty would: 1) create serious disciplinary problems or a hazard to the military mission or to the soldier; or 2) be inappropriate because the soldier is resisting rehabilitation attempts; or c) rehabilitation would not be in the best interests of the Army as it would not produce a quality soldier. [62]

Ironically, this provision not only adversely affects the soldier, but also hurts the Army as a whole. First, the request for waiver is usually prepared by the commander before the soldier consults with counsel and is advised of his or her rights. Under the current transfer section, the separation authority could approve the waiver without waiting for the soldier's submissions.

On the company commander's request alone, the current provisions allow the separation authority to essentially circumvent the purpose of the rehabilitation requirement. At the same time, the government is required to abide by its own regulations where the underlying purpose of the regulation is the protection of personal liberties or interests. [63] Therefore, more than a mere recitation of the statutory language should be required prior to waiving a rehabilitative transfer.

The importance of ensuring the propriety of an administrative separation should not be lost on the United States Government. Each soldier represents thousands of dollars in training costs. To routinely waive a rehabilitative transfer essentially throws away the government's investment. If more rehabilitative transfers are accomplished, soldiers will have a better opportunity to fulfill the requirements of the Montgomery G.I. Bill, and the United States Government will begin to see a return on its investment. The soldiers will then have a weaker argument that their right to procedural due process was abridged.

Conclusion

Without substantial changes in the language and the operation of the Montgomery G.I. Bill, the Army is arguably abridging the constitutional rights of its soldiers and running the risk of future legal action. Those soldiers with fewer than six years active service who forfeit their $1200 contribution to the Montgomery G.I. Bill without a meaningful opportunity to contest their separation have a due process objection to the current procedure. Even more damaging is the effect such a practice could have on the public's support of the military.

It is difficult to watch television or read a magazine without seeing some reference to the Montgomery G.I. Bill in an advertisement: "The military is a great place to start" or "Do you know how you are paying for college?" Imagine the public relations problem the military would have if thousands of former soldiers who had enrolled in the Montgomery G.I. Bill, never received any benefits, and also forfeited $1200 instituted action against the United States Army or the VA.

History has taught the United States that regardless of how many sophisticated weapons the military possesses, the key to victory is the individual soldier and the public's support of that soldier. A little common sense would indicate that if a few changes in the operation of the Montgomery G.I. Bill would avoid problems in the future, those changes should be made.

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[59] Pence v. Brown, 627 F.2d 872 (8th Cir. 1980); Roman v. Schlesinger, 404 F. Supp. 77 (E.D.N.Y. 1975).

[60] Alley v. United States, 6 Cl. Ct. 99 (1984).

[61] AR 635-200, para. 1-18*c* and *d*.

[62] *Id.* para. 1-18*d*.

[63] United States v. Russo, 1 M.J. 734 (C.M.A. 1975).

Contract Appeals Division Notes

What Will it Profit Thee?— Recent Decisions by the GSBCA Concerning Protest and Bid Preparation Costs

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In 1985 the General Services Administration Board of Contract Appeals (GSBCA) assumed jurisdiction over all bid protests concerning the acquisition by the executive branch of computers and computer-related services, with certain limited exceptions. [1]

Unlike protests before the General Accounting Office, bid protests before the GSBCA are complete trials, with written and oral discovery, hearings, and post-hearing briefs, all occurring within an extremely brief period of time. [2] Legal costs for such protests can be enormous. Bills of $100,000 or more are not uncommon, and at least one firm has submitted a claim for protest costs in excess of one-half of a million dollars.

Until recently, it had been assumed that a successful protester automatically recovered virtually all of its attorneys' fees and related protest costs. It had also been assumed that proposal preparation costs were automatically recoverable upon the showing that the buying agency had caused the protester to incur costs it might not otherwise have expended. A series of recent decisions, however, provide some reason for hope.

The Early Standard

Early in July 1985 the board enunciated its position on attorneys' fees and proposal costs. The *Amdahl Corp.* [3] decision promulgated the following general principles: 1) the board would award attorneys' fees to prevailing parties; 2) these fees were not restricted, except by the "prevailing rates" for similar work; and 3) little notice would be taken of complaints about "overstaffing" of protests by opposing government agencies. [4]

While stating that the Competition in Contracting Act had made the award of protest costs discretionary, the board went on to imply that award of attorneys' fees and related costs would be the rule rather than the exception, because the benefits of competition accrue to the "citizenry as a whole." [5] The following year, in *NCR Comten*, [6] the board reaffirmed its decision in *Amdahl* and in addition to attorneys' fees, the board awarded proposal preparation costs. In awarding all of the claimed attorneys' fees and costs, the board performed no analysis. The board merely consulted an American Bar Association study on such fees and stated that the fees were well within prevailing rates. [7]

The board also "clarified" the definition of a prevailing party in the following broad terms, citing a Supreme Court decision for the proposition that "[p]arties have prevailed if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." [8]

The Evolving Standard

Attorneys' Fees

Protesters and their attorneys should now be wary. The board will not pay for "learning time" by an inexperienced attorney in a bid protest, even if that attorney is fully successful. In *React Corporation* [9] a successful protester claimed $23,000.00 in attorneys' costs for 200 hours of work at $115.00 per hour. The board found nothing wrong with the hourly rate, but held:

> In the case before us, the attorney fees are simply too great in light of the issue and facts involved. While we have no particular problem with the rate, $115.00 per hour for an attorney in Boston, Massachusetts, such a rate presupposes an efficient attorney knowledgeable in the field of government contracts and protests.
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> . . . .

[1] Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, 1182-84 (1986); 40 U.S.C. § 759(f) (Supp. V 1987); Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783-342 (1986).

[2] Protest decisions must be rendered within 45 working days (normally about 64 calendar days) from the date of protest filing. Because the board normally takes two weeks to render its written decision, all of the litigation, including post-hearing briefs and reply briefs, must be concluded within six weeks.

[3] GSBCA No. 7965-C(7859-P), 85-3 BCA ¶ 18,283.

[4] *Id.* at 91,762.

[5] *Id.* at 91,761.

[6] GSBCA No. 8229, 86-2 BCA ¶ 18,822.

[7] *Id.* at 94,850.

[8] *Id.* at 94,852 (citing Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983)). The board, however, did not go more deeply into *Hensley*, which provides a careful rationale for determining how much a prevailing party should attain in the event of only partial success.

[9] GSBCA No. 9530-C(9456-P), 88-3 BCA ¶ 21,026, 1988 BPD ¶ 161.

> Of the remaining 21,242.42 . . . we disallow one-half of it, 10,621.21 as being excessive in light of the difficulty and nature of the case. [10]

Moreover, even the most sophisticated protesters and law firms may have their claimed fees substantially reduced. In *U.S. West Information Systems, Inc.*, [11] the protester's attorneys had claimed $506,862.17 for the costs of filing and successfully pursuing two protests, plus substantial bid preparation costs.

In regard to its first protest, the protester received only $10,500 of its claimed $90,000.00 in costs. The board held:

> Our first task is to arrive at a "lodestar" amount, which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. In determining the lodestar we deduct time spent on discrete and unsuccessful claims.
>
> In [the first protest], four of the five counts were dismissed as premature, with protester prevailing on a minor count involving lack of a sufficient DPA. The Board was able to resolve the DPA count on protester's motion for summary relief and resolution of that claim did not involve fact-finding. [12]

In the second protest, protester sought $407,513.00 in attorneys' fees and costs, but received only $145,600.00. The board held that, because the protester had prevailed on only one issue of significance out of the five it had pleaded, forty-five percent of its claimed expenses was a reasonable "lodestar" amount. Moreover, the board deducted an additional twenty percent "to reflect the success obtained." The protester had sought a complete recompetition of the requirement, but received only a chance to revise its proposal.

The board was clearly trying to send a message in *U.S. West*: 1) don't over-litigate; 2) don't use a shotgun when a rifle will do; and 3) concentrate on real issues, not on every possible claim that might be generated from a generous reading of the facts.

In *U.S. West* the board also denied all of the protester's claimed $903,000.00 in proposal preparation costs, because the protester never bothered to send in a revised proposal, claiming that the Army was biased against it. [13]

Proposal Costs

Proposal preparation costs are frequently sought by successful protesters, but less frequently obtained than attorneys' fees. The current standard is that, if the protester can show that the procuring agency caused it unnecessary expense, it will receive that portion of its preparation costs that were unnecessarily incurred. [14] This is a refinement of the earlier standard, which sometimes appeared to be the automatic award of proposal costs along with attorneys' fees.

But there is now an implied (if nowhere fully articulated) condition in order to receive preparation costs. The successful protester should not withdraw from the recompetition or revised solicitation if one is ordered by the board. If it does, it runs the risk of being perceived as having filed its protest solely to recover its proposal costs. In such a case the board is likely to find a way to deny proposal preparation costs, even while granting the full amount of attorneys' fees.

A classic example of the board's new attitude may be seen in the different treatment afforded two successful protesters in the same procurement. One of them, *Recognition Equipment Inc.*, [15] received its full bid preparation costs in addition to winning the contract on the recompetition! The other successful protester, *Severn Companies*, [16] was denied all of its proposal preparation costs because, even though it submitted a pro-forma bid, its behavior was such that the board believed that it had withdrawn from the procurement for reasons unrelated to the protest.

The new standard, therefore, appears to be that sincere protesters who have been caused by the agency to expend funds needlessly in preparing a proposal can recover those costs. On the other hand, a successful protester who is perceived to have filed a protest solely to recover those costs will probably not recover proposal costs if they have been given another chance to win the contract but failed to take advantage of the opportunity. This does not mean that a protester can never recover its proposal costs if it drops out of the bidding. It does mean that dropping out or "faking" a revised proposal will make the recovery of proposal costs unlikely, unless the decision to drop out is perceived to be a valid one.

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[10] *React*, 1988 BPD ¶ 161 at 4.

[11] GSBCA Nos. 9114-C(8995-P) 9255-C(9103-P), 89-2 BCA ¶ 21,774, 1989 BPD ¶ 119. The board begins to adopt a rationale similar to that used by the Supreme Court in Hensley v. Eckerhart, although it does not say so.

[12] *U.S. West*, 1989 BPD ¶ 119 at 8 (citations omitted).

[13] Lest the *U.S. West* decision be construed as an unqualified victory for the Army, it should be pointed out that the various protests by this company delayed completion of the FORSCOM Information System (FIS) project by nearly a year. Because of the delay a large new building at Fort McPherson could not be occupied, because the computer system had to be built into the structure itself. The estimate of the delay cost by the requiring activity was $10,000.00 per day!

[14] Morton Management, Inc., GSBCA No. 9053-C(8965-P), 88-2 BCA ¶ 20,777, 1988 BPD ¶ 92; Computer Consoles, Inc., GSBCA No. 8450-C (8134-P), 87-1 BCA ¶ 19,440.

[15] GSBCA No. 9408-C(9363-P), 89-1 BCA ¶ 21,281, 1988 BPD ¶ 228.

[16] GSBCA No. 9425-C(9344-P), 1989 BPD ¶ 141. As the board stated:
[The] record demonstrates that although Severn maintains that the Army's violations of law caused it to make major modifications to its proposal, its evidence in support of that assertion is sorely lacking . . . . After the Army requested Severn's specific responses to what the Army believed to be deficiencies in the protester's proposal, Severn asked for two additional weeks to respond . . . but never actually provided the Army with the information it sought.

Settlements

Most protests are settled. Perhaps half of the settlements are agreed to on terms favorable to the protester, and many of these will involve all or a portion of the attorneys' fees. [17] Few government agencies will agree to pay proposal costs as a result of settlement as long as the protester is being granted the right to recompete.

In the event of a settlement favorable to the protester, an agency has two options to obtain the funds. It may pay these funds out of its own monies (usually the appropriations for the contract in question), or it may apply to the board for approval of the settlement for payment out of the permanent indefinite judgment fund. [18]

Theoretically, having the board approve an award arising from a settlement is the most desirable route for the agency and the protester. Because of what was probably an oversight by Congress, the agency, by having the board approve the settlement, can reimburse the protester without having the funds taxed to the agency itself. [19] Nevertheless, this loophole has caused considerable soul-searching by the board, and on several recent occasions the board has declined to approve awards in settlement agreements that it suspected were the result of unethical collusion between the agency and a protester for the sole purpose of "buying-off" a protest.

Indeed, in *Bedford Computer Corporation* [20] the board virtually accused the buying agency of doing just that. The board felt that the agency was attempting to use monies from the permanent indefinite judgment fund to satisfy a protester without making any changes in its unlawful procedures. The lesson of *Bedford* is clear; the board will not approve protest or proposal costs for payment out of "general" funds unless the agency both admits error and corrects the error. Merely admitting to error and attempting to write a check with someone else's money to satisfy the aggrieved protester will not be enough. [21]

Conclusion

A successful or properly aggrieved protester can obtain its attorneys' fees and proposal preparation costs. This may be accomplished either as a result of a decision on the merits granting the protest or by settlement with the agency involved. The fees must be reasonable in light of the success achieved, however, and if the board believes that the real reason behind the protest was to obtain proposal costs, it may not award such costs even to a successful protester who has proven on the merits that its competitive position has been impaired or otherwise harmed by the government. These trends herald a new, if unannounced, change in the attitude of the GSBCA toward the recovery of costs by successful protesters. Executive agencies, sometimes faced with a blizzard of pleadings from a protester whose real and sole desire is to recover proposal preparation costs, have some reason to be thankful.

Hindsight—Litigation That Might Be Avoided

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This is part of a continuing series of articles discussing ways in which contract litigation may be avoided. The trial attorneys of the Contract Appeals Division will draw on their experiences and share their thoughts on how to avoid litigation or develop the facts in order to ensure a good litigation posture.

Introduction

The three case studies presented below all deal with a common theme: the failure of the government to explain, at the time it took an action, why it took that particular action. While each case must be evaluated on its own merits, these cases provide an interesting insight into how the board may resolve unusual problems. While it may be difficult to determine when the board will apply the concepts discussed below, it is not difficult to protect ourselves. We simply have to keep in mind that the board is showing an increasing interest in whether the government had a reasonable basis for taking the action in issue.

Problem 1

While reviewing a solicitation for new construction on post, you noted that the solicitation sets out $125.00 per day in liquidated damages for each day the contractor is late in completing the project. Because the solicitation

[17] The experience of the Army GSBCA bid protest team bears this out. Of the 40 protests since August, 1987, 20 were settled. Of those, the protester received either award of the contract, attorneys' fees, or proposal costs as a condition of settlement in seven cases.

[18] Awards are paid without interest. Zwerling v. Marsh, 783 F.2d 1032, 1032 (Fed. Cir. 1986).

[19] Unlike the various civil rights fee shifting statutes, CICA does not include a provision requiring the agency to reimburse the fund.

[20] GSBCA No. 9837-C (9742-P), 1989 BPD ¶ 121. This issue may have been resolved. The board has "read in" a requirement for agency reimbursement despite the lack of statutory language. *See* Julie Research Lab., Inc., GSBCA No. 9075-C (8918-P), 89-1 BCA ¶ 21, 213. As a result, it may worry less about "payoffs."

[21] Nor will payment out of the agency's own funds necessarily protect the buying command or agency from scrutiny. The General Accounting Office recently launched a case by case review of all settlements of ADP protests by executive agencies in which monies were paid to resolve the protest, from whatever source.

does not contain any information as to how the $125.00 was determined, you called the contracting officer to find out why he decided to charge $125.00 for liquidated damages. The contracting officer advised you that the figure was worked out about three years ago and that it includes a $75.00 charge for "inspection and administration" costs and a $50.00 charge for "contract administration." When you asked how each of the individual items were determined, the contracting officer told you that he did not know and that each of the charges were developed before he began working at the office. He went on to state that he believes the costs are reasonable and that they have never been challenged by a contractor. When you told the contracting officer that you wanted more information on how the rates were computed, he told you that you have all the information you need and suggests that you approve the rates. What should you do?

Solution 1

You should require the contracting officer to provide a detailed breakdown of how the liquidated damages were determined for the particular contract involved. While the contractor will have the burden of coming "forward with evidence that the amount of liquidated damages is an unreasonable forecast of potential damages and that they bear no reasonable relation to damages," [22] the board may not strictly enforce that burden. [23]

The Federal Acquisition Regulation (FAR) states:

> The rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty, and therefore unenforceable. [24]

The "case-by-case" standard has been relaxed by the Court of Claims. In *Young Associates, Inc. v. United States* [25] the contractor alleged that the liquidated damages clause in its contract should be set aside as a penalty because the evidence showed "case-by-case" consideration had not been given to the rate of liquidated damages. [26] The contractor contended that the government's use of a three-year-old chart that was part of the contract to determine the amount of liquidated damages violated the regulations requiring determination of the amount on a "case-by-case basis." [27] The court ruled that "the regulation does not require a liquidated-damage schedule to be tailor-made for each individual contract. It is enough if the amount stipulated is reasonable for the particular agreement at the time it is made." [28]

While *Young* does not require liquidated damages to be "tailor-made" for each contract, it does require that the amount be "reasonable at the time the particular agreement is made." In the solicitation under consideration there is no evidence that the amount the contracting officer wants to include is reasonable at the present time. In the absence of such evidence the board may not allow the government to assess liquidated damages. The board has repeatedly held that "a liquidated damages provision bearing no reasonable relationship to anticipated actual damages or greatly disproportionate to the presumed loss will be stricken as an unenforceable penalty." [29]

In *U.S. Floors* [30] the board prohibited the government from collecting liquidated damages because there "was no evidence that the liquidated damages amount bore a reasonable relationship to the anticipated loss under this contract." [31] In that appeal the contracting officer stated she did not know where the charge for administrative costs came from, that she was unable to state how it was derived, and that she was not aware of any back-up materials that went into the estimate. [32] In addition an engineer stated that the costs for "inspection and admin-

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[22] Rivera-Cotty Corporation, ASBCA No. 32291, 86-3 BCA ¶ 19,148.

[23] *See* U.S. Floors, ASBCA No. 36356, 88-3 BCA ¶ 21,153, *motion for reconsideration denied*, slip. op. (21 Dec. 1988), *vacated* 89-1 BCA ¶ 21,552 (After the government's motion for reconsideration was denied, the parties settled the matter. The settlement agreement required appellant to withdraw the appeal and move to vacate each of the decisions.). The board stated that it decides appeals on the basis of the preponderance of the evidence, regardless of the burden of proof, when evidence has been presented by both sides. The board went on to note that it only considers the burden of proof in those rare instances when the evidence is evenly balanced. Because the board vacated both its original decision and the decision on the government's motion for reconsideration, this appeal does not have any precedential value. Nonetheless, the decisions do provide interesting insight as to how the board may consider a liquidated damages issue. The government would be wise to take the board's decisions in this appeal seriously and ensure that we can always show that our assessment of liquidated damages is reasonable.

[24] Fed. Acquisition Reg. 12.202(b) (1 Apr. 1984) [hereinafter FAR].

[25] 471 F.2d 618, 622 (Ct. Cl. 1973).

[26] *Id.* at 621. The clause in *Young* was actually from the old Federal Procurement Regulations (FPR), however, the wording is virtually identical to the wording in the current FAR clause.

[27] *Id.* at 622. In *Young* the evidence established that the liquidated damages rate was determined from a table setting out a "'graduated scale of 'daily charge[s] for liquidated damages for each calendar day of delay' rising from $30 to $300, depending on the original contract amount." The chart in question had been prepared three years before the contract in issue was awarded. The court took judicial notice of the fact that costs had not decreased in the three years that had passed since the chart was issued and found it an acceptable basis for assessing liquidated damages.

[28] *Id.*

[29] *See* Orbas & Associates, ASBCA No. 33569, 87-3 BCA ¶ 20,051, and cases cited therein at 101,524.

[30] ASBCA No. 36356, 88-3 BCA ¶ 21,135.

[31] *Id.* at 106,792.

[32] One of the key facts omitted from the board's decision was that the contracting officer at the time of the hearing was not the same contracting officer that awarded the contract. Consequently, she could not testify that the liquidated damages were reasonable for the contract at the time of award since she was not involved with the award of the contract.

istration was not developed specifically for this contract but 'was developed for our office in general.'" [33] He also stated that neither he nor anyone else on his staff had discussed the quarters charge portion of the liquidated damages with the contracting officer. Finally, he stated he had no knowledge as to how equipment rental and miscellaneous charges were determined. Based on these facts the board could not find a basis to determine the reasonableness of the liquidated damages charges. Consequently, the board found all of the charges to be an "impermissible penalty" and set aside the liquidated damages assessment.

While the *U.S. Floors* case does not carry any precedential value, it does illustrate an important point. The board expects the government to have a factual basis when it decides to include liquidated damages in a contract. For example, in *Young* [34] the court found the government's reference to a chart, even though it was outdated, to be reasonable. These cases clearly establish the importance of documenting the manner in which liquidated damages are determined for each particular contract. While it does not take much to sustain the reasonableness of liquidated damages, it does take something. If your contracting officer is serious about collecting liquidated damages, he or she is going to have to articulate a reasonable basis for the amount included in each contract. Each contract file should contain a form showing how each of the elements of the liquidated damages charge were determined. That form should end with a statement, signed by the contracting officer that released the solicitation, stating that the contracting officer has reviewed the data supporting the liquidated damages amount for the solicitation and determined that the assessment is fair and reasonable for that particular solicitation.

Problem 2

One of the post contracting officers has just come to your office and asked for advice as to whether a material submittal sent in by a contractor can be rejected. The contract in question involves the construction of a new loading dock on the post. One of the items called for in the contract is an automatic loading ramp. This device is basically an adjustable ramp that can be moved up or down to allow convenient unloading of trucks with trailers of different heights. One of the requirements for the ramp is that it be operated by a four button switch: one button for up, one for down, one for in, and one for out. The buttons are designed so that the ramp will not move unless one of the buttons is pressed.

The contractor has proposed an automatic ramp, operated by a toggle switch. The toggle switch has three positions: off, on, and raise. When the switch is pushed the ramp extends to its highest position and adjusts itself to the level of the truck. When the truck pulls away the ramp automatically returns to its storage position. Although the procedure is different than the ramp described in the solicitation, the function is basically the same.

The engineers have recommended rejecting the ramp. Their proposed response simply says: "The submitted ramp has all of the automatic features but uses a toggle switch in lieu of pushbutton. Provide pushbutton control." The contracting officer tells you that he called the engineers and told them he did not feel their response was adequate and asked them to explain why the toggle switch is unacceptable. The engineers responded by insisting that the contractor comply with the letter of the contract, and they refused to provide any more information.

The contracting officer wants to know if he should let the rejection go "as is" or if he should require the engineers to write a more detailed explanation. You agree to look into the matter. Your investigation reveals the following facts:

1. The specification for the automatic loading ramp was based on the technical description of a ramp manufactured by the Load-It-Up Company.

2. Load-It-Up is the only company in the United States that makes ramps that meet the "four button" requirement of the contract.

3. The solicitation did not contain a clause specifically requiring contractors to use a ramp manufactured by Load-It-Up. In fact, the solicitation failed to disclose that Load-It-Up manufactured a ramp that met the contract requirements or that Load-It-Up was the only manufacturer of the ramp in question.

4. The Contract contained a clause which stated:

> This equipment shall be the product of a reputable manufacturer who has been regularly engaged in the production of such adjustable loading ramps and who issues catalog information on this product. The equipment shall have been in successful operation for at least one year.

5. The contract also contained an extract from FAR 52.236-5, entitled *Material and Workmanship* (1 Apr. 1984), which states in part:

> References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

6. While there are several differences between the ramp offered by the contractor and the technical requirements of the contract, the toggle switch was the only feature objectionable to the post engineers.

7. The contractor believed he could provide the functional equivalent of the ramp described in the contract. He told you he based this conclusion on the following facts:

[33] *U.S. Floors*, 88-3 BCA ¶ 21,153 at 106,792.

[34] 471 F.2d 618 (Ct. Cl. 1973).

a. The contract did not require him to provide a ramp manufactured by a specific firm.

b. The contract specifically stated he could offer the equipment of any reputable manufacturer whose equipment has been in successful operation for at least one year.

c. The *Material And Workmanship* clause of the solicitation allowed him to offer any ramp that was equal to the ramp named in the contract. Because the solicitation did not name a specific brand, the contractor believed he could offer any ramp that was the functional equivalent of the ramp described in the solicitation.

8. If the contractor had known the solicitation was really limited to ramps provided by Load-It-Up, it would have bid differently on the contract.

9. The engineers wanted a ramp like the one made by Load-It-Up for the following reasons:

a. There were two basic types of ramps available on the commercial market. The ramp made by Load-It-Up (type A) stored flat on the dock and was moved by the controls to the truck. If a truck left while the ramp was extended it would stay in place. The other type of ramp (Type B) contained a hinge and basically was stored against the side of the dock. When the switch was depressed the ramp would move to a horizontal position, raise itself to about eighteen inches above the dock and then lower itself to the truck. If a truck left while the ramp was extended the ramp would automatically go to its storage position.

b. The type A ramp was less likely to malfunction than the Type B ramp. Consequently, maintenance costs would be lower and "down time" on the dock would be less.

c. The type A ramp was safer because it would not move unless one of the buttons was depressed.

10. The engineers are adamant about limiting their response to the submittal to simply saying that it does not include the push buttons as required by the contract. They have told you the contract means what it says and that they do not believe they have to explain to the contractor why his nonconforming submittals have been rejected. They feel to do so would allow the contractor to call all of the shots under the contract. Their bottom line is "if the contractor made a mistake in preparing its bid, it should pay the price." What should you do?

Solution 2

The contracting officer is correct. You should tell the engineers to explain why the product offered by the contractor does not meet the needs of the contract.

The key problem in this case revolves around the interpretation of the *Materials and Workmanship* clause in the contract. That clause specifically states that "the contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the contracting officer, is the equal to that named in the specifications, unless otherwise specifically provided in this contract." [35] At first glance this clause may not appear to be relevant, because the contract does not include a "[r]eference to any equipment, material, article, or patented process, by trade name, make, or catalog number." [36] Nevertheless, the board will examine the specification to determine if it is so detailed that, in fact, it can only be satisfied by one type of product.

In *Bruce-Anderson Company, Inc.*, [37] the case on which the above example is based, the board found that the specification was "latently restrictive" [38] and ruled that the contractor could offer a substitute in accordance with the *Material and Workmanship* clause. [39] While the standard rule is that an offeror must protest a restrictive specification prior to award, and failing that, is barred from making such a challenge, the board distinguished the *Bruce-Anderson Company, Inc.*, case, because that was not a situation "where there is a clearly recognizable restrictiveness." [40]

Once a contractor offers a product for which there are "no discernible quality differences" between it and the item set out in the contract, the government can "neither fail nor refuse to provide a reasonable explanation for rejection of the alternate." [41] Basically, the board recognizes that the contracting officer has the discretion to reject an alternate product, but goes on to note that such "discretion is not absolute and must be reasonably and fairly exercised." [42]

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[35] FAR 52.236-5(a).

[36] FAR 52.236-5(a).

[37] ASBCA No. 29411, 88-3 BCA ¶ 21,135.

[38] *Id.* at 106,713. It is important to note that the board did not object to the fact that the clause was restrictive. It simply stated that, since the specification was restrictive, the contractor had a right to offer a product that was equal to the specified product. The board specifically noted, citing three Comptroller General opinions, that the government had the right, in appropriate circumstances, to use restrictive specifications. Those circumstances arise when the "specification is reasonably related to the minimum needs of the agency." *See* Amray, Inc., Comp. Gen. Dec. B-208308, 83-1 CPD ¶ 43; Gerber Scientific Instrument Co., Comp. Gen. Dec. B-97265, 80-1 CPD ¶ 263; Pacificorp Capital, Inc., Comp. Gen. Dec. B-227822, slip op. (31 July 1987).

[39] FAR 52.236-5.

[40] *Bruce-Andersen*, 88-3 BCA ¶ 21,135 at 106,716. This problem can be avoided by simply specifying the name of the item the government wants. If only one source can meet the government's requirements for the item that fact should be set out in the solicitation. In this way all bidders are on notice that there is a "brand name or equal" or a source limitation in the contract. In such a case, they will not be able to successfully challenge a restrictive specification after award on the grounds that it was "latently restrictive."

[41] *Id.* at 106,715.

[42] *Id.*

It must be kept in mind that the board was not concerned about the restrictiveness of the specification or that Appellant's substitute was rejected. The board was only concerned with the fact that the government had failed to articulate any reason for rejecting the substitute offered by the contractor. The board specifically noted:

> [T]here may have been some technical reason or safety reason why the Government wanted the delayed action but no reasons appear in the record. It appears to us that a single word 'unacceptable' is no explanation at all. The failure or refusal to give an explanation when one is clearly called for appears to us to be arbitrary. [43]

In the above problem you should instruct the engineers to identify each aspect of the submittal that fails to meet the contract requirements and explain why the contractor's proposed substitute will not meet the needs of the government. If the engineers cannot articulate a reason for their action now, they clearly will not be able to do so if the matter ends up in litigation. A clear statement setting forth the specific reasons why the proposed substitute is not effective will ensure that the government gets exactly what it needs at no additional cost.

Problem 3

The post contracting officer is preparing to terminate a contract for default because the contractor failed to deliver on time. The final decision simply states that the contract is terminated for default due to the contractor's failure to deliver on time and advises the contractor of his statutory right to appeal. When you discuss this matter with the contracting officer you are advised that the contractor called before the contract was terminated and claimed it was not responsible for the delay. The contracting officer believes the contractor was responsible for the delay. There were no other communications, either oral or in writing, concerning the delay. You are concerned that the termination letter is too vague, but you think it is probably sufficient. Should you approve the letter?

Solution 3

Your concerns are probably correct. While there is no definitive case on this matter, Judge John V. Riismandel, a Vice Chairman of the Armed Services Board of Contract Appeals, recently issued a concurring opinion in *Delphi Construction Company* [44] that addressed this issue. Although his concurring opinion was not the opinion of the board, it does provide an interesting insight into what the board may do in such a situation.

In *Delphi* Judge Riismandel notes that § 6(a) of the Contract Disputes Act of 1978 [45] requires the final decision of the contracting officer to include the "reasons for the decision." He goes on to note that FAR 33.211(a)(4) states that the contracting officer's final decision shall include a "[s]tatement of the factual areas of agreement and disagreement." [46] He further states that "FAR 49.402-3, Procedure for default, further provides in para. (g) that a notice of termination shall state '[t]he acts or omissions constituting default.'" [47] Finally, he notes that FAR 49.402(k) states:

> If the contracting officer has not been able to determine, before issuance of the notice of termination whether the contractor's failure to perform is excusable, the contracting officer shall make a written decision on that point as soon as practicable after issuance of the notice of termination. The decision shall be delivered promptly to the contractor with a notification that the contractor has the right to appeal as specified in the Disputes clause.

Judge Riismandel concludes his discussion by noting that DOD FAR Supp. 43.301(a)(2)(ii)(B) [48] also requires the contracting officer to set out the reasons for his or her conclusion that the default was not excusable. Judge Riismandel goes on to state the contracting officer's failure to comply with the regulations listed above resulted in a defective final decision. Consequently, in his opinion, the statute of limitations set forth in the CDA had not begun to run, and the appellant could file an appeal with the board more than 90 days after the "final decision was issued."

While Judge Riismandel's concurring opinion may not be binding precedent, it certainly gives an idea of where the board may be heading in the future. In reviewing final decisions, you need to ensure that they set out the factual basis for the decision, [49] for failure to do so may result in a virtually limitless [50] time for the contractor to file an appeal.

Summary

In each of the above cases the board ruled against the government because we were unable to explain the basis for our actions. While these cases may contain somewhat unusual facts, they still provide a valuable lesson on how to protect ourselves against challenges to the decisions of contracting officers.

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[43] *Id.*

[44] ASBCA No. 34208, 88-3 BCA ¶ 21,138.

[45] 41 U.S.C. § 601 (1982).

[46] *Delphi*, 88-3 BCA ¶ 21,138 at 106,728. In the decision the FAR provision in question was mistakenly printed as 33.011(a)(4).

[47] *Id.*

[48] The referenced clause is actually 243.301(a)(2)(ii)(B) of the DOD FAR Supplement.

[49] You also need to keep in mind that § 6(a) of the CDA also states that any findings of fact stated in the final decision are binding in future proceedings.

[50] The doctrine of laches may apply, although it does not provide very good protection.

The government probably would have prevailed in each of the above cases if the contracting officer had taken the time to explain the basis for his or her actions at the time the action was taken. We strongly urge you to discuss these cases with your contracting officers and ensure that they know you are available to help them draft timely documents that establish the reasonableness of their actions.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Courts-Martial Jurisdiction Over Enlisted Retirees? — Yes, But a Qualified Yes in the Army!

The issue of court-martial jurisdiction continues to be in the forefront of military law. The most recent pronouncement is *Pearson v. Bloss* [1] . Master Sergeant (MSGT) Jon Pearson is a retired member of the regular component of the United States Air Force. Before and after his retirement from active duty, MSGT Pearson engaged in conduct that became the subject of several charges against him. While MSGT Pearson was in a retired status, the Air Force sought to exercise jurisdiction over him under the provisions of article 2(a)(4) of the Uniform Code of Military Justice, [2] which subjects "retired members of a regular component of the armed forces who are entitled to pay" to courts-martial jurisdiction. At trial, MSGT Pearson moved to dismiss the charges for lack of personal jurisdiction, contending that article 2(a)(4), UCMJ, is unconstitutional because retired enlisted members are not in the armed forces. [3] After the trial judge denied his motion, MSGT Pearson petitioned the Air Force Court of Military Review for extraordinary relief. The Air Force court denied the relief and found that MSGT Pearson was subject to court-martial jurisdiction. [4] Again alleging that article 2(a)(4) was unconstitutional as to enlisted retirees, MSGT Pearson petitioned the United States Court of Military Appeals to prohibit his pending court-martial.

By reading the clear language of the statute, the Court of Appeals rejected MSGT Pearson's claims that article 2(a)(4), UCMJ, does not include retired enlisted members of a regular component. [5] Moreover, the court relied on its prior opinion in *United States v. Overton* [6] to hold that Congress's decision to give the military UCMJ jurisdiction over personnel in a retired military status was constitutional. In effect, the court determined that the military status of a retiree is such that any offense committed by a retired member of the regular components is "arising in the land or naval forces" [7] and therefore does not require indictment by grand jury. Thus, it is now clear that the Court of Military Appeals sees no constitutional impediment to the exercise of UCMJ jurisdiction over retirees, whether they be officer or enlisted.

Notwithstanding this latest pronouncement by the Court of Military Appeals, Army practitioners should be cognizant of the Army policy on the matter, which provides that "retired personnel subject to the [UCMJ] will not be tried for any offenses by any military tribunal unless extraordinary circumstances are present linking them to the military establishment or involving them in conduct inimical to the welfare of the nation." [8] This policy will be placed in the next revision of Army Regulation 27-10. [9] Moreover, the regulation will require approval from the Criminal Law Division, Office of The Judge Advocate General, before any case against a retired member goes to trial. MAJ Holland.

Must the Crime Scene Be Preserved?

C.T., the wife of an airman, worked as a cashier at the Noncommissioned Officer's Open Mess at Bergstrom Air Force Base, Texas. She was sexually assaulted, beaten, strangled, and discovered unconscious in her car in the parking lot of the Open Mess on February 7,

[1] 28 M.J. 376 (C.M.A. 1989).

[2] Uniform Code of Military Justice art. 2(a)(4), 10 U.S.C. § 802(a)(4) (1982) [hereinafter UCMJ].

[3] *Pearson*, 28 M.J. at 377.

[4] Pearson v. Bloss, 28 M.J. 764 (A.F.C.M.R. 1989).

[5] The United States Court of Military Appeals had previously held that UCMJ jurisdiction existed over retired officer members of a regular component. United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958).

[6] 24 M.J. 309 (C.M.A. 1987), *cert. denied*, 108 S. Ct. 487 (1987) (UCMJ jurisdiction exists over members of the Fleet Marine Corps Reserve).

[7] U.S. Const. amend. V. ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . ..").

[8] Dep't of Army, Pam. 27-174, Legal Services: Jurisdiction, para. 4-5 (25 Sept. 1986).

[9] Army Reg. 27-10, Legal Services: Military Justice (16 Jan. 1989).

1987. [10] Significant evidence was found in the victim's car that linked Technical Sergeant Gerald Mobley to the crime, including the following: 1) a receipt with Mobley's name on it; 2) seminal fluid; 3) a pubic hair; 4) clothing; 5) a dusty shoe imprint on the car window; and 6) a bloody palm print on a sheet of paper. Mobley was tried at a general court-martial, convicted of murder, and sentenced to a dishonorable discharge, total forfeitures, and confinement for life. [11]

On appeal, defense counsel argued that Mobley's sixth amendment and article 46, UCMJ, rights were violated when the victim's car was released to the victim's husband on the day charges were preferred against Mobley and defense counsel was detailed. The car was released by the Austin police department without notice to Mobley, who had not requested an opportunity to inspect the car. [12] At the time the car was released, the investigation was a joint effort of the Austin police and the Air Force Office of Special Investigations.

On appeal the Air Force Court of Military Review considered a recent U.S. Supreme Court case concerning the destruction of evidence, *Arizona v. Youngblood*, [13] which held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." [14] In *Youngblood*, the Court relied upon its earlier holding in *California v. Trombetta*, [15] where the Court heard a challenge that California should have preserved breath samples that were tested for drunk driving. The *Youngblood* Court reaffirmed the importance of the factors the Court had considered in *Trombetta*: 1) the police officers had acted according to their usual procedures and with good faith; 2) the samples were probably not exculpatory; and 3) the accused could still attack the breathanalysis test. [16]

In *Mobley* the court also cited article 46, UCMJ, and *United States v. Garries*, [17] in which the Court of Military Appeals stated: "Under Article 46, the defense is entitled to equal access to all evidence, *whether or not it is apparently exculpatory* . . . . Thus, the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present." [18]

The court in *Mobley* conducted its analysis using the procedure discussed in *Youngblood* and *Trombetta*. First, the court found that the government agents (OSI and Austin police) had not acted in bad faith. Second, the court decided that it was pure speculation as to whether the vehicle would have yielded any exculpatory evidence for Mobley. Third, the court questioned whether a "crime scene" (the vehicle) was the type of evidence contemplated by article 46 and constitutional law. "The vehicle was the crime scene itself. We know of no rule based on constitutional, statutory or case law which requires police authorities to preserve a crime scene until appropriate defense representatives have had the opportunity to examine it." [19] In fact, the court found that it would be "impractical" to preserve a crime scene, particularly if the accused is not immediately identified. This is an interesting interpretation because the evidence and the crime scene were synonymous in this case. When the car was returned, the blood stains, sole print, semen stains, and the other physical evidence were also lost. Finally, the court decided that Mobley did not suffer any prejudice because he could still examine the forensic tests and the experts who conducted the tests for the government. [20]

The court correctly concluded under *Youngblood* that the return of the victim's car did not constitute "bad faith" by the Austin police department. [21] It is at best speculative whether the car would have yielded exculpatory evidence, and the crucial tests and experts were still subject to attack by the defense. Therefore, the Supreme Court standards established in *Trombetta* and *Youngblood* appear to be satisfied.

The issue still remains, however, as to whether there exists any additional requirements to maintain evidence under article 46 or *Garries*. The court dismissed this issue by concluding that a crime scene was probably not

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[10] C.T. was determined to be "brain dead," and life support efforts were discontinued.

[11] United States v. Mobley, 28 M.J. 1024 (A.F.C.M.R. 1989). The convening authority reduced the amount of forfeitures.

[12] There was no requirement or standard operating procedure requiring notice by the Austin police. *Id.* at 1027.

[13] 109 S. Ct. 333 (1988).

[14] *Id.* at 337. Youngblood was convicted of sexual assault, kidnapping, and child molestation. The victim's clothes and semen samples from the victim were not maintained or tested to determine the identity of the perpetrator.

[15] 467 U.S. 479 (1984).

[16] *Youngblood*, 109 S. Ct. at 336 (citing *Trombetta*, 467 U.S. at 485).

[17] 22 M.J. 288 (C.M.A. 1986).

[18] 22 M.J. at 293 (emphasis added). The court in *Garries* also mentioned, however, that "[i]f the testing had been done by the military or at its request, a different result might be required. In that situation, it would be difficult to excuse the failure to provide notice to the defense." 22 M.J. at 293 n.6. Article 46 provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46.

[19] *Mobley*, 28 M.J. at 1028.

[20] This is similar to the conclusion the Court reached in *Trombetta*, when the Court stated that the accused could challenge the reliability of the breathanalysis test and the credibility of the test operators.

[21] In *Youngblood* the police destroyed Youngblood's car. The dissent vigorously argued that this was probably evidence of bad faith, as the testimony of the victim described features of the car that Youngblood claimed were inaccurate. 109 S. Ct. at 345 n.10.

the type of evidence contemplated by article 46. Because the crime scene contained the significant physical evidence, this appears to be a solution based more in semantics than logic. Perhaps the real issue is whether evidence that is not clearly exculpatory must be preserved and what role the good or bad faith of the government plays in this decision. These are tough issues that the Court of Military Appeals has not yet resolved. As previously discussed, it is clear from the decision in *Garries* that equal access to evidence pursuant to article 46 is not limited to clearly exculpatory evidence; however, the court has not yet given clear directions as to what article 46 does require and how it might extend the Supreme Court standards in *Youngblood* and *Trombetta*. [22] This is an issue to watch in the future. MAJ Merck.

Defense Counsel on Strike

Addressing a "hopefully unique issue," the Navy-Marine Court of Military Review has reminded defense counsel that they should not "utterly cease to function" in protest against a military judge's ruling. According to the court in *United States v. Galinato*, [23] such actions were an "astounding show of contempt" and resulted in the denial of effective assistance of counsel under the sixth amendment.

Galinato was a citizen of the Philippines who joined the U.S. Navy in 1983. Starting in 1986, he embarked on three different "check-bouncing" sprees. He was originally court-martialed at a special court-martial for twenty specifications of making and delivering bad checks. When he continued this bad habit, he found himself at a general court-martial facing thirty-one specifications of making and delivering bad checks. [24]

Galinato requested individual military counsel, Lieutenant Gray, and hired civilian defense counsel, Mr. Jesus R. Llamado. The defense counsel were granted three continuances from January 22, 1988, to February 24, 1988. The third continuance was granted over the trial counsel's objection after the civilian defense counsel promised to make no further requests for continuances. [25] On February 24, 1988, the court-members and government witnesses were standing by, and the military judge called the court-martial to order. Defense counsel immediately requested another continuance, which was denied by the military judge. The defense counsel insisted that they needed more time to prepare their case, but the judge again denied the request for a continuance. The only other time that defense counsel thereafter participated in the court-martial was when they moved for a mistrial at the conclusion of the government's case. [26] In fact, defense counsel

> did not voir dire the members; challenge any member, even peremptorily; make an opening statement; object to a single prosecution question; present a defense case; participate in preparation of instructions to the members; make closing argument; object to clearly objectionable prosecution aggravation evidence; present any matter in extenuation and mitigation; and, most glaringly, they permitted appellant to make a very damaging and rambling unsworn statement without any apparent coaching or counselling whatsoever. [27]

Counsel and military judges can learn valuable lessons from this case. Although the court commended the military judge for his amazing restraint in refusing to lose his temper or "to be intimidated by this outrageous conduct," the court reminded military judges that an accused is guaranteed effective assistance of counsel, not necessarily counsel of choice. [28] The military judge, therefore, could have severed the relationship with requested military counsel and civilian counsel and recalled the former detailed counsel, or the judge could have appointed new counsel.

Defense counsel perhaps thought that they lost the battle, but won the war. By withdrawing as adversaries on the accused's behalf, the defense counsel deprived their client of his right to assistance of counsel. "When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character *as a confrontation between adversaries*, the constitutional guarantee is violated." [29] The government did not err or engage in misconduct, yet the findings and sentence were set aside.

Beware defense counsel: this is not the way to win a case on appeal. To achieve the results, defense counsel abandoned their client as "the opposing gladiator approache[d], sword upraised;" [30] violated ethical standards; were ineffective; and were contemptuous of the court. Two of the basic professional responsibility obligations that a defense counsel owes to a client are

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[22] In United States v. Hart, 27 M.J. 839, 841 (A.C.M.R. 1989), the Army Court of Military Review noted that the Court of Military Appeals has observed "without deciding that Article 46, UCMJ . . . may impose stricter standards for nondisclosure of information to the defense."

[23] 28 M.J. 1049 (N.M.C.M.R. 1989).

[24] *Id.* at 1050. Galinato was sentenced to a dishonorable discharge and fifteen years confinement.

[25] *Id.*

[26] The military judge properly denied the motion for a mistrial. *Id.* at 1051.

[27] *Id.* Trial counsel presented uncharged misconduct including evidence that Galinato had taught others his criminal skills and encouraged them to engage in similar conduct. Galinato made a statement, reading from four pages of script, in which he admitted that he had received a captain's mast for unauthorized absence and mentioned that his financial responsibilities included the support of two mistresses in addition to his wife and family.

[28] The court cited Wheat v. United States, 108 S. Ct. 1692 (1988), and United States v. Hanson, 24 M.J. 377 (1987).

[29] *Galinato*, 28 M.J. at 1052 (quoting United States v. Cronic, 466 U.S. 648, 656-57 (1984)) [emphasis added].

[30] *Id.* (quoting *Cronic*, 466 U.S. at 657) (quoting United States ex. rel. Williams v. Twomey, 510 F.2d 637, 640 (7th Cir. 1975)).

competence and diligence. [31] "Competent representation requires the . . . skill, thoroughness, and preparation reasonably necessary for the representation." [32] Moreover, a defense counsel must "act with reasonable diligence and promptness in representing a client." [33] When the military judge granted the three prior requests for continuance in this case, the defense counsel were obligated to prepare adequately for the next session of court. [34] Moreover, the defense counsel had the duty to "advocate [the client's cause] with courage, devotion, and to the utmost of his or her learning and ability." [35] Certainly, professional standards do not permit a defense counsel to go on strike when the judge grants a ruling adverse to the defense counsel. Indeed, defense counsel have the obligation to support the authority of the court and must maintain an attitude of professional respect toward all parties. [36] Even if the defense counsel felt that the judge ruled unfairly, the judge's action "is not justification for similar dereliction by an advocate." [37] Moreover, as noted by the court, military counsel are reminded that "[e]ven if a civilian defense counsel is the chief counsel, a military counsel is still accountable for his or her own behavior." [38]

The court concluded by stating:

> Finally, we are not concerned that our ruling today will embolden other defense counsel to behave similarly. Every defense counsel owes to his client his or her zealousness, competence, and diligence. We presume that counsel will conscientiously, ethically and lawfully represent their defense clients to the fullest extent permissible within the context of a supervised adversary proceeding. [39]

The sixth amendment and an attorney's ethical obligations to the legal profession require no less. [40] MAJ Merck and MAJ Holland.

Contract Law Note

Another Split Between GAO and the GSBCA

In a recent decision, *C3, Inc.*, [41] the General Services Board of Contract Appeals (GSBCA) granted the protestor relief even though well-settled General Accounting Office (GAO) precedent would have dictated a contrary result. Judge Neill, writing for the board, held that noncompliance with an internal DOD policy letter was a "fatal flaw" in the procurement. The GAO has held that it will not review alleged violations of internal agency regulations, policies, and procedures. [42] The GSBCA, by adopting a contrary rule, substantially expands the number of bases a protestor may use to challenge an ADPE acquisition. Therefore, acquisition attorneys must increase the care and expertise they apply to an ADPE acquisition.

C3, Inc., was terminated for default on a contract to modernize Defense Logistics Agency (DLA) AUTODIN communication centers. It protested the reprocurement alleging, among other grounds, that DLA did not follow a decade-old policy letter from the Assistant Secretary of Defense for Command, Control, and Communications (ASD/C3). The policy letter required Defense Agencies to seek approval from ASD/C3 for the resolicitation. C3, Inc., correctly pointed out that the Delegation of Procurement Authority obtained from the General Services Administration contained the standard provision that the acquisition had to be conducted in "compliance with all applicable federal statutes, policies, and regulations governing the acquisition, management, and utilization of ADP resources." The resolicitation was unquestionably covered by the policy letter; this conclusion was confirmed by the fact that the necessary approval had been sought in 1982 for the original requirement on which C3, Inc., had defaulted. DLA had also sought the required approval for the reprocurement. DOD, however, had vacillated between approval and disapproval.

Judge Neill held that failure to gain the necessary approval prior to issuance of the RFP was a fatal flaw in the procurement. Hence, C3, Inc., prevailed on this count.

The importance of this decision is readily apparent to those who are engaged in the day-to-day acquisition of ADPE. There is no lack of regulatory and letter guidance in the highly centralized information management

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[31] Dep't of Army, Pam 27-26, Rules of Professional Conduct for Lawyers, Rule 1.1 and 1.3 (31 Dec. 1987) [hereinafter Army Rules].

[32] Army Rule 1.1.

[33] Army Rule 1.3.

[34] *See* Comments, Army Rule 1.1 ("competent handling of a particular matter . . . also includes adequate preparation").

[35] ABA Standards Relating to the Administration of Criminal Justice, Standard 4-1.1. [hereinafter ABA Standards]. (The ABA Standards are made applicable to counsel at courts-martial by Army Reg. 27-10, Legal Services: Military Justice, para. 5-8 (16 Jan. 1989).

[36] ABA Standard 4-7.1.

[37] Comment, Army Rule 3.5.

[38] *Galinato*, 28 M.J. at 1054 n.6.

[39] *Id.* at 1054.

[40] As the court said: "It is a rare counsel who feels on the day of trial that more time to perfect the case could not be used. Counsel must, however, be prepared to go once they have been granted a reasonable amount of time to prepare. Failure to do so is both unethical and a dereliction of the counsel's duty to protect and defend the accused's rights." *Id.* at 1052 n.3.

[41] GSBCA No. 10066-P, 89-2 BCA ¶ ___ , 1989 BPD ¶ ___ (30 June 1989).

[42] *See* Peco Enterprises, Inc., B-232413 (6 Dec. 1988), 88-2 CPD ¶ 566; Baird Corporation — Second Reconsideration, B-228190.3 (2 Nov. 1987), 87-2 CPD ¶ 430.

arena. Not only do the Federal Information Resource Management Regulations (FIRMR's) govern, so do a separate series of information management regulations including: OMB Cir A-130, Management of Federal Information Resources (12 Dec. 1985); Dep't of Defense Directive 7740.1, DOD Information Resources Management Program (20 June 1983); Army Reg. 25-1, The Army Information Resources Management Program (18 Nov. 1988); AFR 700 series; SECNAV Inst. 5231 series; and command and local supplements thereto. Additionally, a number of unpublished policy letters and messages supplement and modify published guidance. A plain reading of the *C3, Inc.* decision is that a contracting activity could, by unknowingly violating some obscure policy on an ADPE acquisition, lose a GSBCA bid protest. While DLA's violation was done knowingly, the board gave no indication that an unknowing violation would be excused. Furthermore, the rather liberal rules under which the GSBCA grants attorney's fees should encourage protestors to identify and raise violations.

The local acquisition attorney must become familiar with *all* regulations and policy letters governing acquisition of ADPE, telecommunications, and similar items; familiarity with the FAR and FIRMR alone is insufficient. Furthermore, information resource managers should be educated on both the need to comply with regulations and policies, *and* the impact that such policies may have on the acquisition process. MAJ Jones.

Administrative and Civil Law Note

Assignment of HIV-Positive Soldiers

The Army's policy concerning persons infected with the Human Immunodeficiency Virus (HIV) has undergone some subtle but important changes in the past few months. These modifications or clarifications of Army policy have been distributed to the field by electronic messages [43] and an interim change [44] to AR 600-110. [45] You should ensure that your command is operating within the current guidelines.

The Army's HIV policies were first articulated in AR 600-110. The regulation was based on the existing Department of Defense policy. [46] The current changes to AR 600-110 are precipitated primarily by the August 1988 modifications to the Department of Defense (DOD) policy. [47]

One of the changes to the DOD policy allowed the Service Secretaries to limit the assignment of HIV-positive soldiers to nondeployable units or positions for force readiness reasons. [48] In September 1988 the Office of the Deputy Chief of Staff for Personnel (DCSPER) indicated that "[a] list of deployable units which will be closed to HIV positive soldiers will be announced by message within the next 90 days." [49] The memorandum further noted that "[c]ommanders are not authorized to designate any of their units as restricted units." [50] Although the proposal to close certain units to HIV-positive soldiers was staffed to the field and received favorable recommendations, it was not approved.

DCSPER, however, recently clarified DA's policy regarding the assignment of HIV-positive personnel: [51]

a. An HIV-positive soldier who is medically evaluated and determined to be fit for duty will be returned to duty in his or her MOS, except that the soldier will not be assigned to Ranger, special operation command (SOCOM), or COHORT units or to military-sponsored educational programs that result in an additional service obligation. [52]

b. The fact that the HIV-positive soldier is nondeployable [53] does not prevent the soldier's assignment to a deployable unit in CONUS, except Ranger, SOCOM, and COHORT units. [54]

c. Commanders may not impose additional assignment restrictions on HIV-positive soldiers without first obtaining ODCSPER approval, which will be granted on a case-by-case basis. [55]

In summary, HIV-positive soldiers who are fit for duty will continue to be assigned to units based on their

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[43] Message, HQ, Dep't of Army, DAPE-MPH-S, 282040Z Mar 88, subject: Pen and Ink Corrections to AR 600-110; Message, HQ, Dep't of Army, DAPE-MPH-H, 231240Z Aug 89, subject: Clarification of Assignment Policy for HIV-Infected Soldiers [hereinafter Clarification Message].

[44] Army Reg. 600-110, Personnel—General: Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (11 Mar. 1988) (IO1, 22 May 1989) [hereinafter AR 600-110 (IO1, 1989)].

[45] Army Reg. 600-110, Personnel—General: Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (11 Mar. 1988) [hereinafter AR 600-110]. The effective date is 11 April 1988.

[46] Memorandum, Secretary of Defense, 20 Apr. 1987, subject: Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV).

[47] Memorandum, Secretary of Defense, 4 Aug. 1988, subject: Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) [hereinafter DOD Memo].

[48] *Id.* para. B7.

[49] Memorandum, HQ, Dep't of Army, DAPE-MPH-S, 2 Sep. 1988, subject: Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV), para. 3 [hereinafter DA Memo].

[50] *Id.*

[51] Clarification Message, *supra* note 43.

[52] *Id.* para. 2. *See also* AR 600-110 (IO1, 1989), para. 4-2b.

[53] *See* DOD Memo, *supra* note 47, para. B7; AR 600-110, paras. 4-2a and 4-6a.

[54] Clarification Message, *supra* note 43, para. 2.

[55] *Id. See also* AR 600-110, para. 4-2c; DA Memo, *supra* note 49, para. 3.

MOS. Commanders are not authorized to close any of their units to HIV-positive soldiers without first obtaining ODCSPER approval. MAJ Bell.

Legal Assistance Items

Professional Responsibility Note

Kentucky and Texas Adopt New Ethics Rules

Kentucky and Texas recently adopted new ethics rules [56] patterned after the American Bar Association Model Rules. [57] The new rules will become effective in both states on 1 January 1990.

The new Texas rules of ethics differ from the ABA Model Rules in several important respects. The Texas rule on confidentiality mandates disclosure of confidential information necessary to prevent death or serious bodily harm. The ABA Model Rules permit, but do not mandate, disclosure in these circumstances. [58]

The Texas rule on confidentiality clarifies that lawyers do not have to blow the whistle on a client if the lawyer has information clearly showing that a client is likely to commit a crime or fraudulent act likely to result in damage to someone's financial or property interests. Under these circumstances, the lawyer's obligation is to make reasonable efforts to dissuade the client from committing the act. If the act has already been committed, the lawyer should persuade the client to take remedial action.

The new Texas rule on candor to the tribunal provides that a lawyer has the duty to rectify the presentation of false evidence until legal measures are no longer reasonably possible. The duty of candor a lawyer owes to a tribunal is more limited under the model rules. Model Rule 3.3 provides that the duty of candor extends only until the conclusion of the proceeding. [59]

Texas ethics rules will prohibit an attorney from contacting an opposing lawyer's expert witnesses without the lawyer's consent. Neither the Army Rule nor the ABA Model Rule restricting contact with third persons represented by counsel includes this prohibition. [60] The Texas rule does not, however, preclude lawyers from furnishing second opinions to persons who are represented by another.

Texas adds a provision not found in the Model Rules; it prohibits threatening criminal or disciplinary charges to gain an advantage in a civil matter. Although the Army Rules do not include a specific prohibition against this conduct, it will probably violate several of the broader provisions of the Army Rules. [61] The new Texas rules also add an unusual rule that prohibits threatening complainants or witnesses with civil, criminal, or disciplinary charges to prevent participation in bar disciplinary proceedings.

The Texas rules regulating the practice of law also differ from the ABA Model Rules. The Texas rules ban the use of trade names, which are permitted, with some qualification, under the Model Rules. The Texas rules do not adopt the Model Rule prohibition against contingent fees in domestic cases. A comment adds, however, that such cases will be "rarely justified." The new Texas rules will also permit division of fees between a lawyer and a referring lawyer.

The Kentucky ethics rules also track the ABA Model rules, but include several significant changes. Unlike Texas, Kentucky has retained the ABA Model Rule permitting, but not mandating, disclosure of confidential information necessary to prevent death or serious bodily harm. Kentucky also adds an exception that gives a lawyer the discretion to reveal information necessary to comply with other laws or court orders.

Kentucky has also changed the Model Rule on candor to the tribunal. Unlike the Model Rules, Kentucky does not require the disclosure of directly adverse legal authority in the controlling jurisdiction. [62] Kentucky has made a potentially significant difference in the language for the rule on candor to the tribunal. The Kentucky rule broadly prohibits the perpetration of a fraud on the tribunal, while the Model Rule counterpart prohibits assisting a client in a criminal or fraudulent act. [63]

Kentucky has made several major changes to the Model Rules concerning misconduct. Kentucky's ethics rules do not include any portion of Model Rule 8.3, which requires that a lawyer report the misconduct of another lawyer or judge. Moreover, Kentucky's definition of misconduct does not include conduct that is prejudicial to the administration of justice.

The Kentucky rule concerning fairness to the opposing party omits a provision found in the Model Rules that permits a lawyer to request that a client's employees and relatives refrain from giving information to another party. Kentucky, however, adds a provision to the rule prohibiting a lawyer from presenting or threatening to

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[56] *See* ABA/BNA Lawyer's Manual on Professional Conduct No. 13, at 224, concerning the new Texas rules and 5 ABA/BNA Lawyer's Manual on Professional Conduct No. 14, at 240, discussing the new Kentucky rules.

[57] Model Rules of Professional Conduct (1983). [Hereinafter Model Rules].

[58] Model Rule 1.6.

[59] Model Rule 3.3(b). The Army Rules also limit the obligation to correct a possible fraud on the tribunal to the conclusion of the proceedings. Dep't of Army Pam 27-26, Legal Services: Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter R.P.C.].

[60] *See* R.P.C. 4.2 and Model Rule 4.2.

[61] *See* Ethics Opinion 89-01, The Army Lawyer, June 1989, at 54-55. For an excellent summary of the ethical rules in this area, see Laverdure, *Threat of Criminal Sanctions in Civil Matters-An Ethical Morass*, The Army Lawyer, Jan. 1989, at 16.

[62] Model Rule 3.3(a)(3). The Army Rules are consistent with the model rules in this area. *See* R.P.C. 3.3(a).

[63] *See* Model Rule 3.3(a)(2).

present criminal or disciplinary charges solely to gain an advantage in a civil or criminal matter.

The new Kentucky rules also change the Model Rules concerning fees, safekeeping of property, specialization, and advertising.

Judge advocates licensed in Texas or Kentucky should become familiar with the new ethics rules adopted in these states. Although Army lawyers are bound by the Army Rules of Professional Conduct for Lawyers, they must also comply with the ethics rules in effect in the jurisdiction in which they are licensed to practice. [64] If a conflict between the two standards exists, however, Army Rule 8.5 requires compliance with the Army standard. [65] MAJ Ingold.

Estate Planning Note

Joint and Mutual Wills

Estate planning clients who desire to leave their property to someone but limit that person's ability to later dispose of the property present a formidable challenge to the will drafter. Clients requesting this testamentary scheme typically fall into one of two groups. The first group consists of couples who have children from another marriage. They want their property to go to one another, but they do not want the surviving spouse to be able to disinherit the deceased spouse's children. Another common situation is when parents would like their children to enjoy their property but want to guarantee that the property will ultimately go to their grandchildren.

Several alternatives are available to accomplish these testamentary goals. The first alternative is to draft a testamentary trust giving the initial beneficiary a life interest in the estate. The property is distributed according to the terms of the trust to the named remaindermen upon the death of the life tenant.

These trusts can become quite complex and are generally outside the scope of legal assistance practice. [66] Legal assistance attorneys must therefore turn to less complex drafting alternatives such as joint and reciprocal wills. A joint will is a single document executed by two persons as their respective wills. [67] Typically, a joint will names the surviving spouse as the beneficiary and lists common beneficiaries upon the death of the second spouse.

A joint will may dispose of property owned jointly by the co-testators or property held separately. The modern and generally recognized view is that a joint will is regarded as the will of each co-testator and probated twice, upon the death of each. [68]

Joint wills must be distinguished from reciprocal or mutual wills. The term mutual or reciprocal wills applies to separate wills that contain similiar provisions. Joint and mutual wills may be revoked by either testator unless they include, or are accompanied by, an agreement not to revoke them. [69] A joint or mutual will is not irrevocable merely because it contains reciprocal provisions.

Although the law concerning joint and mutual wills is fairly well settled, courts look with disfavor on these instruments. [70] A Maryland case involving a joint will [71] stands as a recent justification for this historical attitude.

In the case, Lester and Clara Shimp executed a joint will giving one another their property. They both named their children as the primary beneficiaries upon their deaths. Both testators irrevocably waived their right to amend or revoke the joint will.

After Clara's death in 1975, Lester sought declaratory relief requesting the right to execute a new will. The Maryland Supreme Court held that although Lester could revoke his will, the beneficiaries under the joint will could specifically enforce a contract claim against his estate upon his death. [72] The court concluded that the agreement not to revoke the joint will was clear and unambiguous. As a result of the adverse decision, Lester did not revoke the joint will even though he remarried.

The joint will was again the subject of litigation when Lester died. When the joint will was presented for probate, Lester's second wife sought payment of a family allowance and filed an election for her statutory spouse's share under Maryland statute.

The court relied on the strong public policy interests surrounding the marriage relationship to uphold the surviving spouse's claims. The court held that both of her claims take priority over the claims of general creditors and other legatees and rejected the argument that Lester had no estate from which to pay these claims because he had contracted to will his entire estate. [73]

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[64] R.P.C. Rule 8.5 comment.

[65] R.P.C. Rule 8.5.

[66] Drafters of these trusts, for example, must be familiar with the complex rules concerning the tax on generation skipping transfers. *See generally* I.R.C. § 2612 (West Supp. 1989).

[67] Atkinson, Law of Wills § 49 (West 1957).

[68] *Id.*

[69] *Id.*

[70] Thompson, The Law of Wills, § 34 at 69 (3d ed. 1974).

[71] Shimp v. Huff, 556 A.2d 252 (Md. 1989).

[72] Shimp v. Shimp, 287 Md. 387, 556 A.2d 1228 (1979).

[73] 556 A.2d at 263.

A recent case from the District of Columbia, *Duggan v. Peter*,[74] involved another common problem associated with joint or mutual wills. In *Duggan* a married couple made wills giving one another their estate. Both wills left the bulk of their property to the husband's children by a former marriage in the event their spouse failed to survive them. The wife inherited the property upon the husband's death and changed her will to benefit her relatives, with only minor amounts to her stepchildren.

The stepchildren brought suit against the wife's estate, alleging that she entered into an oral agreement not to revoke her mutual will. The court observed that the mere fact that mutual wills exist is not sufficient proof of an agreement not to revoke.[75] Rather, complete and certain evidence of contract is required to establish a contract not to revoke a mutual will.

The court held that the evidence, while showing a common testamentary scheme on the part of the couple, was not sufficient to prove an agreement not to revoke. The court followed a long line of cases requiring some independent evidence that a testator actually entered into a contract to deny the stepchildren's claim.[76]

The trial court frustrated the stepchildren's attempt to find this evidence when they ruled that the estate could invoke the testator's attorney-client privilege when defending the suit. The appellate court upheld this ruling by distinguishing a previous Supreme Court case[77] that held that the attorney-client privilege does not apply in disputes between beneficiaries. The court characterized the case brought by the stepchildren as a claim adverse to the estate and not a dispute among beneficiaries. Therefore, the estate could invoke the attorney-client privilege.

As these two cases indicate, legal assistance attorneys should exercise extreme caution when drafting joint or reciprocal wills. The attorney should carefully explain to testators executing reciprocal or mutual wills that they will not be considered irrevocable unless they are accompanied by a contract not to revoke. To clarify this important point and eliminate the potential for litigation about the intent of the testators, it is a good idea to include a provision in the will stating that the instrument is not intended to be irrevocable. A sample clause to use for this purpose is as follows:

> My spouse and I are at approximately the same time executing wills in which each of us is the recipient of the other's property. These wills are not, however, the result of any contract or agreement between us and either may be revoked at the sole discretion of the maker.

There may be some occasions when clients desire to execute irrevocable joint or mutual wills. In these instances, a written agreement should carefully and unambiguously recite that the parties agree that the will is irrevocable. Even if the language is clearly stated, the agreement may not be valid in all cases. For example, according to *Shimp*, these agreements cannot defeat the elective share or family allowance rights of a new spouse. Attorneys should also explain the comparable advantages of executing a testamentary trust to every client requesting an irrevocable joint or mutual will. MAJ Ingold.

Tax Notes

IRS Allows Change In Reporting Savings Bond Interest

The Internal Revenue Code gives the owner of Series E or EE U.S. savings bonds the option to defer reporting interest until the year the bonds are redeemed.[78] Once selected, taxpayers must continue to use the optional method during ownership of the bond. It is possible, however, for taxpayers to obtain Internal Revenue Service consent to change the method of reporting interest.

The IRS recently simplified the procedure for obtaining consent to a change in reporting method.[79] Owners of savings bonds may request a change by filing Form 3115 with their federal income tax return for the year the change is desired. Taxpayers should print "Filed Under Rev. Proc. 89-46" at the top of page 1 of Form 3115.

Taxpayers complying with this procedure will be considered to have obtained IRS consent to change their method of reporting. There is no user fee for filing this application.

Accrued Leave Can't Be Used to Pay Taxes

A U.S. Marine Corps officer recently proposed to turn in his accumulated leave as payment for his individual income taxes. The IRS concluded that this unusual method of payment does not comply with applicable law.[80]

The IRS rejected the taxpayer's argument that "the spirit" of section 6302(b)[81] of the code allowed this form of payment. This section authorizes the Secretary to collect taxes by means of "returns, stamps, coupons, tickets, books or such other reasonable devices"[82]

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[74] 554 A.2d 1126 (D.C. App. 1989).

[75] 554 A.2d at 1132 (citing Coveney v. Conlin, 20 App. D.C. 303, 329 (1902)).

[76] 554 A.2d at 1226.

[77] Glover v. Patten, 165 U.S. 394 (1897).

[78] I.R.C. § 454(a) (West Supp. 1989); Treas. Reg. § 1.454-1(a)(1)(i).

[79] Rev. Proc. 89-46, 1989-33 I.R.B. 28.

[80] Priv. Ltr. Rul. 89-28-016 (April 11, 1989).

[81] I.R.C. § 6302(b) (West Supp. 1989).

[82] *Id.*

necessary to secure a complete and proper collection. The IRS concluded, however, that this section applies only to employment and excise taxes and not to income taxes.

By statute, [83] the proper form of payment for income taxes is U.S. coins and currency. The IRS can not be ordered to accept anything other than legal tender, such as items of personal property, as payment for taxes. [84] MAJ Ingold.

Soldiers' and Sailors' Civil Relief Act Notes

Personal Appearances and the Right to Reopen Default Judgment

A recent Wisconsin case illustrates the perils faced by legal assistance attorneys who correspond directly with courts when requesting stays under the Soldiers' and Sailors' Civil Relief Act (SSCRA). [85] In *Artis-Wergin v. Artis-Wergin* [86] an active duty soldier assigned to Europe received in the mail a petition for divorce and a summons. The soldier did not sign or return the enclosed admission of service. Instead, the soldier's legal assistance attorney wrote the court and requested a delay of six months before responding to the petition. The court granted the requested delay. Several months later, the soldier personally wrote the court and requested a stay [87] under the SSCRA for the six-month period previously granted. He also made a jurisdictional objection, asking the court to construe his letter as a request only for protection under the SSCRA and not as an appearance.

After several telephonic conferences involving the court and both parties, the trial court granted a divorce to the soldier's spouse, divided the marital property, and ordered the soldier to pay alimony. The court found that the soldier was acting in bad faith by not appearing in court after the six-month period had expired. The soldier had received several notices of the actual trial date.

In affirming the trial court's disposition of the case, the Wisconsin Court of Appeals held that the legal assistance attorney's initial letter to the trial court served as an appearance and gave the court personal jurisdiction over the soldier. Although the soldier's own letter to the court invoked the SSCRA and objected to the court's exercise of personal jurisdiction, the legal assistance attorney's prior letter did not. The court concluded that a party cannot enter an appearance through written correspondence requesting relief such as a six-month stay, and then later object to the court's exercise of personal jurisdiction. Any objection to the court's exercise of personal jurisdiction should have been in the first letter.

Additionally, the appellate court held that the soldier could not invoke the SSCRA provision [88] for reopening a default judgment. Although the soldier was not physically present for the trial, his attorney's letter had constituted an appearance. Under the SSCRA, any appearance in an action waives the opportunity to reopen a default judgment.

Finally, the court denied the soldier an additional stay of the proceedings under the SSCRA. It held that the six-month delay was sufficient. The soldier did not show how his military service materially affected his ability to appear in court after the six months had passed. Therefore, the court refused to grant a further stay.

The *Artis-Wergin* case, considered along with other equally restrictive interpretations of the SSCRA, [89] forces legal assistance attorneys to consider all available alternatives when advising soldiers how to respond to summons and petitions. If the jurisdiction follows the *Artis-Wergin* approach, the court may consider a letter from the legal assistance attorney or the client to be an appearance. Although the *Artis-Wergin* court found it significant that the legal assistance attorney's letter did not include an objection to personal jurisdiction, in at least one instance another court ignored such an objection.

In *Skates v. Stockton* [90] a legal assistance attorney wrote to the clerk of a county court in Arizona requesting a stay in a pending paternity action against his client, a Marine assigned to London. The legal assistance attorney stated that his "letter was in no way intended to be an appearance or answer in the action or be a waiver of the [client's] protections under the [SSCRA]." The court held that the client had lost his ability to reopen the case following the judgment that the county court entered when the client did not appear. More significantly, the court also held that the legal assistance attorney's letter gave the county court personal jurisdiction over the client, notwithstanding the precatory statement in the letter. Without the letter, the court could not have perfected jurisdiction in the case.

Although the *Artis-Wergin* and *Skates* cases are anomalies and most courts do honor objections to jurisdiction, legal assistance attorneys cannot assume all courts will honor these statements. Several alternative ap-

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[83] 31 U.S.C. § 5103 (1982).

[84] Calafut v. United States, 277 F. Supp. 266 (M.D. Pa. 1967) (holding that the Internal Revenue Service could not be ordered to accept an automobile in satisfaction of liability for income taxes).

[85] 50 U.S.C. App. §§ 500-591 (1982).

[86] No. 89-0033, slip op. (Wis. Ct. App. June 20, 1989).

[87] 50 U.S.C. App. § 521 (1982).

[88] *Id.* § 520(4) (1982).

[89] *See, e.g.*, Skates v. Stockton, 140 Ariz. 505, 683 P.2d 204 (Ct. App. 1984). *But see* Kramer v. Kramer, 668 S.W. 2d 457 (Tex. Ct. App. 1984).

[90] 140 Ariz. 505, 683 P.2d 304 (Ct. App. 1984).

proaches may be useful in these situations. [91] One approach is a letter from the soldier's chain of command. Letters to the court from commanders and NCO supervisors should serve two useful purposes. First, the commander's letter can help establish why the soldier's military service is materially affecting the soldier's ability to appear in court. Second, such a letter can contain a request for a stay without constituting an appearance by the soldier. Additionally, an attorney's letter to the judge in the judge's personal capacity may be successful because the letter does not address the court. The danger remains that the judge may very well construe the letter to be an official correspondence with the court.

Perhaps the most practical approach remains the telephonic inquiry to local practitioners. Local attorneys will often be very helpful in determining a court's likely response to a legal assistance attorney's letter. Following a conversation with such an attorney, the legal assistance attorney should have a better appreciation for which approach will best serve the client's interests.

Annual Taxes (Fees) for Motor Vehicles

Members of the command at Fort Sheridan, Illinois, recently succeeded in their efforts to stop the city of Highwood, Illinois, from taxing motor vehicles owned by nonresident soldiers assigned to Fort Sheridan. In *United States v. City of Highwood* [92] the city required all residents to pay an annual tax or license fee on motor vehicles owned and operated in the city. The city assumed that any soldier registering a vehicle in Illinois was a resident and subject to the city ordinance on motor vehicle fees. The city excepted only those soldiers who could prove they were domiciled in another state and paid a similar tax or fee to their state of domicile.

The federal district court agreed with Fort Sheridan that the city's tax violated the SSCRA. Under the SSCRA, the personal property of soldiers is deemed to be located in their state of domicile for property tax purposes. [93] This property can be taxed only by the state of domicile. A state may levy a use tax on motor vehicles, such as for licenses and registration. [94] Highwood's license fee, however, was designed to raise revenues, rather than to pay for the cost of licensing. The district court recognized the fee for what it actually was—a tax. Accordingly, the court held that the city could not enforce the fee against soldiers who were permanently domiciled in another state.

The court also held that a soldier need not pay a similar tax to the state of domicile in order to avoid the city fee. Nonresident soldiers are exempt from paying such a fee, regardless of whether they pay a similar fee in their home state.

Finally, the court rejected Highwood's argument that registering a vehicle or obtaining a driver's license was clear and unequivocal evidence of a soldier's intent to remain permanently in Illinois. These could be factors evidencing such an intent, but, in the absence of other proof, they were an insufficient basis for the tax. Soldiers did not become domiciliaries of Illinois simply by registering their cars in the state and obtaining drivers' licenses. MAJ Pottorff.

Operations and Training Note

Military Qualification Standards System

The Military Qualification Standards (MQS) system is a professional development system that addresses officer training from precommissioning through the tenth year of service. The system focuses on precise duty position tasks and prescribes educational requirements to improve cognitive skills that help officers mature in their profession. Judge advocates, as Army officers, must be knowledgeable of the MQS system. Many major subordinate commands require JAGC officers to fulfill these established standards in the performance of certain military skills. Although all aspects of this system are not formally adopted for JAGC officers, the reference manuals should become a well-used reference in each JAGC officer's personal library.

The MQS system currently consists of three phases-MQS I, MQS II, and MQS III. Two components comprise all phases of MQS: 1) a military task (skills and knowledge); and 2) a professional military education component. The professional military education component is a valuable guide for the professional development of a JAGC officer and includes, at the MQS II level, four reading lists: Military Classics, Military Ethics, Contemporary Military, and a Branch Specific list.

MQS I addresses precommissioning training and applies to all commissioning sources: the United States Military Academy, the United States ROTC Cadet Command, and the Officer Candidate School. All officers, except the professional branches (such as the Judge Advocate General's Corps and the Medical Corps), must meet certain standards for common military skills and knowledge in order to begin training in the Officer Basic Course. JAGC commissionees are issued the MSQ I & II manuals during Phase I of the Judge Advocate Officer Basic Course.

MQS II provides requirements for the officer's common officer and branch technical and tactical development prior to being promoted to captain. This level is designed to qualify a lieutenant in his or her branch and to continue developing those qualities, abilities, and knowledge essential for professional growth. MQS II is supported by a manual of common tasks and branch manuals that lieutenants use to qualify in a given branch. Basic branch officers participate in a directed reading program as part of their professional military education in MQS II. In the directed reading program,

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[91] *See generally* Hayn, *Soldiers' and Sailors' Civil Relief Act Update*, The Army Lawyer, Feb. 1989, at 4.

[92] 712 F. Supp. 138 (N.D. Ill. 1989).

[93] 50 U.S.C. App. § 574 (1982).

[94] *See* California v. Buzard, 382 U.S. 386 (1966).

officers are to read at least eight books during the time they are lieutenants. Lieutenants, assisted by their raters, must choose two books from the branch reading list. These books are selected and goals are established when the officer's DA Form 67-8-1 is completed and must be read by the completion of the officer's rated period. Although the Judge Advocate General's Corps does not have a directed reading requirement, TJAGSA has developed the following recommended list for judge advocates:

Primary List

The Army Lawyer: A History of the Judge Advocate General's Corps 1775-1975, various authors.

Berry, John Stephens. *Those Gallant Men: On Trial in Vietnam.*

Dunnigan, James F. *How to Make War.*

Huntington, Samuel P. *The Soldier and the State.*

McGinniss, Joe. *Fatal Vision.*

Sheehan, Neil. *Bright Shining Lie.*

Supplementary List

Phibbs, Brendan. *The Other Side of Time.*

Schneider, Dorothy & Cal J. *Sound Off: American Military Women Speak Out.*

Snyder, Don J. *A Soldier's Disgrace.*

NOTE: This list will evolve as new works are published or additions are identified.

Recommended Additions to Military Classics and Military Ethics Lists (Published since 1987).

Military Ethics:

Gabriel, Richard. *To Serve With Honor: A Treatise on Military Ethics and the Way of the Soldier.*

Wakin, Malkam; Wenker, Kenneth; and Kempf, James. *Military Ethics: Reflections on Principles — The Profession of Arms, Military Leadership, Ethical Practices, War and Morality, Educating the Citizen-Soldier.*

Military Classics:

Manchester, William. *American Caesar.*

MQS III provides the requirements for the officer's fourth through tenth years of service. MQS III is to qualify the officer in his branch at the intermediate level and to further the officer's professional development.

All JAGC officers should be aware of the Army requirements at each MQS level. The technical skills and knowledge required by the varied range of military law can be time consuming. The severe restrictions on time and instructional resources limit the institutional teaching of many basic officer and tactical skills to JAGC officers. Senior judge advocates should therefore ensure that junior officers are informed of the requirements at each level. CPT Thibault.

Claims Report

United States Army Claims Service

Claims Notes

A System for Processing Motor Vehicle Claims

Most claims judge advocates are aware of the need to investigate accidents that may result in small claims for motor vehicle damage. This note presents a system for discovering, screening, investigating, and settling claims from incidents resulting in damage to motor vehicles. The information in this note applies to personnel claims under Chapter 11, AR 27-20, as well as to tort claims. Additionally, the procedures in this article will serve to identify affirmative claims (both property damage and medical care recovery) for action by the recovery judge advocate.

Most claims judge advocates and claims attorneys are aware that small claims procedures apply to tort claims as well as to personnel claims. There is a tendency to ignore the small claims requirement for torts because of the difficulty in implementing it. To resolve a "simple" traffic accident claim, an MP report must be reviewed, the scope of duty must be verified, and the claimant must secure a damage estimate (or sometimes two estimates). Finally, a settlement agreement should be signed by the claimant.

As a result of all these requirements, many offices require a claimant to visit the claims office two, three, or more times to settle a claim for property damage. Every claims office has experienced the frustration associated with having a $200 tort claim sit open for weeks because the claimant has failed to sign a settlement agreement. Other times, the delays required to obtain substantiation of liability will often cause the claimant to complain that the claims office is dragging its feet in settling the claim.

Much of this delay occurs because considerable time is wasted waiting for the military police report, scope of employment statement, and settlement agreement. This delay can result in larger payments for loss of use (for claims under Chapters 3 and 4) and in more complaints against the claims office. A claimant rightfully expects prompt settlement of a claim in cases where there is obvious liability and no dispute as to damages. On the other hand, most claims offices do not have the resources to independently investigate every potential traffic accident claim.

A solution is to link potential claims investigation with small claims procedures. Small claims procedures are difficult to implement when the claimant visits the claims

office to file a claim unless the processing time problem is anticipated by organizing a system to screen, investigate, and settle potential claims. If the potential claim file is complete at the time the claim is presented, the claim can often be settled on the spot, especially if small claims procedures are used.

Screening

Many motor vehicle incidents (including off-post accidents) are investigated by the military police. The military police blotter contains reports of traffic accidents and other incidents that may give rise to a claim and should be reviewed by the claims judge advocate daily.

The blotter identifies the persons involved in the incident and notes whether a military vehicle was involved, the type of damage and injury, and whether anyone was charged with a violation.

Investigation

Whenever an incident involving a potential claim is identified, a file is started with the blotter entry and a chronology sheet. All potential claims files should be kept in a central location accessible to all claims personnel.

The claims judge advocate should request the MP report from MP operations. The claims judge advocate and claims NCOIC should have a good working relationship with the MP operations branch and the traffic investigation section so that these reports are easily obtained. If the report is requested in writing, a copy of the request should be placed in the potential claim file. If the request is oral, an entry should be made on the chronology sheet.

If the incident involves a military vehicle, the commander of the unit to which the vehicle and driver are assigned should be sent a memorandum requesting that a scope of employment statement be completed and a copy of the Operator's Report of Motor Vehicle Accident (Standard Form 91) be furnished to the claims office. A locally produced form with blanks for the information pertaining to the accident could be used. The commander should be asked whether a report of survey has been initiated and the name of the surveying officer. A copy of the blotter entry should be attached to the memorandum along with a blank scope of employment statement. The memorandum should be given a suspense date (five working days is reasonable), and a suspense file should be maintained for these actions.

The information provided by the unit, along with the claimant's repair estimate, should be enough to settle any "liability" claim that can be settled using small claims procedures. Make sure the information is reviewed and promptly filed in a potential claim file. Record the liability decision of the claims judge advocate or the claims attorney when there is enough information in the potential claims file.

Settlement

The goal of this system is to simplify processing of small motor vehicle damage claims by allowing a settlement to be concluded at the time the claim is filed. Even if the file is not complete, there is a good chance that a telephone call will provide the answers on scope of duty or liability.

To speed up processing settlement of small claims, ensure that there is always at least one person available to settle small tort claims on the spot. Allow experienced legal specialists or civilian claims examiners to provisionally settle small claims. An experienced paralegal can be trained to settle claims involving obvious liability and obtain a settlement agreement before the claimant leaves the office.

The program described above has benefits other than allowing prompt settlement of small claims. Routine screening will also help you discover claims involving serious injuries that are disguised as minor traffic accidents. By aggressively pursuing potential claims, the image of your office will be enhanced because commanders and other personnel will be aware that your office is investigating even the smallest potential claims. These benefits justify the small investment the system requires (a few minutes a day in most cases). MAJ Brown.

Personnel Claims Note

Greek Restrictions on Resale of POV'S

On March 1, 1988, the Greek Ministry of Finance issued Decision No. D.247/13, which effectively made it impossible for a soldier stationed in Greece to transfer a privately owned vehicle (POV) that is more than six years old to a new owner. Inasmuch as POV's with European specifications may not be imported into the U.S. without extensive modifications, soldiers who own such vehicles have no recourse except to turn them over to Greek customs for salvage. The State Department is still working to alter this ruling. Because of the small size of the U.S. Army contingent in Greece, only a few soldiers will be affected.

Mirroring the policy adopted by the Air Force, USARCS has determined that if a European-specification POV was purchased without notice of the Ministry of Finance ruling and is turned over for salvage, it has been unjustly confiscated by a foreign power within the meaning of paragraph 11-4c(1), AR 27-20. A claim for the value of the vehicle would be compensable under the Personnel Claims Act *up to* the maximum allowance of $1,000. Mr. Frezza.

Management Note

Claims Publications

USARCS has completed its revision of DA Pamphlet 27-162 (Claims) and submitted it for publication. It is anticipated that publication will occur within the next two months.

This revision is extensive, incorporating materials presently found in bulletins and appendices in the USARCS Claims Manual and in materials developed for use in claims workshops. It also contains some material that is entirely new. The new pamphlet was designed to provide a practical guide for the investigation and processing of

claims, supplementing the policy and directives contained in AR 27-20.

When this pamphlet is received at field claims offices, it will replace the USARCS Claims Manual. Except for the Federal Tort Claims Handbook and addenda (distributed at past workshops for inclusion in the Manual), the Manual should be discarded. If you have included the Allowance List-Depreciation Guide in your Manual, that table should also be retained.

The pamphlet has been written in conjunction with the drafting of Change 2, AR 27-20, which should be published shortly after the pamphlet. Change 2 replaces references to the Manual in that regulation with references to appropriate portions of the pamphlet. The pamphlet cites to AR 27-20 as it will exist with change 2; thus, some cites in the pamphlet will not correspond to AR 27-20 until change 2 is published. Users of the pamphlet will thus find some discrepancies until the change is published and, if questions arise as to proper actions in a given case during the interim between these two publications, field offices should contact USARCS for guidance.

With the fielding of this pamphlet, a claims office should have the following references as its minimum claims "library": AR 27-20; AR 27-40; DA Pam 27-162 (one copy for each attorney, investigator and claims examiner); the Allowance List-Depreciation Guide; and documentation booklets for claims data management programs.

We plan to update and republish the Federal Tort Claims Handbook as a USARCS reference book during FY 90. COL Lane.

Note From the Field

Kwajalein

Introduction

Approximately halfway through the Graduate Course, an officer from the Personnel, Plans, and Training Office (PP&TO) visited The Judge Advocate General's School to discuss future assignments with the students. The PP&TO representative told us that approximately eighty-eight percent of the class would receive one of their top three choices. I proceeded to list nine assignments in Germany and the assignment on Kwajalein, feeling quite confident that I would be spending cool summers in Europe playing soccer and visiting my family in England. Shortly after Christmas, PP&TO revisited The Judge Advocate General's School to hand out the long-awaited assignments. Colonel Gray called me into the office and said the words I will never forget, "I think you better sit down." I knew I had won the coveted Pacific slot. How was I going to explain to my wife that we were going to a place that no one knew anything about, but prohibited pets and vehicles! The purpose of this article is to provide some basic information about one of the most fascinating and challenging assignments in the Judge Advocate General's Corps—command judge advocate on Kwajalein Atoll.

Geography

Micronesia is a series of archipelagoes located in the central and western Pacific ocean. The Marianas, Carolines, Gilberts, and the Marshalls consist of a series of coral atolls with Kwajalein, located in the center of the Marshalls, being the single largest coral atoll in the world. Kwajalein Atoll is located 2100 miles southwest of Hawaii and 2000 miles northeast of Australia. It consists of 90 small coral islands that enclose a lagoon of 1000 square miles. Approximately 3000 people live on the 1.2 square miles of coral, although more than half of the area is runway! The vast majority of the 3000 people are contractor personnel representing companies such as Lincoln Laboratories/MIT, RCA, GTE, and Pan American. Due to the limited amount of family housing available, 2500 of the contractor personnel are bachelors who live in military-style barracks. There are only thirty-five members of the United States Army and an additional ninety or so Department of the Army civilians representing the United States Army Strategic Defense Command assigned to Kwajalein. Military members are normally assigned to Kwajalein for two-year tours. Because of the remote location, the Army tries to assign only married personnel to Kwajalein. The length of tours for civilians varies depending on the contractor, but there are some people who have lived on Kwajalein for twenty years.

History

In the late nineteenth century Micronesia came under the colonial influence of Germany, which purchased the Carolines from Spain in 1885 and purchased Palau and the Marianas in 1899. Germany annexed the Marshalls in 1885 from Spain and then annexed the phosphate rich island of Nauru, now an independent country, in an agreement with Great Britain in 1886. The German Pacific colonies became mandates of the League of Nations at the end of World War I, and Japan was appointed to administer them in 1919. This mandate was forcibly ended in 1944, when the United States eliminated all Japanese military forces from Micronesia.

In July 1947 the Micronesian islands came under the jurisdiction of the United Nations (U.N.) and were formally named the Trust Territory of the Pacific Islands (TTPI). The U.N. Security Council appointed the United States as the administrator of the TTPI. It is interesting to note that this is the only mandate established under the authority of the U.N. Security Council. All the other mandates were created by the U.N. General Assembly. Although the United States Navy had the

initial responsibility for administering the TTPI, the Department of Interior has had executive responsibility since 1951. A High Commissioner, appointed by the President, administers the TTPI from Saipan.

The TTPI was designed as an interim political entity until the political status of the Micronesian islands could be determined through negotiations with the United States, which was acting as the trustee on behalf of the U.N. Protracted negotiations between the United States and the island states began in 1969. They discussed various options: statehood; commonwealth status similar to Puerto Rico; independence; and "Free Association," which has no precedence in international law but envisions strong local autonomy while also maintaining ties with the United States. The Northern Marianas quickly voted for commonwealth status, a path no other island nation has taken. Due to the tremendous cultural, political, and linguistic differences between the remaining island states, a referendum was held in 1978 to determine if the trusteeship should be divided into separate political subunits. As a result of the referendum, three new "nations" were created: Palau, Federated States of Micronesia (FSM), and the Marshall Islands.

Constitutional governments were established in the Marshall Islands and the Federated States of Micronesia in 1979, with Palau following in 1981. All three nations were to remain under the jurisdiction of the Trusteeship government administered by the United States until the Compact of Free Association [1] (Compact) was ratified by each nation and the United States. The Compact recognizes the three former island territories as sovereign nations. Each nation enjoys self-government and conducts its own foreign affairs, although the Compact specifically vests in the United States the responsibility and authority for their defense. The Compact was signed into law by President Reagan and by the Marshallese parliament, known as the Nitijella, in 1986. The 38,000 Marshallese finally achieved nationhood and officially became known as The Republic of the Marshall Islands (RMI). No provisions were ever set forth in the 1947 Trusteeship Agreement requiring the U.N. Security Council's approval of the termination of the mandate. Nevertheless, both the United States and the RMI believe the Compact accomplished such termination automatically.

The Compact authorized the creation of numerous agreements between the parties, including: telecommunications, [2] weather services, [3] civil aviation, [4] education, [5] and health care services. [6] These agreements provide extensive amounts of United States financial assistance to the RMI, a poor nation with no natural resources other than the barely profitable copra crop and a fishing industry dominated by United States and Japanese fishing fleets. Over ninety percent of the RMI budget consist of United States funds provided for in the Compact. The Compact also provides extensive funding for economic development of the infrastructure. [7] Most importantly, the Compact guarantees the United States the right to operate the Kwajalein Missile Range. [8]

The TTPI government was responsible for all governmental functions of the Trust Territory, including those of the attorney general and the courts. These functions have now been transferred to the governments of the RMI and FSM. Palau and the United States have not yet ratified the Compact; therefore, the TTPI, now often called the Trust Territory of the Palauan Islands, still maintains a certain amount of control over Palauan affairs. The Palauan constitution has severe limitations on the entrance of nuclear weapons into its territory. [9] This limitation has been the subject of continual negotiations with the United States, which has strong objections to such constraints on United States Navy ships using Palauan ports.

United States Army Kwajalein Atoll

Kwajalein was a key Japanese naval and air installation during World War II. Reconnaissance planes from Ebeye, a small island less than two miles from the main island of Kwajalein, were heavily involved in the battle of Midway. United States forces, consisting of both Army and Marine units, finally crushed all resistance in the Marshalls in 1944. Kwajalein itself was devastated after receiving the most intense United States artillery bombardment of WWII. A single palm tree was all that remained of a key Japanese base. Thousands of Japanese died in mass suicide attacks and were buried in common graves. Each year the commander of the United States Army Kwajalein Atoll (USAKA) allows Japanese relatives a short four-hour visit to say prayers at the Japanese war memorial located on the island. Construction at Kwajalein frequently uncovers the remains of Japanese soldiers, and forensic pathologists are brought in from Hawaii to identify and catalogue the remains. Twenty-five sunken Japanese ships and an unknown number of planes litter Kwajalein lagoon. Perhaps the most interesting wreck is that of the powerful German battle cruiser the Prinz Eugen, which accompanied the

[1] Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

[2] *Id.* at Title One, Article III.

[3] *Id.* at Title Two, Article II.

[4] *Id.* at Title Two, Article II.

[5] *Id.* at Title Two, Article II.

[6] *Id.* at Title Two, Article II.

[7] *Id.* at Title Two, Article I.

[8] *Id.* at Title Three, Article II.

[9] Repeated attempts to amend the constitution to allow nuclear weapons have failed.

battleship Bismark on many of its forays in the Atlantic. The Prinz Eugen came into the possession of the United States at the end of WWII and took part in the nuclear experiments conducted at Bikini Atoll, [10] located north of Kwajalein. After surviving the tremendous shock blasts of the nuclear weapons, the Prinz Eugen was towed to Kwajalein where it capsized in shallow water. To this day, its mighty stern and brass screws protrude defiantly out of the crystal-clear waters. A group of Kriegsmarine war veterans came to Kwajalein and, at considerable cost, removed one of the screws and transported it to Hamburg, where it is displayed in a German naval museum.

The United States Navy used Kwajalein as a supply base from 1944 to 1956, and it became a vital link in the movement of both troops and equipment during the Korean War. The island was also instrumental in supporting the numerous atomic tests conducted in the neighboring coral atolls of Bikini and Enwietak. From 1959 to 1968 Kwajalein became a critical test site for missile tests, including the Nike-Zeus anti-missile program. In 1968 the Kwajalein Test Site was renamed as the Kwajalein Missile Range. The range came under the operational control of the United States Army Ballistic Missile Command. Finally, in 1985, Kwajalein became part of the United States Army Strategic Defense Command. It is now the primary range for the long-range testing of ICBM's launched from Vandenburg Air Force Base in California and projects associated with the Strategic Defense Initiative. In addition, the vast complex of radars operated by MIT and its fellow contractors provide vital tracking services for NASA and other federal agencies.

Living and Working On the Rock

Getting to Kwajalein is no simple task; it is approximately 7500 miles from TJAGSA. Access to USAKA is strictly controlled from Hawaii, and clearances are necessary to board the plane in Honolulu. Flights to Kwajalein take six hours on a C141 nonstop and about eight hours on the "island hopper," which is a Boeing 727 operated by Air Micronesia, a joint operation between Continental Airlines and the RMI government.

At 10,000 feet Kwajalein looks like a small sandbar in the ocean; walking around the island gives one a similar impression. At first, the continual ninety degree temperature and ninety-five percent humidity is difficult to get used to. The lowest recorded temperature in the RMI is seventy-three degrees, and with the island located just seven degrees from the equator, the sun feels even hotter. During the dry season the trade winds blow continuously at thirty-five miles per hour, but they stop almost immediately when the torrential rains signal the beginning of the wet season.

There are no private vehicles on Kwajalein, so the 3000 people ride bicycles. Unless the bicycles are properly maintained, the corrosive effect of the salt spray that continually drifts over the island can completely destroy a metal bicycle in six months. People with small children often use three wheel bikes and put the kids in the "back seat" or pull them in a cart. Pedaling these bikes into thirty-five mile per hour trade winds can tire even the strongest biker.

The Kwajalein school system is one of the top-ranked schools in the United States. Approximately three hundred students attend the three schools, which are contractor operated and not part of the Department of Defense Schools System. Many of these students are born and raised on Kwajalein, and college on the mainland is their first experience of being in a "real" school. The high school graduates about fifteen students a year. Historically, approximately four of these graduates have been National Merit scholars and at least one has been a Presidential scholar. Kwajalein schools are very academically demanding.

Kwajalein is run entirely by contractors, including the provision of contract ministers and priests. Many interesting and unique questions arise in the operation of the chapel because its administration is completely set out in the "scope of work" section of the base operations contract. [11] Due to its small size, Kwajalein does not have a cemetery—all bodies have to be shipped to Hawaii for either autopsy or transhipment to the continental United States. The logistics contractor is required to stock caskets and have a mortician on the hospital staff.

Medical and dental services are provided by the contractor. Because of the good pay and outstanding recreational activities, the contractor has never had difficulty attracting highly qualified doctors or dentists. In fact, many of the civilians refer to Kwajalein as "paradise." Medical services are limited, and many patients are referred to Hawaii for complex surgery and such things as obstetrics, gynecology, or opthamology. Because of these limitations, Kwajalein may not be a good assignment for soldiers with family members who require specialized medical care. [12] If necessary, Military Airlift Command (MAC) planes flying in the vicinity of Kwajalein would be diverted to pick up patients needing emergency surgery and take them to Tripler Army Hospital in Honolulu. Contractor personnel and Marshallese citizens from the surrounding islands receive medical services from the Kwajalein hospital, but are referred to civilian hospitals in Hawaii or a newly-opened hospital in Majuro, the capital of the Marshall Islands.

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[10] Bikini Atoll is located north of Kwajalein Atoll and is an integral part of the Marshall Islands. Although Bikini and Enwietak Atolls are currently uninhabited due to high radiation levels, it is the hope of the natives that the cleanup effort currently underway will allow them to return in the near future.

[11] In 1987 the base operations contract was combined with the technical range operations contract and awarded to Pan American Services, replacing Global Associates, which had operated on Kwajalein for over twenty years.

[12] This is of critical importance because it takes a C141 five and one-half hours to get to Honolulu from Kwajalein, assuming there is a plane immediately available.

Kwajalein, even though it is a United States Army base, has no commissary or post exchange. The local food store, called Surfway, is run by the contractor. The prices are quite high, and the selection is very limited; milk is $3.88 per gallon. The local department store, Macys, [13] provides a very limited selection of goods. As a result, most people either buy through catalogues or shop while they are off the island. Surprisingly, there is no cost of living allowance (COLA) for duty at Kwajalein. The United States Department of State, which recently opened a mission in Majuro, considers the area one of extreme hardship and provides their personnel with a substantial COLA. All military personnel assigned to USAKA are entitled to government housing, but they still receive twenty-five percent of their BAQ. Department of the Army civilians receive a pay increase of approximately ten percent and receive free housing. Both the military and the Department of the Army civilians pay federal income tax. Contractor personnel receive free housing and pay no federal income tax as long as they earn under $80,000 a year, [14] although they do pay a five percent income tax to the RMI government. This income tax is authorized by the Compact. [15] All contractor personnel are entitled under their contract to fly "space required" on MAC flights, while the military personnel fly "space available." This means that contractor personnel often bump military members attempting to go on leave.

Getting to work each day can involve riding the Huffy one-speed bike or taking a helicopter or fixed-wing plane to one of the many radar sites that dot the lagoon. The Kwajalein "air force" consists of five British Short Brothers transport planes, [16] and a number of pontoon-equipped helicopters, the only ones so equipped in the United States Army. In addition, the Kwajalein "navy" consists of a large number of tugs and modified landing craft suitable for carrying passengers or cargo. The police use high speed patrol boats to provide security around the defense sites as well as to perform search and rescue missions. Some 700 Marshallese workers are transported daily by ferry to Kwajalein from the island of Ebeye, [17] located less than two miles away. Ebeye, which has 10,000 people on seventy-two acres, is a very depressing place. The barren and densely populated island is overflowing with refuse, humanity, and disease, although a major upgrade of the island's roads, sewers, and power plant was begun in 1987. The vast majority of the funding for these projects is provided for by the Compact. Kwajalein also has the United States Army's only submarine, which is designed for mission recovery work. Every building, trailer, and radar site is air-conditioned twenty-four hours a day for comfort from the ninety percent humidity and to protect the sensitive equipment from the corrosive effects of the salt air and the intense heat.

Recreation is an important part of life on Kwajalein. There are 400 certified scuba divers on the island, and classes are always available for newcomers. Many believe that there is no better diving anywhere in the world, to include Australia's Great Barrier Reef. There is also a nine hole golf course on the island. Some of the finest deep sea fishing in the world is found in the rich waters off Kwajalein. Private boats or those rented from the marina ply the waters for yellow fin tuna, swordfish, mahi-mahi, shark, etc. Soccer, softball, volleyball, and basketball are played year-round. All-star soccer and volleyball teams are always ready to challenge the crews of the domestic and foreign ships that come to Kwajalein for refueling and courtesy visits. The Thai and Indonesian visits are eagerly awaited because they often have marching bands, kick-boxing, and martial arts demonstrations. The two large saltwater pools are continually used for swim meets and inner tube water polo. There are over 150 different clubs on the island, with groups studying everything from Hawaiian quilt making to gourmet cooking. Trips to Bali, Australia, New Zealand, or Hawaii are also a favorite pastime.

Kwajalein Legal Office

At first glance, one might question the need for a legal office in such an isolated place. In reality, however, the practice of law in Kwajalein is exceptionally interesting and complex. Criminal law is one example of the uniqueness of Kwajalein legal practice.

The Compact authorized the establishment on Kwajalein of the only United States Magistrate Court [18] located outside the United States and specified that Hawaiian law would be used under the Assimilative Crimes Act. [19] This required a tremendous amount of work, not the least of which was smoothing the ruffled feathers of the senior federal court judge in Hawaii who had never heard of the Compact and saw no need for such a court on Kwajalein, especially one that had not been budgeted for. Fort Shafter's staff judge advocate office provided invaluable assistance and advice concerning Hawaiian law. At that time, there were no Hawaiian law books available in the entire Trust Territory. The only civilian lawyer on Kwajalein, the wife of an RCA engineer, agreed to serve as the part-time Magistrate, thus saving

[13] The contractor has received permission from Macy's of New York to use the name on the department store.

[14] This tax free status exists only if they are in the U.S. for no more than thirty days a year.

[15] Status of Forces Agreement concluded pursuant to Section 323 of the Compact of Free Association Act of 1985, Pub. L. 99-239, 99 Stat. 1770 (1986).

[16] These outstanding planes replaced the legendary DeHavilland Caribous, which were retired after twenty years because it was becoming increasingly difficult to get spare parts for the vintage radial engines.

[17] Ebeye is not one of the eleven defense sites and is the closest inhabited island to Kwajalein. The Marshallese workers receive USAKA identity cards and must pass through a security checkpoint on the dock before being admitted on the installation.

[18] Compact of Free Association Act of 1985, Section 202, Pub. L. No, 99-239, 99 Stat. 1770 (1986).

[19] 18 U.S.C. § 13 (1982).

the government the tremendous cost of having to bring a Magistrate from Honolulu every month.

One of the most difficult issues that had to be resolved involved the contractor police, who were sworn in as RMI law enforcement officers and were trained in both RMI and TTPI criminal law. The issue was whether the police officers could serve as United States Marshals and RMI law enforcement officials at the same time. After extensive negotiations, the United States Marshal's Service finally allowed four contractor police officers to serve as United States Marshals. Defendants accused of serious crimes are held in the Kwajalein jail until they can be transported to Hawaii on a C141 for arraignment before the United States District Court.

Kwajalein also has a local RMI court that applies RMI and TTPI laws. [20] This court has jurisdiction over the following people: Marshallese who work on Kwajalein; the dozen or so dependent wives who are not United States citizens; minors of any nationality under the age of eighteen; and American citizens being tried for crimes not recognizable under Hawaiian law, such as traffic offenses involving one or more of the thousands of bicycles on Kwajalein. With the approval of the RMI Attorney General and the Chief Judge of the RMI High Court, we established the first operational juvenile court on Kwajalein. This court, part of the RMI court system, proved very effective in taking care of minor juvenile problems. The lay judges of this court are Americans who serve on this court as a community service. They are advised and trained by one of the two judge advocates assigned to the island and by American and Australian attorneys who work for the RMI Attorney General. Appeals from the local trial courts may be taken to the RMI High Court, which is staffed primarily by British-educated Sri Lankan judges. The Supreme Court of the RMI is located in Honolulu and consists of three American lawyers from Hawaii who are in private practice in Honolulu when they are not hearing RMI cases. The court rarely meets, but the few cases the court does hear are of critical importance to the Marshallese and normally involve land disputes. Because there are few qualified lawyers in RMI, the government has recruited Americans, Sri Lankans, and Australians to staff their court system and the Attorney General's office.

The vast majority of the legal work on Kwajalein involves international law. In 1985 the Marshall Islands were part of the TTPI and were administered from Saipan by Janet McCoy, the United States High Commissioner. In 1986 the Marshalls became independent and were known as the RMI. Kwajalein's operation and status were then fully covered in great detail by the Compact and the comprehensive subsidiary agreements, including a Status of Forces Agreement (SOFA).

The path to nationhood was not a smooth one. Many of the Marshallese who lived on the islands in the Kwajalein Atoll were unhappy at the amount of compensation they were receiving from the United States for the use of their leased lands that comprise the eleven defense sites of USAKA. Approximately one hundred dissident land owners decided to express their anger by sailing over to Kwajalein and occupying parts of the base. At the same time, they filed numerous law suits in both United States and RMI courts. Although the United States had sufficient personnel to repel the "invaders," a decision was made in Washington to allow the dissidents to land and to keep them contained on one part of the island so as not to interfere with the sensitive missile testing done on the test range. As soon as the boats landed the logistics contractor removed them from the harbor and impounded them so that they could not be used to haul more dissidents. The entire operation was filmed, which proved invaluable when the United States was sued for causing extensive damage to the boats. The film proved the falsity of the allegations, and the suit was dismissed.

After lengthy negotiations with the RMI government, the command decided that we would use police from the capital city of Majuro to remove the demonstrating natives rather than calling in United States troops from the mainland. The negotiations with the RMI were often difficult because there was a substantial number of elected officials who were sympathetic to the dissidents on Kwajalein. [21] On one occasion I was ordered to Majuro by our Commanding General to assist in the negotiations. We arrived in Majuro on one of the Army planes. The new pilot asked for landing instructions because the Marshallese had abandoned the control tower. I told the pilot to land the plane near one of the empty hangars until I could locate some Marshallese officials. Shortly thereafter I, along with the other members of the American delegation, were ordered off the island. A week or so later we were invited back to complete the negotiations. The removal operation was conducted by the RMI's Attorney General, who is an American, 40 RMI policemen, 120 heavily armed Kwajalein contractor police under the command of a highly decorated former marine officer, and about 20 members from the United States Army contingent at Kwajalein. During the thirty-six hour operation I acted as the advisor to the USAKA commander and as the liaison with the RMI Attorney General. This required me to be at the demonstration site or operating the radios from the Emergency Operations Center (EOC). All the demonstrators were removed in police vans and loaded on a landing craft (LCM) for transportation to their homes on a nearby island. The LCM was stoned by about 500 Marshallese when it tried to unload its passengers on the island of Ebeye, so they were discharged down the front ramp of the LCM on a small island about a mile away. Once the tide went down the demonstrators walked back on the coral reef to their homes. This successful police action was vital to the RMI central government in establishing its authority over the Marshallese on the Kwajalein Atoll.

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[20] The RMI court and the United States Magistrate's Court operate out of the same building because of the limited facilities on Kwajalein.

[21] The RMI is a small country with a matriarchal structure. Many of the key dissidents were led by an Ebeye queen. Another critical problem for the RMI government was the fact that many of the local police were directly related to the dissidents who were forcibly removed.

Implementation of the Compact and the many subsidiary agreements required a constant interface between the judge advocates and the members of the RMI Attorney General's office. Our first order of business was to defend the lawsuits filed against the RMI and the United States in Honolulu, Washington D.C., and Majuro that challenged the very legitimacy of the Compact. Every question was one of first impression and required continual coordination with higher headquarters, the Office of Micronesian Status Negotiations, and the State Department. USAKA maintains a one person liaison office manned by a field grade officer in Majuro to coordinate the range activities with the RMI government. Establishing this office was one of the more challenging legal tasks that I was assigned. There are no real estate agents in the RMI, so we had to ask around to see if there was a suitable house we could lease from one of the landowners. [22] After much research, we found that the real estate division of the United States Navy located in Pearl Harbor was responsible for administering this lease. The Navy attorneys authorized me to negotiate the terms of the lease, so I took one of the USAKA planes and quickly flew to Majuro to complete the deal. The lease is administered through the base operations contract with the approval of the Navy.

There were rarely any routine or normal questions asked of the legal office. Protection of the fragile environment around Kwajalein is covered in detail by the Compact, [23] and I was frequently asked questions concerning missile shots into the lagoon. A detailed environmental impact statement is currently being conducted for the atoll. Numerous questions arose over the operation of the VFW/American Legion post, which is the only one that I know of that is allowed to operate on a United States Army installation. This unique organization claims members throughout the Pacific area, including active members in China, Thailand, Laos, Cambodia, and other exotic places in the Far East. Standards of conduct questions involving real or imagined conflicts of interest were a continual problem on the island because contractors and their evaluators lived and worked together. Most members of the command were heavily involved in the evaluation of contractor performance; therefore, the local supplement to Army Regulation 600-50 prohibited the spouses from working for any of these companies. The only possible employment opportunities, if they were even available, were as Department of the Army civilians or as employees of a contractor that the command group did not evaluate. This was a sore point with many of the spouses, and it is an important factor to consider when seeking an assignment to Kwajalein. [24]

The legal office handles a large volume of routine legal assistance questions and many unique claims matters. For example, after much discussion with the United States Army Claims Service it was determined that a thirty-ton crane that rolled down the pier onto a boat was indeed a maritime claim. [25] Also, there was the occasional claim for damage caused by typhoons or for flood damage to quarters from the torrential monsoon-like rains. In 1987 many of the contract administration functions were transferred to Kwajalein from United States Army Strategic Defense Command in Huntsville, Alabama. This change vastly increased the amount of procurement law practiced on Kwajalein.

Conclusion

Kwajalein is a fascinating place to live and to work. Every day is a challenge. A judge advocate assigned to Kwajalein serves in many capacities. He or she may be called upon to act as a general's aide, as an outer island escort for Senate staffers or U.N. delegations, or as a host for foreign dignitaries. Because it is the last time zone in the United States it is often difficult to coordinate actions with higher headquarters in Huntsville or Washington. In addition, because all the telephone calls go through a limited number of satellite circuits, it may take a couple of hours just to get a phone call through to the continental United States. The rewards, however, are great. One of the most satisfying aspects of my assignment to Kwajalein was the great sense of accomplishment that I experienced working on the Compact with members of the Marshallese Government. All of the minor inconveniences of life on Kwajalein seem insignificant when compared to the wonderful experience of seeing the new nation of the Republic of the Marshall Islands created from the TTPI. Major Gregory Taylor, Deputy Staff Judge Advocate, Redstone Arsenal.

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[22] All real estate in the RMI is privately owned. Land is divided into "weto's," which are strips of land stretching the width of the island from one body of water to another.

[23] Compact of Free Association Act of 1985, Title One, Article VI, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

[24] During my tour, a number of spouses returned to CONUS because they could not find suitable work. The United States Army and it's contractors are the only employers on Kwajalein. There is no "downtown" area with private employers.

[25] Army Reg. 27-20, Legal Services: Claims, Chapter 8 (15 Feb. 89).

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices, which receive them from the MACOM's. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM's and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1989

November 6-9: 3d Procurement Fraud Course (5F-F36). **Note—This course has been changed from a basic introductory course to a more advanced course that will include an update on procurement law issues.**

November 13-17: 23d Criminal Trial Advocacy Course (5F-F32).

November 27-December 1: 29th Fiscal Law Course (5F- F12).

December 4-8: 6th Judge Advocate & Military Operations Seminar (5F-F47).

December 11-15: 36th Federal Labor Relations Course (5F-F22).

1990

January 8-12: 1990 Government Contract Law Symposium (5F-F11).

January 16-March 23: 121st Basic Course (5-27-C20).

January 29-February 2: 101st Senior Officer Legal Orientation Course (5F-F1).

February 5-9: 24th Criminal Trial Advocacy Course (5F- F32).

February 12-16: 3d Program Managers Attorneys Course (5F-F19).

February 26-March 9: 120th Contract Attorneys Course (5F-F10).

March 12-16: 14th Administrative Law for Military Installations Course (5F-F24).

March 19-23: 44th Law of War Workshop (5F-F42).

March 26-30: 1st Law for Legal NCO's Course (512-71D/E/20/30).

March 26-30: 26th Legal Assistance Course (5F-F23).

April 2-6: 5th Government Materiel Acquisition Course (5F-F17).

April 9-13: 102d Senior Officer Legal Orientation Course (5F-F1).

April 9-13: 7th Judge Advocate and Military Operations Seminar (5F-F47).

April 16-20: 8th Federal Litigation Course (5F-F29).

April 24-27: JA Reserve Component Workshop.

April 30-May 11: 121st Contract Attorneys Course (5F- F10).

May 14-18: 37th Federal Labor Relations Course (5F-F22).

May 21-25: 30th Fiscal Law Course (5F-F12).

May 21-June 8: 33d Military Judge Course (5F-F33).

June 4-8: 103d Senior Officer Legal Orientation Course (5F-F1).

June 11-15: 20th Staff Judge Advocate Course (5F-F52).

June 11-13: 6th SJA Spouses' Course.

June 18-29: JATT Team Training.

June 18-29: JAOAC (Phase IV).

June 20-22: General Counsel's Workshop.

June 26-29: U.S. Army Claims Service Training Seminar.

July 9-11: 1st Legal Administrator's Course (7A-550A1).

July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).

July 10-13: 21st Methods of Instruction Course (5F-F70).

July 16-18: Professional Recruiting Training Seminar.

July 16-20: 2d STARC Law and Mobilization Workshop.

July 16-27: 122d Contract Attorneys Course (5F-F10).

July 23-September 26: 122d Basic Course (5-27-C20).

July 30-May 17, 1991: 39th Graduate Course (5-27-C22).

August 6-10: 45th Law of War Workshop (5F-F42).

August 13-17: 14th Criminal Law New Developments Course (5F-F35).

August 20-24: 1st Senior Legal NCO Management Course (512-71D/E/40/50).

September 10-14: 8th Contract Claims, Litigation & Remedies Course (5F-F13).

September 17-19: Chief Legal NCO Workshop.

3. Civilian Sponsored CLE Courses

January 1990

4-6: ALIABA, Eminent Domain and Land Valuation Litigation, Scottsdale, AZ.

7-12: AAJE, Judicial Educator Training Specialist Program, Scottsdale, AZ.

11-12: PLI, Advanced Antitrust Seminar: Mergers and Acquisitions, San Francisco, CA.

11-12: ALIABA, Broker-Dealer Regulations, Washington, DC.

12: PLI, Workshop on Legal Writing, New York, NY.

14-19: NJC, Judicial Productivity, Orlando, FL.

14-19: NJC, Current Issues in Family Law, Orlando, FL.

14-19: NJC, Law, Ethics, and Justice, Orlando, FL.

15-18: USCLC, Institute on Federal Taxation, Los Angeles, CA.

16: PLI, Workshop on Legal Writing, Chicago, IL.

18-19: PLI, Problems of Indenture Trustees—Defaulted Bonds, San Francisco, CA.

18-19: PLI, Preparation of Annual Disclosure Documents, Atlanta, GA.

18-19: PLI, Technology Licensing, New York, NY.

19: PLI, Workshop on Legal Writing, Washington, DC.

21-25: NCDA, Trial Advocacy, Denver, CO.

22-23: PLI, Environmental Regulation and Business Transactions, Houston, TX.

22-24: ALIABA, Commercial Real Estate Leasing, Scottsdale, AZ.

22-26: GPC, Contracting With the Government, Washington, DC.

25-26: PLI, Distribution and Marketing, New York, NY.

25-27: ALIABA, Commercial Real Estate Financing, Scottsdale, AZ.

29-30: PLI, Advanced Antitrust Seminar: Mergers and Acquisitions, Chicago, IL.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1989 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	Reporting requirement temporarily suspended for 1989. Compliance fees and penalties for 1988 shall be paid.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	27 hours during 2 year-period
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the July 1989 issue of *The Army Lawyer.*

5. Army Sponsored Continuing Legal Education Calendar (16 September 1989 - 30 September 1990)

The following is a schedule of Army Sponsored Continuing Legal Education that is not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972-6380; Trial Judiciary, (703) 756- 1795; Trial Counsel Assistance Program (TCAP), (202) 756-1804; U.S. Army Trial Defense Service (TDS), (202) 756-1390; U.S. Army Claims Service, (301) 677-7622; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: MAJ Duncan, Heidelberg Military 8459). This schedule will be updated in The Army Lawyer on a periodic basis. Coordinator: CPT Cuculic, TJAGSA, (804) 972-6342.

TRAINING	LOCATION	DATES
PACOM CLE	Far East	16 Sep - 8 Oct 89
TJAGSA On-Site	Minneapolis, MN	7 - 8 Oct 89
USAREUR Criminal Law CLE I	Chiemsee, FRG	9 - 11 Oct 89
USAREUR Criminal Law/Chief of Justice CLE	Chiemsee, FRG	13 Oct 89
USAREUR Trial Advocacy CLE	Chiemsee, FRG	11 - 14 Oct 89
TJAGSA On-Site	Boston, MA	14 - 15 Oct 89
USAREUR Criminal Law CLE II	Chiemsee, FRG	16 - 18 Oct 89
TCAP Seminar	Seattle, WA	17 - 18 Oct 89
USAREUR International Law Trial Observer CLE	Heidelberg, FRG	19 - 20 Oct 89
TDS Workshop, Region II	Atlanta, GA	25 - 27 Oct 89
TJAGSA On-Site	Little Rock, AR	27 - 29 Oct 89
TJAGSA On-Site	Philadelphia, PA	28 - 29 Oct 89
TDS Workshop, Region I	Fort Meade, MD	31 Oct - 3 Nov 89
TJAGSA On-Site	Detroit, MI	11 - 12 Nov 89
Advanced Claims Workshop	Baltimore, MD	13 - 16 Nov 89
TJAGSA On-Site	New York, NY	18 - 19 Nov 89
USAREUR JA Management Seminar	Berchtesgaden, FRG	19 - 21 Nov 89
TCAP Seminar	Seoul, Korea	2 - 3 Nov 89
TCAP Seminar	Honolulu, HI	6 - 7 Nov 89
TDS Workshop, Region III & IV	Leavenworth, KS	November 89
TDS Workshop, Region V	Treasure Island, CA	November 89
USAREUR International Law CLE	Berchtesgaden, FRG	27 Nov - 1 Dec 89
1st & 2d Judicial Circuit Conference	TBD	Dec 89
TCAP Seminar	San Antonio, TX	4 - 5 Dec 89
TJAGSA On-Site	San Antonio, TX	8 - 10 Dec 89
TJAGSA On-Site	Los Angeles, CA	6 - 7 Jan 90
USAREUR Tax CLE	Ramstein A.F.B. FRG	9 - 12 Jan 90
Far East Tax CLE	Far East	15 - 19 Jan 90
TCAP Seminar	Baltimore, MD	18 - 19 Jan 90
TJAGSA On-Site	Seattle, WA	20 - 21 Jan 90
3rd & 4th Judicial Circuit Conference	TBD	Feb 90

TRAINING	LOCATION	DATES
TJAGSA On-Site USAREUR	Orlando, FL	10 - 11 Feb 90
Administrative LAW CLE	Heidelberg, FRG	12 - 16 Feb 90
TCAP Seminar	Atlanta, GA	15 - 16 Feb 90
TJAGSA On-Site	Austin, TX	16 - 18 Feb 90
TJAGSA On-Site	Salt Lake City, UT	24 - 25 Feb 90
TJAGSA On-Site	Nashville, TN	3 - 4 Mar 90
TCAP Seminar	Kansas City, KS	8 - 9 Mar 90
TJAGSA On-Site	Columbia, SC	10 - 11 Mar 90
USAREUR Contract Law CLE	Frankfurt, FRG	12 - 16 Mar 90
TJAGSA On-Site	Washington, DC	17 - 18 Mar 90
TJAGSA On-Site	San Francisco, CA	17 - 18 Mar 90
TJAGSA On-Site	El Paso, TX	30 Mar - 1 Apr 90
TCAP Seminar	San Francisco, CA	2 - 3 Apr 90
TJAGSA On-Site	Chicago, IL	7 - 8 Apr 90
TCAP Seminars	USAREUR	30 Apr - 11 May 90
TJAGSA On-Site	Columbus, OH	5 - 6 May 90
TJAGSA On-Site	Jackson, MS	5 - 6 May 90
USAREUR International Law Trial Observer CLE	Heidelberg, FRG	17 - 18 May 90
USAREUR SJA CLE	Heidelberg, FRG	17 - 18 May 90
USAREUR Op Law CLE	Heidelberg, FRG	22 -25 May 90
TCAP Seminar	Ft Hood, TX	21 - 22 Jun 90
TCAP Seminar	Norfolk, VA	12 - 13 Jul 90
TCAP Seminar	Ft Bragg, NC	2 - 3 Aug 90
USAREUR Branch Office CLE	Heidelberg, FRG	10 Aug 90
USAREUR Contract Law - Procurement Fraud Advisor CLE	Heidelberg, FRG	17 Aug 90
USAREUR SJA CLE	Heidelberg, FRG	23 - 24 Aug 90
5th Judicial Circuit Conference	Garmisch, FRG	Sep 90
USAREUR Legal Assistance CLE	Heidelberg, FRG	4 - 7 Sep 90
TCAP Seminar	Colorado Springs, CO	17 - 18 Sep 90

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/ JAGS-ADK-87-1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/ JAGS-ADK-87-2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS-ADK-86-1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
*AD B135492	Legal Assistance Guide Consumer Law /JAGS-ADA-89-3 (609 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
AD B116102	Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs).
*AD B135453	Legal Assistance Guide Real Property /JAGS-ADA-89-2 (253 pgs).
AD A174549	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
AD B093771	All States Law Summary, Vol I/ JAGS-ADA-87-5 (467 pgs).
AD B094235	All States Law Summary, Vol II/ JAGS-ADA-87-6 (417 pgs).
AD B114054	All States Law Summary, Vol III/ JAGS-ADA-87-7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
AD B116103	Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
AD B124120	Model Tax Assistance Program/ JAGS-ADA-88-2 (65 pgs).
AD-B124194	1988 Legal Assistance Update/JAGS-ADA-88-1

Claims

AD B108054	Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS-ADA-81-7 (76 pgs).
AD B100235	Government Information Practices/ JAGS-ADA-86-2 (345 pgs).
AD B100251	Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
AD B108016	Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/ JAGS-ADA-87-3 (110 pgs).

AD B100675	Practical Exercises in Administrative and Civil Law and Management/ JAGS-ADA-86-9 (146 pgs).
AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

AD B087845	Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations/ JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B124193	Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

*AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B100212	Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
*AD B135459	Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 11-7	Internal Review and Audit Compliance Program	16 Jul 89
AR 11-27	Army Energy Program	14 Jul 89
AR 30-1	The Army Food Service Program	15 Aug 89
AR 50-5	Nuclear Surety	7 Aug 89
AR 635-200	Personnel Separations—Enlisted Personnel, Chg. 101	4 Aug 89
AR 702-6	Ammunition Stockpile Reliability Program (ASRP) and Nuclear Weapons Stockpile Reliability Program (ANWSRP)	23 Jun 89
Update 13	Officer Ranks Personnel	21 Aug 89
Update 17	Message Address Directory	30 Jun 89
Update 21	Reserve Component Personnel	10 Jul 89
Pam 27-153	Contract Law	15 Aug 89

*U.S. GOVERNMENT PRINTING OFFICE:1989-242-777:00009

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