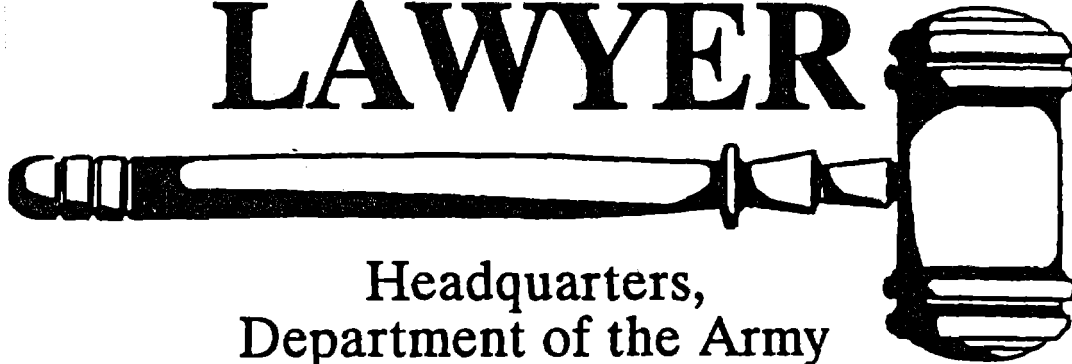


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Let the Good Times Role: Morale, Welfare, and Recreation Operations¹

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Let the Good Times Role: Morale, Welfare, and Recreation Operations¹

1. Purpose and Scope.

Soldier morale is vital to accomplishment of Army missions. Army morale, welfare, and recreation (MWR) operations devote tremendous resources to enhance soldier morale. This article is a comprehensive overview and users guide describing MWR operations. The table of contents (page 3), the acronym list (page 59), the index (page 62), the numerous footnotes, and the addresses and phone numbers for key offices and personnel are intended to make this a user-friendly practical resource for quick research of MWR issues.

This article provides the history, classification system, operational principles, legal status, financial and property management methods, patronage policies, activities description, and other items concerning MWR operations. Collectively, MWR operations often are referred to as NAFIs (nonappropriated fund instrumentalities) because much of their funding is derived from other than congressional appropriations. Morale, welfare, and recreation operations include the post exchange, Army clubs, and a variety of other programs that contribute to the MWR of military members and their families.

2. Historical Overview.

Throughout time, armies received MWR goods and services from myriad sources. Sometimes MWR goods and services were provided by the military, sometimes by the soldier, sometimes from entrepreneurs, sometimes from a combination of providers, and sometimes soldiers went without. This tension continues today as political and military leaders, entrepreneurs, soldiers, and family members determine who should (and how to most effectively and efficiently) deliver MWR services to soldiers.

Military forces always have relied, to some extent, on non-governmental sources for subsistence, quarters, and other forms of support and entertainment. Michael Noone, in his doctoral thesis examining the historical evolution of what are now non-appropriated fund instrumentalities, gave this background perspective:

Neither armies nor navies have supplied all the needs of their men. Caesar alludes to the itinerant merchants who followed the legions, selling items not considered necessities by quartermasters. These men came to be known as sutlers. The *Shorter Oxford English Dictionary* defines a sutler as one who follows an army or lives in a garrison town and sells provisions to soldiers. The word, first identified in 1590, is from the modern Dutch and means a small vendor. It seems that sutlers were held in ill-repute, since the term is derived from "soltelen" which means to befool or perform mean duties. While seamen had shops available when ashore, the merchants could not, of course, follow them to sea. "Bumboats" met the ships in foreign ports and attempted to supply the seamen with everything not issued through military channels; a practice discouraged by navies, inasmuch as bumboats sold contraband and prohibited articles, as well as charging monopoly prices for whatever they sold. The sailors' response was to organize ships' cooperatives which were called "slop chests." The *Shorter Oxford English Dictionary* traces the word "slop" to 1663, stating that its derivation is unknown, and describes "slop" as very cheap clothes like those sold in ship's stores.²

When European armies came to North America, they brought the concept of the sutler with them. The British Articles of War of the 17th and 18th centuries officially recognized the sutler, a civilian seller of ale, victuals and other merchandise, and regulated sutler transactions with the soldiers.³ The first American Army's Articles of War and later the American Articles of War of 1775 contained similar provisions.⁴

¹ This article combines and updates numerous publications produced by The Judge Advocate General's School, United States Army (TJAGSA). The genesis for this article was chapter 11, *Department of the Army Pamphlet 27-21, Administrative and Civil Law Handbook* (15 March 1992), which is now obsolete. The author updated and substantially altered that work during the summer of 1995 and used it at TJAGSA as a text for various classes. On 29 September 1995, the Army published the most recent edition of *Army Regulation 215-1, Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities*. Changes in the new regulation required further substantial updating and revisions of related TJAGSA publications. The following students, all members of the TJAGSA 44th Graduate Course Morale, Welfare, and Recreation Elective, provided significant assistance in updating the related TJAGSA publications and much of their work is reflected in this article. Major John Alumbaugh, Major Joseph Bestul, Major Timothy Conley, Major Dave Conn, Captain Holly Cook, Major Michael Coughlin, Major Kevin Fritz, Major Mark Gingras, Major Kenneth Goetzke, Major Mark Seitsinger, Major Shawn Shumake, and Major Kenneth Tozzi. To each officer, thank you for a job well done. Thanks also to Colonel Jim Quinn, Command Judge Advocate, Community and Family Support Center, and his staff for their tremendous assistance.

² Michael F. Noone, *Legal Problems of Non-appropriated Funds*, Bicentennial Issue MIL. L. REV. 357, 361 (1975) (footnotes deleted) (reproduced in *Hearings on S. 3163 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, app. I, 90th Cong., 2d Sess. 201, 203-208 (1968)). For an excellent historical overview, see DAVIS M. DELO, PEDDLERS AND POST TRADERS: THE ARMY SUTLER ON THE FRONTIER (1938).

³ Noone, *supra* note 2, at 362 (citing Articles of War of James II, arts. II, XLIV, XLVI (1688), reprinted in WINTHROP, MILITARY LAW AND PRECEDENTS 953 (2d ed. 1920) (reprinting British Articles of War of 1765, § VIII)).

⁴ *Id.* (Articles of War of 1775, arts. XXXII, LXIV, LXVI). Winthrop, *supra* note 3, app. IX.

The first mention of a nonappropriated fund (NAF) in the American Army was Article 2 of the American Articles of War, 1775. It provided that fines from soldiers who misbehaved during church services would be used for the sick soldiers of the troop:

American Articles of War, 1775 (Enacted June 30, 1775)

ARTICLE 2: It is earnestly recommended to all officers and soldiers, diligently to attend divine service; and all officers and soldiers who shall behave indecently or irreverently at any place of divine worship, shall, if commissioned officers, be brought before a court-martial, there to be publicly and severely reprimanded by the president; If non-commissioned officers or soldiers, every person so offending, shall, for his first offense, forfeit one sixth of a dollar, to be deducted out of his next pay; For the second offense, he shall not only forfeit a like sum, but be confined for twenty-four hours, and for every like offense shall suffer and pay in like manner; which money so forfeited, shall be applied to the use of the sick soldiers of the troop or company to which the offender belongs.⁵

Although not a member of the Army, the sutler was subject to the articles of war and controlled by the local commander.⁶ The sutler received concessions from the Army, which permitted sales of liquor, food, and incidentals to soldiers. The sutler also was permitted to charge credit sales against the pay of soldier-customers. This assured payment directly from the paymaster. In return for these privileges, each sutler paid to the post commander a monthly charge based on the average number of soldiers assigned to the unit during the pay period.⁷

These monthly payments, together with any fines collected from the sutlers, were deposited in the post fund—an early NAFI (nonappropriated fund instrumentality). The post fund could be

used to aid indigent widows or children of deceased military soldiers, as well as disabled soldiers discharged without pensions. The post fund also could be used to buy books and magazines for the post library and to support the post school and the post band.⁸

This system remained effectively unchanged for fifty years. Because the regular Army was small, Congress was able to regulate sutler activities fairly easily. The *General Regulations of the Army of 1821 (General Regulations)*⁹ gave more specific guidance on the operation of sutlers. Article 41 of the *General Regulations* authorized one sutler for each post or regiment. The sutler was allowed to sell on credit and, if unpaid, to present his bill to the paymaster who might deduct the debt from the soldier's pay. In return, the sutler paid for this franchise through an assessment based on the number of military personnel that he had authorization to serve. The assessment, and any fines paid by the sutler, constituted the "post fund."

In addition to providing uniform guidance for the activities of sutlers, the *General Regulations* gave official recognition to other NAF activities, including unit, welfare, and library funds.¹⁰ The *General Regulations* also established a council to administer the post fund and authorized expenditures for these other nonappropriated funds, after approval by the fund council and commanding officer. The *General Regulations*, which were approved by Congress, also contained procedures for the administration and dissolution of such funds. This is important because it represents a rare statutory recognition of NAFs!

In 1835, the *General Regulations* authorized company funds.¹¹ Although company funds had several sources of income, such as the rental of billiard tables, they derived most of their income from a "slush fund" made up of monies received from the sale of grease from the company mess and other savings from the economical use of food. These funds also were subject to Army regulation and control by the unit commander. The *General Regulations* required that a quarterly report on the status of each fund be submitted to the Adjutant General of the Army. With the exception of the messes, all funds were exclusively for the use of enlisted soldiers.¹²

⁵ *Id.*

⁶ See Articles of War of 1806, art. 6 ("All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."). 2 Stat. 359, 366 (1806).

⁷ Army Regulations of 1821, art. 41. See 3 Stat. 615, 616 (1821) (congressional approval).

⁸ *Id.* On the transfer of a unit, an equitable portion of the post fund would be transferred to the departing unit, whose commanding officer was required to use the funds for the benefit of that unit.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Army Regulations of 1835, para. 15.

¹² *Id.* paras. 31, 32.

At approximately the same time, "Consolidated Officers' Messes" (1835) and "Nicosia Messes" (1841) were officially recognized.¹³ The *Army Regulations of 1835* proscribe the following:

On many accounts it is desirable that the officers of the same regiment should form themselves into a mess and live together as one family. While such an association tends to promote the harmony and comfort of its members, it is at the same time, if judiciously managed, the most respectable and economical manner in which officers can live within their pay. To encourage the messing of officers, the government allows rooms, kitchens, and fuel.¹⁴

Regulations for the same year, in an apparent attempt to correct an abuse, further state, "no non-commissioned officer or soldier is to be employed in any menial office or made to perform any service not strictly military, for the private profit of any officer or mess of officers."¹⁵ This indicates that, although officially accepted as authorized activities, messes were only slightly regulated. Although messes received very little regulation, the *Army Regulations of 1835* devoted six pages to the control and disposition of sutlers and post funds.

The regulation of sutlers was closely monitored and modified over the years. For example, in 1847 a sutler's right to have debts deducted from a soldier's pay was discontinued.¹⁶ This practice was reinstated in 1858 and then withdrawn again in 1861.¹⁷ It was finally reinstated in 1862 but with certain limitations.¹⁸

Events experienced by the Union Army during the Civil War raised questions concerning the ethical standards of the sutlers. At that time, the custom was for the regimental commander to appoint the regiment's sutler. Although Congress controlled the

relationship between regular Army commanders and sutlers, the state militias were not under congressional control. During the Civil War, the vast majority of troops in the Union Army were members of these state militias. The lack of control over nonappropriated fund activities led to a great deal of questionable situations. One historian noted the following:

To promote rapid recruitment, the Union Army granted commissions to civilians who often possessed little military experience and who had no intention of remaining in the service after the war. Individuals who were selected for positions of leadership, including regimental colonels, were often locally prominent politicians capable of raising the necessary quota for a new brigade or regiment.¹⁹

The militia commander chose his own sutler or had a group of fellow officers select him. What could be more natural than for a patriotic leader or his followers to pick a trusted neighbor, relative, or business associate? Even if an officer formed a tacit partnership with his regimental sutler to share in the often considerable profits, at least the needs of the soldiers were being met.²⁰

After hearing a number of complaints about these types of arrangements, and other complaints about sutler misdeeds, Congress responded by abolishing the office of sutler in 1866.²¹ Simultaneously, Army regulations required the subsistence department to furnish soldiers, at cost, certain articles to be designated by the Inspector General.²² In the following year, to further compensate for the loss of the services previously furnished by sutlers, Congress authorized the Commanding General of the Army to permit the establishment of trading posts on certain military reservations.²³ Congress later expanded this authority to permit the Secretary of War to appoint post traders at all military posts, regardless of location.²⁴

¹³ *Id.* art. IX; *Army Regulations of 1841*, para. 94. These messes were originally considered principally as eating establishments.

¹⁴ *Army Regulations of 1835*.

¹⁵ *Id.*

¹⁶ Noone, *supra* note 2, at 364 (citing Act of March 3, 1847, ch. 61, § 11, 9 Stat. 185).

¹⁷ *Id.* (citing Act of June 12, 1858, ch. 156, § 5, 11 Stat. 336; Act of Dec. 24, ch. 4, § 6, 1861, 12 Stat. 331).

¹⁸ Delo, *supra* note 2, at 157.

¹⁹ *Id.*

²⁰ *Id.* at 106.

²¹ 14 Stat. 328, 336 (1866).

²² *Id.*

²³ 15 Stat. 29 (1867).

²⁴ 19 Stat. 97, 100 (1876).

not subject to a state licensing tax on the privilege of distributing gasoline.⁴³ The Court observed that executive regulations established post exchanges and that Congress recognized them for appropriations and by other legislation.⁴⁴ Government officers also supervised and operated exchanges under government regulations for the benefit of soldiers.⁴⁵ The Court found that "post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the constitution and federal statutes."⁴⁶

Standard Oil is the key case for various issues involving NAFIs.⁴⁷ Analysis of legal issues involving NAFIs begins with the foundational principle that they are instrumentalities of the United States.

b. Taxation.

(1) **Federal Taxes.** Generally, NAFIs have immunity from federal taxes.⁴⁸ However, because the federal government has the power to tax itself, Congress made some taxes applicable to fed-

eral instrumentalities, including NAFIs. Specifically, NAFIs must comply with the following:

- a. Withhold federal income tax from all MWR civilian and off duty military "employee"⁴⁹ wages.⁵⁰
- b. Deduct Federal Insurance Contribution Act (FICA) taxes from MWR civilian and off duty military employee wages.⁵¹
- c. Pay occupational taxes imposed by the Internal Revenue Service in the continental United States, Alaska, and Hawaii.⁵²
- d. Report to the Internal Revenue Service awards of cash or merchandise to individuals participating in contests or activities.⁵³

In addition to federal taxes, manufacturers may pass federal taxes on to NAFIs in the form of increased costs.⁵⁴

⁴³ *Id.* at 482. In *Standard Oil*, the State of California imposed a motor vehicle fuel tax on distributors of fuel but specifically exempted "any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government." *Id.* at 482. California did not consider the post exchange part of the United States government and levied the tax on it. *Id.*

⁴⁴ *Id.* at 484, n.6-7.

⁴⁵ *Id.* at 484.

⁴⁶ *Id.* at 485. See also AR 215-1, *supra* note 38, para. 3-1b(9) (stating that "NAFIs . . . are considered integral and essential to the conduct of the military mission").

⁴⁷ See, e.g., *Matthews v. Commissioner of Internal Revenue*, 907 F.2d 1173 (D.C. Cir. 1990) (noting that NAFIs are agencies of the United States before determining that appellants were common law employees not entitled to the foreign earned income exclusion); *Champaign-Urbana News Agency v. J.L. Cummins News Co., Inc.*, 632 F.2d 680 (7th Cir. 1980) (holding that AAFES is a governmental instrumentality entitled to immunity from an antitrust act); *United States v. Biagini*, 10 C.M.R. 682 (1953) (holding that a military tribunal convened overseas has jurisdiction over a civilian employee of the exchange because an exchange is a government instrumentality and forms an integral part of the Armed Forces); *United States v. Query*, 121 F.2d 631 (4th Cir. 1941), *aff'd*, 37 F. Supp. 972 (E.D.S.C. 1941) (holding that a post exchange was a federal instrumentality and not subject to a state license tax).

⁴⁸ AR 215-1, *supra* note 38, para. 3-1b(2).

⁴⁹ *Id.* para. 3-7(a). For the purposes of federal employment taxes, many individuals will be considered NAF employees even though they are not considered NONAPPROPRIATED FUND employees for any other purposes. *Id.* para. 3-8. To determine whether an individual is a nonappropriated fund "employee" for tax purposes, apply the common law rules relating to the employer-employee relationship. See REV. RUL. 87-41, 1987-1 C.B. 296; DEP'T OF DEFENSE, DIRECTIVE 7000.14R, FINANCIAL MANAGEMENT REGULATION: NONAPPROPRIATED FUNDS POLICY AND PROCEDURES, vol. 13, para. 0804 (1994) [hereinafter DOD 7000.14R]; AR 215-1, *supra* note 38, fig. 3-1.

⁵⁰ Nonappropriated fund instrumentality employees working overseas are not eligible for the foreign earned income exclusion. See I.R.C. § 911a (1988); *Matthews v. Commissioner of Internal Revenue*, 907 F.2d 1173 (D.C. Cir. 1990).

⁵¹ AR 215-1, *supra* note 38, para. 3-7b. In the United States and its possessions, the nonappropriated fund will pay its share of FICA taxes on payments to all MWR employees regardless of citizenship. *Id.* para. 3-1b(1). In all other areas, the nonappropriated fund will pay only its share on payments to MWR employees who are citizens of the United States or resident aliens ("green card" holders). *Id.* para. 3-1b(2). See also DOD 7000-14R, *supra* note 49, ch. 5 (providing procedural information regarding the collection and payment of FICA taxes).

⁵² DOD 7000.14R, *supra* note 49, para. C050201E. Occupational taxes include the taxes on wholesale and retail dealers in beer, wholesale and retail dealers in liquor, and the taxes on fuel and heavy trucks. *Id.* For alcoholic beverages, a NAFI is liable for only one tax, regardless of how many sales outlets are operated. AR 215-1, *supra* note 38, para. 3-10. Only one wholesale tax is paid when conducting both wholesale and retail operations. *Id.* See also DEP'T OF ARMY, REG. 60-20, ARMY AND AIR FORCE EXCHANGE SERVICE OPERATING POLICIES, para. 6-1d (15 Dec. 1992) (describing specific federal alcohol occupational taxes applicable to exchanges in the continental United States, Alaska, and Hawaii) [hereinafter AR 60-20].

⁵³ AR 215-1, *supra* note 38, para. 3-11.

⁵⁴ For example, the costs charged to NAFIs by manufacturers include the costs manufacturers pay for excise taxes on automotive accessories and taxes on the sale of gasoline. See *id.* para. 3-13.

(2) **State Taxes.** Nonappropriated fund instrumentality operations are immune from directly imposed state and local taxes.⁵⁵ Retail sales of NAFIs are immune from state sales and use taxes, except for the sale of tobacco products and soft drinks through vending machines.⁵⁶ The doctrine of immunity from state and local taxes stems from *McCulloch v. Maryland*⁵⁷ in which the Supreme Court held that states have no power to tax the operation of the United States government.⁵⁸ An additional ground for immunity may exist for activities conducted on property where the United States has exclusive jurisdiction.⁵⁹

May a state or local tax be imposed on a NAFI or on the manufacturer or distributor who supplies the commodity? The key to answering this is determining where the "legal incidence" of the tax falls.⁶⁰ If the tax falls directly on the NAFI, it generally need not be paid. However, if the tax falls on the supplier, even though ultimately paid by the NAFI through increased costs, there is no tax immunity. The NAFI will indirectly pay the tax.⁶¹

Tax-related issues arise when states attempt to control those doing business with a NAFI. For example, in *United States v.*

Texas,⁶² the Texas Alcoholic Beverage Commission interpreted the Texas Alcoholic Beverage Code to prohibit nonresident sellers from selling alcohol directly to NAFIs located on military installations within Texas.⁶³ Texas's concern was that the NAFIs would "avoid the Texas gallonage tax by some sort of direct order to a wholesaler or nonresident seller."⁶⁴ Texas wanted to tax the seller and then have the seller pass the tax on to the NAFI in the form of higher prices. The United States Court of Appeals for the Fifth Circuit held that this provision of the Texas Alcoholic Beverage Code was unconstitutional under the Supremacy Clause of the United States Constitution.⁶⁵

The United States may consent to state taxation of its instrumentalities.⁶⁶ Under the Hayden-Cartwright Act,⁶⁷ Congress specifically permits collection of state taxes on gasoline and other fuels sold through post exchanges and other retail sales agencies of the federal government on military installations when such fuels are not for the exclusive use of the United States.⁶⁸ This is the only instance of specific congressional consent to the states to tax NAFIs.⁶⁹

⁵⁵ *Id.* para. 3-13a.

⁵⁶ *Id.* para. 3-13b.

⁵⁷ 17 U.S. (4 Wheat.) 316 (1819).

⁵⁸ *Id.* at 433.

⁵⁹ See *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525 (1885) (holding that a state has the right to tax railroad property within the territorial limits of a military reservation because the federal government did not have complete and sole jurisdiction over the property); *Paul v. United States*, 371 U.S. 245, 263 (1963) (remanding a case to determine whether a state law was in effect at the time the federal government acquired land).

⁶⁰ See *United States v. State Tax Commission of the State of Mississippi*, 421 U.S. 599 (1975) (holding that the wholesale markup on liquor sold to military installations constituted a tax on purchases made by NAFIs from out of state suppliers).

⁶¹ AR 215-1, *supra* note 38, para. 3-13a. See also AR 60-20, *supra* note 52, para. 6-2c (stating that "the immunity of AAFES from direct sales taxation does not extend to indirect taxation, i.e., taxes the legal incidence of which is on the wholesaler, manufacturer importer and the like").

⁶² 695 F.2d 136 (5th Cir.), *cert. denied*, 464 U.S. 933 (1983).

⁶³ *Id.* at 137.

⁶⁴ *Id.* at 137, n.4.

⁶⁵ *Id.* at 138.

⁶⁶ See *Bank Tax Cases*, 70 U.S. (3 Wall.) 396 (1866).

⁶⁷ 4 U.S.C. § 104 (1985).

⁶⁸ AR 215-1, *supra* note 38, para. 3-13c. See *United States v. Colorado*, 666 P. Supp. 1479 (D. Colo. 1987) (finding that a Colorado statute exempting United States from gasoline sales tax precluded Colorado from imposing gasoline sales tax on purchases of gasoline for sale in exchange service stations on military reservations).

⁶⁹ By enacting the Buck Amendment to the Hayden-Cartwright Act, 4 U.S.C. §§ 105-106, Congress permitted States to levy sales, use, or income taxes within federal areas to the same extent as though the area were not a federal area, except for sales and use taxes on property sold by the United States or its instrumentalities to authorized purchasers. 4 U.S.C. § 107 (1985). This provision had the effect of removing any immunity previously enjoyed by concessionaires as they are not instrumentalities of the United States. Concessionaires located on military installations are now subject to all state taxes. See AR 215-1, *supra* note 38, para. 3-2 (stating that "NAFI concessionaire and contractor-operated activities are private businesses and not instrumentalities of the United States"); and AR 60-20, *supra* note 52, para. 6-2d (stating that "concessionaires and other independent contractors are not entitled to claim AAFES immunity from taxation").

(3) **Foreign Taxes.** Nonappropriated fund instrumentalities located in a foreign country will not pay, nor collect, any foreign country or political subdivision tax, unless the United States has consented by treaty or other agreement.⁷⁰

(4) **Reporting Requirements.** All matters involving attempts to impose taxes on, or to require tax collection from, NAFIs by the federal government, a state, the District of Columbia, a United States possession, Puerto Rico, or a foreign nation must be reported in detail, prior to payment or collection, through the local staff judge advocate or command judge advocate office to The Judge Advocate General of the Army.⁷¹ Nonappropriated fund instrumentalities will not conduct negotiations with taxing authorities without the express authorization of The Judge Advocate General through an installation staff judge advocate office.⁷²

Questions involving the liability of the AAFES for local, foreign, or any other tax difficulty should be forwarded with pertinent details and a request for instructions through appropriate command channels to the Commander, AAFES, Attention: General Counsel.⁷³

c. Nonappropriated Fund Property. Nonappropriated fund instrumentality fund managers serve as accountable officers for all NAFI property.⁷⁴ Investigations into NAFI losses⁷⁵ are conducted per *Army Regulation 15-6 (AR 15-6)*.⁷⁶ Investigations must be initiated when:

(1) Prescribed by a relevant Army regulation.

(2) Directed by a commander or approving authority.

(3) Required to establish proof of loss for NAFI insurance purposes.

(4) Cash or NAFI property losses are the result of the following:

a. Apparent theft where there are no visible signs of breaking and entering.

b. Mysterious disappearance.

(5) Inventory variances exceed \$500.

(6) Retail sales accountability variances exceed \$500.

(7) Circumstances indicate one of the following:

a. A lack or disregard for management control procedures.

b. Fraud, dishonesty, willful misconduct, recklessness, or wanton disregard for the safekeeping of NAF assets.

c. Individual actions are beyond the scope of employment or permitted use.

(8) A second or succeeding loss at the same location under similar circumstances.⁷⁷

For losses of less than \$2000 or where the circumstances above do not exist, an *AR 15-6* investigation is not required. However, an investigation under *Army Regulation 215-1 (AR 215-1)*, appendix L, is required.⁷⁸

⁷⁰ AR 60-20, *supra* note 52, para. 6-3. See also AR 215-1, *supra* note 38, para. 3-13a (stating that NAFI operations are immune from most host country taxes).

⁷¹ AR 215-1, *supra* note 38, para. 3-17a. If there are any questions, the phone number for DAJA-KL is commercial (703) 693-4071 or DSN 223-4071.

⁷² *Id.* para. 3-17b. If there are any questions, the phone number for the Commercial Law Branch of the AAFES General Counsel Office is commercial (214) 312-2174.

⁷³ AR 60-20, *supra* note 52, para. 6-4a.

⁷⁴ AR 215-1, *supra* note 38, para. 12-10a.

⁷⁵ The term "property loss" includes all NAF property lost, damaged, or destroyed by causes other than fair wear and tear. *Id.* para. 12-13a.

⁷⁶ DEP'T OF ARMY, REG. 15-6, BOARDS, COMMITTEES, COMMISSIONS: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARD OF OFFICERS CONDUCTING INVESTIGATIONS (11 May 1988) [hereinafter AR 15-6]. See also AR 60-20, *supra* note 52, ch. 7, § II (AAFES claims and investigative procedures).

⁷⁷ See AR 215-1, *supra* note 38, para. 13-4.

⁷⁸ *Id.* para. 13-4b.

Depending on the facts, the fund manager, investigating officer, or board of officers will determine culpability and make a recommendation as to pecuniary liability.⁷⁹ The approving authority will decide how much the person should pay for the loss and start the process to secure restitution for the loss.⁸⁰

d. Insurance. The United States Army NAFI Risk Management Program (RIMP) covers all Army NAFIs worldwide. This includes chaplains' funds and NAFIs of the Department of Defense and other agencies for which the Army has executive agency responsibilities. The following Army NAFIs are not covered by the RIMP program: AAFES, the Cadet Mess Ration Fund at the United States Military Academy, the United States Army Reserve, and the United States Army National Guard.⁸¹

The Director, Resource Management, Community and Family Support Center, manages the RIMP, which is a centralized property and casualty insurance program.⁸² The RIMP uses self-insurance and the centralized purchasing of commercial insurance to protect NAFIs. Assets purchased with appropriated funds are not covered under the RIMP.⁸³ Other insurance is not allowed unless specifically authorized by the Director, Resource Management, Community and Family Support Center.⁸⁴

All NAFIs not excepted above must participate in the RIMP and certain coverages are mandatory. This ensures stability in the RIMP by spreading the risk so that routine losses can be predicted accurately. Participation in the following RIMP programs are mandatory:⁸⁵

- (1) Fidelity bonding, money, and securities.
- (2) General tort, vehicle tort, and aircraft liability for flying and parachute activities.
- (3) Workers' Compensation and Unemployment Compensation.
- (4) Family Child Care (FCC) Providers Claims Fund.⁸⁶

The RIMP includes six separate insurance programs: Property, tort, workers' compensation, cargo, unemployment compensation, and family child care providers.⁸⁷ Each program has its own section within AR 215-1, chapter 14, which describes the coverage of the program.⁸⁸

The Army Central Insurance Fund (ACIF), which is a NAFI, receives and disburses RIMP funds.⁸⁹ Losses covered under the RIMP are adjusted and payment of claims is made from the ACIF. Army claims offices process most RIMP claims under *Army Regulation 27-20 (AR 27-20)*.⁹⁰ Claims not processed under AR 27-20 rely on general principles of the insurance industry to adjudicate claims.⁹¹

e. Tort Liability.⁹² Nonappropriated fund instrumentalities, as components of the United States, possess sovereign immunity

⁷⁹ *Id.* para. L-3a; AR 15-6, *supra* note 76, para. 3-10.

⁸⁰ AR 215-1, *supra* note 38, paras. L-5, L-11; AR 15-6, *supra* note 76, para. 3-19.

⁸¹ AR 215-1, *supra* note 38, para. 14-2.

⁸² *Id.* para. 14-3.

⁸³ *Id.* para. 14-4.

⁸⁴ *Id.* para. 14-4c (foreign insurance coverages are specifically provided in AR 215-1, para. 14-8).

⁸⁵ *Id.* para. 14-4b.

⁸⁶ *Id.* para. 14-5b.

⁸⁷ *Id.* para. 14-5a.

⁸⁸ In AR 215-1, the property program comprises sections VI through XII; the tort program is section V; the workers' compensation program is section XV; the cargo program is section XIV; the unemployment compensation program is section XVI; and the family child care provider program is section V. AR 215-1, *supra* note 39.

⁸⁹ *Id.* para. 14-3b.

⁹⁰ DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (1 Aug. 1995) [hereinafter AR 27-20].

⁹¹ AR 215-1, *supra* note 38, para. 14-4a(3).

⁹² The NAFI Tort program is found in AR 215-1, chapter 14, section IV. Tort claims are processed under AR 27-20, chapter 12. *Supra* note 90.

from suit.⁹³ The Department of Justice, through local United States Attorneys, defends NAFIs in tort actions and other litigation.⁹⁴ Where the federal government waives its sovereign immunity, in certain circumstances, immunity has been waived for NAFIs.⁹⁵ When NAFIs are liable for damages in tort, payments generally are made from nonappropriated funds.⁹⁶

(1) Suits by NAFI Employees. Since 1958, employees of NAFIs receive the same coverage for injuries received in the course of employment as employees covered by the Longshore and Harbor Workers' Compensation Act.⁹⁷ This Act provides that its method of compensation is an employee's sole and exclusive remedy.⁹⁸ The RIMP provides a scheme for self-insured coverage and processing claims.⁹⁹

Prior to 1958, some NAFI employees sought recovery for injuries incurred in the course of employment by suing under the Federal Tort Claims Act (FTCA) because NAFIs were required to be self-insured.¹⁰⁰ In at least one case, an employee was successful.¹⁰¹ In subsequent cases, however (before adoption of the present explicit statutory language), the courts held that an employee's

exclusive remedy was under workers' compensation insurance.¹⁰² All other torts not covered by workers' compensation, such as damage to personal property, will be processed under current Army claims regulations.¹⁰³

(2) Suits by Third Parties. Although disputed in the past, NAFIs are within the scope of the FTCA for suits brought by third parties. Under the FTCA, the United States consents to be sued for money damages for personal injury or property damage caused by the negligence of government employees acting within the scope of their employment.¹⁰⁴ An "employee of the government" includes officers and employees of any federal agency, members of the military or naval forces, and persons acting on behalf of a federal agency in an official capacity temporarily or permanently, with or without compensation. "Federal agency" includes "the military departments" and "independent establishments of the United States."¹⁰⁵ Nonappropriated fund instrumentalities are extensions of the United States government. The acts of their employees, whether compensated or not, may subject the United States to liability under the FTCA.

⁹³ 28 U.S.C. §§ 1346(b), 2671-80. See also *Dalehite v. United States*, 346 U.S. 15 (1953). Even when the government waives its immunity, as with the FTCA, the waiver legislation still may reserve certain areas of conduct that would not give rise to suit against the government. There is no waiver of sovereign immunity without specific congressional consent. See *United States v. Shaw*, 309 U.S. 495 (1940). For a case involving a NAFI being sued, see *American Commercial Co. v. United States Officers' and Noncommissioned Officers' Club, European Theatre*, 187 F.2d 91 (D.C. Cir. 1951) (dicta).

⁹⁴ When a NAFI becomes involved in litigation, either the nonappropriated fund manager or the local claims office is the first to receive notice. Claims must be reported through the nonappropriated fund manager to the claims judge advocate, who in turn reports all necessary facts and data regarding the incident to the United States Army Claims Service (USARCS) under AR 27-20. See DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION, para. 3-8b (19 Sept. 1994) [hereinafter AR 27-40]. From the USARCS, the case is sent to the Office of The Judge Advocate General for referral to the United States Attorney General, who refers the case to the local United States Attorney for action. The general policies, procedures, and reporting requirements are described in AR 27-20 and AR 27-40.

⁹⁵ See generally 28 U.S.C. §§ 1346(b), 2671-80.

⁹⁶ AR 27-20, *supra* note 90, para. 12-7. See also AR 215-1, *supra* note 38, para. 14-19. However, not all claims will be paid with nonappropriated funds or processed under AR 27-20, chapter 12, section I, especially where the activities of appropriated fund employees cause the loss. See AR 27-20, *supra* note 90, para. 12-5.

⁹⁷ Workers' compensation benefits were established under the Nonappropriated fund Instrumentalities Act of 1958 (5 U.S.C. §§ 8171-73), extending the provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-50) to NAFI employees.

⁹⁸ 5 U.S.C. § 8173 (1995).

⁹⁹ AR 215-1, *supra* note 38, ch. 14, § XV.

¹⁰⁰ Act of June 19, 1952, ch. 444, § 2, 66 Stat. 138, 139 (1952).

¹⁰¹ In *Faleni v. United States*, 125 F. Supp. 630 (E.D.N.Y. 1949) and *Daniels v. Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill. 1955) civilian employees of NAFIs sought to bring actions under the FTCA although under different theories of recovery. In *Faleni*, the court held that the employee of a NAFI was not an employee of the United States and, because the employee had an alternative recovery under New York law through employer provided workers' compensation insurance, the court did not address the FTCA issue. *Daniels* rejected the *Faleni* case insofar as it held an employee of a NAFI was not an employee of the United States. *Daniels* did agree that workers' compensation insurance was not plaintiff's exclusive remedy and allowed rehearing for a claim under the FTCA.

¹⁰² See, e.g., *Lowe v. United States*, 185 F. Supp. 189 (D.C. Miss. 1960), *aff'd mem.*, 292 F.2d 501 (1961); *United States v. Forfari*, 268 F.2d 29 (9th Cir.), *cert. denied*, 361 U.S. 902 (1959); *Aubrey v. United States*, 254 F.2d 768 (D.C. Cir. 1958). The *Lowe* court held that if there is a system of compensation set up for a particular class of employees, then that system is the exclusive source of compensation for that class. These cases were decided after Congress had made workers' compensation insurance the employee's exclusive remedy because they involved accidents that had occurred prior to that time. In this particular case, an FTCA claim would have been barred by operation of Mississippi law. For a case with the accident arising after 1958, see *Harrison v. United States*, 302 F. Supp. 104 (E.D. Va. 1969).

¹⁰³ AR 27-20, *supra* note 92, ch. 12.

¹⁰⁴ 28 U.S.C. §§ 1346(b), 2671-80.

¹⁰⁵ *Id.* § 2671.

Government counsel in the first tort claims cases against NAFIs asserted that NAFIs were merely adjuncts of the Department of the Army and not federal agencies within the meaning of the FTCA because they lacked official capacity.¹⁰⁶ The courts, however, disagreed with this argument because NAFIs rely on their federal status to avoid state taxes. In *United States v. Holcombe*,¹⁰⁷ the government argued that NAFIs were not "federal agencies" within the meaning of the FTCA. The court in *Holcombe* made the following observations:

An Officers' Mess being an integral part of the military establishment, and an agency of the Government according to the usual meaning of the word, and having been held to be such in other contexts, it is difficult to escape the conclusion that the Federal Tort Claims Act encompasses it. The policy of the act is to fix government liability under the doctrine of *respondent superior* just as if the United States were a private employer. In the absence of any restriction in the statute, a court cannot read into it the exception contended for.¹⁰⁸

Since *Holcombe*, the government has apparently conceded this position.¹⁰⁹

(3) Non NAFI RIMP Claims.¹¹⁰ Non NAFI RIMP claims arise from the activities of:

- a. Members of recreational NAFIs or authorized users of nonappropriated fund recreational property while using such property, except real property, in the manner and for the purposes authorized by Army regulations and the charter, constitution, and bylaws of the particular nonappropriated fund activity.¹¹¹ Whether a

claim based on an act or omission of a member or authorized user of other types of nonappropriated fund activities would be cognizable under this paragraph depends on the facts and circumstances, including the degree of participation by the member or authorized user in the activities of the fund. Claims arising from the use of nonappropriated fund property are not cognizable under the FTCA or Military Claims Act because members or authorized users are not considered employees of the Army or NAFI acting within the scope of their office or employment.

- b. Family child care providers, authorized members of the provider's household, and approved substitute providers acting consistent with the FCC program in the manner prescribed in *Army Regulation 608-10*.¹¹² Such claims generally are limited to injuries or death of children receiving care under the FCC program caused by negligence. Claims arising from the transportation of children in motor vehicles and claims involving loss or damage of property are not cognizable.
- c. The total payments for all claims (including derivative claims) arising as a result of injury to or death of any one person is limited to \$500,000 for each incident.¹¹³

f. **Contract Liability.** Government counsel previously persuaded the courts that all NAFIs were not equivalent to the United States but were nonetheless entitled to sovereign immunity from suit. This interesting conclusion was illustrated by the United States Court of Claims in *Borden v. United States*.¹¹⁴ Borden, an accountant, was employed by the Army Exchange Service, Euro-

¹⁰⁶ Claims, Op. JAG, JAGL, (2 Feb. 1952), reprinted in 1 Dig. Ops. JAG 52-54, § 33.1 (1951-52).

¹⁰⁷ See *United States v. Holcombe*, 277 F.2d 143 (4th Cir. 1960).

¹⁰⁸ *Id.* at 146.

¹⁰⁹ *Accord* *Fournier v. United States*, 220 F. Supp. 752 (S.D. Miss. 1963); *Richardson v. United States*, 226 F. Supp. 49 (E.D. Va. 1964). *Scott v. United States*, however, held that because a post equestrian club was not an "integral" part of the Army, it was not a federal agency amenable to suit under the FTCA. 226 F. Supp. 864 (M.D. Ga. 1963), *aff'd*, 337 F.2d 471 (5th Cir. 1964), *cert. denied*, 380 U.S. 933 (1965). Such a decision was tantamount to a determination that the club was a private organization and not a NAFI.

¹¹⁰ Non NAFI RIMP claims are paid exclusively under the provisions of AR 27-20, chapter 12, section II, and are not cognizable elsewhere. See AR 27-20, *supra* note 90, para. 12-9.

¹¹¹ *Id.* para. 12-10a(1).

¹¹² *Id.* para. 12-10a(2). See also AR 215-1, *supra* note 38, ch. 14, § V (more information on the RIMP FCC claims program).

¹¹³ AR 27-20, *supra* note 90, para. 12-10d.

¹¹⁴ 116 F. Supp. 873 (Ct. Cl. 1953).

pean Theater. Under his employment contract, a portion of his salary was withheld to reimburse the Army Exchange Service for a loss of funds by theft allegedly resulting from his negligence. Borden sued the United States, not the Army Exchange Service, to recover this portion of his salary. The Court of Claims found that the Army Exchange Service was a NAFI, an agency of the United States, and immune from suit. No statutory waiver of sovereign immunity had been enacted. This conclusion, based on *Standard Oil Company of California v. Johnson*,¹¹⁵ was likely anticipated by Borden because he elected to sue the United States rather than the Army Exchange Service.¹¹⁶

The Court of Claims noted that NAFIs were often equated to the United States. However, like all employees, Borden's employment contract was executed with the Army Exchange Service under regulations that specifically provided that the contract was an obligation of the Army Exchange Service and not an obligation of the United States.¹¹⁷ Even though the Court of Claims found no evidence of negligence on Borden's part and stated that fairness required either the Army Exchange Service or the United States be amenable to suit, the Court of Claims held that Borden had no action against the United States.¹¹⁸

Because of the harsh result in *Borden*, the Tucker Act was amended to extend its waiver of sovereign immunity for appropriated fund contract claims to post exchange service contract claims.¹¹⁹ For other NAFI activities, the United States does not

waive sovereign immunity. Suits against those NAFIs must be brought against them individually and payments made out of nonappropriated funds.¹²⁰

4. General Concepts and Major MWR Categories.

a. **General Concepts.** Morale, welfare, and recreation operations are activities on military installations or property controlled by a military department or provided by a contractor that provide for the esprit de corps, comfort, pleasure, contentment, and mental and physical productivity of authorized Department of Defense (DOD) personnel.¹²¹ This does not include private organizations.¹²² Morale, welfare, and recreation operations are the historical successors to the sutlers discussed previously. Activities include recreational and leisure-time programs, resale of merchandise and services, or general welfare programs outlined in AR 215-1.¹²³

Nonappropriated fund instrumentalities provide funding for MWR programs. Nonappropriated fund instrumentalities as United States government organizations are fiscal entities performing essential government functions. They are not federal agencies, yet they enjoy the legal status of an instrumentality of the United States.¹²⁴ Nonappropriated fund instrumentalities are not corporations and they are not unincorporated associations. No individual may profit from NAFI supported operations and no individual or group of individuals is liable for NAFI MWR debts.¹²⁵ Each NAFI has a fund manager and often a fund council.¹²⁶ Its

¹¹⁵ 316 U.S. 481 (1942).

¹¹⁶ *Borden*, 118 F. Supp. at 877. See also *Edelstein v. South Post Officers' Club*, 118 F. Supp. 40 (E.D. Va. 1951); *American Commercial Co. v. United States Officers' and Noncommissioned Officers' Club, European Theatre*, 187 F.2d 91 (D.C. Cir. 1951).

¹¹⁷ *Borden*, 118 F. Supp. at 877.

¹¹⁸ *Id.* Accord *Pulaski Cab Company v. United States*, 157 F. Supp. 955 (Ct. Cl. 1958).

¹¹⁹ 28 U.S.C. § 1346(a)(2). *Army Regulation 60-20*, paragraph 3-34a, states, in part, "Army and Air Force Exchange Service contracts are United States contracts; however, they do not obligate appropriated funds of the United States except for a judgment or a compromise settlement in suits brought under the Contract Disputes Act (41 USC 601-613), in which event the Army and Air Force Exchange System will reimburse the United States Government (31 USC 1304)." AR 60-20, *supra* note 52, para. 3-34a. 31 U.S.C. § 1304(c) requires the AAFES to reimburse the government when a judgment or settlement is paid and arises out of an express or implied contract made by that Exchange Service. The amendment extends to employment contracts. See *United States v. Hopkins*, 427 U.S. 123 (1976). The Tucker Act amendment, withdrawing sovereign immunity, applies exclusively to Exchange Services and not other NAFI entities. See *Swift-Train Co. v. United States*, 443 F.2d 1140, 1143 (5th Cir. 1971).

¹²⁰ See *Morales v. Senior Petty Officers' Mess*, 366 F. Supp. 1305 (D.P.R. 1973). For NAFI contract claims payments, See DEP'T OF ARMY, REG. 215-4, MORALE, WELFARE, AND RECREATION: NONAPPROPRIATED FUND CONTRACTING, ch. 7, § III (10 Oct. 1990).

¹²¹ AR 215-1, *supra* note 38, glossary, § II.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See *id.* para. 3-1. See generally *id.* ch. 11. Also, in the absence of consent or fault, members of a NAFI are not subject to an assessment to make up a deficit. See JAGA 1960/4405, reprinted in 47 JUDGE ADVOCATE LEGAL SERVICE 2 (28 July 1960). On loss of cash or other assets or on damage to or destruction of nonappropriated fund property other than that lost by normal operation, however, a fault-finding investigation may recommend that certain individuals be held liable for negligence, fraud, dishonesty, or misconduct, and that the amount of the loss or damages may be collected from the responsible party. See AR 215-1, *supra* note 38, para. 12-13, ch. 13, app. L (procedures for investigating, reporting and assessing NAFI losses).

¹²⁶ AR 215-1, *supra* note 38, ch. 5, §§ 2, 3.

operations, however, are subject to the control of the commander.¹²⁷ Through their operations, NAFIs generate nonappropriated funds, which are government funds used for the collective benefit of those who generate them—primarily service members and their families.¹²⁸

The DOD establishes policy, assigns responsibilities, and prescribes procedures for operating and managing programs for MWR activities.¹²⁹ Army NAFIs are established under the authority of the Secretary of the Army.¹³⁰ *Army Regulation 215-1* contains policies on the administration, operation, and management of NAFIs and MWR programs within the Army.¹³¹

Nonappropriated fund instrumentalities are, to a considerable extent, self-supporting. Additionally, NAFIs receive support, usually in the form of manpower and physical facilities, from funds that have been appropriated by Congress (appropriated funds or APF).¹³² However, this does not alter their basic nature as NAFIs. As an instrumentality of the United States, NAFIs enjoy the privileges and immunities of the United States regarding taxes, tort liability, and contract liability.¹³³

b. Major MWR Categories. The DOD establishes a standard classification system for MWR activities within the Army, as well as all other DOD components.¹³⁴ Following this standard classification system, *AR 215-1* classifies NAFIs into one of three categories according to their relationship to readiness and their ability to generate revenue.¹³⁵ Supplemental mission activities outside of this classification system also generate nonappropriated funds and they are discussed separately below.

c. The Categorization System.

(1) Category A, Mission Sustaining Activities. Category A activities are essential in meeting the organizational objectives of the military services. They are designed to promote the physical and emotional well-being of soldiers, which supports the basic military mission. The activities in this category have little or no capability to generate nonappropriated fund revenues; consequently, they are supported almost entirely with APFs. Generally, nonappropriated funds will be used only when the use of APFs is prohibited by law, or the use of nonappropriated funds is not otherwise prohibited, and it is certified in writing that APF support is not available.¹³⁶ The following are Category A activities:

- a. Armed Forces Professional Entertainment Program Overseas.
- b. Gymnasiums, field houses, aquatic training, and other physical fitness facilities and training programs.
- c. Libraries.
- d. Movies (free admission overseas and isolated and remote locations).
- e. Outdoor recreation.
- f. Recreation centers.
- g. Sports (individual, intramural, and unit).

¹²⁷ *Id.* para. 2-4. Note that it is the installation commander who ensures that a fund manager and council (when appropriate) are designated. *Id.* para. 2-4e.

¹²⁸ *Id.*

¹²⁹ See generally DEP'T OF DEFENSE, INST. 1015.10, PROGRAMS FOR MORALE, WELFARE, AND RECREATION (MWR) (3 Nov. 1995) (see referenced DOD directives) [hereinafter DOD Inst. 1015.10].

¹³⁰ AR 215-1, *supra* note 38, para. 2-1. The major NAFI regulations, other than those pertaining to the exchange system, civilian welfare fund, and the chaplain's fund can be found in the *MWR UPDATE Volume*, which is periodically republished. Beginning in September, 1995, *AR 215-1* was published separately. Separate regulations address civilian welfare funds, *Army Regulation 215-7*, and the chaplain's fund, *Army Regulation 165-1*.

¹³¹ AR 215-1, *supra* note 38, para. 1-1.

¹³² See generally *id.* ch. 4, app. D.

¹³³ See *id.* (discussion in section IV).

¹³⁴ DOD Inst. 1015.10, *supra* note 129, para. 3.

¹³⁵ AR 215-1, *supra* note 38, para. 4-1.

¹³⁶ *Id.* para. 4-1a.

(2) **Category B, Community Support Activities.** The activities in Category B are closely related to Category A activities,¹³⁷ but the focus of Category B activities moves from the soldier to include the soldier's family. Many Category B activities are the community support systems that make military bases temporary hometowns. They are authorized a substantial amount of APF support and differ from Category A in that they can generate limited NAF revenue.¹³⁸ The following are Category B activities:

- a. Arts and crafts.
- b. Automotive crafts/skill.
- c. Bowling centers (twelve lanes or less).
- d. Child development services.
- e. Entertainment (music and drama).
- f. Information, ticketing, and registration services.
- g. Outdoor recreation programs.

- * Archery ranges.
- * Beach facilities, including bath-houses and lifeguard stations.
- * Campgrounds (small vehicles, trailers, tents).
- * Garden plots.
- * High adventure activity areas (such as adventure training, skydiving, hang gliding, and rappelling).
- * Hunting and fishing areas and control stations.
- * Marinas without retail sales or private boat berthing.
- * Off-road vehicle areas and trails.
- * Outdoor recreation checkout centers (includes tents, coolers, sleeping bags, water and snow skis, and canoes).

- * Stables (leases animals and equipment).
- * Trails (bicycling, cross country skiing, and hiking).

- h. Recreational swimming pools and aquatic areas.
- i. Sports above the intramural level (including athletic courts, fields, courses).
- j. Youth Services.
- k. *Stars and Stripes*.¹³⁹

(3) **Category C, Revenue-Generating Activities.** These activities are not directly related to readiness but offer desirable recreational and social opportunities. While they generate enough income to cover most operating expenses, they often cannot sustain themselves based solely on their business activities and receive very limited APF support. Generally, this includes only the indirect support available to all installation activities.¹⁴⁰ Category C activities include the following:

- a. Amusement machines.
- b. Armed forces recreation centers (accommodation, dining, and resale)
- c. Army and Air Force Exchange Service.¹⁴¹
- d. Army Recreation Machine Program (ARMP) gaming activities.
- e. Audio, photo, and other resale activities.
- f. Bingo (stand-alone program).
- g. Commercial travel.
- h. Food, beverage, and entertainment operations (including catering).
- i. Golf courses and companion operations.

¹³⁷ Some of these activities will use identical facilities. For example, aquatic training centers and recreational swimming pools usually use the same swimming pool. The primary purpose of the facility determines its category.

¹³⁸ AR 215-1, *supra* note 38, para. 4-1b.

¹³⁹ *Id.* para. 2-10b.

¹⁴⁰ Examples of the APF common services available include police protection, fire protection, and medical services.

¹⁴¹ The AAFES is considered to be mission essential and is included in this category because of its ability to generate revenue. Its operation is governed by ARs 60-10 and 60-20.

j. Military clubs (officer, noncommissioned officer, enlisted, and community) (includes catering).

k. Outdoor recreation:

- * Cabins, cottages, cabanas, and fixed mobile home and trailer operations.
- * Campgrounds and travel camps for large recreational vehicles, vans, and trailers.
- * Flying activities.
- * Marinas and boathouses (resale, private boat berthing, and chartered boats).
- * Motorcycle and other motor activities.
- * Rod and gun activities (skeet and trap).
- * Ski slope operations.
- * Sport parachuting activities.
- * Stables (boarding for privately owned mounts).

l. Skating rinks, regardless of type.

m. Snack bars and soda fountains not operated by AAFES.

n. Temporary housing facilities (includes cabins, cottages, guest houses, cabanas, hotels, and motels).

Under certain circumstances, Category C activities may be funded at levels equal to Category B activities.¹⁴² This applies at

designated "remote and isolated installations," which are listed in AR 215-1.¹⁴³

Additionally, activities in all categories are entitled to "common support services." This includes consolidated support services functions such as accounting, logistics, and indirect support services such as security and assistance with environmental compliance.¹⁴⁴ Significantly, virtually all MWR activities are entitled to legal and contracting support.¹⁴⁵

d. Supplemental Mission Activities and Funds. Certain APF supplemental mission activities generate nonappropriated fund revenue; for example, they collect service fees or dues, receive gifts, and operate gift shops. These supplemental mission activities are not MWR activities and do not support the MWR program. To reduce overhead and avoid the need to establish separate NAFIs to account for these funds, their revenues may be accounted for in an installation morale, welfare, and recreation fund (IMWRF). The funds generated by these activities cannot be used to support MWR activities. Conversely, MWR-generated nonappropriated funds will not be used to support supplemental mission activities. Although these activities receive APFs, this is not considered APF support of the MWR program. Their organization and operation are governed by separate regulations.¹⁴⁶ Some of these activities, and the regulations that govern them include:

- a. Army Community Service (ACS) (*Army Regulation 608-1*).¹⁴⁷
- b. Veterinary Services (*Army Regulation 40-905*).¹⁴⁸
- c. Supplemental field ration dining facility funds (*Army Regulation 30-1*).¹⁴⁹
- d. Army historical museum funds (*Army Regulation 870-20*)¹⁵⁰ (may be established as a separate NAFI).

Further, there are separate, non MWR supplemental mission NAFIs whose funds are not accounted for in the IMWRF. These include, but are not limited to:

¹⁴² AR 215-1, *supra* note 38, para. 4-2f.

¹⁴³ *Id.* tbl. 4-1, at 7.

¹⁴⁴ *Id.* app. D, paras. 12c, g.

¹⁴⁵ *Id.* app. D, paras. 12c, d.

¹⁴⁶ *Id.* paras. 4-4, 4-5.

¹⁴⁷ DEP'T OF ARMY, REG. 608-1, PERSONAL AFFAIRS: ARMY COMMUNITY SERVICE PROGRAM (30 Oct. 1990) [hereinafter AR 608-1].

¹⁴⁸ DEP'T OF ARMY, REG. 40-905, MEDICAL SERVICES: VETERINARY HEALTH SERVICES (16 Aug. 1994).

¹⁴⁹ DEP'T OF ARMY, REG. 30-1, FOOD PROGRAM: THE ARMY FOOD SERVICE PROGRAM (15 Aug. 1989).

¹⁵⁰ DEP'T OF ARMY, REG. 870-20, HISTORICAL ACTIVITIES: MUSEUMS AND HISTORICAL ARTIFACTS (9 Jan. 1987).

a. Nonappropriated fund billeting accounts (Army Regulation 210-50).¹⁵¹

b. Fisher House Funds.

c. Vehicle registration funds.

d. United States Military Academy funds (Army Regulation 210-3).

g. Fort Leavenworth United States Disciplinary Barracks Fund.

e. Installation Morale, Welfare, and Recreation Fund. As

noted, some of the individual NAFIs listed in the three categories above generate revenue through sales of goods and services or collection of user fees and charges. The IMWRF, or "the Single Fund," is the umbrella NAFI under which most individual NAFIs are organized and nonappropriated funds are administered. Each MWR activity pools its nonappropriated funds in the IMWRF, which reallocates these funds according to installation priorities and AR 215-1. All IMWRFs have a council, which is a non-governing body representing the interests and concerns of authorized patrons and fund managers.¹⁵²

Under the single installation fund, each separate MWR NAFI was merged into a single NAFI to provide central overview and financial management of the nonappropriated fund resources under the purview of the installation commander. Thus, a single business entity was created at the installation, and the installation commander has the flexibility to transfer funds among the previously separate MWR operations as the commander sees fit, consistent with regulations.

Nonappropriated funds also may be reallocated at the major army command (MACOM) level. The MACOM commanders

have the authority to "realign [nonappropriated fund] cash between installations to satisfy overall major command requirements."¹⁵³ Generally, though, each IMWRF should, together with authorized APF support, sustain local MWR programs. When this does not happen, an unprofitable IMWRF may receive surplus nonappropriated funds from other IMWRFs in the MACOM.¹⁵⁴

Federal law requires that IMWRFs not retain any funds in excess of cash required for installation MWR activities, and that any excess funds be accumulated in a single fund administered by each service.¹⁵⁵ Excess funds are deposited in the Army Morale, Welfare and Recreation Fund (AMWRF). This fund is used for, among other things, capital improvements. The AMWRF is funded, in part, by a monthly capital reinvestment assessment strategy (in essence, a tax) of two-percent of revenue in Fiscal Year 1996 and three percent in Fiscal Year 1997 and each year thereafter. The assessment is levied on all IMWRFs.

5. MWR Organization.

Generally, each installation commander manages MWR activities to meet community needs under guidance from Headquarters, Department of the Army (HQDA).¹⁵⁶

a. Headquarters, Department of the Army. As with almost all Army programs, the Secretary of the Army (SA) has primary authority to establish, fund, and maintain Army MWR activities.¹⁵⁷ Except for financial oversight, which is the responsibility of the Assistant Secretary of the Army for Financial Management (ASA(FM)),¹⁵⁸ the SA has delegated policy formation and oversight for MWR and related NAFIs to the Assistant SA for Manpower and Reserve Affairs (ASA(M&RA)). The Assistant Chief of Staff for Installation Management (ACSIM)¹⁵⁹ has primary Army Staff responsibility for MWR policy, programs,

¹⁵¹ DEP'T OF ARMY, REG. 210-50, INSTALLATIONS: HOUSING MANAGEMENT (24 Apr. 1990).

¹⁵² AR 215-1, *supra* note 38, para. 5-8a(1)(A).

¹⁵³ *Id.* para. 6a.

¹⁵⁴ *Id.* para. 5-2.

¹⁵⁵ 10 U.S.C. § 2219 ("Retention of morale, welfare, and recreation funds by military installations: Limitation") See also Pub. L. 103-337, Div. A, Title III, § 373(a), Oct. 5, 1994, 108 Stat. 2736), which reads as follows:

Amounts may not be retained in a nonappropriated morale, welfare, and recreation account of a military installation of a military department in excess of the amount necessary to meet cash requirements of that installation.

Amounts in excess of that amount shall be transferred to a single, department wide nonappropriated morale, welfare, and recreation account of the military department.

¹⁵⁶ AR 215-1, *supra* note 38, paras. 1-6, 1-7.

¹⁵⁷ DOD Inst. 1015.10, *supra* note 129, para. E-2.

¹⁵⁸ AR 215-1, *supra* note 38, para. 2-1.

¹⁵⁹ The ACSIM's office was created in 1993 and assumed Army Staff proponentcy for "installation" matters that were previously under the Deputy Chief of Staff for Personnel (DCSPER) and the other deputy chiefs of staff. References not recently revised may refer to the former proponents.

and related NAF and APF management.¹⁶⁰ Implementation of these responsibilities, however, rests with the United States Army Community and Family Support Center, a Field Operating Agency of ACSIM.¹⁶¹

b. CFSC Command Judge Advocate. The command judge advocate's office provides legal advice and guidance to the Community and Family Support Center (CFSC) Commander and CFSC offices (installation commanders receive legal advice from the judge advocate office servicing their command) ((703) 325-9633, DSN 221-9633).

c. Community and Family Support Center. The CFSC makes policy recommendations to the ACSIM, administers HQDA-level MWR operations, and provides administrative and technical support to MWR activities worldwide.¹⁶² Although installation commanders have ultimate responsibility for most MWR operations in their community, the CFSC provides technical management and oversight for installation programs, as well as administering HQDA-level programs. In November 1995, the CFSC reorganized along functional lines (see CFSC chart below). The CFSC now has two major subdivisions, Programs and Operations. Several offices of interest to judge advocates include:

(1) Soldier and Family Support. This directorate administers both community recreation operations and family support programs ((703) 325-9467, DSN 221-9467).

(2) Business Programs. Larger installation activities such as the club system, golf courses, bowling alleys, and food, beverage

age, and entertainment are managed by this directorate ((703) 325-1442, DSN 221-1442).

(3) Hospitality. The hospitality directorate manages the Army Recreation Machine Program, amusement machines, and Armed Forces Recreation Centers ((703) 325-9500, DSN 221-9500).

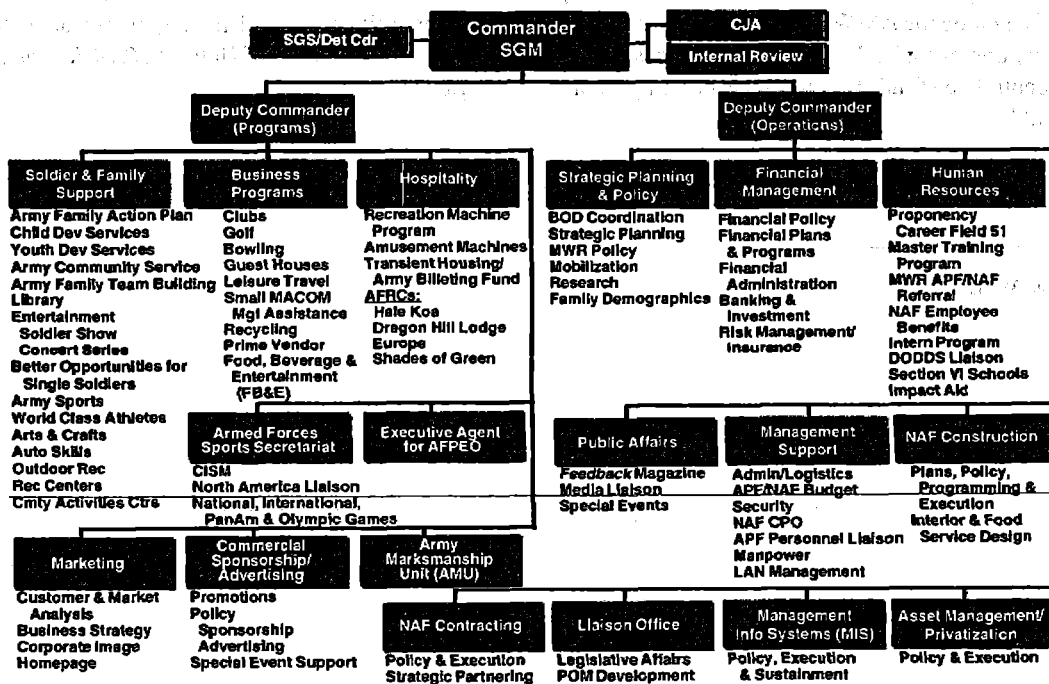
(4) Commercial Sponsorship and Advertising. This directorate spearheads the Army's efforts to increase MWR revenues by involving private corporations in sponsorship of MWR events and by increasing commercial advertising in MWR facilities and publications ((703) 325-2473, DSN 221-2473).

(5) Financial Management. This office develops financial management practices for NAF and MWR resources ((703) 325-8640, DSN 221-8640).

(6) Asset Management and Privatization. This office oversees "enlistment of private enterprise to deliver a product or service formerly provided by the government and to share in the associated risks and benefits"¹⁶³ ((703) 325-2742, DSN 221-2742).

(7) Liaison Office. Executive agent and Army point of contact for AAFES policy, Department of Defense MWR coordinating committees ((703) 325-4398, DSN 221-4398).

d. Chart: CFSC Structure and Functions.



¹⁶⁰ AR 215-1, *supra* note 38, para. 2-2.

¹⁶¹ *Id.* para. 2-5.

¹⁶² *Id.*

¹⁶³ FEEDBACK, Dec. 1995, at 6

e. MACOMs. The commanders of MACOMs oversee the MWR activities and NAFIs operated by subordinate installations and units.¹⁶⁴ Their responsibilities include general supervision, budget approval, allocation of APF support for MWR activities, and review of requests for MWR construction and repair projects. The MACOM commanders also are responsible for ensuring that MWR activities will be provided during mobilizations and deployments. Overseas MACOM commanders have additional responsibilities for joint activities, policies concerning the purchase and sale of foreign goods, and community-level programs.

f. Installations. Installation commanders are responsible for the planning and operation of MWR programs on their installation.¹⁶⁵ Commanders ensure that MWR programs meet mission requirements, community needs, budgetary constraints, and HQDA policies. Specific responsibilities include appointing NAFI fund managers and councils,¹⁶⁶ developing MWR five-year plans,¹⁶⁷ and reviewing nonappropriated fund financial statements on at least a quarterly basis.¹⁶⁸ Commanders also plan for MWR support during mobilizations and deployments¹⁶⁹ and provide authorized local support for touring Army shows.

6. Operational Principles.

a. NAFI Establishment, Consolidation, and Disestablishment.

(1) Administration. There are three levels of NAFIs: those centrally controlled at the HQDA level, those administered at the installation level, and unit funds managed for Reserve Component units or active Army units at isolated locations. Centrally administered NAFIs include the AMWRF, the ultimate successor in interest to all Army operating NAFIs, the Armed Forces Recreation Centers, and centralized funds for insurance, billeting, banking, and hospitality.¹⁷⁰

(2) Establishment of NAFIs. Army policy mandates a minimum number of NAFIs to reduce overhead costs and eliminate duplication of efforts. Accordingly, all NAFIs at an installation must be consolidated into the IMWRF, unless otherwise prohibited or impractical.¹⁷¹ When requested by commanders or HQDA, the CFSC may create a new NAFI. Prior to creation of a new activity, the CFSC requires an analysis of the proposed activity's purpose, an explanation of why the new proposed activity cannot be included within the IMWRF or furnished by AAFES or other existing NAFIs, and a projection of the new activity's financial viability.¹⁷²

(3) Revalidation, Disestablishment, and Transfer of NAFIs. Every three years, installations evaluate each NAFI to ensure that it is conducting intended activities; that its continued existence is warranted with assurances of no unnecessary duplication of effort.¹⁷³ The NAFIs are consolidated or inactivated when they no longer meet these criteria or have been affected by closure, realignment, or inactivation of supported units.¹⁷⁴ Commanders are responsible for ensuring that activities are transferred or disestablished in an orderly manner, minimizing financial losses, losses of property, and disruption to nonappropriated fund employees. When a NAFI is transferred to another command, all associated nonappropriated fund assets are normally transferred intact. Inactivated nonappropriated fund assets are transferred to that NAFI's successor fund.¹⁷⁵

b. Fund Managers. Commanders appoint a fund manager for each NAFI under their supervision. These managers are responsible for the financial management of the NAFI and also may be responsible for overall program management. The specific responsibilities of fund managers are detailed throughout *AR 215-1*, and volume 13 of *DOD 7000.14-R, Nonappropriated Fund Policy*.¹⁷⁶

¹⁶⁴ AR 215-1, *supra* note 38, para. 2-3.

¹⁶⁵ *Id.* para. 2-4.

¹⁶⁶ *Id.* ch. 5.

¹⁶⁷ *Id.* para. 10-1.

¹⁶⁸ *Id.* ch. 11.

¹⁶⁹ *Id.* para. 8-25.

¹⁷⁰ *Id.* tbl. 5-1.

¹⁷¹ *Id.* para. 5-2.

¹⁷² *Id.* para. 5-1.

¹⁷³ *Id.* para. 5-3.

¹⁷⁴ *Id.* para. 5-4.

¹⁷⁵ *Id.* paras. 5-4, 5-5.

¹⁷⁶ See generally *DOD 7000.14-R*, *supra* note 50.

If the fund manager will be absent for more than thirty but less than sixty days, then the fund manager will designate an assistant or acting fund manager to perform tasks designated by the fund manager. During the fund manager's absence, the acting or assistant fund manager assumes responsibility for all cash, negotiable assets, and nonexpendable property. A permanent change of fund managers or an absence of more than sixty days requires more thorough accountability, including the preparation of financial statements, reconciliation of bank accounts, and an inventory. If the fund manager must be replaced due to death or incapacity, then the commander will follow the report of survey procedures in *Army Regulation 735-5*.¹⁷⁷

c. NAFI Councils. All installation NAFIs are required to have a NAFI council appointed by the commander or his delegate. These councils ensure that the needs and interests of authorized patrons are considered in the management of the NAFI. Commanders determine whether a NAFI council will operate as a governing or nongoverning council; however, the IMWRF council will be nongoverning. Governing councils directly manage and supervise operations of the nonappropriated fund through the fund manager. Nongoverning councils operate in an advisory capacity, representing the interests of authorized patrons and fund management.¹⁷⁸

Governing council membership is limited to active duty military personnel, Reservists on active duty, and full-time DOD civilian employees. Nongoverning councils also may include military retirees and family members. At a minimum, councils will include four voting members plus the fund manager who is a non-voting member. The council is chaired by the senior ranking military or civilian member; nongoverning councils may be chaired as determined by the membership.¹⁷⁹

Councils meet at least annually, as determined by the chairperson, and minutes are provided to the chairperson. Depending

on local policy, other individuals may be invited to attend meetings either as observers or participants.¹⁸⁰

d. Unit Funds. Active Army units normally are not authorized to establish separate unit funds.¹⁸¹ Two exceptions exist. Isolated active units and Reserve Component (RC) units may establish funds at the unit level. Eligible units receive nonappropriated fund support from a coordinating installation's IMWRF and request reimbursement from the MACOM responsible for the unit. Unit funds are then expended for the collective benefit of all unit members in the same manner as prescribed for all other MWR activities.¹⁸² Installation MWR activities may provide RC commanders with standard equipment and supplies on a hand-receipt basis. However, installation MWR activities will not provide items for the exclusive benefit of RC personnel without reimbursement from RC unit funds.¹⁸³

e. Sales, User Fees, and Credit. *Army Regulation 215-1*, chapter 7, deals extensively with the administration of MWR activities. Major areas include sales, user fees, and credit. A NAFI generates much revenue on an installation, which funds MWR programs. These programs significantly benefit the morale of soldiers and their families. Because morale affects unit readiness and performance, NAFI generated revenue is vital and closely regulated.

Nonappropriated fund instrumentalities may engage in resale activities in accordance with *AR 215-1* within the boundaries of military installations. Installation commanders may authorize other resale privileges on military installations such as Army Air Force Exchange Service (AAFES) sales and services, commissaries, occasional sales by on-post private organizations in accordance with *Army Regulation 210-1*,¹⁸⁴ *DOD Directive 5500.7-R*,¹⁸⁵ (*Joint Ethics Regulation*),¹⁸⁶ and sales by blind vendors under applicable state and federal laws.¹⁸⁷ *Army Regulation 210-7* regulates sales by private vendors authorized to solicit on-post.¹⁸⁸

¹⁷⁷ AR 215-1, *supra* note 38, para. 5-7.

¹⁷⁸ *Id.* para. 5-8.

¹⁷⁹ *Id.* para. 5-9b. The regulation does not specifically identify a procedure for determining seniority between military and civilian members. In such cases, the commander should designate which member will act as chair. *Cf.* AR 15-6, *supra* note 77 (pending 1996 revision).

¹⁸⁰ AR 215-1, *supra* note 38, para. 5-10.

¹⁸¹ *Id.* para. 5-11.

¹⁸² *Id.* para. 5-12e.

¹⁸³ *Id.* para. 5-13.

¹⁸⁴ DEP'T OF ARMY, REG. 210-1, INSTALLATIONS: PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS (14 Sept. 1990) [hereinafter AR 210-1].

¹⁸⁵ DEP'T OF DEFENSE, DOD 5500.7-R, JOINT ETHICS REGULATION (JER) (Aug. 1993) [hereinafter DOD 5500.7-R].

¹⁸⁶ *Id.* (Check supplements.).

¹⁸⁷ AR 215-1, *supra* note 38, para. 7-1c. *See* 20 U.S.C. § 107 (the Randolph-Sheppard Act); DEP'T OF ARMY, REG. 210-25, VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL PROPERTY (1 Jan. 1979).

¹⁸⁸ DEP'T OF ARMY, REG. 210-7, INSTALLATIONS: COMMERCIAL SOLICITATION ON ARMY INSTALLATIONS (15 Apr. 1982).

Army Regulation 215-1 divides resale responsibility between AAFES and IMWRFs. The primary retailer of merchandise on the installation is AAFES, and AAFES package beverage stores are the primary resale source of alcoholic beverages except for malt beverages and wine coolers.¹⁸⁹ The IMWRFs are the primary provider of prepared foods, beverages, entertainment activities, entertainment in membership clubs, and snack bars incidental to MWR operations.¹⁹⁰

Resale by AAFES is primarily controlled by *Army Regulation 60-10*¹⁹¹ and *Army Regulation 60-20*.¹⁹² Among the key provisions of these regulations is a listing of all items and services Congress has approved for AAFES sales.¹⁹³ For example, these regulations are the source of the AAFES restriction on selling television sets with over 27" screens in the continental United States. This is also the source for discerning the types of services military exchanges are authorized to provide, which include pet grooming, piano tuning, and the operation of shoe shine stands among various other services.¹⁹⁴ Installation commanders may request AAFES to operate and manage any installation sales activity, and commanders may enter into memorandums of agreement (MOAs) and memorandums of understanding (MOUs) with AAFES to manage designated sales operations for a management fee. These arrangements may include those entered into by the United States Army CFSC on behalf of the Army.¹⁹⁵ Typical sales operations that can be managed by AAFES with command agreement include, but are not limited to, amusement machines, vending machines in military clubs and bowling centers, concession contracts for overseas clubs and Armed Forces Recreation Centers (AFRCs), and any other resale function connected with MWR consistent with the above general guidelines.¹⁹⁶

Army regulations also contemplate situations where resale by NAFIs other than AAFES are authorized. For example, the resale of golf apparel and equipment at a MWR golf course is authorized as these sales are normally part of, and directly relate to, the purpose of the activity conducting the sales. Such sales also could encompass the resale of snack foods and beverages.¹⁹⁷ Installation commanders are charged with monitoring NAFI resales to ensure that the items and services provided are necessary and related to the purpose of the activity selling or providing the goods and services.¹⁹⁸ Before MWR resale activities take place in an area for which AAFES is the primary provider, the local commander and the regional AAFES exchange director must agree in writing that the particular requirement cannot be met in a responsive manner by AAFES. This determination is based on the compatibility of operating hours between the exchange and the activity, the distance of the exchange from the activity, the availability of delivery service, and the ability of the exchange to provide the types of goods and services required by the activity.¹⁹⁹

Army Regulation 215-1 contains several other rules regarding resale activities by NAFIs.²⁰⁰ A dispute resolution mechanism operates at the MACOM level, with appeals to the AAFES commander for disagreements between the local commander and AAFES regional director. The operating expenses of NAFIs are paid from operating income, except for situations where APFs are specifically authorized or the law requires sales at cost. Unless otherwise designated, AAFES has the responsibility for the service and maintenance of vending machines. Food services also are addressed in *AR 215-1*. Installations may contract for MWR food services only with MACOM and CFSC approval. Free-standing food outlets, like snack bars, at locations other than clubs may be operated by an MWR only if AAFES declines to provide the service.²⁰¹

¹⁸⁹ AR 215-1, *supra* note 38, para. 7-2a.

¹⁹⁰ *Id.*

¹⁹¹ See generally AR 60-10, *supra* note 38.

¹⁹² See generally AR 60-20, *supra* note 53.

¹⁹³ *Id.* app. C.

¹⁹⁴ *Id.* apps. B, C.

¹⁹⁵ AR 215-1, *supra* note 38, para. 7-2b.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* para. 7-2c.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* paras. 7-2c(4)-(13).

²⁰¹ *Id.*

In overseas locations, nonappropriated fund resale activities will stock primarily goods of United States origin in preference to comparable foreign merchandise. Overseas nonappropriated fund resale activities should prominently display United States goods, label and segregate foreign-made merchandise, avoid inferior foreign imitations, and cooperate with United States suppliers of goods in meeting foreign competition when customer demand is shifting to foreign products.²⁰²

The IMWRF prices, user fees, and other charges also are regulated by AR 215-1. Prices, user fees, and charges generally are structured to meet cash management goals for the sustainment of a NAFI and its operations to cover its overhead and to satisfy budget requirements for the support of other MWR activities dependent on the NAFI.²⁰³ Some specific guidelines are established, such as a prohibition on charging user fees for the general use of Category A MWR activities.²⁰⁴ When setting charges and fees, including dues for club memberships, prices will ordinarily be established within twenty-five percent of the average prevailing off-post cost for similar goods or services.²⁰⁵ Annual surveys of off-post costs for similar goods and services will ensure that prices are within the twenty-five percent range.²⁰⁶ The MACOMs are responsible for setting prices, user fees, and charges overseas.²⁰⁷

Special pricing arrangements or discounts should not be given to "command functions," but if offered consistently and equitably, discounts may be given to junior enlisted personnel. Further, promotional discounts may be tailored to major target groups and situations such as single soldiers, retirees, family nights, and birthdays.²⁰⁸

The preferred method of extending credit to MWR patrons is through the acceptance of commercial credit cards. Therefore, contracts may be awarded to commercial card issuers and com-

mercial bank credit card services may supplement or replace in-house credit systems. The local commander must approve the use of in-house credit systems. Finally, the IMWRF may acquire commercial credit cards for use by IMWRF activities.²⁰⁹

Child care fees are established under AR 608-10. Reasonable fees, to include registration fees and miscellaneous charges, are authorized and consider such factors as the financial capability of eligible military personnel; adequacy of APF support for the child development center; unusual service requirements, such as the local nonappropriated fund wage scale; fee structures of other military child care operations in the same general area; fee structures of comparable civilian operations; the number of children being served and family demographics; and other factors.²¹⁰

f. Alcoholic Beverages. Army Regulation 215-1 establishes numerous rules concerning the sale and consumption of alcoholic beverages on military installations. The sale of alcoholic beverages on military installations generates much revenue, and that revenue often supports other IMWRF activities. The consumption and sale of alcoholic beverages also are closely monitored because alcohol related incidents can have an adverse effect on a command or unit.

One of the most important areas covered is the age restriction concerning the consumption of alcohol. Eighteen years of age is the overseas minimum age for the purchase of alcohol from the military retail system.²¹¹ In the United States, the minimum age for purchasing, drinking, or possessing alcoholic beverages, including low-content alcohol beverages, must be consistent with the law of the state in which the installation is located.²¹² Civilians, including spouses of military personnel, must meet the minimum state drinking age requirements.²¹³

²⁰² *Id.* para. 7-3.

²⁰³ *Id.* para. 7-5a.

²⁰⁴ *Id.* para. 7-5c.

²⁰⁵ *Id.* para. 7-5d.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* para. 7-5g.

²⁰⁹ *Id.* para. 7-6.

²¹⁰ DEP'T OF ARMY, REG. 608-10, PERSONAL AFFAIRS: CHILD DEVELOPMENT SERVICES, para. 3-5a(1)-(8) (12 Feb. 1990) [hereinafter AR 608-10].

²¹¹ AR 215-1, *supra* note 38, para. 7-7b.

²¹² *Id.* para. 7-7c.

²¹³ *Id.* para. 7-7e.

Installations can request exceptions to the minimum age restrictions through their MACOM to the Deputy Chief of Staff for Personnel. Exceptions are considered in limited circumstances. Among the circumstances is an exception for remote installations where privately owned vehicles are not available for soldier use.²¹⁴ Another exception is considered when there is a substantial risk of increased incidence of intoxicated driving by soldiers to and from a jurisdiction with a lower drinking age. This includes international borders where the neighboring country has a lower drinking age than the state where the installation is located. To qualify for this exception, the installation must be located within approximately fifty miles or within one hour driving time of the neighboring border. The sole factor considered under this exception is the motor vehicle safety of the community. This exception is statutorily based.²¹⁵ *Department of Defense Instruction 1015.10* states that the minimum drinking age for a DOD installation located within fifty miles of another state with a lower drinking age, Mexico, or Canada "shall be the lowest applicable age of the State in which the DOD installation is located or the State or jurisdiction of Mexico or Canada that is within 50 miles of such DOD installation."²¹⁶

Another possible exception to minimum drinking age restrictions may be considered under controlled conditions to foster friendship in a military environment. The first general officer in the chain of command may authorize the serving of alcoholic beverages on infrequent occasions when an entire unit marks a uniquely military occasion at a military installation. The event

must take place on the military installation and appropriate controls must be used to ensure the safety of soldiers and surrounding communities.²¹⁷

There are certain locations on the military installation where alcohol should not be consumed. For example, alcohol should not be consumed in skill development facilities, child and youth services facilities, basic training barracks, in Army aircraft and motor vehicles, in recreation centers (except on special occasions with prior command approval), or in troop dining halls and civilian MWR activities supported by nonappropriated funds (these facilities may provide malt beverages under certain circumstances with prior command approval).²¹⁸

Specific locations where alcoholic beverages may be consumed or purchased are described in *AR 215-1*.²¹⁹ Distinctions are drawn between malt beverages and wine coolers with an alcohol content of less than seven percent, and distilled spirits and wine with an alcohol content above seven percent. This section also details where alcohol may be served by the drink, and locations where packaged alcoholic beverages may be purchased.²²⁰ The MWR activities authorized to sell alcoholic beverages may sell and serve alcohol at catered events where the consumption of alcohol is authorized. In the United States, such catering is limited to on-post activities and transporting alcohol off the installation for use at off-post catered functions is prohibited. Overseas, the MACOMs will determine off-post catering policy.²²¹

²¹⁴ *Id.* para. 7-7c(1).

²¹⁵ *Id.* para. 7-7c(2); DOD Inst. 1015.10, *supra* note 130. 10 U.S.C. § 2683 states in pertinent part:

(c)(1) Except as provided in paragraphs (2) and (3), the Secretary concerned shall establish and enforce as the minimum drinking age on a military installation located in a State the age established by the law of that State as the State minimum drinking age.

(2)(A) In the case of a military installation located-

(i) in more than one state; or

(ii) in one State but within 50 miles of another State or Mexico or Canada, the Secretary concerned may establish and enforce as the minimum drinking age on that military installation the lowest applicable age.

(B) In subparagraph (A), the term "lowest applicable age" means the lowest minimum drinking age established by the law-

(i) of a State in which a military installation is located; or

(ii) a State or jurisdiction of Mexico or Canada that is within 50 miles of such military installation.

(3)(A) The commanding officer of a military installation may waive the requirement of paragraph (1) if such commanding officer determines that the exception is justified by special circumstances.

²¹⁶ DOD Inst. 1015.10, *supra* note 129, encl. 12.

²¹⁷ AR 215-1, *supra* note 38, para. 7-7c(2). See 10 U.S.C. § 2683c(3)(A) (1995).

²¹⁸ AR 215-1, *supra* note 38, para. 7-8.

²¹⁹ *Id.* para. 7-9.

²²⁰ *Id.* para. 7-9.

²²¹ *Id.* para. 7-10.

Regarding the procurement of alcoholic beverages by MWR activities, those MWR activities outside the United States must purchase consistent with policies developed by the MACOMs, and all AAFES purchases will comply with AAFES operational procedures. In the United States, malt beverages and wine purchased by NAFIs for resale will be purchased from in-state sources while distilled spirits may be purchased from any source. In Alaska and Hawaii, all purchases of alcohol must be from in-state sources.²²²

Installation commanders and legal advisors should be aware of a series of regulatory controls in the alcoholic beverage area. Commanders are directed to conduct programs to discourage irresponsible drinking.²²³ Commanders should make available designated driver and "Dial-A-Ride" programs, particularly during holiday seasons. Commanders also should make use of newspapers, bulletins, and command channels to promote the responsible use of alcohol. Commanders also must comply with the provisions of AR 600-85 when their personnel are cited or arrested in an alcohol related incident.²²⁴

Some seemingly common sense restrictions also apply on military installations consistent with the goal of fostering the responsible use of alcoholic beverages. For example, the giving of alcoholic beverages as prizes is prohibited.²²⁵ Serving more than one drink at a time to a customer for consumption and serving intoxicated patrons is prohibited.²²⁶ Soldiers on duty may not be served alcoholic beverages. The duty determination is made based on the soldier's duty status, not the normal duty hours of the installation. Whether a soldier is in or out of uniform is not relevant to the duty determination.²²⁷ Finally, reduced price alcohol promotions, such as happy hour, are prohibited. Open bar functions where one price covers unlimited alcoholic beverages are similarly prohibited. Activities may conduct food promotions where the price of an alcoholic beverage is included in a meal

(for example, "Beef and Burgundy" functions), but customers must be given the choice of a nonalcoholic beverage.²²⁸

Details concerning the sale of alcohol by the drink are found in AR 215-1, paragraph 7-15. One of the highlights of this area is a prohibition on in-house commercial promotions offering free or reduced price drinks.²²⁹ Commercial promotions that are available to the general public in the private sector generally are authorized.²³⁰

Packaged alcoholic beverages may be sold by nonappropriated funds for the personal use of authorized patrons. All persons purchasing alcoholic beverages must provide proof of eligibility to purchase.²³¹ Outside of the United States, the MACOMs establish policy on where package stores will be located on an installation. In the United States, the Secretary of the Army must approve the sale of packaged goods with an alcohol content over seven percent. The local commander should forward requests to establish a package goods store through the CFSC. Such a request must include a detailed analysis of various factors, including the importance of potential profits to other MWR activities, the estimated number of authorized patrons, geographical inconveniences, highway safety, and others. The command also must compile a digest of attitudes of local off-post community officials concerning establishment of a new package store. This digest must be thorough and consider the opinions of local businesses, civic organizations, state legislators, members of Congress, and others.²³² The establishment of a new package store is a major undertaking and thorough preparation of the digest of attitudes is a critical portion of the request package.

Army Regulation 215-1 contains provisions dealing with the protection of American wines in overseas package beverage stores,²³³ and the ability of local commanders to ration per capita

²²² *Id.* para. 7-12. See 10 U.S.C. § 2488 (1995).

²²³ AR 215-1, *supra* note 38, para. 7-14b.

²²⁴ *Id.* paras. 7-14i, j.

²²⁵ *Id.* para. 7-14e.

²²⁶ *Id.* para. 7-14f.

²²⁷ *Id.* para. 7-14h.

²²⁸ *Id.* para. 7-14g.

²²⁹ *Id.* para. 7-15a.

²³⁰ *Id.* para. 7-15a.

²³¹ *Id.* paras. 7-15b, c.

²³² *Id.* para. 7-18.

²³³ *Id.* para. 7-20. See 10 U.S.C. § 2489 (1995).

purchases of alcoholic beverages when per capita sales are deemed excessive.²³⁴ The regulation also requires labeling of alcoholic beverages overseas in accordance with the Alcoholic Beverage Labeling Act.²³⁵ All alcoholic beverages sold by nonappropriated funds must contain the following warning prominently displayed:

GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.

The above warning must be tailored to fit specific sized containers, and labels that are not an integral part of the container must be affixed and removable only with water or solvents.²³⁶

As evidenced above, all aspects of the sale and consumption of alcoholic beverages by nonappropriated funds are closely regulated by AR 215-1.

g. Travel and Transportation. Depending on their category,²³⁷ NAFIs are eligible for a number of the travel and transportation benefits available to APF agencies. For example, certain NAFIs may use government-owned vehicles to support MWR activities.²³⁸ Department of Defense policy specifically

authorizes nonreimbursable government bus transportation in support of certain MWR activities.²³⁹ Motor pool vehicles, however, generally may be used only if the local commander finds that it does not adversely affect the command mission.²⁴⁰ Nonappropriated fund instrumentalities also are authorized to purchase or lease vehicles in support of MWR activities,²⁴¹ which include passenger carriers (sedans, vans, buses), as well as recreational vehicles, campers, trailers, off-road vehicles, and motorcycles, and mopeds.²⁴² In the United States and Puerto Rico, all NAFI vehicles are registered with the nonappropriated fund RIMP and bear NAFI license plates.²⁴³ Drivers of NAFI vehicles must have both a valid United States government operator's license and a state driver's license.²⁴⁴

Eligible NAFIs also may transport cargo to and from the continental United States by the Air Mobility Command (AMC) or the Military Sealift Command (MSC).²⁴⁵ Certain NAFI employees on official TDY also may travel on air mobility aircraft on a nonreimbursable basis.²⁴⁶ Permanent change of station travel and transportation of NAFI employees, however, may not be funded with APFs.²⁴⁷

Regardless of the funding source, when traveling on MWR business, provisions of the *Joint Travel Regulation (JTR)* apply to nonappropriated fund employees.²⁴⁸ The limitations on nonappropriated fund official travel closely parallel appropriated fund agency limitations. For example, funding for first-class travel

²³⁴ *Id.* para. 7-21.

²³⁵ Pub. L. No. 100-690 (1988).

²³⁶ AR 215-1, *supra* note 38, para. 7-22.

²³⁷ *Id.* app. D (categorizes NAFIs according to their eligibility for various types of appropriated fund support). See also DOD Inst. 1015.10, *supra* note 129, tbl. 6. (which provides definitive guidance on APF support to nonappropriated fund activities).

²³⁸ AR 215-1, *supra* note 38, para. 7-28. Use of government vehicles is specifically regulated by *Army Regulation 58-1. DEP'T OF ARMY, REG. 58-1, MOTOR TRANSPORTATION: MANAGEMENT, ACQUISITION, AND ADMINISTRATIVE USE OF MOTOR VEHICLES* (12 March 1981).

²³⁹ See AR 215-1, *supra* note 38, para. 7-28c.

²⁴⁰ *Id.* para. 7-28b.

²⁴¹ Installation commanders retain administrative control of NAFI vehicles. See *id.* para. 7-29c.

²⁴² See generally *id.* para. 7-30.

²⁴³ *Id.*

²⁴⁴ *Id.* para. 7-30e.

²⁴⁵ *Id.* para. 7-27. See also *id.* tbl. D-1, para. 6.

²⁴⁶ *Id.* para. 7-25a(3).

²⁴⁷ *Id.* para. 7-25a(6); See also DEP'T OF ARMY, REG. 215-3, MORALE, WELFARE, AND RECREATION: NONAPPROPRIATED FUNDS AND RELATED ACTIVITIES PERSONNEL POLICIES AND PROCEDURES (10 Sept. 1990) [hereinafter AR 215-3].

²⁴⁸ AR 215-1, *supra* note 38, para. 7-25a.

is prohibited.²⁴⁹ Likewise, home to work transportation in nonappropriated fund vehicles generally is prohibited.²⁵⁰ Under the *Joint Ethics Regulation*, frequent flyer miles and other gratuities received by nonappropriated fund employees traveling on nonappropriated fund business revert to the NAFI.²⁵¹ Nonappropriated fund instrumentalities are required to use the Government Travel System (GTS) when purchasing nonappropriated fund-funded tickets to obtain government negotiated airfares.²⁵²

h. Contracting and Acquisitions. Whenever an MWR acquisition uses APFs, the *Federal Acquisition Regulation (FAR)* and Army supplements apply.²⁵³ *Army Regulation 215-4* generally governs NAFI contracting when using nonappropriated funds.²⁵⁴ The latter procedures generally are much more relaxed than typical appropriated fund contracting. For example, *AR 215-1* contains specific guidance on the purchase of data processing equipment (ADP), including computer hardware and software.²⁵⁵ When NAFIs use appropriated funds for ADP purchases, specific Army regulations apply. When only nonappropriated funds are involved, the rules are less restrictive.²⁵⁶ Likewise, provisions of the Buy America Act²⁵⁷ do not apply to NAFI nonresale purchases. *Army Regulation 215-1*, however, does incorporate some of the

principles of the Buy American Act for NAFIs in foreign areas for purchases over specified dollar limits or for United States goods within a specified percentage above the cost of foreign goods.²⁵⁸

i. Gifts. Nonappropriated fund instrumentalities have broad authority to accept unsolicited gifts of money as well as real and personal property.²⁵⁹ Although gifts cannot be solicited, NAFIs may identify their needs in response to inquiries from prospective donors.²⁶⁰ Local NAFI fund managers may be delegated authority to accept gifts and donations not exceeding \$5000. Local commanders may accept donations up to \$25,000. Commanders of MACOMs may accept gifts of up to \$50,000. The United States Army CFSC accepts gifts up to \$150,000. Only the SA may accept gifts in excess of \$150,000.²⁶¹ The criteria for accepting a gift include whether the NAFI needs the proposed gift, evaluating the cost to the NAFI, and whether the NAFI can meet any conditions that the donor may impose.²⁶²

Nonappropriated fund instrumentalities must meet and impose a number of conditions before accepting a gift. For example, donors may not be granted special privileges or concessions, and the donor must relinquish all ownership in the property donated.²⁶³ Donated items of minimal value may contain commercial logos

²⁴⁹ *Id.* para. 7-25d(2).

²⁵⁰ *Id.* paras. 7-29a, b.

²⁵¹ *Id.* para. 7-25a(4). See also DOD Dir. 5500.7-R, *supra* note 187 (*JER* cited in *AR 215-1*). The *JER*, *DOD Dir. 5500.7-R*, applies to nonappropriated fund supervisory and management personnel. *AR 215-1*, *supra* note 38, para. 7-32.

²⁵² *AR 215-1*, *supra* note 38, para. 7-26a.

²⁵³ *Id.* para. 7-34.

²⁵⁴ *Id.*

²⁵⁵ *Id.* para. 7-31.

²⁵⁶ *Id.*

²⁵⁷ 41 U.S.C. §§ 10a-10d (1995).

²⁵⁸ *AR 215-1*, *supra* note 38, para. 7-37 (allows foreign area NAFIs to purchase foreign nonresale goods if the purchase does not exceed \$25,000 or if comparable United States goods are more than twenty-five percent above the foreign goods, including transportation).

²⁵⁹ *Id.* para. 7-39. Appropriated fund agencies are significantly more restricted in what gifts they can accept and how they are received. For example, 10 U.S.C. § 260f requires Secretary of Defense approval to accept money gifts for defense purposes. The money received is placed in the general treasury and cannot be spent by the agency until Congress appropriates it for agency use. For gifts to the government generally, see *Army Regulation 1-100*. DEP'T OF ARMY, REG. 1-100, ADMINISTRATION: GIFTS (15 Nov. 1983). Unsolicited promotional premiums must have an individual value of \$10 or less. *AR 215-1*, *supra* note 38, para. 7-45b.

²⁶⁰ *AR 215-1*, *supra* note 38, para. 7-39(b). Donor boxes in chapels and museums are not considered solicitations under the regulation. See *id.* para. 7-39d.

²⁶¹ *Id.* para. 7-39c(1)-(5).

²⁶² *Id.* para. 7-39a(1)-(3).

²⁶³ *Id.* para. 7-39c.

or slogans so long as they do not include identity with the government.²⁶⁴ Nonappropriated fund instrumentalities may not give donors exclusive rights to furnish products.²⁶⁵ Nonappropriated fund instrumentalities must post a disclaimer stating that the Army does not officially endorse the donated products or the organization furnishing them.²⁶⁶

j. Volunteer Services. Morale, welfare, and recreation activities may accept volunteers in certain categories of NAFIs, such as family support groups.²⁶⁷ These volunteers are entitled to reimbursement for their incidental expenses and receive certain statutory protections.²⁶⁸ Moral, Welfare, and Recreation activities also may accept gratuitous services. Gratuitous servants are not, however, volunteers.²⁶⁹ Morale, welfare, and recreation gratuitous servants "volunteer" their services but are not entitled to any compensation and do not receive statutory protection for work related injury or claims for damages or losses. Nonappropriated fund gratuitous servants must complete and sign an agreement waiving rights to compensation.²⁷⁰ Like volunteers, MWR activities must screen, train, and supervise gratuitous servants.²⁷¹ By regu-

lation, MWR activities may not accept gratuitous services that would otherwise be performed by an APF or nonappropriated fund employee, including positions falling under general service (GS) classifications.²⁷² Nonappropriated fund instrumentalities cannot use gratuitous employees in lieu of filling a nonappropriated fund employee position.²⁷³

Unlike volunteers, providers of gratuitous services may not be reimbursed for their incidental expenses with either nonappropriated fund or APF money.²⁷⁴ To compensate MWR volunteers for some of their expenses, private organizations (PO) may reimburse them for incidental expenses²⁷⁵ directly or through a fund maintained by the NAFI.²⁷⁶

k. Health and Safety. Nonappropriated fund instrumentalities must establish safety and fire prevention programs under Army regulations.²⁷⁷ Requirements include safety SOPs,²⁷⁸ qualification records for use of specialized equipment at MWR facilities such as arts and crafts shops and automotive craft shops,²⁷⁹ health and environmental quality programs,²⁸⁰ and weapon and ammu-

²⁶⁴ *Id.*

²⁶⁵ *Id.* para. 7-39c(2).

²⁶⁶ *Id.* para. 7-39c(1).

²⁶⁷ The term "volunteer" is a term of art and should not be confused with a gratuitous servant. *Id.* para. 4-6j (recognizing volunteers as those working for Army Community Service, Family Support Groups and mayoral programs). Volunteers are entitled to reimbursement for their incidental expenses, are covered by workers' compensation, and are protected under the Westfall Act for tort claims. In the 1994 Defense Appropriation Act, Congress amended 10 U.S.C. § 1588 (pertaining to volunteer programs) to expand its scope. The 1994 Appropriation Act mandated a pilot program to expand the scope of volunteer services to soldier and family support programs under 10 U.S.C. § 1588. The amended statute allows the Secretary of the Army to authorize certain activities, including MWR activities to use volunteers, who may receive compensation for incidental expenses and protections discussed above. In AR 215-1, the Secretary of the Army has included Army Community Services, Family Support Groups, and Mayoral Programs as volunteers under the statute. All others, by omission, are not "volunteers." Instead, they are gratuitous servants. Gratuitous servants may not receive nonappropriated or appropriated fund reimbursement for their services and are not protected under workers' compensation or the FTCA for incidents arising from their service.

²⁶⁸ AR 215-1, *supra* note 38, para. 4-6j.

²⁶⁹ See 10 U.S.C. § 1588a (1995). The statute specifically identifies family support programs, child development, youth services, library, education programs, religious programs, housing referral programs, programs providing spouse employment assistance, and museums as activities authorized to accept volunteers. Although MWR activities not specifically mentioned in the statute may be covered under the statute, unless designated by the service secretary, they are not volunteers for purposes of the statute.

²⁷⁰ AR 215-1, *supra* note 38, para. 7-40a(1). Figures 7-1 and 7-2 of AR 215-1 are sample agreements for adults and minors who provide gratuitous services. Note that volunteers, such as Army Community Service volunteers, also must complete a written agreement prior to providing voluntary services. See AR 608-1, *supra* note 147, para. 4-3 (DA Form 4712-R).

²⁷¹ AR 215-1, *supra* note 38, para. 7-40a(2)-(8).

²⁷² *Id.* para. 7-40c(1), (3).

²⁷³ *Id.* para. 7-40c(2).

²⁷⁴ *Id.* paras. 7-40a, b. Additionally, NAFI gratuitous service providers are not covered by 10 U.S.C. § 1588 for workers' compensation and tort claims.

²⁷⁵ *Id.* para. 7-40b (for regulation governing Private Organizations, see AR 210-1, *supra* note 160).

²⁷⁶ *Id.*

²⁷⁷ *Id.* para. 7-41.

²⁷⁸ *Id.* para. 7-41b.

²⁷⁹ *Id.* para. 7-41c.

²⁸⁰ *Id.* para. 7-41d.

dition storage and accountability.²⁸¹ Smoking in MWR facilities follows Army-wide policy.²⁸² Morale, welfare, and recreation activities may use liability waivers (commonly known as "releases" or "hold harmless agreements").²⁸³ An installation commander, in consultation with the staff judge advocate, may approve use of liability waivers.²⁸⁴ Chapter 8 of AR 215-1 provides detailed guidance regarding high-risk MWR activities.

I. MWR Advertising (Use, Purchase, and Sales). Morale, welfare, and recreation activities can publicize their programs in command-sponsored media. Additionally, they are authorized both to buy and sell advertising. Morale, welfare, and recreation activities may advertise their goods and services in a wide variety of media. To better understand the requirements for MWR advertising, it is best to consider the type of media.²⁸⁵

(1) Media Primarily Intended for Authorized Patrons. Morale, welfare, and recreation activities may use post newspapers, Armed Forces Radio and Television Service (AFRTs), and installation cable television to publicize MWR events and services.²⁸⁶ Morale, welfare, and recreation activities also may purchase paid advertising in civilian enterprise media.²⁸⁷ If the advertising includes brand names and item prices, admission price or cover charges, names of commercial sponsors, or similar commercial information, the advertising must prominently display the

phrase "PAID ADVERTISING."²⁸⁸ Morale, welfare, and recreation activities also may purchase advertising in nongovernmental media primarily aimed at military audiences.²⁸⁹ When using these media, the advertising must indicate both that it is paid advertising and that the offer or event is available only to authorized patrons.²⁹⁰

(2) MWR Advertising in Civilian Media. When MWR special events such as concerts and fun runs are open to the private sector, MWR activities may pay to advertise in civilian media.²⁹¹ This type of advertising must be coordinated in advance with the installation public affairs office.²⁹² These events may be advertised in civilian media only if they do not compete with similar local civilian events.²⁹³ To be open to the public, MWR events must be occasional and infrequent and enhance community relations.²⁹⁴ Event-related merchandise may not be advertised in civilian media, and food and beverages may be sold for on-premises consumption only.²⁹⁵

(3) Commercial Advertising in MWR Media. Morale, welfare, and recreation activities have the authority to sell commercial advertising on MWR print and electronic media, placards, and billboards.²⁹⁶ This does not include authority to sell commercial advertising on the AFRTS, local commander's television or radio channels, or any APF electronic media.²⁹⁷ Like-

²⁸¹ *Id.* para. 7-41e.

²⁸² *Id.* para. 7-41f. See DEP'T OF ARMY, REG. 600-63, PERSONNEL-GENERAL: ARMY HEALTH PROMOTION (17 Nov. 1987).

²⁸³ AR 215-1, *supra* note 38, para. 7-43.

²⁸⁴ *Id.*

²⁸⁵ *Id.* para. 7-44.

²⁸⁶ *Id.* para. 7-44b.

²⁸⁷ "Civilian Enterprise Newspaper" is a term of art referring to command contracted newspapers governed by AR 600-63.

²⁸⁸ AR 215-1, *supra* note 38, para. 7-44c.

²⁸⁹ *Id.* para. 7-44d.

²⁹⁰ *Id.* para. 7-44e.

²⁹¹ *Id.* para. 7-44f.

²⁹² *Id.* para. 7-44f(1). All such advertising is governed by Army Regulation 360-61. DEP'T OF ARMY, REG. 360-61, ARMY PUBLIC AFFAIRS: COMMUNITY RELATIONS (15 Jan. 1987).

²⁹³ AR 215-1, *supra* note 38, para. 7-44f(1).

²⁹⁴ *Id.* para. 7-44f(2). "Infrequent" is defined in the regulation as less than monthly.

²⁹⁵ *Id.* para. 7-44f(3).

²⁹⁶ *Id.* para. 7-44g.

²⁹⁷ *Id.* para. 7-44g(3).

wise, it does not authorize distribution of NAFI media off the installation.²⁹⁸ Signs will be coordinated with installation engineers.²⁹⁹ Individual MWR program managers may not sell or purchase commercial advertising. The installation Directorate of Community Activities (DCA) is responsible for centralizing commercial advertising and advertising sales, which is subject to the final approval of the installation commander.³⁰⁰

Commercial advertising in NAFI media is subject to standards of propriety outlined in *Army Regulation 360-81*.³⁰¹ As a general rule, the advertising may not interfere with the mission or adversely affect loyalty, discipline, or morale of the command.³⁰² The advertising cannot violate DOD policies. For example, MWR activities cannot solicit membership in private groups, it may not be of a partisan or political nature, and it may not promote games of chance.³⁰³ All potential advertisers must be given a fair and equal opportunity to compete for this type of advertising and there must be no discrimination for or against certain groups.³⁰⁴ Any advertising offering loans or financing must comply with Truth in Lending Laws, verified by the installation staff judge advocate.³⁰⁵ All advertising must include a disclaimer indicating that

it does not constitute an endorsement by the Army, the DOD, or the United States government.³⁰⁶ Mailing of commercial advertising to NAFI patrons must be at the request of the patron and paid with nonappropriated funds.³⁰⁷ Nonappropriated fund instrumentality media that are primarily commercial advertising devices cannot be distributed through official channels.³⁰⁸

m. Commercial Sponsorship.³⁰⁹ Morale, welfare, and recreation programs may receive assistance, funding, goods, equipment and services for exclusive use within the MWR program³¹⁰ from individuals and corporate sponsors *in exchange for* public recognition, advertising and other promotions.³¹¹ Unlike gifts, commercial sponsorship may be actively solicited by NAFIs,³¹² except from tobacco and alcoholic beverage companies.³¹³

(1) Commercial Sponsorship Coordinators and Agreements. A number of conditions apply to local commercial sponsorship in support of MWR activities. The command must designate in writing the individual MWR employees who perform sponsorship duties.³¹⁴ These individuals must receive appropriate pro-

²⁹⁸ *Id.* para. 7-44g(7).

²⁹⁹ *Id.* para. 7-44g(5).

³⁰⁰ *Id.* para. 7-44h. The local commander must make the final decision on accepting paid commercial advertising under paragraph 7-44g(4) of *AR 215-1*. The MACOM or USCAFSC also has authority to sell advertising though how that authority is affected by the local commander's final decision authority is unclear.

³⁰¹ DEP'T OF ARMY, REG. 360-81, ARMY PUBLIC AFFAIRS: COMMAND INFORMATION PROGRAM (20 Oct. 1989).

³⁰² *AR 215-1*, *supra* note 38, para. 7-44g (1)(a).

³⁰³ *Id.* para. 7-44g(1)(b).

³⁰⁴ *Id.* para. 7-44g(1)(c). This does not include potential advertisers who have been placed off limits by the commander.

³⁰⁵ *Id.* para. 7-44g(1)(e).

³⁰⁶ *Id.* para. 7-44g(2).

³⁰⁷ *Id.* para. 7-45a (for rules governing promotional materials generally, see paragraph 7-45).

³⁰⁸ *Id.* para. 7-45b.

³⁰⁹ In addition to *AR 215-1*, see Enclosure 9 to *DOD Instruction 1015.10*, which deals with commercial sponsorship policy. The CFSC runs a highly effective and successful commercial sponsorship program, which organizes sponsored events at a number of Army installations throughout the continental United States. The coordinator of the program is Ms. Robin Donohoe, Hoffman 1, 2461 Eisenhower Ave, Washington, D.C. 22331-0507, Telephone (703) 325-2473, DSN 221-2473, E-Mail donohoe@hoffman-cfsc.army.mil. Ms. Donohoe is an excellent resource for information about commercial sponsorship programs and opportunities for installations to participate in ACFSC organized sponsorship events.

³¹⁰ *AR 215-1*, *supra* note 38, para. 7-47b.

³¹¹ *Id.* para. 7-47a.

³¹² *Id.* para. 7-47b. For a discussion of gifts, see *AR 215-1*, paragraph 7-39.

³¹³ *Id.* para. 7-47c(8).

³¹⁴ *Id.* para. 7-47d(4).

fessional development opportunities, including standards of conduct training, and training in the principles and procedures of solicitation, evaluation of offers and file documentation.³¹⁵ All commercial sponsorship agreements must be in writing and are valid for one year or less, with the option for annual renewal for a total period not exceeding five years.³¹⁶ The installation staff judge advocate reviews all sponsorship agreements prior to signature.³¹⁷

(2) Competition and Sponsorship Agreement Requirements. Solicited sponsorships require a competitive solicitation process pursuant to a locally developed standard operating procedure, similar to those that guide nonappropriated fund contracting.³¹⁸ This includes publicized solicitations³¹⁹ to an adequate number of known United States sources,³²⁰ generally limited to firms and organizations involved with consumer products.³²¹ The agreements must include performance monitoring provisions,³²² termination and assignment provisions, and allowance for *force majeure*;³²³ they also must contain a specific certification in writing that costs of sponsorship will not be charged to any part of the federal government.³²⁴ The selection criterion is the market value of the services, goods, or cash offered, and may include the appropriateness of the potential sponsor.³²⁵ Nonselected parties must be advised in writing of the reason for their nonselection.³²⁶ Un-

solicited commercial sponsorships must comply with all the guidelines of solicited agreements, except that they need not be competitively bid or announced.³²⁷

Sponsorship agreements are not gifts. Sponsors receive the right to advertising and promotional opportunities such as signage, sampling opportunities, and couponing; however, they are to receive no other concessions or favored treatment.³²⁸ Morale, welfare, and recreation management must coordinate commercial sponsorship proposals with AAFES management to ensure no violation of AAFES policy, understandings, or agreements.³²⁹ Nonsponsoring entities should not be treated with disfavor and may not suffer any form of reprisal.³³⁰

(3) Commercial Sponsorship, Publicity, and Compliance Requirements. All public recognition, including printed materials and signage, must include a disclaimer that sponsorship does not constitute an endorsement by the Army, DOD, or the United States government.³³¹ Agreements regarding television and broadcast of MWR events require coordination with the Office of the Secretary of the Army for Public Affairs.³³² Tobacco, beer, and alcoholic beverage enterprises may provide unsolicited sponsorship, so long as the sponsorship is not directed predomi-

³¹⁵ *Id.* para. 7-47c.

³¹⁶ *Id.* para. 7-47c(2).

³¹⁷ *Id.* para. 7-47e (requires legal review prior to signature).

³¹⁸ *Id.* para. 7-47d. Procurement and contracting officials are not to be directly involved with the solicitation process; they may, however, be involved in nonappropriated fund contract administration related to the sponsorships. *See id.* para. 7-47d(3).

³¹⁹ *Id.* para. 7-47d(1)(b) (the regulation refers to "announced" solicitations).

³²⁰ *Id.* para. 7-47d(2).

³²¹ *Id.*

³²² *Id.* para. 7-47d(1)(g).

³²³ *Id.* para. 7-47d(1)(f).

³²⁴ *Id.* para. 7-47c(9).

³²⁵ *Id.* para. 7-47d(2).

³²⁶ *Id.* para. 7-47d(1)(g).

³²⁷ *Id.* para. 7-47e.

³²⁸ *Id.* The *DOD Instruction 1015.10* specifically forbids award of coupons for reduced prices on alcoholic beverages or tobacco products. *DOD Inst. 1015.10, supra* note 129, para. 10e.

³²⁹ AR 215-1, *supra* note 38, para. 7-47(11).

³³⁰ *Id.* para. 7-47c(4).

³³¹ *Id.* para. 7-47c(5). Enclosure 9 to *DOD Instruction 1015.10* requires Army review of advertising media that refers to "any part or program of the DOD." *DOD Instr. 1015.10, supra* note 129, para. 2f.

³³² AR 215-1, *supra* note 38, para. 7-47c(7).

nantly at the military community.³³³ A "responsible use" campaign and an appropriate Surgeon General's warning are mandatory parts of tobacco and alcohol sponsorship.³³⁴ All MWR events in the continental United States must comply with applicable law and regulations; events overseas must comply with applicable international treaties and agreements.³³⁵ By 30 January of each year, installations must report all commercial sponsorship activities to the CFSC.³³⁶ This report facilitates CFSC's required annual report to DOD.³³⁷

n. Installation Open Houses, MWR, and Private Organization Events. Military open house programs are primarily public affairs office (PAO) activities and are not intended as MWR events.³³⁸ Commercial sponsorship for MWR events in conjunction with open houses must be specifically approved by the SA or designated representative.³³⁹ Command cohosted private organization (PO) events may include PO sales activities (not including alcoholic beverages)³⁴⁰ if specifically approved by the installation commander.³⁴¹ These sales cannot compete with MWR sales.³⁴² If entrance or gate fees are charged, the IMWRF will collect and account for all receipts; nonappropriated fund expenses will be recovered from the receipts, and the net proceeds will be split on a pro rata basis between the cohosts.³⁴³

7. Patronage and Activities.

a. Patronage. Active duty (AD) personnel, including AD Reservists, retirees, DOD civilians, and their families are the primary users of MWR programs. Family members do not have to

be accompanied by their sponsors to use MWR programs and facilities.³⁴⁴

Authorized patrons must accompany their guests to MWR facilities and programs. Guests may purchase items incidental to participation, including food and beverages, but are not authorized other resale purchases. The installation commander may approve local rules governing the number and frequency of guests. Also, the installation commander may suspend, terminate, or deny patronage privileges for good cause. The MWR activity must display patronage rules.³⁴⁵

Army Regulation 215-1, table 6-1, contains extensive patronage and eligibility criteria. These criteria are now outdated. Title 10 U.S.C. § 1065 (1996) significantly changed MWR patronage policies. Now members of the Selected Reserve³⁴⁶ and members eligible for retirement pay³⁴⁷ (and the dependents of each group) shall be permitted use of the exchange stores and other revenue-generating facilities operated by NAFIs. Reservists shall be permitted to use such facilities on the same basis as AD service members.³⁴⁸

Other United States military elements located on Army installations are entitled to use post MWR facilities on the same basis as Army units. Likewise, Army units located on installations of other services are entitled to use those facilities on the same basis as the host service.³⁴⁹

³³³ *Id.* para. 7-47c(8).

³³⁴ *Id.*

³³⁵ *Id.* para. 7-48b(1).

³³⁶ *Id.* para. 7-47c(12).

³³⁷ DOD Instruction 1015.10, *supra* note 129, encl. 9, para. B2.

³³⁸ AR 215-1, *supra* note 38, para. 7-47c(13). *See also id.* para. 7-48c(2).

³³⁹ DOD Instruction 1015.10, encl. 9, para. A3. *See also* AR 215-1, *supra* note 38, para. 7-47 (indicating that PAO approval is required).

³⁴⁰ AR 215-1, *supra* note 38, para. 7-48c(1)(c).

³⁴¹ *Id.* para. 7-48c(1)(a).

³⁴² *Id.*

³⁴³ *Id.* para. 7-48c(1)(b).

³⁴⁴ *Id.* para. 6-2a.

³⁴⁵ *Id.* paras. 6-2b, c, d.

³⁴⁶ The members must be in good standing as determined by the Secretary concerned.

³⁴⁷ This refers to retired pay under 10 U.S.C. § 1331 that would be received if the service member were under sixty years of age. *See* 10 U.S.C. § 1065(a) (1996).

³⁴⁸ *See* AR 215-1, *supra* note 38, para. 6-1i.

³⁴⁹ *Id.* para. 5-16.

For each foreign country, the DOD has designated a single military service to provide MWR nonappropriated fund support to military assistance and advisory missions in that country. Services may alter these responsibilities on an element-by-element basis, but missions in those countries are prohibited from receiving nonappropriated fund support from more than one service. Each service, however, may provide additional MWR APF support to its personnel.³⁵⁰

b. Activities. The following describes the myriad MWR activities and issues that judge advocates often handle relative to those activities.

(1) Amusement and Vending Machines.³⁵¹ Amusement and vending machines do not include gambling devices such as slot machines. Access to and collection of moneys from these machines is closely controlled with specific locking devices, revenue collection, and inventory accountability guidelines. Procedures vary depending on whether the IMWRF receives a percentage of revenue or a flat fee from a particular machine. Tighter controls apply when only IMWRF personnel (and not the concessionaire) are present for collection of money or when the IMWRF receives a percentage of the revenue.³⁵²

(2) Armed Forces Recreation Centers. Armed Forces Recreation Centers (AFRCs) offer comprehensive leisure, lodging, entertainment, and other recreational activities. The DOD has designated the Army as the executive agency for AFRCs.³⁵³ Army operated AFRCs include:

- a. Armed Forces Recreation Center-Europe, Bavaria, Germany.
- b. Hale Koa Hotel, Honolulu, Hawaii.

- c. The Dragon Hill Lodge, Seoul, Korea.
- d. Shades of Green, Walt Disney World Resort, Orlando, Florida.

The CFSC may periodically issue operational guidelines superseding regulations concerning AFRCs.

(3) Army Recreation Machine Program. The Army Recreation Machine Program (ARMP) allows the Army in overseas locations to operate slot machines in accordance with local laws, status of forces agreements (SOFAs), or other local agreements.³⁵⁴ Non-ARMP slot machines are prohibited on Army installations.³⁵⁵ The ARMP machines may be installed in Class C activities.³⁵⁶ Only ARMP personnel may maintain the machines.³⁵⁷

Currently, patrons on an Army installation retain ninety-three percent of machine play as payout.³⁵⁸ The installation NAFI keeps ten percent of gross revenue to offset program operating expenses.³⁵⁹ Since its inception, the ARMP has generated over \$713 million for MWR programs.³⁶⁰

Adult patrons and bona fide members of the MWR activity may play ARMP machines. The following persons may *not* play ARMP machines:

- a. Local or third-country nationals when prohibited by local laws (unless permitted by SOFA or other agreements).
- b. Nonactive duty persons under eighteen years old.
- c. The ARMP employees and their families.

³⁵⁰ *Id.* para. 5-17, tbl. 5-2; DOD Inst. 1015.10, *supra* note 129, encl. 11.

³⁵¹ This section does not include machines that pay out moneys. It does include pinball machines, video games, and vending machines.

³⁵² AR 215-1, *supra* note 38, para. 8-1.

³⁵³ No APFs may be used to support AFRC-Europe except for utilities, real property, maintenance and transportation of property made in the United States. 10 U.S.C. § 2247 (1995).

³⁵⁴ DOD Inst. 1015.10, *supra* note 129, encl. 11, para. a(1); AR 215-1, *supra* note 38, para. 8-5b(1)(a).

³⁵⁵ AR 215-1, *supra* note 38, para. 8-3b(1)(b).

³⁵⁶ *Id.* para. 8-3b(3) (Class C activities are set out at para. 4-1).

³⁵⁷ *Id.* para. 8-3b(1)(c).

³⁵⁸ See *id.* para. 8-3b(1)(d) (reciting policy of DOD Inst. 1015.10 authorizing each service to determine payouts from recreation machines).

³⁵⁹ *Id.* para. 8-3b(1)(e).

³⁶⁰ MWR ANNUAL REPORT 33, 1994.

d. The MWR activity managers, management employees, and their families while on the installation or in the community where employed.

e. Nonmanagerial MWR employees and their families in the facility where employed.

f. Others whom the installation commander prohibits.³⁶¹

Access to and collection of money from these machines is closely monitored, with specific locking devices (four locks), and revenue collection procedures (four observers).³⁶² The nonappropriated fund RIMP insures ARMP assets and funds against loss and theft.³⁶³

(4) Arts and Crafts Program. This program offers educational self-development activities that advance technical knowledge and skills and offer opportunities for creative growth. The CFSC issues program guidance for core activities including: drawing and painting, photography, woodworking, industrial arts, pottery, ceramics, sculpture, and 3-D design. The Arts and Crafts Program encourages self-help through formally scheduled classes, individual instruction, community demonstrations, and installation, MACOM, and Army contests.³⁶⁴

The MWR activity may sell specialized merchandise for the Arts and Crafts Program, and may impose user fees for certain functions and equipment.³⁶⁵ Staff members may not accept gratuities for their personal services.³⁶⁶ Commanders may allow soldier representatives to use the Arts and Crafts Program to provide trophies and picture frames for their units as long as the customary fees for materials are paid.³⁶⁷

(5) Automotive Crafts and Skills Centers: These centers offer facilities, equipment, technical instruction, skilled assistance, and problem-solving services. Patrons reduce their automobile repair costs³⁶⁸ through hands-on participation in mechanical processes and develop skills that sustain morale, enhance self-development, and expand recreational opportunities.³⁶⁹

To accomplish these goals, professional instructors offer formal classes and individual instruction. Self-directed individual use of basic equipment, tools, and workspace also is permitted. At a minimum, automotive crafts and skills centers have four functional work areas: a general repair area, a tool and equipment issue and control area, a tool and bench work area (separated from areas where automobiles move), and a technical reference area. To ensure safety, at least two employees must be within the building whenever it is open.³⁷⁰

The construction, repair, or maintenance of military equipment, Government Services Administration vehicles, and APF furnishings and vehicles is prohibited; although, the automotive crafts and skills centers can be used to repair and maintain nonappropriated fund vehicles during nonpeak hours.³⁷¹

Authorized patrons may only use shop equipment to work on vehicles or boats that are state registered in the name of the user or a member of his or her immediate family. A responsible adult must accompany patrons under fourteen years of age unless the young patron is participating in a specially designed program.³⁷²

The automotive crafts and skills center may sell materials, supplies, and component parts needed for work on personal projects and vehicles. It also may collect fees for the use of certain specialized equipment, for the use of repair bays, for the use

³⁶¹ AR 215-1, *supra* note 38, para. 8-3b(4).

³⁶² *Id.* paras. 8-3b(5), (6).

³⁶³ *Id.* para. 8-3b(11)(a).

³⁶⁴ *Id.* para. 8-4.

³⁶⁵ *Id.* paras. 8-4b(11), (13).

³⁶⁶ *Id.* para. 8-4b(12).

³⁶⁷ *Id.* para. 8-4b(7).

³⁶⁸ Patrons may not use facilities or equipment for personal or commercial profit. *See id.* para. 8-5b(14).

³⁶⁹ *Id.* para. 8-5a.

³⁷⁰ *Id.* paras. 8-5b(1)-(3).

³⁷¹ *Id.* para. 8-5b(6).

³⁷² *Id.* para. 8-5b(6)(d).

of car washes and vacuums, and for parking and storage of authorized personally owned vehicles. All fees go to the automotive crafts and skills center; staff members may not accept any gratuities.³⁷³

Automotive skills personnel may only perform services if all of the following conditions are met: The patron is present, the installation commander has approved the service, the service is listed on the fee chart displayed in the center, and the service is classified as technical or safety restrictive. The automotive crafts and skills center manager may restrict the use of any equipment to automotive crafts and skills center personnel.³⁷⁴

The control of hazardous waste must comply with all applicable local regulations and laws.³⁷⁵ The use and possession of alcoholic beverages or controlled substances in or around the automotive crafts and skills center is prohibited.³⁷⁶

(6) Bingo. Morale, welfare, and recreation activities may sponsor or conduct bingo in areas of exclusive federal jurisdiction or when in compliance with applicable state and local requirements. Bingo also may be played overseas when not prohibited by host-country laws and when in compliance with applicable international agreements.³⁷⁷

To prevent actual or perceived impropriety, volunteers serving as callers or monitors, MWR managers, the DCA, direct line supervisors, and other employees of the sponsoring activity (and their immediate families) may not play bingo. If otherwise eligible, employees assigned to one or more MWR activities may participate in bingo sponsored by an unrelated activity.³⁷⁸

Bingo prizes may be cash or merchandise. The annual value of prizes may not exceed ninety percent of the sponsoring activity's projected annual income. Other expenses are limited to not more than ten percent of income. The DCA determines the size of the bingo cash prize fund. The cash prize for a single game totaling more than \$2500 must be awarded by check or by a combination of cash and check (cash payment is limited to \$2500).³⁷⁹ Two or more winners during a single game share cash prizes equally; a coin toss determines the winner of indivisible prizes.³⁸⁰

Army Regulation 215-1, paragraph 8-6e, establishes strict card and cash controls. Before receiving a prize, winners must present their winning card(s) and ticket stub or guest check to the cashier for verification, sign their names, and furnish their social security number (or club membership number where appropriate).³⁸¹ Advertisements and other bingo-related information may not be mailed if bingo is prohibited in the state where the game is held.³⁸² The DCA may authorize POs to conduct bingo in MWR facilities. The POs must adhere to management controls applicable to MWR-operated bingo.³⁸³

(7) Bowling. The bowling program may offer leagues, open tournaments, instructional programs, youth services-sponsored events, locker rentals, and child care services.³⁸⁴ It also may operate pro shops, sell food and alcoholic beverages, and manage amusement machines.³⁸⁵ To ensure accountability, pin setter meter readings must be compared to cash receipts and any discrepancies explained.³⁸⁶

(8) Casino Games. Casino games, played at "Monte Carlo" or "Las Vegas" events, are played exclusively for enter-

³⁷³ *Id.* paras. 8-5b(7), (9).

³⁷⁴ *Id.* para. 8-5b(10). AR 215-1, *supra* note 38, fig. 8-1, lists equipment that only trained personnel may operate.

³⁷⁵ See e.g., 42 U.S.C. §§ 6921-28.

³⁷⁶ AR 215-1, *supra* note 38, para. 8-5b(12).

³⁷⁷ DOD Inst. 1015.10, *supra* note 129, para. D 11(2) ("Bingo may be played at installations in foreign countries when not prohibited by host-country laws or agreements"). AR 215-1, *supra* note 38, para. 8-6a, simply says "overseas international agreements apply." These two provisions do not necessarily say the same thing. Arguably, DOD Inst. 1015.10 would prohibit bingo where host-country law prohibited it even if it were permitted by agreement.

³⁷⁸ AR 215-1, *supra* note 38, para. 8-6b.

³⁷⁹ Winners should be advised of potential federal, state, or foreign tax liability. *Id.* para. 8-6 (does not address tax this issue although paragraph 8-18f directs that winners of raffles be so informed).

³⁸⁰ *Id.* para. 8-6c.

³⁸¹ *Id.* The Bingo Activity Card should contain a Privacy Act statement when social security numbers are required. See DEP'T OF ARMY, REG. 340-21, OFFICE MANAGEMENT: THE ARMY PRIVACY PROGRAM (5 July 1985). Also, for games conducted in clubs, the Bingo Activity Card should state whether the club reserves the right to offset winnings against any club dues in arrearages.

³⁸² AR 215-1, *supra* note 38, para. 8-6d.

³⁸³ *Id.* para. 8-6f.

³⁸⁴ AR 608-10, *supra* note 210.

³⁸⁵ AR 215-1, *supra* note 38, para. 8-7a.

³⁸⁶ *Id.* para. 8-7b(3).

tainment and may not provide any monetary gain in the form of legal tender to the patron. Only play money or chits are authorized for use as bets; legal tender may not be used. After the patron purchases play money or chits, they may not be exchanged for legal tender; however, legal tender, chits, or play money may be used to purchase food, beverage, and other items sold at the event.³⁸⁷ The patron also may use the play money or chits to bid on items auctioned at the end of the event. The cost of prizes may not exceed ninety percent of the ticket sales after deducting operating expenses.

The staff judge advocate must review plans for casino events for legal sufficiency. In the United States, casino games must conform to state and local laws unless these events are played at installations under exclusive federal jurisdiction. International agreements apply overseas.³⁸⁸ Employees of the sponsoring MWR activity, their families, and volunteers assisting in the games may not take part in any game or accept any prize.³⁸⁹

An MWR activity may conduct up to four casino events a year. The installation commander may allow POs to conduct one casino event a year. The PO must reimburse all MWR expenses. If the MWR activity operates food and beverage sales at a PO-run casino event, then the MWR retains all income from those sales.³⁹⁰ Casino games may not be publicized through the United States mail.³⁹¹

(9) Child Development Services. Child Development Services include full-day, part-day, and hourly child care programs provided by Child Daycare Centers, Family Child Care (FCC)

homes within government quarters, and other programs such as the School Age Latchkey Program.³⁹²

Background investigations must be conducted on all prospective CDS employees, FCC providers, youth applicants, CDS volunteer applicants, and family members over twelve years of age living in a potential FCC home.³⁹³

(10) Performing Arts Entertainment. This entertainment program provides diverse, demand-driven activities such as music, unit entertainment activities, special events (for example, local community carnivals, patriotic celebrations, circuses, and major sporting events), and Army-sponsored events (for example, the United States Army Soldier Show).³⁹⁴ An entertainment program manager, who also serves as the installation copyright control officer and chief of the professional specialist staff, directly supervises the activities.³⁹⁵

The entertainment program manager must submit a copyright clearance request, DA Form 3238-R, to the CFSC and obtain a copyright clearance prior to public performance of any work.³⁹⁶ Licenses must be obtained prior to filming, recording, or duplication of any copyrighted work. Licenses are usually subject to substantial royalties and use restrictions. Requests to film, record, or duplicate works must be forwarded to the CFSC no later than four months prior to the proposed date.³⁹⁷ The installation pays copyright clearance fees, licenses, royalties, and related fees through the CFSC to the owner.³⁹⁸ If a production of original works of local playwrights, authors, composers, or lyricists is planned, notarized statements from each original work contributor will certify exclusive right to the material and its authorized use.³⁹⁹

³⁸⁷ *Id.* para. 8-8b; DOD Inst. 1015.10, *supra* note 129, para. D 11a(4).

³⁸⁸ AR 215-1, *supra* note 38, para. 8-8a; DODI 1015.10, *supra* note 129, para. D 11a(4).

³⁸⁹ AR 215-1, *supra* note 38, para. 8-8c.

³⁹⁰ *Id.* para. 8-8d.

³⁹¹ *Id.* para. 8-8g. This paragraph does not permit casino games to be advertised through the United States Mail under any condition, but it is permissible to use the United States Mail for advertising bingo. *Id.* paras. 8-6 (bingo), 8-18d (raffles).

³⁹² See 10 U.S.C. § 113; AR 608-10 *supra* note 210.

³⁹³ AR 608-10, *supra* note 210, para. 2-24.

³⁹⁴ AR 215-1, *supra* note 38, para. 8-10.

³⁹⁵ *Id.* para. 8-10b(1)(a).

³⁹⁶ *Id.* paras. 8-10b(5)(a), 8-10b(5)(d) (recording, filming, or duplication), 8-10b(5)(f) (discounted and royalty-free copyrights), app. H-7a (local original works). See also 17 U.S.C. § 101. A sample DA Form 3238-R is at AR 215-1, pages 157-59.

³⁹⁷ *Id.* para. 8-10b(5)(d).

³⁹⁸ *Id.* app. H-6.

³⁹⁹ *Id.* app. H-7.

Members of the entertainment program, professional staff, soldiers, and civilian employees of the Army may offer a work of their creation to be produced by the Army, but they may not receive payment from the project.⁴⁰⁰ Royalty-free or discounted licenses will not be used if an admission fee is charged, professional entertainers are paid, or the Army sponsors the event.⁴⁰¹ If an admission fee is charged, Army bands may not furnish the theatrical music support.⁴⁰²

(11) Commercial Entertainment. Morale, welfare, and recreation activities may only book professional entertainment that meets regulatory requirements and military community standards. Performers known to have offended any racial or ethnic groups or who have dressed inappropriately may not be booked.⁴⁰³

The DCA may approve written nonappropriated fund entertainment contracts under \$25,000, and the installation commander may approve such contracts above \$25,000. Entertainers receive no free food, beverages, transportation, or other considerations unless specified in the contract. An MWR activity may not enter into a contract with government employees or their substantially owned or controlled organizations, unless the MWR activity cannot otherwise meet its needs.⁴⁰⁴

Contracts for entertainment must stipulate that the producer is responsible for copyright clearances and licenses. The entertainment program manager must submit producer-supplied copyright clearances and licenses to the CFSC at least six weeks prior to the performance.⁴⁰⁵

If the contract specifies that the performer is paid immediately after a successful performance, the Central Accounting Of-

fice (CAO) may issue a check in advance to the responsible manager. The manager on duty monitors the performance and provides a written evaluation to the CAO. If the performance is substandard or objectionable, payment may be withheld, and the contracting officer and staff judge advocate are notified. The installation commander must be advised of incidents that may attract unfavorable comments, controversy, or publicity. The manager on duty must provide a report of any substandard or offensive performances,⁴⁰⁶ any unfavorable comments, controversy, or publicity to the installation commander on the first working day following the event.⁴⁰⁷

(12) Golf. Golf activities may include lessons, open play, league play, tournaments, handicapping services, driving ranges, miniature golf, pro shops, golf club repair, privately owned golf cart storage, food and beverage service (including alcoholic beverages), and locker, equipment, and golf cart rental. Fees and charges must be prominently displayed. Golfers with memberships from other Army installations receive reciprocal privileges.⁴⁰⁸

No APFs may be used to operate, equip, or maintain a DOD golf course except at remote and isolated locations or areas outside the United States.⁴⁰⁹ Installation golf professionals may share a percentage of the earnings from the sale of merchandise, rentals, and lessons. The IMWRF golf course managers may provide golf instruction under a nonpersonal services contract.⁴¹⁰ Golf course employees may not repair or maintain privately owned golf carts.⁴¹¹

(13) Gyms, Physical Fitness Facilities, Field Houses, and Aquatic Training. New fitness and aquatic training facilities must be conveniently located to maximize use.⁴¹² Command-

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* para. 8-10b(5)(f)(3).

⁴⁰² *Id.* para. 8-10b(4)(f).

⁴⁰³ *Id.* para. 8-11.

⁴⁰⁴ *Id.* para. 8-11a. See also DOD 5500.7-R, *supra* note 187 (concerning conflicts of interests); DEP'T OF ARMY, REG. 215-4, MORALE, WELFARE, AND RECREATION: NONAPPROPRIATED FUND CONTRACTING (10 Sept. 1990) (concerning contracting) [hereinafter AR 215-4].

⁴⁰⁵ AR 215-1, *supra* note 38, paras. 8-11b(1), 8-10b(5)(c).

⁴⁰⁶ *Army Regulation 215-1* defines "offensive" broadly. See *Id.* para. 8-11b(5)(c).

⁴⁰⁷ *Id.* paras. 8-11b(3)-(5).

⁴⁰⁸ *Id.* para. 8-12.

⁴⁰⁹ 10 U.S.C. § 2246 (1995).

⁴¹⁰ AR 215-1, *supra* note 38, para. 8-12b(3). See also DOD 5500.7-R, *supra* note 187 (concerning conflicts of interests); AR 215-4, *supra* note 405 (concerning contracting).

⁴¹¹ AR 215-1, *supra* note 38, para. 8-12a(3)(b).

⁴¹² *Id.* para. 8-13b(1).

ers may use APF funds to purchase memberships for soldiers at local commercial or municipal fitness facilities if military facilities are not available or adequate, if commuting distances to the nearest military installation would cause an unreasonable hardship, and if no free opportunities exist in the civilian community.⁴¹³ Civilian employees and AD family members may use fitness and aquatic training facilities subject to the local commander's discretion.⁴¹⁴

(14) Leisure Travel Services. Leisure Travel Services (LTS) provides the MWR patron nonofficial travel and travel-related services at market or discount prices. Commercial travel offices (CTOs) and information, ticketing, and registration (ITR) are programs under LTS.⁴¹⁵ Overseas, LTS provides all tour and travel-related services not specified in the United Services Organization (USO) tour program memorandum of understanding.⁴¹⁶ Authorized MWR patrons may use LTS to arrange activities for POs to which they belong.⁴¹⁷

The CTOs provide services generally associated with commercial travel agencies. These services include: air, rail, and bus ticketing; cruises; tours and resort vacation packages; and lodging and auto rental reservations as part of other commercial travel arrangements. The CTOs provide both official and leisure commercial travel services, but the installation transportation officer has ultimate responsibility for official travel arrangements made from CTOs.⁴¹⁸ The CTOs may contract to receive a concessionaire fee payment. The local CTO normally pays a percentage of its gross leisure sales to the IMWRF.⁴¹⁹

The ITR supplements the CTOs by providing regional travel services such as information, tickets, local and regional group tours and travel arrangements, and local hotel reservations. A CTO and ITR may not directly compete with each other. They should complement and supplement the services that the CTOs provide.⁴²⁰ Although the ITR should serve as an advanced sales outlet for MWR events and provide the revenue to the supported MWR activity, other MWR activities may manage their own sales or registration.

Information, ticketing, and registration personnel may not accept gratuities from businesses or persons having or seeking business with the IMWRF;⁴²¹ however, ITR personnel may accept free or discount transportation, accommodation, or meals if a formal contract is issued, or if the individual is TDY and deducts services received from the travel voucher.⁴²²

Volunteers providing gratuitous director or guide services or escort services for an LTS-arranged trip must execute a written contract with the LTS. The contract will specify benefits provided by the Army (for example, transportation, food, lodging, and admissions) and individual responsibilities (for example, local custom-required spot payments to vendors). Volunteers must receive MWR policies and procedures orientation and first aid training.⁴²³

(15) Libraries. Libraries offer books, periodicals, audiovisuals, and other resources necessary to meet American Library

⁴¹³ *Id.* para. 8-13b(2).

⁴¹⁴ *Id.* paras. 8-13b(2)(b), (2)(c). Morale, welfare, and recreation physical fitness programs are not part of *Army Regulation 600-63, Army Health Promotion for DA Employees*. DEP'T OF ARMY, REG. 600-63, PERSONNEL-GENERAL: ARMY HEALTH PROMOTION (17 Nov. 1987).

⁴¹⁵ AR 215-1, *supra* note 38, para. 8-14.

⁴¹⁶ *Id.* para. 8-14b(3); *see* tbl. 8-1 (program responsibilities of each office).

⁴¹⁷ *Id.* para. 8-14b(2).

⁴¹⁸ *Id.* para. 8-14a(1).

⁴¹⁹ *Id.*

⁴²⁰ Under the Army's regional travel services contract, ITR offices have primary responsibility to serve individuals using personal conveyance for travel. *Id.* para. 8-14a(2)(b).

⁴²¹ *Id.* app. I-1. *See also* AR 215-4, *supra* note 404, para. 1-25 (Contracting for fee or commission acceptance).

⁴²² AR 215-1, *supra* note 38, app. I-2.

⁴²³ *Id.* app. I-3.

Association and Army continuing education standards.⁴²⁴ The CFSC provides monthly book selection and acquisition for Army libraries.⁴²⁵ Libraries must post copyright warnings near unsupervised patron copying machines. Libraries may make one copy of copyrighted material for private study, scholarship, or research.⁴²⁶

(16) Food, Beverage, and Entertainment Programs. Morale, welfare, and recreation food, beverage, and entertainment (FB&E) programs include membership clubs, nonmembership clubs, catering operations, and snack bars.⁴²⁷ Nonmembership FB&E theme operations (for example, sports bars, "old west" steakhouses, and "rock n' roll" restaurants) have begun to take the place of "fine dining" often associated with officers' clubs.⁴²⁸ Snack bars provide short-order menu items without table service in conjunction with other MWR activities like bowling, golf, and recreation centers. Vending machines and brand-name fast food facilities are not part of the snack bar operation.⁴²⁹ In limited circumstances, FB&E programs may sell packaged beverages.⁴³⁰

The installation may contract for FB&E services on a sole source basis only in limited circumstances permitted in the FAR.

Such circumstances could, for example, include a luncheon for a distinguished visitor whose schedule does not allow time for travel to an off-post facility for lunch.⁴³¹

Vendors and sales representatives may conduct sales promotions in FB&E operations. If the FB&E program wants to initiate such a promotion, it must send requests to qualified vendors describing the desired promotion. If the promotion involves alcohol, the FB&E program manager must supervise the event.⁴³² FB&E program managers, employees, and their immediate families and guests may not take part in or accept prizes at FB&E program events.⁴³³ The Criminal Investigation Division Command must perform a background check on program management personnel and central cashiers prior to their hiring.⁴³⁴

Military membership clubs include officers, noncommissioned officers, enlisted, and community clubs (which serve two or more of the above categories).⁴³⁵ Membership is voluntary.⁴³⁶ Clubs that charge membership dues must issue membership cards.⁴³⁷ Membership cards are the primary means of identifying those eligible for reciprocal privileges at other installations' clubs.⁴³⁸ If a husband and wife are eligible for membership in different clubs,

⁴²⁴ *Id.* para. 8-15a. See also DOD Inst. 1015.10, *supra* note 129, encl. 4, para. A-4 (generally not a military training library); DEP'T OF ARMY, REG. 25-1, INFORMATION MANAGEMENT: THE ARMY INFORMATION RESOURCES MANAGEMENT PROGRAM (18 Nov. 1988) (micrographics production and reproduction); DEP'T OF ARMY, REG. 190-47, MILITARY POLICE: THE ARMY CORRECTIONS SYSTEM (17 June 1994) (support of confinement and correctional facilities); DEP'T OF ARMY, REG. 690-950, CIVILIAN PERSONNEL: CAREER MANAGEMENT (8 Sept. 1988); DEP'T OF ARMY, PAMPHLET 570-551, STAFFING GUIDE FOR U.S. ARMY GARRISONS (10 Oct. 1982); DEP'T OF ARMY, REG. 735-17, PROPERTY ACCOUNTABILITY: ACCOUNTING FOR LIBRARY MATERIALS (21 Nov. 1991); DEP'T OF ARMY, PAMPHLET 25-96, INFORMATION MANAGEMENT: LIBRARIES-INFORMATION CENTERS: THE ARMY LIBRARY PROGRAM (18 Mar. 1991) (establishment and disestablishment of libraries); DEP'T OF ARMY, REG. 870-5, HISTORICAL ACTIVITIES: Military History: RESPONSIBILITIES, POLICIES, AND PROCEDURES (12 July 1983) (historical material); DEP'T OF ARMY, PAMPHLET 25-51, OFFICE MANAGEMENT: THE ARMY PRIVACY PROGRAM-SYSTEMS NOTICES AND EXEMPTION RULES (21 Sept. 1988) (Privacy Act and Freedom of Information Act review of requests for circulation information).

⁴²⁵ AR 215-1, *supra* note 38, para. 8-15b(7)(a).

⁴²⁶ *Id.* para. 8-15b(9).

⁴²⁷ *Id.* para. 8-16a.

⁴²⁸ *Id.* para. 8-16c; Information Paper, CFSC-BP, 5 Dec. 1995, POC Shirley Kappa/DSN 325-1382.

⁴²⁹ *Id.* para. 8-16d.

⁴³⁰ *Id.* para. 8-16e(14).

⁴³¹ *Id.* para. 8-16e(2).

⁴³² *Id.* paras. 8-16e(7), e(9); ch. 7 (alcohol sales). See also DOD 7000.14R, *supra* note 50 (gifts, conflicts of interest); AR 215-4, *supra* note 405 (request for proposals).

⁴³³ AR 215-1, *supra* note 38, para. 8-16e(4).

⁴³⁴ *Id.* para. 8-16e(13).

⁴³⁵ *Id.* para. 8-16b.

⁴³⁶ *Id.* para. 8-16b(3).

⁴³⁷ *Id.* para. 8-16b(3)(b).

⁴³⁸ *Id.* para. 8-16b(6)(d).

each may join the club for which he or she is eligible. If both spouses are eligible for membership in the same club, both may become members, or one may join as a sponsor.⁴³⁹ Members will not be charged dues for their last month of membership.⁴⁴⁰

Nonmembers may use membership clubs under the following conditions:

- a. As a guest of a member (if the nonmember is not eligible for membership).
- b. If the installation commander authorizes limited use for authorized MWR patrons assigned to or employed by the installation. This is usually limited to dining hour food services.
- c. When attending a command-sponsored event.
- d. When in a transient status or on TDY for less than thirty days.
- e. As an official guest on the installation.
- f. When attending private functions (for example, a wedding reception).
- g. When attending PO functions.⁴⁴¹

Installations may contract with the IMWRF for the clubs to provide troop feeding services for emergency situations (for example, mobilizations) and when troop dining facilities are not available.⁴⁴²

(17) Outdoor Recreation. Outdoor recreation activities may charge fees.⁴⁴³ The public may use these activities subject to

safety, mission requirements, and impact on recreational use by military community members.⁴⁴⁴

a. Boating and Marinas. Patrons who meet local, state, and federal safety and licensing requirements may use government watercraft.⁴⁴⁵ Marinas provide berthing facilities for private and government owned watercraft as well as sales outlets for food and related equipment.⁴⁴⁶

b. Cabins, Cottages, Cabanas, Trailers and/or Tents (C3T2). These may be offered at Army travel camps or outdoor recreation campgrounds. Individuals or groups may not reserve C3T2 for exclusive or priority use. Reservations are made on a first-come, first-serve basis, regardless of rank. Homesteading or use of Army Travel camps or outdoor recreation facilities for temporary or permanent quarters is not authorized. When required for security or program management reasons, outdoor recreation staff may reside on site and are allowed family housing or barracks furnishing provided they are charged rent.⁴⁴⁷

c. Campgrounds. Small campgrounds primarily support camping or other outdoor recreation activities with minimum or intermediate campground development. Large campgrounds are primarily stand-alone operations with a dedicated staff and maximum development.⁴⁴⁸

d. Equipment Checkout Centers. These centers organize and conduct educational, safety, and instructional classes; organize specialized tours; coordinate equipment facility maintenance; store recreational vehicles for private owners; coordinate outside maintenance and renovation projects for parks, picnics areas, marinas, firing ranges, and operate checkout and resale operations.⁴⁴⁹

⁴³⁹ *Id.* para. 8-16b(3)(b)2(c).

⁴⁴⁰ *Id.* para. 8-16b(5)(a).

⁴⁴¹ *Id.* para. 8-16b(7). See also *id.* tbl. 6-1 (concerning MWR eligibility).

⁴⁴² *Id.* paras. 8-16b(2)(c), (2)(d). See also 18 U.S.C. § 1301 (1995).

⁴⁴³ AR 215-1, *supra* note 38, para. 8-17b(5).

⁴⁴⁴ *Id.* para. 8-17b(4).

⁴⁴⁵ *Id.* para. 8-17b(10).

⁴⁴⁶ *Id.* para. 8-17b(18).

⁴⁴⁷ *Id.* para. 8-17b(11).

⁴⁴⁸ *Id.* para. 8-17b(12).

⁴⁴⁹ *Id.* para. 8-17b(13).

e. **Army Flying Activities.** These activities offer recreational off duty flying opportunities for qualified MWR patrons. All aircraft, pilots, instructors, and mechanics must hold current Federal Aviation Administration certification. The required flying activities personnel (flight activities manager, operations officer, safety officer, maintenance officer, and chief flight instructor) may be employed full-time, part-time, or provided as a gratuitous service. The installation commander may authorize patrons to use hangar space and maintenance facilities and to purchase petroleum products. The installation commander must authorize each aircraft or equipment acquisition. The resale of incidental merchandise (for example, maps, plotters, flight computers, log books, and training materials) is authorized. Flying services also may operate snack bars.

Aircraft use is limited to bona fide recreational flights. Aircraft may not be used to transport passengers or cargo for a fee or to support skydiving or sport parachuting activities. Installation flying activities may allow patrons of other flying activities to fly aircraft if they pass a flight check and have the proper certifications.⁴⁵⁰

f. **Hunting and Fishing.** The outdoor recreation officer manages these activities. After coordinating with appropriate state and federal wildlife management agencies, installations may collect special state hunting and fishing permit fees. Revenues generated by the fees must be used for installation wildlife conservation.⁴⁵¹

g. **Sport Parachuting Activities.** These activities are organized and conducted under applicable federal and Army standards. Sport parachuting activities may perform public relations demonstrations. They may not be organized as a private organization. Sport parachutist may only jump from military aircraft provided at no expense to the Army. To avoid any cost to the Army, jumps must be scheduled to coincide with scheduled flights or aircrew training requirements. Commanders may loan equipment to sport parachuting activities, and the Defense Reutilization and Marketing Office may provide them equipment at reduced or no cost.⁴⁵²

h. **Shooting Sports Centers and Rod and Gun Activities.** These centers and activities offer trap, skeet, archery, rifle

and pistol firing. The staff judge advocate must assist with firearms dealer applications and renewals. Buyers must be over eighteen years old to purchase rifles and shotguns or over twenty-one years old to purchase handguns. Activities located on United States territories purchasing firearms and ammunition from United States manufacturers or importers are exempt from federal sale taxes. Overseas activities' sales will comply with the local SOFA. Physical security of firearms and ammunition must comply with HQDA standards.⁴⁵³

i. **Water Activities.** These activities include swimming, jet skiing, water skiing, scuba diving, fishing, boating, snorkeling, and clamming. Swimming areas that do not provide life-guards must have safety signs posted.⁴⁵⁴

(18) **Raffles.** Morale, welfare, and recreation activities may conduct raffles to raise money subject to the following conditions:

- a. The raffle complies with federal law.⁴⁵⁵
- b. The raffle complies with state and local laws (unless held on installations under exclusive federal jurisdiction).
- c. The raffle is not prohibited by host-country laws or agreements (when held at installations in foreign countries).
- d. The staff judge advocate has reviewed the proposal for legal sufficiency.
- e. The installation commander has approved the raffle in writing, in advance.
- f. Individual raffle prizes may not have a retail value exceeding \$15,000. The total retail value of all prizes one IMWRF awards in one fiscal year may not exceed \$20,000 without MACOM approval.
- g. Raffle tickets, raffle advertisements, and other related materials may not be mailed through the United States mail unless raffles are authorized in the state in which the raffle is to be held.

⁴⁵⁰ *Id.* para. 8-17b(14), app. M.

⁴⁵¹ *Id.* para. 8-17b(17). See also DEP'T OF ARMY, REG. 420-76, FACILITIES ENGINEERING: PEST MANAGEMENT (3 June 1986).

⁴⁵² AR 215-1, *supra* note 38, para. 8-17b(21).

⁴⁵³ *Id.* para. 8-17b(23). See also 18 U.S.C. §§ 921-28 (1995); 27 C.F.R. § 178 (1995) (dealer's licenses); 26 U.S.C. § 4181 (1995) (taxes); DEP'T OF ARMY, REG. 190-11, MILITARY POLICE: PHYSICAL SECURITY OF ARMS, AMMUNITION, AND EXPLOSIVES (30 Sept. 1993); DEP'T OF ARMY, REG. 710-2, INVENTORY MANAGEMENT: USING UNIT SUPPLY SYSTEM (MANUAL PROCEDURES) (28 Feb. 1994) (physical security).

⁴⁵⁴ AR 215-1, *supra* note 38, para. 8-17b(27).

⁴⁵⁵ 18 U.S.C. § 1301 (1995).

h. The timing of the raffle may not conflict with the Combined Federal Campaign or the Army Emergency Relief Campaign.

i. Prize winners must be advised of potential tax liability.

j. Patrons must be at least eighteen years old. When a raffle is part of an event to which the general public has been invited, the general public may purchase raffle tickets if raffles are permitted in the state in which the installation is located. Local nationals overseas may not purchase tickets.

k. Raffle tickets may not be given or resold to noneligible persons.

l. Participation must be voluntary. Coercive tactics to increase sales are prohibited.

m. Issuance of raffle tickets and related documents must comply with applicable privacy requirements.⁴⁵⁶

n. Raffles must be structured to ensure the sponsor at least breaks even.

o. The maximum number of raffle tickets to be sold must be printed on the ticket.⁴⁵⁷

(19) Recreation Centers and Better Opportunities for Single Soldiers (BOSS). The recreation center program supports the MWR mission by providing functions that, due to space and funding constraints, may not otherwise be available. Examples include skills development classes, lectures, cultural exchange activities, organization days, carnivals, and human relations services. Recreation centers may assess fees for activities such as formal classes, bingo, Monte Carlo nights, fashion shows, and contests. Recreation centers also may lease space for private meetings and parties.⁴⁵⁸

The BOSS program provides self-development, leisure, and educational opportunities for AD soldiers with emphasis on the single and unaccompanied soldier. A BOSS committee may be established to suggest ways to enhance quality of life for the soldier. Many BOSS activities are held in recreation centers, but the BOSS program is a distinct entity, separate from the recreation center program.⁴⁵⁹

(20) Sports. Installation and unit level sports programs are designed for broad-based participation in a full range of individual and team sports. Organized sports are primarily designed for military personnel; however, the commander may authorize other patrons to participate in organized sports leagues when too few military persons are available to form teams for intramural play. Such persons may not participate with military personnel in organized individual sports. Children are not eligible for intramural programs if they are eligible for Youth Services sports programs. Mixed participation by men and women in installation sports programs is subject to the commander's discretion.⁴⁶⁰

Teams or individuals representing the Army may not participate in any sports event where participants, administrators, or spectators demonstrate unlawful discrimination based on race, creed, color, or sex. No participants in the Army Sports Program, including those assigned, detailed, or volunteering services, may use drugs or medications designed to improve athletic performance.⁴⁶¹

Athletic officials are funded with APF only under an APF contract or purchase order. A NAFI may provide the services under contract or purchase order only if it is the sole source of the required services, and the contract complies with the FAR. Athletic officiating opportunities are open to all qualified applicants and are not restricted to off duty military or civilian employees. The use of off duty military or civilian employees must comply with government regulations regarding the employment of off duty military personnel or government contractors.⁴⁶² The staff judge advocate must review each such contract for legal sufficiency, regardless of amount.⁴⁶³

⁴⁵⁶ See DEP'T OF ARMY, REG. 340-21, OFFICE MANAGEMENT: THE ARMY PRIVACY PROGRAM (5 July 1985).

⁴⁵⁷ AR 215-1, *supra* note 38, para. 8-18.

⁴⁵⁸ *Id.* para. 8-19b.

⁴⁵⁹ *Id.* para. 8-19c.

⁴⁶⁰ *Id.* para. 8-20b.

⁴⁶¹ *Id.* para. 8-20b(1)(e).

⁴⁶² *Id.* para. 8-20b(3)(b). See also AR 215-4, *supra* note 405; AR 215-3, *supra* note 248.

⁴⁶³ AR 215-1, *supra* note 38, para. 8-20b(3)(b).

Installation sports program managers coordinate with the installation safety directors to ensure appropriate safety practices (including those prescribed by the appropriate national sports governing bodies) are followed. For example, professionals in boxing, judo, and karate may not participate with amateurs; Army-sponsored boxers must wear appropriate protective equipment; individuals playing racquetball and handball must wear eye protection.⁴⁶⁴

Competition between Army and civilian teams is permitted under certain conditions. Various rules govern the use of professionals during joint Army and civilian competitions.⁴⁶⁵ Before entering Army personnel in any civilian competition, the commander should carefully consider the effect of the competition on community relations, its consistency with the Army Sports Program, and the nature and details of any commercial sponsorship.⁴⁶⁶ Locally sponsored sporting events may not use the terms "interservice" or "Armed Forces." These terms are reserved for competitions that the Armed Forces Sports Committee (a DOD agency) sponsors.⁴⁶⁷

The Army sports program has various types and levels of competition:⁴⁶⁸

a. Unit. Unit level programs are for active duty soldiers only. They are conducted during or after duty.

b. Intramural. Intramural level programs supplement unit level programs. They are usually conducted off-duty. Civilians are eligible to compete if there are not enough active duty soldiers. Civilians may not compete above this level.

c. Installation, regional, and MACOM. The MACOMs may conduct installation, regional, or MACOM championships as follow-ons to intramural programs. The MACOMs may au-

thorize the installations to place participants on administrative leave to practice for a maximum of thirty days before a championship.

d. Departmental and Armed Forces. Competition at these levels is designed for accomplished athletes meeting certain administrative requirements⁴⁶⁹ and certain minimum skill levels.⁴⁷⁰ The MACOMs may nominate competitors. Individuals who believe they qualify also may submit applications to CFSC, which ultimately bears most training and administrative costs.

e. National and international competition. Exceptional soldier-athletes may qualify for participation in prestigious national and international competitions such as the Pan American and Olympic Games.⁴⁷¹

f. World Class Athlete Program (WCAP). Athletes of world-class caliber may be assigned for no more than two years to this program to train for national and international sports competitions, including the Olympics. The CFSC ultimately chooses applicants who have at least two years remaining in the service through the month following completion of the next Olympic Games. The WCAP is the primary assignment for those selected although athletes will be encouraged to pursue available opportunities to work in their career field or military occupational specialty as much as possible. When not training, athletes perform duties at their assigned units.⁴⁷²

g. United States Modern Pentathlon Program. Soldiers who meet certain standards for swimming and running may travel on permissive TDY (at no expense to the government although NAFs may be available) for up to ninety days to compete for assignment to the United States Modern Pentathlon Program. Normally, up to thirty full-time athletes are assigned to the program.⁴⁷³

⁴⁶⁴ *Id.* para. 8-20b(4) (Table 8-2 of AR 215-1 lists the United States National sports governing bodies).

⁴⁶⁵ *Id.* para. 8-20b(6).

⁴⁶⁶ *Id.* para. 8-20b(6)(f).

⁴⁶⁷ *Id.* para. 8-20b(8).

⁴⁶⁸ *Id.* para. 8-20c.

⁴⁶⁹ *Id.* para. 8-20c(4).

⁴⁷⁰ *Id.* para. 8-20(c)(4)(1)-(3), tbl. 8-3 (listing the minimum qualifications for track and field competitors).

⁴⁷¹ *Id.* para. 8-20(c)(5); DEP'T OF DEFENSE, DIR. 1330.4, PARTICIPATION IN ARMED FORCES, NATIONAL, AND INTERNATIONAL SPORTS ACTIVITIES (9 Nov. 1987) (governs the participation of United States Armed Forces personnel in national and international competitions).

⁴⁷² AR 215-1, *supra* note 38, para. 8-20(c)(6).

⁴⁷³ *Id.* para. 8-20(c)(7).

h. United States Army Parachute Team (Golden Knights). This program represents the Army in national and international sport parachuting events and competitions and in doing so boosts recruiting, retention, and public relations. Its members are chosen from volunteers meeting certain parachuting qualifications. Candidates may try out for the program in a TDY-and-return status.⁴⁷⁴

(21) **Swimming.** The Army swimming program promotes fitness and recreation. The program may offer swimming lessons, water aerobics, lap swimming, and water safety and survival lessons. Pools primarily used for physical fitness receive more APFs than those primarily used for recreational swimming. Certain training and staffing requirements must be met.⁴⁷⁵

(22) **Transient Housing Facilities.** The transient housing facilities (THF) are operated under a single management structure. The Assistant Chief of Staff for Installation Management (ACSIM), Army Housing Division, is the functional proponent for THF. The CFSC provides advice and recommendations.⁴⁷⁶ The THF include Unaccompanied Personnel Housing (UPH) and TDY personnel housing. The UPH and TDY facilities are not MWR facilities, although they may generate limited nonappropriated funds by service charges (such as maid service).⁴⁷⁷ The THF also include guest houses, which are MWR activities and generate NAFIs. Guest houses support permanent change of station (PCS) and recreational travelers.⁴⁷⁸

The THF classification is based on majority use by status of occupant (such as TDY, PCS, unofficial, and recreational), with one exception: All THF built with MWR nonappropriated funds or built under a MWR nonappropriated fund privatization contract are considered guest houses.⁴⁷⁹

The Director of Public Works (DPW) is the installation manager for the THF. Guest house practices must be coordinated with the DCA, who provides guidance and nonappropriated fund program oversight to the installation commander concerning guest house budgeting, financial management, operating standards, and capital improvements.⁴⁸⁰ Guest house policies must be coordinated with the CFSC.

The CFSC is responsible for the acquisition of commercial MWR lodging facilities and provides contracting support. Commercial lodging facilities include hotels and motels located on military installations acquired through nonappropriated contracts. They provide quality accommodations at twenty to twenty-five percent below the average rate for similar off-post accommodations.

(23) **Youth Services.** Family members enrolled in grades 1-12 whose parents are assigned to an installation are eligible for the youth services (YS) program. The YS program is designed to support the well-being and social growth of the youth. The CFSC issues overall program guidance. Federal, state, and local resources may be used for YS programs.⁴⁸¹

All YS staff members and volunteers must be screened for suitability.⁴⁸² *Army Regulation 215-1*, table 8-4, provides minimum adult-to-youth ratios according to age. At least two professionals, or one professional and one volunteer, must be on duty at any open facility or program, regardless of the number of youths present. Persons in support positions (such as clerical, maintenance, and food services) are not counted when calculating staffing ratios.⁴⁸³

⁴⁷⁴ *Id.* para. 8-20(c)(8).

⁴⁷⁵ *Id.* para. 8-21.

⁴⁷⁶ *Id.* paras. 8-22a, b(1).

⁴⁷⁷ DEP'T OF ARMY, REG. 210-50, INSTALLATIONS: HOUSING MANAGEMENT (24 Apr. 1990) (contains guidance for computation of service charges for UPH/TDY facilities).

⁴⁷⁸ AR 215-1, *supra* note 38, para. 8-22a(1).

⁴⁷⁹ *Id.* para. 8-22a(2).

⁴⁸⁰ *Id.* para. 8-22b.

⁴⁸¹ *Id.* paras. 8-23a, b.

⁴⁸² AR 608-10, *supra* note 211; AR 215-3, *supra* 247 (these regulations control the screening process).

⁴⁸³ AR 215-1, *supra* note 38, para. 8-23b(6).

c. Optional Program Management.

(1) **Community Activity Centers.** Community activity centers (CACs) provide the opportunity to consolidate separate facilities such as recreation centers, BOSS activities, entertainment activities, and arts and crafts activities. The CAC component activities retain their funding category designation (A, B, or C).⁴⁸⁴

(2) **Recreation Clubs.** Recreation clubs, which are distinct from military clubs and private organizations, provide specialized activities such as archery, drama, ceramics, skiing, baseball, and rugby. These clubs operate as part of the community recreation program. The community recreation program manager may designate a club representative to collect fees for an event, but a community recreation employee must staff any on-going activity that handles funds. Funding depends on the category of the recreation activity. Examples of category B recreation clubs include varsity baseball, drama, ceramics, archery, and woodworking. Category C recreation clubs include skeet shooting, boating, horseback riding, and motorcycling.⁴⁸⁵

(3) **Unit Recreation.** Unit personnel may plan and conduct recreational activities in unit areas. They are assisted by at least one MWR recreation or sports specialist per brigade-size unit. The MWR specialist's duties include coordinating activities, training designated military personnel, operating recreation facilities, and procuring and maintaining equipment.⁴⁸⁶

d. Mobilization, Contingency, and Wartime Operations.

(1) **Responsibilities.** Because MWR activities are necessary to maintain physical fitness and to alleviate combat stress, commanders of deployable units must, during peacetime, plan for MWR support for mobilization, contingency, and wartime operations. Commanders are responsible for acquiring, assembling, and shipping their own thirty-days supply of athletic, recreation, and library book kits.⁴⁸⁷

(2) **Staffing.** Commanders of deployable units and installation commanders jointly designate deployable MWR civilians. Company, battalion, and brigade commanders of deployable units should designate an officer or noncommissioned officer as the unit MWR coordinator. This individual, with the assistance of the civilian specialist, serves as the focal point for the unit MWR program.⁴⁸⁸

(3) **Other MWR Activities in Contingency and Combat Operations.** Deployed troops may receive entertainment in coordination with the USO and the Armed Forces Professional Entertainment Office. As conditions permit within the theater of operations, clubs, unit lounges, Armed Forces Recreation Centers (AFRCs), and rest areas may be established. The CFSC also may establish AFRCs outside the theater of operations.⁴⁸⁹

(4) **Financial Operations.** Physical fitness and other MWR activities, both in-theater and on the installation, must be mission funded with APFs to the fullest extent authorized. Installation MWR funds electing to use their nonappropriated fund resources to support authorized APF contingency functions will not be reimbursed from the Army MWR fund.⁴⁹⁰

(5) **Installation MWR Services.** The installation from which a unit deploys continues to offer basic MWR activities as long as possible during all levels of mobilization.⁴⁹¹

(6) **Redeployment and Demobilization.** On redeployment or demobilization, nonappropriated fund accounts must be closed and NAFIs disestablished as necessary. Morale, welfare, and recreation equipment in-theater must be accounted for and properly redistributed.

8. MWR Employees.

a. **General.** Morale, welfare, and recreation activities are operated by military APF and NAF employees. Although military personnel and civilian employees, both APF and NAF, are

⁴⁸⁴ *Id.* para. 8-24a.

⁴⁸⁵ *Id.* para. 8-24b.

⁴⁸⁶ *Id.* para. 8-24c.

⁴⁸⁷ *Id.* (provides commanders additional guidance and appropriate references). *See also id.* para. 8-28.

⁴⁸⁸ *Id.* para. 8-26.

⁴⁸⁹ *Id.* para. 8-29 (subparagraph e discusses the operation of the Army Recreation Machine Program in the theater of operations).

⁴⁹⁰ *Id.* para. 8-30.

⁴⁹¹ *Id.* para. 8-31.

included in separate personnel management systems, MWR managers must treat each in accordance with applicable policy. Employment of nonappropriated fund civilians must comply with applicable labor laws of the state or territory where the NAFI is located.⁴⁹² Nonappropriated fund employees are not considered employees of the United States for the purpose of law administered by the Office of Personnel Management (OPM) or the Federal Employee's Compensation Act.⁴⁹³ They are, however, considered essential to the operation of the military establishment, and their status as employees will not differ materially from the standing enjoyed by other DA civilian employees.⁴⁹⁴

Although NAF employees make up the largest category of MWR employees, military personnel and APF civilians also may be employed by NAFIs. Soldiers may be used on a full-time permanent basis to perform "command supervisory and management functions."⁴⁹⁵ Special duty military personnel may be temporarily assigned or detailed only to category A or B MWR activities, not to exceed ninety days.⁴⁹⁶ They must have a noncritical military occupational specialty (MOS), be awaiting reassignment or other personnel action, and not currently required to perform their MOS.⁴⁹⁷

Military personnel employed by MWR activities during off duty time may not be paid from APFs.⁴⁹⁸ In the case of enlisted soldiers, their off duty employment must not interfere with the performance of their assigned military duties. Furthermore, written approval from the soldier's commanding officer is required prior to employment of a military member.⁴⁹⁹ If, at any time, the commander determines that off duty employment is detrimental

to military duty, employment will be terminated based on disqualification.

Commissioned or warrant officers may only provide off duty services, such as officiating at sports events or conducting educational, religious, entertainment, or recreational activities, on a fee basis without direct supervision and control by official supervisors.⁵⁰⁰ This provision will not be used to compensate officers with nonappropriated funds for work in excess of their regular military duties.⁵⁰¹

The employment of retired military soldiers is carefully controlled so as to avoid the appearance of preferential treatment in hiring practices. Retirees can only be hired following strict compliance with the principles of merit and open competition.⁵⁰²

Because of 5 U.S.C. §§ 5531(2) and 5532(a), a NAFI employee is subject to the prohibition against dual pay and employment ("double dipping") in the federal service.⁵⁰³ As such, retired officers and warrant officers of the regular military components employed by a NAFI are subject to reductions in their retired pay. Furthermore, all retirees—officer and enlisted, active and Reserve Components—who retired after 11 January 1979 are subject to a ceiling on the combined total earnings and retired pay.⁵⁰⁴

The use of official time of civilian employees paid from APFs is generally prohibited. These civilian employees, however, may be utilized for audits and inspections of all NAFIs. Also, civilian employees paid from APFs may be utilized to operate, manage, or support MWR activities in other limited circumstances, such as to provide executive control and essential command supervi-

⁴⁹² AR 215-3, *supra* note 247, ch. 2.

⁴⁹³ *Id.* para. 1-6; 5 U.S.C. § 2105(c) (1995).

⁴⁹⁴ AR 215-3, *supra* note 247, para. 1-5d.

⁴⁹⁵ AR 215-1, *supra* note 38, app. D (APF Authorizations for elements of expense).

⁴⁹⁶ *Id.* This includes personnel whose standard costs are charged to an operating activity other than MWR but who have no assigned duties at the operating activity during the period of their temporary assignment to an MWR activity.

⁴⁹⁷ *Id.* para. 9-3d.

⁴⁹⁸ *Id.* para. 9-2d.

⁴⁹⁹ AR 215-3, *supra* note 247, para. 2-16d.

⁵⁰⁰ *Id.* para. 2-16b.

⁵⁰¹ *Id.*

⁵⁰² *Id.* para. 2-16f.

⁵⁰³ *Id.* paras. 2-2i, 2-16j.

⁵⁰⁴ *Id.* para. 2-16j.

sion.⁵⁰⁵ When both APF and nonappropriated fund functions are performed by the same office, MWR functions qualify for APF support.⁵⁰⁶

b. Status. Department of Army policy is to upgrade the status of NAFI civilian employees. Nonappropriated fund employees should receive the same material advantages as DA civilian employees.⁵⁰⁷ Although they are not subject to the laws administered by the OPM, they are entitled to whistleblower protection⁵⁰⁸ and to appeal to the OPM concerning the government equal employment opportunity (EEO) program and policies of nondiscrimination in government employment.⁵⁰⁹ Allegations of discrimination will first be processed through command EEO channels and paid for with APF.⁵¹⁰ Department of Army policies and procedures pertaining to NAFI employees parallel the practices concerning DA civilian personnel.

Nonappropriated fund instrumentalities must carry workers' compensation and employers' liability insurance, which must provide the same benefits as the Longshore and Harbor Workers' Compensation Act. These employees are covered by the social security program and by federal unemployment compensation. Group health, dental, and life insurance programs are available for NAFI personnel at their option and at a moderate cost to the employer and the employee.⁵¹¹

c. Instructions. On 1 February 1991, HQDA published nonappropriated fund pay instructions in *The Nonappropriated Fund Pay Band System*.⁵¹² Those instructions superseded por-

tions of chapter 3, *Army Regulation 215-3, Nonappropriated Funds and Related Activities Personnel Policies and Procedures (AR 215-3)*.⁵¹³ These sources, and the *DOD Instruction 1401.1-M, Personnel Policy Manual for Nonappropriated Fund Instrumentalities*,⁵¹⁴ are necessary for accurate research in this area. At the time of this writing, a new *AR 215-3* is being staffed through Army channels and substantial changes likely will result. Researchers of this issue should check with the CFSC to ensure that they have the most recent authority.

(1) Salary and Wages. All nonappropriated fund employees will receive equal pay for substantially equal work within the locality of employment.⁵¹⁵ In the case of pay band employees regardless of where employed, their pay will be set within the band set by management.⁵¹⁶

In no case will the pay of a nonappropriated fund civilian employee or off duty soldiers be less than the current applicable federal, state, or municipal minimum wage rate, whichever is higher.⁵¹⁷ Unless prohibited by treaty, the pay rate of United States citizens employed in foreign countries will also comply with the federal minimum wage. The only exception to these minimum wage provisions applies to summer and student employees whose wages are determined by special DOD pay schedules.⁵¹⁸

The annual pay rate for a nonappropriated fund employee may not exceed the maximum amount authorized for GS employees.⁵¹⁹ Unless specifically approved by HQDA, there are no exceptions to this maximum pay limitation. Nonappropriated fund employ-

⁵⁰⁵ AR 215-1, *supra* note 38, para. 9-3.

⁵⁰⁶ *Id.*

⁵⁰⁷ AR 215-3, *supra* note 247, para. 1-5.

⁵⁰⁸ *Id.* para. 1-5(1).

⁵⁰⁹ *Id.* para. 2-17.

⁵¹⁰ *Id.* para. 2-18.

⁵¹¹ *Id.* para. 15-6.

⁵¹² DEP'T OF ARMY, MEMORANDUM OF INSTRUCTION, THE NONAPPROPRIATED FUND (NAF) PAY BAND SYSTEM, para. 3 (1 Feb. 1991).

⁵¹³ See generally AR 215-3, *supra* note 248.

⁵¹⁴ DEP'T OF DEFENSE, INSTR. 1401.1-M, PERSONNEL POLICY MANUAL FOR NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFI) (15 Nov. 1985).

⁵¹⁵ *Id.* para. 3-2.

⁵¹⁶ *Id.* para. 3-6.

⁵¹⁷ *Id.* para. 3-2b.

⁵¹⁸ *Id.*

⁵¹⁹ AR 215-3, *supra* note 247, para. 3-2c.

ees alleging a violation of the Fair Labor Standards Act (FLSA) relating to overtime pay, minimum wages, equal pay, or child labor have the right to file a complaint directly with the OPM.⁵²⁰

(2) Probationary Periods. Each individual receiving an initial appointment to a regular full-time or regular part-time position must serve a probationary period. During this period, supervisors will observe the employee's duty performance and determine if the employee has the ability and fitness for the position.⁵²¹ All regular employees will serve a one-year probationary period.⁵²²

d. Performance Evaluation and Rating. Nonappropriated fund instrumentality employees must be evaluated and rated periodically in a fair and objective manner.⁵²³ The evaluations should be conducted on both a scheduled and continuous basis and should be discussed individually with each employee. Evaluations are used as a basis for making decisions on training, retention, promotion, reassignment, removal, and all other personnel actions. Because evaluations may have a significant impact on an employee's career pattern, the employee is entitled to a copy of their annual performance evaluation.⁵²⁴

The first-line supervisor prepares the annual performance evaluation and is responsible for developing performance requirements for each position supervised and for continually evaluating the employee's performance.⁵²⁵ The first-line supervisor must discuss informally with the employee whether the employee is meeting, exceeding, or failing to meet the performance requirements.⁵²⁶

The second-line supervisor reviews the rating recommended by the first-line supervisor and has final approval authority. If, however, the second line supervisor is geographically, or organizationally, distant from the rated employee, and the second line supervisor is not in a position to have knowledge of the employee's duty performance, the second-line supervisor may delegate final approval authority to the first-line supervisor.⁵²⁷

Each employee serving under a regular appointment will be given a performance rating annually.⁵²⁸ The following ratings may be assigned to indicate the level of performance: outstanding, excellent, satisfactory, minimally satisfactory, or unsatisfactory.⁵²⁹ To rate an employee who has completed the probationary period as unsatisfactory, a thirty-day written warning advising the employee of what performance requirement has not been met must be furnished to the employee.⁵³⁰

e. Administrative Appeals and Employee Grievances. Nonappropriated fund employees are provided with an orderly procedure for appropriate consideration of appeals and grievances.⁵³¹ A grievance is a request by an employee or by a group of employees for personal relief from matters of concern or dissatisfaction that are subject to the control of DA.⁵³² An administrative appeal is a request for reconsideration of a decision to take an adverse personnel action.⁵³³

Detailed guidance for submitting and handling grievances is contained in HQDA memorandum, subject: Nonappropriated Fund Personnel System Modernization, 25 May 1993. Although the procedures for both grievances and appeals are not as extensive

⁵²⁰ *Id.* para. 3-2e; FPM Letter 551-9, 30 March 1976.

⁵²¹ AR 215-3, *supra* note 247, paras. 2-14, 2-15a.

⁵²² *Id.* para. 2-15a.

⁵²³ *Id.* para. 6-3.

⁵²⁴ *Id.* para. 6-3i.

⁵²⁵ *Id.* para. 6-4.

⁵²⁶ *Id.* para. 6-4a.

⁵²⁷ *Id.* para. 6-4b.

⁵²⁸ *Id.* para. 6-7a.

⁵²⁹ *Id.* para. 5-7b.

⁵³⁰ *Id.* para. 11-8.

⁵³¹ *Id.* ch. 8.

⁵³² *Id.* para. 8-4a. Twenty-five areas are specifically excluded from the grievance procedures. *Id.* para. 8-3. Before taking action on a grievance, one must determine if the action is grievable.

⁵³³ *Id.* para. 8-4b. Only those personnel actions identified in AR 215-3, paragraphs 7-4d, 11-2b, d, and e, may be appealed.

for nonappropriated fund employees as they are for APF civilians, employees, supervisors and judge advocates should familiarize themselves with the due process rights prior to undertaking any grievable or appealable action.

Representation and hearing rights are very important.⁵³⁴ Additionally, nonappropriated fund employees are entitled to use official time, subject to supervisory approval, to get advice on rights and privileges from official sources, to get assistance from official sources (for example, gathering copies of witness statements), and to present grievances and appeals. Employees may not use official time or employer resources (for example, word processors) to prepare grievances or appeals.⁵³⁵

f. Disciplinary Actions. A disciplinary action is a penalty imposed by management when an employee's action does not conform to reasonable standards of conduct. Whenever possible, discipline should be maintained through cooperation, fairness, good supervisory practices, and adherence to reasonable standards of conduct.⁵³⁶ Other tools at the disposal of supervisors to help maintain discipline consist of an oral admonishment, a written reprimand, suspension from duty without pay up to fourteen calendar days, or separation for cause.⁵³⁷

Prior to undertaking a disciplinary action, supervisors should consider the seriousness of the offense, the employee's past record, the circumstances surrounding the offense, the likelihood of the proposed penalty having the desired effect, the reasonableness of the penalty in relation to the offense, the need to impose similar punishment for similar offenses, and the effect of the proposed punishment on the morale of other employees.⁵³⁸

Supervisors should initiate disciplinary actions within ten calendar days after an employee commits an offense or after a supervisor learns of the incident.⁵³⁹ For these purposes, supervisors who initiate an official investigation within ten calendar days are deemed to have acted promptly.

If, at the time of hiring, NAFI management is aware of adverse facts concerning an employee's behavior, a supervisor may not propose a disciplinary action based on those adverse facts. However, facts known at the time of hiring may be used to support a showing of a pattern of misconduct, or to show that the negative behavior carried over into an individual's employment with a NAFI, if subsequent employee behavior warrants disciplinary action.⁵⁴⁰

Once an employee has been disciplined for an offense, no further disciplinary action will be proposed against the employee for the same offense. However, prior disciplinary actions may be used in support of a charge to show patterns of conduct or behavior and in determining an appropriate penalty for a later offense.⁵⁴¹

g. Recruitment, Referral, and Selection for MWR Employment.

(1) Recruitment. To assist commanders in filling both APF and nonappropriated fund positions, the CFSC administers an MWR referral program for grades GS-9 and above, and NF-4 and above levels.⁵⁴² The referral list is issued for MWR position vacancies in continental United States commands and activities and for selected other than continental United States commands.⁵⁴³ If local recruitment efforts for lower grade positions fail to produce acceptable candidates, the CFSC will recruit and issue courtesy lists for such positions.⁵⁴⁴

⁵³⁴ See generally *id.* paras. 8-8, 8-10, 8-13, 8-17, 8-21, 8-22.

⁵³⁵ *Id.* paras. 8-9, 8-19.

⁵³⁶ *Id.* para. 7-3a.

⁵³⁷ *Id.* para. 7-4.

⁵³⁸ *Id.* para. 7-3e.

⁵³⁹ *Id.* para. 7-3e.

⁵⁴⁰ *Id.* para. 7-3g.

⁵⁴¹ *Id.* para. 7-3h.

⁵⁴² AR 215-1, *supra* note 38, para. 9-5a.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

For APF positions, the CFSC will perform the following recruitment functions:

- a. Prepare and issue Army-wide announcements to locate qualified candidates for referral to commands and activities. The CPOs will publicize all MWR vacancies to the civilian workforce and inform civilians of application procedures.⁵⁴⁵
- b. Establish and maintain a central inventory of applications for selected MWR positions identified in open-continuous announcements.⁵⁴⁶
- c. Screen applications for eligibility and qualifications. Conduct screening panels, as appropriate, to determine the best qualified candidates for referral.⁵⁴⁷

(2) **Referral.** When an MWR position vacancy for GS-9 and above occurs, the employing activity will submit to the CFSC a request for referral and describe the position to be filled.⁵⁴⁸ On receipt of a request for referral, the CFSC prepares and issues a DA Form 2600, Referral and Selection Register, to employing activities. The referral list will normally provide names of at least three qualified candidates identified through the centralized referral system. Local recruitment for MWR vacancy positions is authorized only if three such candidates are not available for referral.⁵⁴⁹

Referral lists are not provided for vacancies that occur under the following circumstances: (1) positions that are reclassified to a higher grade because of new or revised standards with either no major duty change or with additional duties; (2) positions filled by promotion on a temporary basis when the original selection was made through the competitive process; (3) temporary assign-

ments not to exceed one year; (4) personnel actions resulting from reduction in forces; (5) vacancies identified to be filled by qualified priority candidates; (6) vacancies that can be filled by lateral reassignment or transfers, and there is no known promotion potential; and (7) reassignments or transfers to a position for development purposes.⁵⁵⁰

(3) **Selection.** The selection of an employee for an MWR position vacancy is made from the CFSC referral list unless local recruiting was authorized.⁵⁵¹ Before submission to the selecting official, the CPO will question all candidates on the list for interest and availability. If all candidates are unacceptable, the CPO must provide the CFSC valid reasons for the nonselection of each candidate. The CFSC can then issue a supplemental list or authorize local recruitment.⁵⁵²

When a final selection has been made, the selecting official will contact the gaining CPO, which will then notify the losing CPO. The gaining CPO will notify the CFSC of the selection and return the referral list. The CPO also will notify, in writing, those candidates who were not selected. Copies of the notices will be sent to the CFSC by the gaining CPO.⁵⁵³ If the selection involves a promotion, the selected employee will be released from the current position within fifteen days or within thirty days if no promotion is involved.⁵⁵⁴

h. **Use of OPM Certificates of Eligibles.** If candidates on the CFSC referral list do not meet the requirements of the MWR vacancy position, the employing activity must so certify before the CFSC can authorize the use of OPM certificates of eligibles.⁵⁵⁵ Before selection from an OPM certificate will be made, the employing activity must show that the referred Army candidates do not qualify for the vacancy because they do not have the experience, skill, knowledge, or ability to perform the duties of the position in an acceptable manner.⁵⁵⁶

⁵⁴⁵ *Id.* para. 9-5c(1).

⁵⁴⁶ *Id.* para. 9-5c(2).

⁵⁴⁷ *Id.* para. 9-5c(3).

⁵⁴⁸ *Id.* para. 9-6a.

⁵⁴⁹ *Id.* para. 9-6b.

⁵⁵⁰ *Id.* para. 9-6d.

⁵⁵¹ *Id.* para. 9-7a.

⁵⁵² *Id.* para. 9-7b.

⁵⁵³ *Id.* para. 9-7d.

⁵⁵⁴ *Id.* para. 9-7e.

⁵⁵⁵ *Id.* para. 9-8.

⁵⁵⁶ *Id.*

i. Training and Professional Development.

(1) **Guidelines.** Every individual assigned to or employed in an Army MWR activity receives necessary educational opportunities to enhance near-term qualifications, efficiency, productivity, and to ensure long-term career development and progression.⁵⁵⁷

(2) **Implementation.** Primary responsibility for MWR personnel development rests with local management and supervisors.⁵⁵⁸ Generally, supervisors responsible for writing the employee's performance appraisal should develop an individual plan designed to complement the employee's professional goals and satisfy requirements for employment or career development factors.⁵⁵⁹ Management is also responsible for developing individual training and professional development plans; scheduling resources and time to accommodate and support such plans; assigning duties and responsibilities designed to reinforce training; conducting cross-training programs to supplement formal training; and providing for any special training or experience in addition to that prescribed in such plans.⁵⁶⁰

j. Mandatory HQDA Training. In addition to the formal training developed locally by management, MWR employees must successfully complete the Army Civilian Training, Education, and Development System (ACTEDS) Plan for MWR Career 51.⁵⁶¹ The ACTEDS Plan for MWR Career 51 is a structured, progressive, and sequential approach to employee development and training. It identifies mandatory mission essential training that the employee must have to achieve acceptable performance levels.⁵⁶² Failure or noncompletion of the training plan within a specified time frame will be a factor in determining if the probationary period has been completed satisfactorily.⁵⁶³ Mandatory training

which is included in job announcements for MWR management positions is centrally funded.

9. Financial Management.

a. Administration. Financial management in the area of MWR means proper planning, control, evaluation, and accountability.⁵⁶⁴ Primary areas of responsibility include safeguarding nonappropriated fund assets through proper management controls, efficient cash and capital budgeting, and identifying operational opportunities or problems using budgets and financial analyses. Civilian NAFIs and billeting NAFIs are not subject to the provisions of this chapter unless required by regulation or other governing policies.⁵⁶⁵

The Directorate of Resource Management (DRM) manages APFs at the installation level. The Directorate of Civilian Activities (DCA) or equivalent manages all installation nonappropriated funds. This includes managing the IMWRF and being the point of contact for activities or programs where management responsibilities fall outside of the DCA's functional area of responsibility.⁵⁶⁶

The successor-in-interest NAFI may provide financial support and assistance to specified or assigned NAFIs, receive the remaining assets of a NAFI following dissolution, and assume all existing liabilities.⁵⁶⁷ The successors-in-interest for the various MWR funds are listed in *AR 215-1*, chapter 11, paragraph 11-3.

b. Cash Management. Army NAFIs must generate a positive net income before depreciation which, when coupled with existing funds, will permit the NAFI to fund all of its own operating and capital requirements. This does not apply to major NAF

⁵⁵⁷ *Id.* para. 9-9.

⁵⁵⁸ *Id.* para. 9-10a.

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.* para. 9-10b.

⁵⁶¹ *Id.* para. 9-12.

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ *Id.* para. 11-1.

⁵⁶⁵ Questions and requests for exception to or deviations from requirements in chapter 11 are submitted through the applicable MACOM to USACFSC (CFSC-RM), Alexandria, VA 22331-0508. *Id.* para. 11-1.

⁵⁶⁶ There is an individual fiduciary responsibility to use nonappropriated funds properly and prevent waste, loss, mismanagement, or unauthorized use. Reporting of suspected violations at the lowest organization level possible is encouraged. *Id.* paras. 3-5, 3-6.

⁵⁶⁷ *Id.* para. 11-3.

construction which is funded by the AMWRF.⁵⁶⁸ Installation MWR funds receive local income from AAFES package beverage stores and contract telephone profits, plus a percentage of AAFES revenue generated on the installation.⁵⁶⁹

The ARMP operation fund is administered by the CFSC with net income distributed directly to the Army Recreation Machine Program Trust Fund (ARMPTF).⁵⁷⁰ Profits are split between the ARMPTF, the installation, and the MACOM. Overseas MWR activities that house recreation machines provided by the ARMP are reimbursed for operating expenses at a specified percentage.⁵⁷¹ The AMWRF is resourced primarily from two sources:⁵⁷²

a. Dividends paid from the AAFES and interest from the temporary investment of funds that are programmed but not spent.

b. Monthly Capital Reinvestment Assessment (CRA) of 2% of total installation revenue in Fiscal Year 1996 and 3% in Fiscal Year 1997 and future years. This amounts to a "tax" on the IMWRF to support the AMWRF.

Morale, welfare, and recreation fund managers must maintain strict control of accounts receivable and should consult with the installation staff judge advocate to collect overdue accounts.⁵⁷³ Debt collection procedures must comply with federal law to include the Privacy Act when applicable. Attempts must be made to notify debtors of delinquent accounts before adverse actions are taken. *Army Regulation 215-1*, paragraph 11-8(b), delineates procedures for collecting delinquent accounts. Records of the debt must be maintained for five years even if it is a written off debt.

Nonappropriated fund instrumentalities may not enter into a commercial transaction for a loan nor obtain a loan from private sources unless otherwise authorized.⁵⁷⁴ Nonappropriated fund assets may not be pledged as collateral for obligations due or payable to private or commercial sources. Loans, advances, and grants between installation Army NAFIs are acceptable upon advance approval by the applicable MACOM commanders.⁵⁷⁵

c. **Capital Expenditures.** Nonappropriated fund major construction is funded primarily from AMWRF resources. Installation or MACOM contributions toward a major construction project will be withdrawn from the installation or MACOM bank account as bills on the project are paid.⁵⁷⁶ Nonappropriated fund capital purchases and minor construction (CPMC) will be financed from local installation resources. Unless specifically waived by the MACOM, CMPC will not be budgeted to exceed 115% of the highest of the previous three years actual CMPC. An amount not to exceed 5% of the net annual AAFES dividend to the AMWRF may be used to fund CMPC at installations unable to fully fund CMPC requirements. This exception to policy is not an instrument to finance an installation's normal recurring or replacement requirements.⁵⁷⁷

d. **Budgeting.** Annual budgets prepared by Army NAFIs must comply with the guidance issued annually by the CFSC. This requirement does not apply to civilian welfare funds and billeting funds.⁵⁷⁸ The IMWRF budgets are submitted with the five year MWR plan and will include the separate elements listed in *AR 215-1*, paragraph 11-12.

The MACOMs will review and approve installation and community budgets, unless authority has been deferred to the CFSC. *Army Regulation 215-1*, paragraph 11-13, outlines specific dates

⁵⁶⁸ *Id.* para. 11-4. Nonappropriated fund instrumentalities must produce sufficient revenues to cover operating and capital requirements over the short and long term while maintaining a cash to debt ratio (total cash divided by total liabilities) between 1:1 and 2:1.

⁵⁶⁹ *Id.* para. 11-5.

⁵⁷⁰ *Id.* para. 11-22.

⁵⁷¹ *Id.* para. 11-6b.

⁵⁷² *Id.* para. 11-7.

⁵⁷³ *Id.* para. 11-8.

⁵⁷⁴ Requests for exception to this policy may be obtained by submitting a request through the MACOM to USACFSC (CFSC-RM), Alexandria, VA 22331-0508. *Id.* para. 11-9.

⁵⁷⁵ Written notice with supporting justification must be forwarded to USACFSC, (CFSC-RM), Alexandria, VA 22331-0508. *Id.* para. 11-9.

⁵⁷⁶ *Id.* para. 11-10.

⁵⁷⁷ *Id.* para. 11-11.

⁵⁷⁸ Directives concerning annual budgets for Civilian Welfare Funds is contained in *Army Regulation 215-7*. DEP'T OF ARMY, REG. 215-7, MORALE, WELFARE, AND RECREATION: CIVILIAN NONAPPROPRIATED FUNDS AND MORALE, WELFARE, AND RECREATION ACTIVITIES (22 Apr. 1988). For Billeting Funds see *Army Regulation 210-50*, DEP'T OF ARMY, REG. 210-50, INSTALLATIONS: HOUSING MANAGEMENT (24 Apr. 1990).

and submission requirements. Only future data concerning the Annual Operating Budget (AOB) may be revised. This does not preclude preparation and use of actual data from previous periods together with projected data to compare forecasts with results, actual and projected cash positions, or for other management needs.⁵⁷⁹

e. NAFI Banking and Investments. The concept of the Army Banking and Investment Fund (ABIF) program is to accumulate funds from NAFIs Army-wide and deposit them in a designated central bank which minimizes the levels of cash on deposit with local banks. The "central bank" is a United States commercial bank contracted by the CFSC.⁵⁸⁰ All deposited funds are invested by the ABIF with investment income (interest earned less expenses and losses) credited proportionally among the accounts of participating NAFIs. The ABIF guarantees the deposited principal and has some investment limitations, which are listed in *AR 215-1*, paragraph 11-21(b). Established NAFIs are automatically enrolled in the central bank program.⁵⁸¹

Local cash amounts are limited to the amounts necessary to support change or petty cash funds, check cashing funds and funds performing similar functions. Amounts in excess of that necessary to support the separate funds will be deposited daily in the servicing local bank.⁵⁸²

Within the United States, Puerto Rico, and the Virgin Islands, cash from NAFIs may only be deposited in a financial institution designated by the United States Treasury Department. Eligible institutions include all banks, savings and loans insured by the Federal Deposit Insurance Corporation (FDIC) and credit unions insured by the National Credit Union Administration (NCUA).⁵⁸³

In areas not listed above, NAFIs maintain United States dollar accounts at military banking facilities⁵⁸⁴ or at a local branch of any United States bank that meets the continental United States

bank eligibility criteria. NAFIs also may maintain a local currency account in a United States owned or controlled bank with limitations on the amount of deposits.⁵⁸⁵

The purpose for having a local bank is to facilitate cash transfer to a designated central bank where an account will be established to pay current obligations. Local banking operations require a legal review and will be in accordance with *Army Regulation 215-4*.⁵⁸⁶ Normally, a single NAFI will have no more than one account established to provide full insurance protection. Agreements with local banks will be reviewed at least once annually to ensure the proper establishment of the account and that funds are protected.⁵⁸⁷ Cash maintained in a local account will be limited to the level necessary to minimize or prevent the accrual of service charges. Amounts over the required minimum will be transferred daily to the designated central bank. At no time will current obligations be paid from local bank accounts.⁵⁸⁸

Accounts at local banks or credit unions in the United States, Puerto Rico, the Virgin Islands, and military banking facilities overseas are insured by the FDIC up to \$100,000. Amounts over \$100,000 may be accepted by United States banks and military banking facilities if they are authorized by the Treasury Department and meet criteria in *AR 215-1*, chapter 11.

Accounts in overseas banks, even those owned or controlled by the United States, generally are not insured. Under these circumstances, NAFIs may attempt to obtain collateral for uninsured accounts. Acceptable forms of collateral are listed in *AR 215-1*, paragraph 11-18(f).

Nonappropriated fund instrumentality accounts maintained in local banks are reported to the CFSC at least twice per year. These reports are used to verify the amount of collateral pledged against uninsured balances and to take action to obtain collateral as needed. Deposits that exceed protected levels are prohibited.⁵⁸⁹ The dif-

⁵⁷⁹ *AR 215-1*, *supra* note 38, para. 11-14.

⁵⁸⁰ *Id.* para. 11-20.

⁵⁸¹ *Id.* para. 11-15.

⁵⁸² *Id.* para. 11-16.

⁵⁸³ *Id.* para. 11-17a.

⁵⁸⁴ A military banking facility governed by *Army Regulation 210-135*, is a branch of a United States bank that operates on a United States controlled installation under a United States government contract. *Id.* para. 11-17b(1).

⁵⁸⁵ *Id.* para. 11-17b(2).

⁵⁸⁶ DEP'T OF ARMY, REG. 215-4, MORALE, WELFARE, AND RECREATION: NONAPPROPRIATED FUND CONTRACTING (10 Sept. 1990).

⁵⁸⁷ *AR 215-1*, *supra* note 38, para. 11-17i.

⁵⁸⁸ *Id.* para. 11-17d.

⁵⁸⁹ *Id.* para. 11-15f.

ferent types of reports and when they are required are listed in *AR 215-1*, paragraph 11-19(b).

f. Reports. This section provides policy guidance and outlines requirements for MWR financial and personnel management reporting.⁵⁹⁰ Detailed procedures are covered in *DOD 7000.14-R*, volume 13. The DRM has functional responsibility for gathering information and providing reports required by *AR 215-1* and *DOD 7000.14-R*, volume 13. The provisions apply to all Army MWR programs and to joint service and DOD agency programs over which the Army exercises management support. Most nonappropriated fund reports are prepared at the DA level using installation and MACOM financial statements and personnel reports from the nonappropriated fund Central Payroll office. Specific requirements for the Employees' Compensation and Benefits Report, the MWR Personnel Strength Report, and the Consolidated Execution Report are contained in *AR 215-1*, paragraphs 11-28 to 11-31.

10. Property Management.

a. Separate Record Keeping. At the installation level, APF property is managed by the property or supply office. Nonappropriated property is managed at the fund level by the DCA or equivalent which also designates hand receipt holders for APF property issued to NAFIs.⁵⁹¹ Government property records may not commingle APF and NAFI property or financial data, unless a specific exception allows.⁵⁹²

b. APF Property. Government supply activities may only issue APF supply or equipment items authorized by an authorization document.⁵⁹³ A listing of authorization documents may be found in appendix D and paragraph 12-2 of *AR 215-1*. Appropriated fund property may only be loaned by temporary hand receipt under *Army Regulation 710-2*⁵⁹⁴ and must be carried on the installation property book. Equipment no longer needed or unserviceable must be turned into the APF supply activity.⁵⁹⁵

c. Nonappropriated Fund Property. Nonappropriated fund property may be issued to individuals for either of the following:⁵⁹⁶

a. Use of the property as defined in *AR 215-1*, appendix D, for official functions related to MWR command supervision or operations support. (Property hand receipt holders may subhand receipt as necessary, but further subhand receipting is not authorized.); or

b. Use of property by any eligible MWR patron for social or personal use consistent with the purpose of a MWR activity.

The NAF budget includes NAF acquisition requirements. Approval of the budget constitutes authorization for the purchase. All NAF property, whether purchased or donated, will be carried on the NAF property records.⁵⁹⁷ The purchase of NAF property is governed by *AR 215-4*. Transfer of property between NAFIs on a nonreimbursable basis is governed by *AR 215-1*, chapter 12, and MACOM policy.⁵⁹⁸ Rules concerning NAF property transferred to the government are listed in *AR 215-1*, paragraph 12-8. Gifts and donations are governed by *AR 215-1*, chapter 7, and accounted for at fair market value. The NAFI may retain proceeds from a sale of donated property. *Army Regulation 215-1*, paragraph 12-6, contains the rules addressing surplus APF property, installed equipment, and buildings.

When items of APF property, authorized by a source listed in *AR 215-1*, paragraph 12-2 or appendix D, are not reasonably available for use in an MWR activity, similar items may be purchased if the circumstances are adequately documented.⁵⁹⁹ Nonappropriated fund property may be loaned to MWR patrons while participating in MWR activities or to other NAFIs for periods of 90 days or less.⁶⁰⁰

⁵⁹⁰ *Id.* para. 11-23.

⁵⁹¹ *Id.* para. 12-1a.

⁵⁹² *Id.* para. 12-1.

⁵⁹³ *Id.* para. 12-3a.

⁵⁹⁴ DEP'T OF ARMY, REG. 710-2, INVENTORY MANAGEMENT: USING UNIT SUPPLY SYSTEM (MANUAL PROCEDURES) (28 Feb. 1994).

⁵⁹⁵ *AR 215-1*, *supra* note 38, para. 12-3a.

⁵⁹⁶ *Id.* para. 12-5.

⁵⁹⁷ *Id.* para. 12-6.

⁵⁹⁸ *Id.* para. 12-6b.

⁵⁹⁹ *Id.* para. 12-7.

⁶⁰⁰ *Id.* para. 12-9.

The NAFI fund managers are accountable officers for all NAF property and may serve as responsible officers for APF property issued to the fund. Nonappropriated fund property will be inventoried annually or when there is a change of fund manager or accountable officer. Fund manager responsibilities toward the property are listed in *AR 215-1*, paragraph 12-10.

Nonappropriated fund property losses include all NAF property lost, damaged, or destroyed by other than fair wear and tear. Nonappropriated fund property for which property records are maintained should be insured against loss by the ACIF, which is described in *AR 215-1*, chapter 14.⁶⁰¹

The preferred method of disposing of serviceable property when a NAFI is dissolved is to transfer the property from one NAFI to another. In situations such as downsizing, demobilization, or redeployment, nonappropriated fund property may be transferred to another military service or to a nonDOD federal agency when approved by the MACOM. When a NAFI is affected by Base Realignment And Closure (BRAC), MWR nonappropriated fund property is not offered to the local communities like some APF property. It is retained for soldier use by transferring it to another IMWRF. Proceeds from sales of nonappropriated fund property are returned to the NAFI conducting the sale unless it is being dissolved. If the NAFI is being disestablished, the proceeds go to the successor-in-interest.⁶⁰²

d. Other Dispositions. Morale, welfare, and recreation programs at the installation level are tasked to participate in a recycling program to the maximum extent possible. Recyclable materials will be segregated and disposed of accordingly.⁶⁰³ Materials containing "recoverable" precious metals are not disposed of through private commercial sources. They will be turned into and processed by the DRMO through the DOD Precious Metals Recovery Program. Proceeds from the recovery process are not reimbursed to the IMWRF, as defined in *AR 215-1*, chapter 7.⁶⁰⁴ Items left by self-help patrons of the automotive craft shops are

considered donations to the IMWRF. Items may include motor oil, used auto parts, drive trains, major auto body components, and other similar items.⁶⁰⁵ The sale and transfer of firearms is governed by the provisions of *AR 215-1*, chapter 8. Items that are not disposed of according to *AR 215-1*, paragraphs 12-15 to 12-18, including recycling, may be turned in to the DRMO for salvage or disposed of as scrap under nonappropriated fund contract.⁶⁰⁶

e. Management Controls, Audits, Inspections, and Investigations. *Army Regulation 215-1*, chapter 13, establishes Army policy concerning management controls of NAFIs. Minimum essential key management controls are outlined at appendix K of *AR 215-1*. Assessment tools developed by local management and CFSC are used to ensure operations are conducted as intended and that MWR resources are safeguarded from fraud, waste, and abuse. Checklists found in *DA Circulars 11-87-3*, *11-91-2*, and *11-91-3* are to be used until CFSC provides updated checklists.⁶⁰⁷ Evaluation of management controls should occur on a continuing basis. At least every five years, the evaluation process should be documented with specific information about who conducted the evaluation, what deficiencies were noted, and what corrective actions were taken. Evaluations should be based on direct observation, file analysis, sampling, or simulation.⁶⁰⁸

Audits of NAFIs can be conducted by internal review offices (IR), the United States Army Audit Agency (USAAA), or contracted certified public accountants. Annual audits, which may be financial audits (performance audits are preferred), are conducted for all NAFIs with annual revenues or expenses exceeding \$5 million except NAFIs consisting of groups of activities such as IMWRFs. Annual audits also are conducted for NAFIs deemed to be highly sensitive due to their potential for fraud, waste, abuse, or wide public exposure.⁶⁰⁹ If evidence of a criminal offense, fraud, gross mismanagement, or misconduct is detected, the installation provost marshal shall be notified, and a serious incident report filed in accordance with *Army Regulation 190-40*⁶¹⁰ if appropriate.⁶¹¹

⁶⁰¹ *Id.* para. 12-13.

⁶⁰² *Id.* para. 12-14.

⁶⁰³ *Id.* para. 12-15 (contains rules governing recycling revenues and expenses).

⁶⁰⁴ *Id.* para. 12-16.

⁶⁰⁵ *Id.* para. 12-17.

⁶⁰⁶ *Id.* para. 12-19.

⁶⁰⁷ *Id.* app. K.

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.* para. 13-2.

⁶¹⁰ DEP'T OF ARMY, REG. 190-40, MILITARY POLICE: SERIOUS INCIDENT REPORT (30 Nov. 1993).

⁶¹¹ *Id.*

Investigations into NAFI losses are conducted in accordance with AR 15-6. Circumstances requiring the initiation of an investigation under AR 15-6 include cash or nonappropriated fund property losses in excess of \$2000 as a result of apparent theft or mysterious disappearance; inventory or retail sales variances exceeding \$500; or any other situation where circumstances indicate a lack of or disregard for management control procedures, or fraud, dishonesty, willful misconduct, recklessness, or wanton disregard for the safekeeping of NAF assets.⁶¹² For losses below \$2000 or where the above circumstances do not exist, a process described at appendix L of AR 215-1 will be followed to investigate the loss.⁶¹³ Claims against contractors are processed under Army Regulations 27-20, Claims; 27-40, Litigation, and 215-4, Nonappropriated Fund Contracting.⁶¹⁴

11. Installation MWR Planning and Construction.

a. MWR Planning. The basis for installation MWR planning is the MWR five year plan, which is updated annually. The plan documents needed changes and established priorities. It also provides confirmation of required DOD revalidation of NAFIs and MWR operations.⁶¹⁵

b. MWR Construction. Morale, welfare, and recreation maintenance, repair, and construction projects are coordinated with the installation DPW and included in the installation master plan. Morale, welfare, and recreation construction may be funded by APFs, nonappropriated funds, private donations, or a combination of the above.⁶¹⁶ Appropriated fund construction projects cost-

ing \$300,000 or less are funded from the installation operations and maintenance fund. Appropriated fund projects over \$300,000 are funded by Military Construction, Army.⁶¹⁷ Nonappropriated fund construction projects costing \$500,000 or more must have a commercial project validation assessment and, if approved, are funded by the nonappropriated fund major construction program (AMWRF). These projects are reported to Congress annually. Nonappropriated fund projects costing less than \$500,000 are funded by the Capital Purchases and Minor Construction Program. The MACOM may approve these projects, but each project will be reported to and released by the Office of the Secretary of Defense prior to the start of construction.⁶¹⁸

Approval authorities for dual-funded construction (APFs, nonappropriated funds, or private funds) are the MACOM commander (up to \$300,000), the DA Facilities and Housing Directorate (over \$300,000 up to \$1.5 million), and the Deputy Assistant Secretary for the Army (Installations and Housing) (over \$1.5 million). The CFSC approves the diversion or conversion of facilities constructed or renovated for MWR activities.⁶¹⁹

12. Conclusion.

Morale, welfare, and recreation operations are vital to the Army's mission. Like other Army missions, MWR operations are dynamic and rapidly changing. This publication provides the foundation for quickly identifying, researching, and resolving MWR issues.

⁶¹² AR 215-1, *supra* note 38, para. 13-4a.

⁶¹³ *Id.* para. 13-4b. Appendix L of AR 215-1 provides what is essentially a "Mini-AR 15-6" investigation. An investigating officer senior in rank to the respondent is appointed to investigate the loss and make findings and recommendations in a detailed report to the approval authority. Pecuniary liability may be assessed against the respondent in this process, and legal review is required. An appeal from an approved finding of pecuniary liability is available; at which time, a second legal review is conducted. Upon an unsuccessful appeal, a collection action may be taken if a voluntary repayment cannot be agreed to. This process is described in detail in Appendix L of AR 215-1.

⁶¹⁴ *Id.* para. 13-4c.

⁶¹⁵ *Id.* para. 10-1. For an explanation of DOD revalidation requirements, *See id.* para. 5-3.

⁶¹⁶ *Id.* paras. 10-4a, b, c.

⁶¹⁷ *Id.* para. 10-5a.

⁶¹⁸ *Id.* para. 10-5b.

⁶¹⁹ *Id.* para. 10-4c(3).

Commonly Used Acronyms

AAFCWF	Army and Air Force Civilian Welfare Fund	ASPO	Activity Sport Parachuting Safety Officer
AAFES	Army and Air Force Exchange System	ATCOM	Aviation and Troop Support Command
ABIF	Army Banking and Investment Fund	ARNG	Army National Guard
ACIF	Army Central Insurance Fund	BCE	Base-Level Commercial Equipment
ACS	Army Community Service	BCT	Basic Combat Training
ACSIM	Assistant Chief of Staff for Installation Management	BOSS	Better Opportunities for Single Soldiers
ACTEDS	Army Civilian Training, Education, and Development System	BRAC	Base Realignment and Closure
AD	Active Duty	C3T2	Cabins, Cottages, Cabanas, Trailers, and/or Tents
AER	Army Emergency Relief	CACs	Community Activity Centers
AFA	Army Flying Activities	CAO	Central Accounting Office
AFPEO	Armed Forces Professional Entertainment Office	CBE	Command Budget Estimates
AFRC-E	Armed Forces Recreation Center-Europe	CCB	Configuration Control Board
AMWRF	Army Morale, Welfare, and Recreation Fund	CDC	Child Development Center
AFRCs	Armed Forces Recreation Centers	CDS	Child Development Service
AIFA	AAFES Imprest Fund Activities	CFR	Code of Federal Regulations
AMOPES	Army Mobilization and Operations Planning and Executive System	CFSC or USACFSC	United States Army Community and Family Support Center
AOB	Annual Operating Budget	CID	Criminal Investigation Division Command
APF	Appropriated Funds	CJA	Claims or Command Judge Advocate
ARMP	Army Recreation Machine Program	COD	Community Operations Division
ARMTF	Army Recreation Machine Trust Fund	CONUS	Continental United States
ASA(FM)	Assistant Secretary of the Army (Financial Management)	COR	Contracting Officer's Representative
ASA(IL&E)	Assistant Secretary of the Army (Installations, Logistics, and Environment)	CPMC	Capital Purchases and Minor Construction
ASA(M&RA)	Assistant Secretary of the Army (Manpower and Reserve Affairs)	CPO	Civilian Personnel Office
ASD(FM&P)	Assistant Secretary of the Defense (Force Management and Personnel)	CRA	Capital Reinvestment Assessment
ASIP	Alcohol Sellers Intervention Program	CRRC	Construction Requirements Review Committee
		CTO	Commercial Travel Officer
		DA	Department of the Army
		DAR	Daily Activity Report

Commonly Used Acronyms

DCA	Director of Community Activities	LTS	Leisure Travel Services
DEH	Director of Engineering and Housing	M&R	Maintenance and Repair
DFAS	Defense Finance and Accounting Service	MACOM	Major Army Command
DOD	Department of Defense	MCA	Military Construction, Army
DODAAC	DOD Activities Address Directory	MOU	Memorandum of Understanding
DOL	Director of Logistics	MWR	Morale, Welfare, and Recreation
DPW	Director of Public Works	MWRBOD	MWR Board of Directors
DRM	Director, Resource Management	NAF	Nonappropriated Funds
DRMO	Defense Reutilization and Marketing Office	NAF CPMC	Capital Purchases and Minor Construction
DSN	Defense Service Network	NAFIs	Nonappropriated Fund Instrumentalities
DVQ	Distinguished Visitors Quarters	NAFISS	Nonappropriated Fund Information Standard System
DZSO	Drop Zone Safety Officer	NAFMC	Nonappropriated Fund Major Construction
EEO	Equal Employment Opportunity	NCUA	National Credit Union Administration
FAO	Finance and Accounting Office	NIBD	Net Income Before Depreciation
FAR	Federal Acquisition Regulation	OMA	Operation and Maintenance, Army
FB&E	Food, Beverage, and Entertainment	OMB	Office of Management and Budget
FCC	Family Child Care	OPM	Office of Personnel Management
FDIC	Federal Deposit Insurance Corporation	OSD	Office of the Secretary of Defense
FLSA	Fair Labor Standards Act	PAO	Public Affairs Office
FMD	Financial Management Division	PO	Private Organization
FO	Field Office	POL	Petroleum, Oil, and Lubricants
FORSCOM	United States Forces Command	POM	Program Objective Memorandum
FTCA	Federal Tort Claims Act	POV	Privately Owned Vehicle
GM	General Managers	PVA	Project Validation Assessment
GTS	Government Travel System	R&R	Rest & Relaxation
IMWRF	Installation Morale, Welfare, and Recreation Fund	RC	Reserve Component
ISPSO	Installation Sport Parachuting Safety Officer	RIMP	Risk Management Program
ITR	Information, Ticketing, and Registration	ROI	Return on Investment

Commonly Used Acronyms

SA	Secretary of the Army	USACFSC	See CFSC
SJA	Staff Judge Advocate	USAPT	United States Army Parachuting Team (Golden Knights)
SNN	Standard NAFI Number	USAREUR	United States Army Europe
SOP	Standard Operating Procedures	USARPAC	United States Army Pacific
TDY	Temporary Duty	USC	United States Code
THF	Transient Housing Facility	USCF	United States Chess Federation
TJAG	The Judge Advocate General	USGA	United States Golf Association
TRADOC	United States Army Training and Doctrine Command	USO	United Services Organization
UA	Universal Annual	VOQ	Visiting Officers' Quarters
UPH	Unaccompanied Personnel Housing	WCAP	World Class Athlete Program
UPH-PP	UPH-Permanent Party	YS	Youth Services

USAAA **United States Army Audit Agency**

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TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Office Management Note

39th Legal Assistance Course

It is never too early to make preparations to attend legal assistance training at The Judge Advocate General's School, United States Army (TJAGSA). The next legal assistance continuing legal education course (CLE), the 39th Legal Assistance Course, has been formally scheduled for the week of 21 to 25 October 1996 at TJAGSA. Demand for this course from all services is consistently high. We anticipate that all 150 quotas will be filled well before the course is held. The course will continue to offer a wide spectrum of electives to accommodate legal assistance practitioners from all services no matter what their level of experience. We will again augment the course faculty with instructors from the Naval Justice School and the Air Force Judge Advocate General's School. Interested personnel should refer to the CLE News section of this issue of *The Army Lawyer* for information on obtaining a quota. Lieutenant Colonel Block.

Family Law Notes

States Are Getting Aggressive Enforcing Child Support

You do not have to work in legal assistance to know that child support enforcement is big business in the United States. Successful efforts to criminalize failure to pay support at the state and federal level is no longer hot news. Even the Army's criminalization of failure to pay support, although it is unique to the Department of Defense, is almost ten years old! Dramatic

administrative efforts being made by the states to enforce support are now in the news. Each month, several of these efforts are highlighted in the *NCSEA News*, a publication of the National Child Support Enforcement Association.¹

In Chicago, a taxi driver's "city medallion" was seized and sold in a lottery for \$36,000 to satisfy child support arrears. When traditional efforts fail, the Illinois Department of Revenue invokes streamlined procedures that focus on seizure of real and personal property. Even Illinois jailors can get into the act; one prisoner was allowed to leave his cell to attend a paternity hearing. Like Illinois, New York law provides streamlined asset seizure procedures for parents more than eight weeks in arrears. New York's "Freeze and Seize" program generated more than \$1 million dollars in its first year.²

License revocation has proven to be a motivator in several states. For example, in Maine, 17,400 nonsupporting parents were threatened with revocation of their drivers licenses, prompting them to pay over \$25 million in back support.³ In Texas, a law authorizes suspension of not just drivers licenses but professional and recreational licenses as well. Warning letters sent out shortly before the Texas law's effective date netted almost \$100,000 in one week!⁴

States have experimented with other ideas, like Florida's "Operation Non-Support," which involves a statewide arrest of parents who have defied support orders. In Ohio, the law requires employers to report any lump sum over \$500 paid to their employees to the state child support agency.⁵

Aggressive child support efforts likely will intensify as states find even more creative ways to deter nonsupport. To the extent that child support efforts are focused on the military, all military legal advisors should, consistent with President Clinton's vision to act as a model employer for support enforcement,⁶ educate civilian child support enforcement personnel about our own programs and assist them where possible.

Legal assistance attorneys working with clients who are attempting to avoid support obligations should clarify for the cli-

¹ Founded in 1952, the National Child Support Enforcement Association is a nonprofit organization that brings the nation-wide child support enforcement community together to promote the well-being of children through effective enforcement of support. Testimony of Marilyn Ray Smith, *NCSEA News*, Spring 1995, at 12.

² *Id.* at 16.

³ *Id.*

⁴ *Id.* at 17.

⁵ Testimony of Marilyn Ray Smith, *NCSEA News*, Summer 1995, at 24. Ohio judges also are credited with requiring nonsupporting parents to reenlist in the military if they fail to pay support.

⁶ Exec. Order No. 12,953, 60 Fed. Reg. 11,013 (1995).

ents that they may be delaying the inevitable or even making things worse. Clients seeking assistance with nonsupport issues need to know that state child support enforcement agencies are available to help them and are increasingly getting results. Lieutenant Colonel Block.

Tax Notes

New Home Must Be Purchased and Used During the Replacement Period

A recently decided tax court case emphasizes the importance of not only purchasing a new home within the replacement period but also of occupying the new home.⁷ Failure to occupy the new home within the replacement period will result in a denial of the rollover, or gain, from the old home to the new home. As a result, the taxpayer will owe taxes as well as interest on the gain from the sale of his principal residence.

Mr. and Mrs. Skorniak sold their principle residence on 31 January 1990. They purchased a vacant lot and intended to build a replacement home on the lot. By 31 January 1992, a substantial amount of work remained incomplete. The house was not finished until May 1992, and Mr. and Mrs. Skorniak did not move into the house until June 1992. Because they did not purchase and use their new home within two years, they were not entitled to rollover the gain from the sale.⁸

Military taxpayers also must purchase and use a replacement home within the replacement period.⁹ Fortunately, military personnel receive a longer replacement period. The two-year replacement period is suspended for up to two years for taxpayers on active duty.¹⁰ Therefore, military personnel generally have up to four years in which to purchase and use a replacement home.

Service members stationed overseas may have more time to purchase and use a replacement home. A service member stationed overseas will have up to one year after returning from overseas to purchase and use a replacement home, except that under no circumstances will he be allowed to extend the replacement period beyond eight years.¹¹

Finally, a service member who is stationed in a combat zone will have at least six months after leaving the combat zone to purchase and use a new home.¹²

⁷ Skorniak v. Commissioner, T.C. Memo 1996-178.

⁸ *Id.*

⁹ I.R.C. § 1034 (RIA 1996).

¹⁰ *Id.* § 1034(h)(1).

¹¹ *Id.* § 1034(h)(2).

¹² *Id.* § 7508.

¹³ *Id.* § 1016(a)(2).

¹⁴ See Major Thomas K. Emswiler, *The Tax Consequences of Renting and Then Selling a Residence*, ARMY LAW., Oct. 1995, at 3.

Legal assistance attorneys should advise their clients that they must not only purchase, but also occupy, a new residence within the replacement period. Failure to occupy the new home will make them ineligible to rollover the gain from the sale of their principal residence into their new home. Major Henderson.

Depreciation of Rental Property

Taxpayers who rent a home that they own should always take the depreciation deduction. Several legal assistance attorneys have suggested that it might be better not to take the depreciation so that their clients will have a stronger argument that the residence was always their principal residence. This position is based on a misunderstanding of the tax code.

The fundamental problem with this analysis is that a taxpayer's basis in property is reduced by the greater of the amount of the depreciation that the taxpayer took or the amount of depreciation that the taxpayer should have taken.¹³ Therefore, a taxpayer's basis in rental property will be reduced by the amount of depreciation to which the taxpayer was entitled, whether or not the taxpayer actually takes the depreciation deduction.

Because a taxpayer's basis will be reduced, it makes no sense for him not to take the depreciation to which he is entitled. A taxpayer who desires to argue at a later date that the home was always his or her principal residence will not be harmed by taking the depreciation. No reported case dealing with a home as a principal residence or rental property has been decided by whether or not a taxpayer took depreciation.

There are generally two situations where a taxpayer who rents out his home will be allowed to later treat that home as the principal residence.¹⁴ First, if a taxpayer tried to sell the residence, but was unable to, the home will still be treated as his principal residence even if he temporarily rents out the home. Second, if a taxpayer rented out his home, but always intended to return to it, he will usually be allowed to treat the home as his principal residence.

Whether or not a taxpayer takes depreciation has no bearing on the determination of whether a home is still the taxpayer's principal residence in either of these two situations. Thus, a taxpayer would be ill advised not to take depreciation because the basis in the house is being reduced even if the depreciation is not claimed. Legal assistance attorneys should advise clients who are renting property that they should always take the depreciation deduction to which they are entitled. Major Henderson.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically, appearing in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The content of the latest issue, volume 3, number 8, dated May 1996, is reproduced below.

Clean Air Act and Explosives

The Environmental Protection Agency (EPA) has agreed to conduct notice and comment rulemaking to delete explosives from the list of regulated substances under section 112(r) of the Clean Air Act.¹ If the EPA does not delete explosives from the list, section 112(r) may require military installations to handle and store explosives in a manner substantially different from the current practices developed by the Department of Defense Explosives Safety Board. The proposed rulemaking is expected to occur within the next several months. Lieutenant Colonel Olmscheid.

Clean Air Act and Conformity

The United States District Court for the District of Columbia upheld the EPA's conformity regulations implementing section 176(c) of the Clean Air Act.² Although conformity provisions are burdensome, this decision is important to federal agencies because plaintiffs were attempting to vacate the EPA regulations that limited the number of federal actions requiring conformity determinations. Installations should continue to follow previous conformity guidance announced by Headquarters, Department of the Army and major Army commands. Lieutenant Colonel Olmscheid.

Historic Preservation: A BRAC Installation Case Study

Fort Ritchie, Maryland, is a Base Realignment and Closure (BRAC) installation scheduled for closure by 1998. Built in 1920, portions of the installation appear to qualify as historic districts in the National Register of Historic Places. Currently, the Army and the Maryland State Historic Preservation Office are reviewing the historical documentation on Fort Ritchie to establish its significance. If Fort Ritchie is eligible, the Army must then comply with the requirements of section 106 of the 1966 National Historic Preservation Act (NHPA).³ Section 106 requires all federal agencies to "take into account" the effect of their "undertakings" (activities) on historic properties and "afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment." The ACHP published regulations to carry out section 106.⁴

If the Army determines that buildings, structures, sites, or districts on the installation qualify for the National Register, then the Army must treat those properties as "eligible" national historic sites. The Army then has affirmative consultation duties under section 106 and preservation responsibilities under section 110 of the NHPA. For example, if Fort Ritchie determines that properties on the installation are eligible for the National Register, then Fort Ritchie must consult with the Maryland State Historic Preservation Office, the ACHP, and appropriate interested parties to identify alternatives to avoid or mitigate any adverse effects of transferring the property from federal ownership to any private concern. The goal of the consultation should be to ensure that any private development of the property is sympathetic to the historic and architectural significance of Fort Ritchie. These measures should be codified in a memorandum of agreement with the consulting parties, which will constitute the "comments" of the ACHP as required by section 106.

The ELD is currently working with the Office of the Secretary of the Army General Counsel, the Army Environmental Center, and the ACHP to develop a prototype memorandum of agreement for BRAC situations for each installation to tailor. This document should be available for use by BRAC installations in several weeks. Major Tannenbaum.

¹ *Petroleum Institute v. Environmental Protection Agency*, No. 94-1276 (D.C. Cir. Mar. 29, 1994).

² *Environmental Defense Fund v. Environmental Protection Agency*, No. 94-1044, 1996 U.S. App. LEXIS 8666 (D.C. Cir. Apr. 19, 1996).

³ 16 U.S.C. § 470f (1995).

⁴ *Protection of Historic and Cultural Properties*, 36 C.F.R. pt. 800 (1995).

Critical Habitat Determinations and National Environmental Policy Act

The United States Court of Appeals for the Tenth Circuit (Tenth Circuit) recently held in *Catron County Board of Commissioners v. United States Fish and Wildlife Service*,⁵ that the Department of Interior (DOI) must comply with the National Environmental Policy Act (NEPA) before designating critical habitats for protected species under the Endangered Species Act (ESA). The Tenth Circuit's opinion stands in direct conflict with a previous opinion of the United States Court of Appeals for the Ninth Circuit that affirmed the Secretary of Interior's decision to designate over eleven million acres as critical habitat for the spotted owl while asserting that the DOI need not comply with the NEPA.⁶

In a related matter, *Catron County* discussed, but did not rule upon, whether the NEPA applies to the DOI's decisions to list species as threatened or endangered under section 4 of the ESA.⁷ In 1981, the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) ruled that the Secretary of Interior need not comply with the NEPA when listing species as endangered or threatened under the ESA.⁸ In 1983, the Council on Environmental Quality (CEQ) indicated approval of the position held by the Sixth Circuit when it assented to a letter issued by the Secretary of Interior commenting that the Secretary could cease preparing the NEPA documents when listing species under the ESA.⁹ The split between the Ninth and Tenth Circuits on the application of the NEPA to critical habitat designations means that it is likely that the United States Supreme Court will be asked review this issue. Major Ayres.

⁵ No. 94-2280 (10th Cir. 1996).

⁶ *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

⁷ *Determination of Endangered Species and Threatened Species*, 16 U.S.C. § 1533 (1988).

⁸ *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981).

⁹ *Endangered and Threatened Wildlife and Plants; Preparation of Environmental Assessments for Listing Actions under the Endangered Species Act*, 48 Fed. Reg. 49,224 (1983) (to be codified at 50 C.F.R. pt. 17).

¹⁰ *National Defense Authorization Act for Fiscal Year 1996*, Pub. L. No. 104-106, 110 Stat. 186 (1996).

¹¹ *Environmental Defense Center v. Babbitt*, 73 F.3d 867 (9th Cir. 1995).

¹² *Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species*, 61 Fed. Reg. 7596-613 (1996) (to be codified at 50 C.F.R. pt. 17).

¹³ *Endangered and Threatened Wildlife and Plants; Interim Listing Priority Guidance*, 61 Fed. Reg. 9651-3 (1996).

¹⁴ DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES: LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 11-4(a) (28 Feb. 1995), states: "Species that are candidates for federal listing as threatened or endangered are not protected under the ESA. Because candidate species may be listed in the future, installations will consider them in making decisions that may affect them." Additionally, the FWS encourages the consideration of impacts of agency actions on candidate species when preparing environmental analysis documents under the NEPA and generally will request such consideration during section 7 consultation.

¹⁵ *Native American Graves Protection and Repatriation Regulations*, 60 Fed. Reg. 62158-69 (1995) (to be codified at 43 C.F.R. pt. 10).

¹⁶ 25 U.S.C. §§ 3001-13 (1995).

Candidate Species Listing Developments

Army Installations with resident candidate species should be aware of a series of developments that could affect listing decisions by the DOI. The congressional moratorium for listing species under the ESA has been extended through fiscal year 1996.¹⁰ In a matter connected with the moratorium, the Ninth Circuit recently ruled that the DOI cannot be forced to list species as threatened or endangered absent congressional funding to do the job.¹¹

On 28 February 1996, the Fish and Wildlife Service (FWS) promulgated an updated list of plants and animals that it regards as candidates for listing under ESA section 4.¹² On 11 March 1996, the FWS adopted interim guidance for assigning priorities to conduct listing and delisting actions under ESA section 4.¹³ Taken together, these two FWS announcements may assist installations to appropriately manage their natural resources.¹⁴ Major Ayres.

Native American Graves Protection and Repatriation Act Regulations Published

The DOI has promulgated regulations and procedures to develop a systematic process for determining the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.¹⁵ The regulations took effect on 3 January 1996. Promulgated under the authority of the Native American Graves Protection and Repatriation Act,¹⁶ the regulations apply in relevant

part to the identification and disposition of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony already under federal control, or excavated intentionally or discovered inadvertently on federal land. Major Ayres.

Council on Environmental Quality Proposed Report on Guidance for Addressing Environmental Justice Under the National Environmental Policy Act

On 15 April 1996, following Executive Order 12898, the Council on Environmental Quality (CEQ) issued draft guidance for addressing Environmental Justice (EJ) under the NEPA entitled, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." The draft guidance provides the following general principles for considering EJ in specific phases of the NEPA process:

1. **Scoping.** Scoping should begin as soon as practicable after formulating a purpose and need for the proposed action. Army installations should determine whether the area affected includes low-income or minority populations and then seek ideas from these populations on the proposal. Installations should publish the determination basis to the public as appropriate in later NEPA documents and NEPA process communications. Also, installations must develop and ensure effective communication strategies in the Scoping process that include diverse public involvement.

2. **Public Participation.** The CEQ regulations require comprehensive public involvement throughout the NEPA process. Army installations should use innovative or adaptive approaches to overcome linguistic, institutional, cultural, economic, historical, or other barriers to effective participation in the decision-making processes of federal agencies under customary NEPA procedures.

3. **Determining the Affected Environment.** To determine whether a proposed action is likely to have disproportionately high and adverse effects on minority or low-income communities, Army installations should identify a geographic scale to obtain demographic information and ensure that the geographic scale is coextensive with the potential impact area. Census data on CD-ROM and Landview II are available resources for this information.

4. **Analysis.** When an installation identifies a disproportionately high and adverse impact on a low-income or minority community, the installation should analyze the distribution of environmental effects in that and other communities. When a potential EJ issue is identified, the analysis in an environmental impact study or environmental assessment should state clearly whether, in light of all of the facts and circumstances, a disproportionately high and adverse impact on minority communities or low income communities is likely to result from the proposed action and any alternatives.

5. **Alternatives.** As early as possible in the process, Army installations should encourage populations that may suffer a disproportionately high and adverse impact from a proposed agency action to help develop and comment on possible alternatives to the proposed action. When an installation identifies a disproportionately high and adverse impact on a low-income or minority community from either the proposed action or alternatives, installations should consider the distribution and the magnitude of the impact, as well as the affected communities' views, when determining the environmentally preferable alternatives.

6. **Record of Decision.** The Record of Decision (ROD) should explicitly discuss any disproportionately high and adverse impact on a low-income or minority population. The ROD should address whether the installation took all practicable means to avoid or minimize environmental and social harm. When relevant, the ROD also should summarize the monitoring and enforcement programs.

7. **Mitigation.** Throughout the public participation process, Army installations should solicit the views of the affected communities on measures to mitigate a disproportionately high and adverse impact on a low-income or minority population. The installations should exhibit heightened deference to community views in developing and implementing mitigation strategies. Mitigation measures identified in an environmental impact study or developed as part of a Finding of No Significant Impact should accommodate the preferences of affected low-income or minority populations to the extent practicable. The CEQ believes that successful consultation concerning the mitigation strategy may lead to greater community acceptance of agency actions, which potentially have a disproportionately high and adverse effect on a low-income or minority population.

The draft guidance is intended only to improve the internal management of the Executive Branch and does not create an enforceable right against the United States; however, challenges about whether guidance of this nature creates an enforceable right against the United States may arise. Nevertheless, the draft guidance is likely to undergo additional revisions before approval. Revisions notwithstanding, the theme of the CEQ's final guidance on EJ is bound to remain the same. That is, consider low-income and minority populations during the NEPA process and document EJ consideration at each relevant NEPA stage. Major Corbin.

The Supreme Court Rules on State Immunity

On 22 March 1996, the United States Supreme Court issued a ruling in *Seminole Tribe of Florida v. Florida, et al.*¹⁷ In a five to four decision, the Court held that the 11th Amendment to the Constitution prevented Congress from authorizing suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian Commerce Clause.

¹⁷ No. 94-12, 1996 U.S. LEXIS 2165 (Mar. 27, 1996).

By this ruling, the Court overruled the 1988 decision in *Pennsylvania v. Union Gas Company*¹⁸ whereby a plurality of the Court had held that Congress had the power, via the Interstate Commerce Clause, to unilaterally abrogate the states' immunity from suit. In *Pennsylvania*, the Court held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allows suits in federal courts against a state by a third party based on Congress's power under the Interstate Commerce Clause. Union Gas had sued Pennsylvania to recover costs of a clean-up performed by the company. The *Seminole* decision means that the states are again immune from suit by third parties, even if a state was the owner or operator of a site. The impact of this decision on other environmental laws remains to be seen, but the two dissenting opinions speculated about major adverse effects. Lieutenant Colonel Lewis.

New Resource Conservation Recovery Act Enforcement Policy

The EPA's Hazardous Waste Civil Enforcement Response Policy (ERP), published 15 March 1996, took effect on 15 April 1996. The intent of the ERP, which the EPA sent to regional administrators and state agencies, is to establish flexible guidelines for a nationally consistent approach to enforcement of the Resource Conservation Recovery Act (RCRA).

The ERP establishes two categories of violators: significant non-compliers (SNCs) and secondary violators (SVs). The SNCs are "those facilities that have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements . . ." ¹⁹ Secondary violators "are typically first time violators and/or violators which pose no actual threat or a low potential of threat of exposure to hazardous waste or constituents. A facility classified as a SV should not have a history of recalcitrant or non-compliant conduct."²⁰

For SNCs, "formal" enforcement is appropriate under the ERP, which would "mandate compliance and initiate a civil, criminal or administrative process which results in an enforceable agreement or order."²¹ The ERP recommends for SVs, at a minimum, an "informal enforcement response" that "consists of a recitation of the violations and a schedule for returning the facility to full compliance with all substantive and procedural requirements of applicable regulations, permits and statutes."²² Facilities are given ninety days to correct violations or face reclassification as SNCs.

Army installations are encouraged to read the new policy, and to use the definitions and standards therein when negotiating with the EPA regarding open or threatened enforcement action. Captain Anders.

Litigation Division Notes

Hartmann v. Stone

On 2 November 1995, the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) decided *Hartmann v. Stone*²³ invalidating two provisions of *Army Regulation 608-10 (AR 608-10)*.²⁴ Chapter 6 of *AR 608-10* establishes and regulates the Family Child Care (FCC) program under which military family members may provide child care in their government quarters on post or in government leased housing off post.²⁵

Background

The FCC program is but one component of an Army child care network that includes child development centers and supplemental programs and services such as the Latch Key program, baby sitter referral, and Foster Grandparents.²⁶ Virtually all aspects of quarters based child care is governed by *AR 608-10*, and they are closely monitored by Child Development Service (CDS) personnel.

¹⁸ 491 U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1988).

¹⁹ *Id.* at 3.

²⁰ *Id.* at 4.

²¹ *Id.* at 5.

²² *Id.* at 6.

²³ 68 F.3d 973 (6th Cir. 1995).

²⁴ DEP'T OF ARMY, REG. 608-10, PERSONAL AFFAIRS: CHILD DEVELOPMENT SERVICES (12 Feb. 1990) [hereinafter *AR 608-10*].

²⁵ *Id.* para. 6-1.

²⁶ *Id.* para. 1-9, fig. 1-1.

For example, AR 608-10 prescribes the maximum number of children allowed in an FCC home,²⁷ the size and layout of the home and play areas,²⁸ dietary requirements,²⁹ and minimum daily developmental activities.³⁰ The FCC providers must prepare a written discipline and touch policy that must be approved by FCC personnel. Corporal punishment is not allowed.³¹

Providers also must undergo extensive and continuing training. Potential FCC providers must complete twenty hours of training before they can be certified by CDS personnel.³² Following certification, FCC providers periodically must receive additional training to maintain their certified status.³³ The providers do not pay for any of their certification training.³⁴

In addition to their training, FCC "resource/toy lending" libraries provide equipment and toys to FCC certified providers.³⁵ An additional benefit to providers is the recognition of claims under the Army Risk Management Program (RIMP) arising out of FCC activities.³⁶ Each installation must also hire a director for its FCC system, and "FCC outreach workers," who may each supervise up to forty homes.³⁷

²⁷ *Id.* para. 6-26, tbl. 6-1.

²⁸ *Id.* paras. 6-32, 6-33.

²⁹ *Id.* ch. 4, § VI.

³⁰ *Id.* para. 6-30.

³¹ *Id.* para. 6-25. See also *id.* para. 2-28.

³² *Id.* para. 6-20a.

³³ *Id.* para. 6-20.

³⁴ *Id.* para. 3-5b(3).

³⁵ *Id.* paras. 3-5b(3), 6-6.

³⁶ *Id.* para. 6-19. (See also DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, ch. 12 (1 Aug 1995); DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION: NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES, ch. 14 (29 Sept. 1996). The RIMP is administered by the United States Army Community and Family Support Center. See AR 608-10, *supra* note 24, para. 6-19e (stating that the RIMP is not a substitute for private liability insurance, but providers are not required to obtain private coverage because "[w]hether to carry private liability insurance is an independent business decision to be made by the FCC provider").

³⁷ AR 608-10, *supra* note 24, para. 6-3.

³⁸ *Id.* paras. 6-1b, 6-5d.

³⁹ *Id.* para. 6-22(a).

⁴⁰ *Id.* para. 3-5b(2).

⁴¹ *Id.*

⁴² *Id.*

⁴³ The FCC program is administered by Army Community Services and not the military chaplaincy. *Hartmann* does not disturb the unique status of the military chaplaincy recognized in *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (Army Chaplaincy does not violate the Establishment Clause).

While enjoying benefits usually indicative of employee status, FCC providers are expressly described in AR 608-10 as independent contractors³⁸ and possess a great deal of leeway in conducting their home child care "business." Within the constraints of the regulation, providers are free to set their own hours³⁹ and to establish fees through negotiation with parents.⁴⁰ Providers are also solely responsible for collecting their fees.⁴¹

As a part of the overall regulatory scheme covering the entire Army child development system, AR 608-10 contained express prohibitions on religious activities that became the subject of this litigation. The prohibitions were intended "[t]o avoid inadvertently or purposefully communicating religious beliefs and or doctrines to children in care."⁴² Paragraph 1-8i of the regulation states:

The dissemination of religious information (e.g., grace) or materials is prohibited as well as providing program activities that teach or promote religious doctrine. (Programs operated by chaplains are exempted from this restriction).⁴³

The other challenged provision of the regulation was entitled Compliance Item 9,⁴⁴ which stated in part:

Religious materials or activities specifically designed to teach or promote religious doctrine are not permitted.

a. *Standard requires.*

(1) CDS management oversight to ensure religion is not promoted or taught in CDS settings.

(2) Does not permit religious Bible stories, pictures, prayers including grace at meals.

(3) Does not permit special purpose "religious" FCC homes.⁴⁵

The FCC regulation also provided for exceptions to the general prohibition on religious activities in FCC homes. Holiday decorations such as Christmas trees, menorahs, and creches were allowed. An FCC provider was expressly not required to remove religious symbols normally displayed in the home so long as the symbols were not used in a proselytizing manner.⁴⁶

The Rutherford Institute, a nonprofit organization in Charlottesville, Virginia, filed suit on 3 August 1992 to challenge the prohibitions in AR 608-10 on behalf of three couples stationed at Fort Campbell, Kentucky. One of the named plaintiffs, Tandra Hartmann, had been a provisionally certified FCC Provider whose certification was revoked by Fort Campbell for, among other things, conducting Christian oriented day care in violation of the regulation.

In addition to other relief, the plaintiffs sought a declaratory judgment that the prohibitions in AR 608-10 violated the First Amendment by unlawfully infringing on their right to the free exercise of religion.⁴⁷

⁴⁴ AR 608-10, *supra* note 24, app. C-10, Compliance Item 9.

⁴⁵ This is the only prohibition pertaining exclusively to FCC homes. The other prohibitions in the regulation also extend to the other components of the Army CDS system such as the Child Development Centers. *Hartmann* invalidates these prohibitions only so far as they concern FCC homes.

⁴⁶ *Id.* app. C-10, Compliance Item 9b.

⁴⁷ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

⁴⁸ *Hartmann v. Stone*, No. C 92-0462L(M), slip op. (W.D. Ky. Oct. 8, 1993).

⁴⁹ *Id.* at 10.

⁵⁰ *Id.* at 17.

⁵¹ 403 U.S. 602, at 612-13 (1971). Although its continuing viability is questionable, it is fair to say that this case is well established. As of the date of this article, Westlaw showed 125 pages of Shepard's citations.

District Court Decision

The United States District Court for the Western District of Kentucky granted summary judgment for the Army on 8 October 1993. The court adopted the findings of fact and conclusions of law of a magistrate judge who found that, although the plaintiffs sincerely held a religious belief that a Christian learning environment was required for their children, the Army was not obligated to provide this religious instruction.⁴⁸

The district court noted that the FCC regulation did not prohibit the plaintiffs from obtaining religious day care outside of the FCC program off post (and to some extent on post as well) or from holding religious beliefs. Furthermore, the regulation did not seek to control or prohibit any religious practices by military families in their own homes apart from the day care environment.⁴⁹ The court fully adopted the magistrate's conclusion that AR 608-10 did not violate the Free Exercise clause as it contained nothing that "affirmatively required" the plaintiffs to violate any religious beliefs.⁵⁰

The court next turned to the Establishment Clause. The district court, as did the Sixth Circuit on appeal, analyzed the Establishment Clause issue using the test established by the Supreme Court in *Lemon v. Kurtzman*.⁵¹ Under this three-part test, government action does not violate the Establishment Clause so long as the action:

1. Has a secular purpose;
2. Does not have the principal or primary effect of either advancing or inhibiting religion; and,
3. Does not foster an excessive entanglement with religion.

The district court also adopted the magistrate judge's findings that the amount of Army involvement in the FCC program, by regulation and subsidization, was pervasive. The court found

that religious oriented FCC day care would inevitably serve to improperly advance religion, entangle the Army in religious affairs, and would therefore result in a violation of the Establishment Clause.⁵²

Finally, the district court held that the decision not to allow religious activities within the FCC program was within the discretion of the military. Citing such cases as *Goldman v. Weinberger*⁵³ and *Chappel v. Wallace*,⁵⁴ the court deferred to the Army's judgment on how to structure the FCC program to meet its stated objective of promoting the quality of the force.⁵⁵

The plaintiffs appealed from the district court to the Sixth Circuit. On 2 November 1995, a three judge panel of the Sixth Circuit reversed the district court and held that the prohibitions in AR 608-10 pertaining to the FCC program violated the First Amendment.

The Sixth Circuit diametrically disagreed with the district court ruling in virtually every respect. Unlike the district court, the Sixth Circuit applied a strict scrutiny test to the regulatory prohibitions—whether the prohibitions were narrowly tailored to serve a compelling state interest. The Sixth Circuit found that the challenged provisions failed both prongs of the strict scrutiny test, and of perhaps greater significance to military practitioners that the deference traditionally accorded military decision makers could not save the provisions in this case.

Deference to Military

In *Hartmann*, apparently for the first time in the First Amendment free exercise context, the Sixth Circuit subjected a military regulation to a strict scrutiny standard of review. This action is seemingly at odds with the Supreme Court case of *Goldman v. Weinberger*.

In *Goldman*, the Supreme Court did not go through a strict

⁵² *Hartmann*, slip op. at 21.

⁵³ 475 U.S. 503 (1986).

⁵⁴ 462 U.S. 296 (1983).

⁵⁵ *Hartmann*, slip op. at 29-30. The objectives of the CDS program are stated at in AR 608-10: *Supra* note 24, para. 1-4.

⁵⁶ *Goldman*, 475 U.S. at 509-10.

⁵⁷ *Id.* at 530-31. Of the justices who decided *Goldman*, Chief Justice Rehnquist and Justices Stevens and O'Connor remain on the Court (Chief Justices Rehnquist and Justice Stevens were in the majority).

⁵⁸ *Hartmann v. Stone*, 68 F.3d 973, 983 n.7. (6th Cir. 1995). While its treatment of deference to the military was apparently not significant to the Sixth Circuit in this case, the significance of this footnote in future cases remains to be seen.

⁵⁹ *Id.* at 985-86. The Sixth Circuit also distinguished *Goldman* on the basis that the Air Force uniform regulation was neutral and only incidentally impaired Goldman's religious practice.

⁶⁰ *Id.* at 986.

scrutiny analysis when considering Chaplain Goldman's claim that the Air Force's uniform regulation, which banned all indoor head gear, violated his right to the free exercise of religion by restricting his wearing of a yarmulke. Instead, the majority accorded great deference to the Air Force's stated military interest in uniformity and merely applied a reasonableness test.⁵⁶ In dissent, Justice O'Connor argued that the Court should have applied the strict scrutiny test. She asserted that the military interest should be considered as a part of the compelling need prong of this test.⁵⁷

Despite some strong language reaffirming the concept of deference, the Sixth Circuit applied a sort of hybrid approach in *Hartmann*. Tucked in a footnote which begins with the always dangerous words, "though not significant in this case," the Sixth Circuit explained its treatment of the deference analysis by stating the following:

Though not significant in this case, it has never been clear exactly where in a free exercise analysis this portion of the test must fit. Some have characterized it as replacing the 'compelling state interest' portion, but we think it stands as a separate option open to the military to justify its regulation. Therefore, once we conclude that the regulation would fail the normal constitutional test we still must determine whether, in the face of what is normally a constitutional violation, the court must defer to military judgment.⁵⁸

The Sixth Circuit distinguished the *Goldman* case because the provisions at issue in AR 608-10 are directed at military family members in quarters rather than at soldiers.⁵⁹ Viewing the link to any discernable military mission as far too attenuated to merit judicial deference, the Sixth Circuit stated that the Army lacked "any remotely possible argument of military necessity for the general enforcement of such rules."⁶⁰

Strict Scrutiny

With *Goldman* posing no bar to full judicial review of the FCC prohibitions, the three judge panel of the Sixth Circuit found that the disparate treatment of religious activity contained in the challenged provisions of *AR 608-10* demanded application of strict scrutiny. The Sixth Circuit flatly asserted that "[a] rule that uniformly bans all religious practice is not neutral."⁶¹

This finding was crucial to the outcome of the case. Under current law, "neutral" rules (or rules of general applicability) are not subject to strict scrutiny unless the plaintiff makes a showing that the challenged provisions "substantially burden" the free exercise of their religion.⁶²

The plaintiffs would have faced a much more daunting task under the "substantial burden" test. As the district court found, the "Plaintiff's religious beliefs do not require that religious instruction be provided through the CDS or FCC programs; that religious instruction must be provided through child care outside of the family; or that Plaintiff's children must be placed in the FCC program."⁶³

The Sixth Circuit relied heavily on the Supreme Court case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*⁶⁴ in applying the strict scrutiny standard. In *Lukumi*, four city ordinances that were used to prohibit the ritual sacrifice of animals in Hialeah, Florida, were challenged on First Amendment free exercise grounds. The Supreme Court, reversing both the district court and the United States Court of Appeals for the Eleventh Circuit,⁶⁵ applied strict scrutiny in reviewing (and overturning) these ordinances.

In *Lukumi*, the Supreme Court examined the texts of the challenged ordinances, the events leading up to their enactment, and the impact of the ordinances in practice. The Court concluded that the real aim of these facially neutral ordinances⁶⁶ was to outlaw animal sacrifice in the City as practiced by a particular religious cult⁶⁷. The Court stated the following:

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons [I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.⁶⁸

Interestingly, the facts in *Hartmann* may present the mirror image of the *Lukumi* case. In stark contrast to the Hialeah ordinances, the challenged provisions of *AR 608-10* are facially discriminatory. Unlike *Lukumi*, however, there was no evidence that the prohibitions in *AR 608-10* were enacted with the official purpose of discouraging or disapproving of any particular religious beliefs or practices. The object, instead, was to preserve the secular nature of the FCC program because of the Army's operational needs and its desire to avoid violating the Establishment Clause.⁶⁹

Establishment Clause

The Sixth Circuit accepted the Army's argument that avoiding a violation of the Establishment Clause was a compelling in-

⁶¹ *Id.* at 978.

⁶² *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (The *Mozert* decision was written by the same judge who wrote the opinion in *Hartmann*). In *Employment Div., Dep't of Human Resources v. Smith*, the Supreme Court held that neutral rules do not require strict scrutiny even if they serve to "substantially burden" religious activity. 494 U.S. 872 (1990). This test was reiterated by the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. 113 S. Ct. 2217, 2226 (1993). Congress, however, overruled *Smith* in 1993 by passing the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, to restore the test previously enunciated by the Court in *Sherbert* and *Yoder*. Although the case was primarily briefed and argued on the basis of the "substantial burden" test, the Sixth Circuit relegated the issue to two footnotes in the opinion as a result of the court's finding that the regulatory provisions were not neutral and required a strict scrutiny analysis. *Hartmann*, 68 F.3d at 979 nn. 3-4.

⁶³ *Hartmann v. Stone*, No. C 92-0462L(M), slip op. at 11 (W.D. Ky. Oct. 8, 1993).

⁶⁴ 113 S. Ct. 2217 (1993).

⁶⁵ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989); *Church of the Lukumi Babalu Aye v. Hialeah*, 936 F.2d 586 (11th Cir. 1991), a one paragraph *per curiam* opinion.

⁶⁶ The Court expressly found that the ordinances were facially neutral despite containing the words, "ritual" and "sacrifice." *Lukumi*, 113 S. Ct. at 2227.

⁶⁷ *Id.* at 2231. The ordinances were aimed at a ritual of the Santeria religion. *Id.* at 2222.

⁶⁸ *Id.* at 2226-27.

⁶⁹ The Sixth Circuit vehemently disagreed that the Army's stated reasons justified the prohibitions in the regulation.

interest. The Sixth Circuit flatly disagreed, however, with the contention that the Army would become inextricably and unconstitutionally entangled with religion should religious activity be allowed in FCC homes.⁷⁰

The Sixth Circuit rested this conclusion in large part on its finding that the FCC providers were independent contractors. The Sixth Circuit noted that the providers are paid no salary and receive no benefits. They privately contract with parents and set both the price and hours of the child care. Furthermore, both AR 608-10 and a "Provider Statement of Understanding," which each FCC provider must sign, expressly state that FCC providers are private contractors.⁷¹

The Sixth Circuit gave little credence to the Army's argument that the sheer volume of detailed regulation governing the FCC program would inevitably create undue entanglement with religion should the prohibited activities be allowed. The court stated:

It is, after all, the Army that has created the regulations. An agency of the government cannot create a Byzantine regulatory code and then ban religious practice because its regulatory code is so complex.⁷²

In the Sixth Circuit's view, the danger of an unconstitutional entanglement with religion comes not from allowing the activity but in prohibiting it. The Sixth Circuit explained:

The regulations require the Army to determine exactly how much religion is too much, what is substantive about particular religions and what is merely educational, and when a Provider is using a religious symbol in

'proselytizing manner.' This involves a far greater risk of entanglement than allowing parents to set the terms of care in a private contract.⁷³

Next, the Sixth Circuit examined the amount of support that the Army gives to FCC providers. Again, contrary to the district court, the Sixth Circuit found that this support was not very substantial. The Army made no direct payments to providers; government quarters were provided as a part of a soldier's employment; the Army's risk insurance program covered only limited claims; and the loan of equipment by itself did not *per se* advance religion.⁷⁴

Despite the Sixth Circuit's view that the Army's support to FCC providers under AR 608-10 does not violate the Establishment Clause, several Supreme Court cases have held that any amount of direct federal financial funding of religious activities violates the Constitution.⁷⁵ However, the majority holding in the recent Supreme Court case of *Rosenberger v. Rector & Visitors of the University of Virginia*⁷⁶ lends new support to the Sixth Circuit's conclusion that providing support under AR 608-10 to FCC providers offering religious oriented day care would not violate the Establishment Clause.

The Supreme Court in *Rosenberger* dealt with a University of Virginia policy that provided student activity fee funding to contractors to print publications from authorized student groups. Wide Awake Productions, a student activity that published a magazine with a Christian editorial view point, was denied funding for its magazine because of its religious activity.⁷⁷ The University of Virginia raised the same argument that the Army used unsuccessfully in *Hartmann*; that the restriction was necessary to prevent a violation of the Establishment Clause.⁷⁸

⁷⁰ *Hartmann v. Stone*, 68 F.3d 973, 979 (6th Cir. 1995).

⁷¹ *Id.* at 980-81. "When viewed in light of how the Army presents its program in the regulations and to the participants, it is clear that the sudden attempt to cast FCC Providers as little more than the Army's alter egos exaggerates the relationship between the program and the individual Providers." *Id.* at 981.

⁷² *Id.* at 981.

⁷³ *Id.* at 981-82.

⁷⁴ *Id.* at 982-83. The court chose to characterize the Army's loan of equipment to FCC providers as allowing them "access to a community toy box." *Id.* at 983.

⁷⁵ See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Chief Justice Rehnquist opinion, joined by Justices O'Connor, Kennedy, Scalia); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976).

⁷⁶ 115 S. Ct. 2510 (1995). This case was decided on 29 June 1995 after arguments but before a decision in *Hartmann*. The *Hartmann* decision only refers to *Rosenberger* in a footnote dealing with free speech. *Hartmann*, 63 F.3d at 981 n.5.

⁷⁷ *Rosenberger*, 115 S. Ct. at 2514-15.

⁷⁸ *Id.* at 2520-21. (Although the University of Virginia apparently abandoned this argument at the Supreme Court, the Court focussed a great deal of attention on this issue).

In overturning the University of Virginia's guideline denying funding based on religious viewpoints, a five-justice majority of the Supreme Court seemed to embrace the rule that direct provision of financial support does not violate the Establishment Clause *per se* so long as the aid is provided in a neutral manner even if the recipient uses the support for a clearly religious purpose.⁷⁹ Writing for the majority, Justice Kennedy wrote, "Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life."⁸⁰

More decisions will be necessary before the meaning of *Rosenberger* is understood. Justice Souter's strong dissent in *Rosenberger* reflects the number of seemingly contradictory Supreme Court decisions on this issue. Writing for the four-justice minority, Justice Souter recited the body of contrary cases and lamented, "[w]hy does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional violation?"⁸¹ Justice Thomas's observation in his concurring opinion that "our Establishment Clause jurisprudence is in hopeless disarray"⁸² rings all too true.

Hartmann stands at the precise confluence of two irreconcilable First Amendment forces—the Free Exercise Clause and the Establishment Clause. Justice O'Connor's words in *Rosenberger* are equally apt in *Hartmann*: "This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities."⁸³ Justice O'Connor then added: "When two bedrock principles so conflict, understandably neither can provide the definitive answer. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause."⁸⁴

In promulgating the restrictions on religious activity in *AR 608-10*, the Army, caught between these two "bedrock principles," judged the balance in favor of the Establishment Clause. Although the district court agreed, the Sixth Circuit did not. The Army and the Department of Justice have elected not to appeal the *Hartmann* decision. The United States Army Community and Family Support Center is currently staffing changes to *AR 608-10* to end the prohibition on religious activities in FCC homes Army wide.⁸⁵ Major Lawrence Wilde.

⁷⁹ Interestingly, nowhere in the opinion is the three part *Lemon v. Kurtzman* test even mentioned. The case itself is cited only once as a passing footnote reference. *Id.* at 2542 n.8.

⁸⁰ *Id.* at 2524. Following this reasoning, arguably, the direct and indirect assistance the Army gives to FCC providers is merely furthering the Army's secular purpose of ensuring safe and available child care. Although FCC providers may use the training and equipment that the Army gives them to provide a religious environment or religious training for the children in their care, this use is merely incidental, and does not place the Army in the position of improperly promoting religion. Although discussed in *Rosenberger* at some length by both the majority opinion and by Justice O'Connor in her concurrence, the significance that the support came from student activity fees and that the printing was done by outside contractors does not clearly distinguish this case from *Hartmann*.

⁸¹ *Id.* at 2539-40.

⁸² *Id.* at 2532.

⁸³ *Id.* at 2525.

⁸⁴ *Id.* at 2525-26.

⁸⁵ As interim guidance, the United States Army Community and Family Support Center (CFSC) requests that inquirers from the field regarding religious activities in FCC homes coordinate with CFSC Headquarters. The points of contact are Mr. Joe Perreault, FCC, DSN 221-0710, and Lieutenant Colonel James F. Quinn, Command Judge Advocate, DSN 221-2475.

Tort Claims Note

Damages in Wrongful Death Claims

The Federal Tort Claims Act (FTCA) permits recovery for damage or loss to property, personal injury, and death. The general rule is that state law determines whether a person has a cause of action under the FTCA and what types of damages are compensable. In common law, no cause of action exists for death caused by negligence. State legislatures have mitigated the harsh effect of the common law by enacting wrongful death and survival statutes or some combination thereof. These statutes vary greatly in defining who may file, who may recover, and the types of compensable damages. Accordingly, when investigating a wrongful death claim, the first step is to review the state's wrongful death and survival action statutes.

According to the Code of Federal Regulations, the administrator or executor of the deceased's estate is the proper claimant, but anyone with standing under state law also may submit the claim. Some wrongful death statutes permit the administrator to bring the wrongful death claim while others permit only those who would benefit from recovery. Some statutes even grant certain beneficiaries priority over others. Recoverable damages may include: lost wages (past and future), medical bills, funeral expenses, loss of services, pain and suffering, emotional distress, and loss of consortium. State law will dictate the exact damages available.

A minority of states have wrongful death statutes that allow punitive damages. Originally, the FTCA did not permit recovery of punitive damages; however, Congress amended the FTCA to allow recovery of compensatory or pecuniary damages even under the punitive statutes.

The claimant interview is extremely important in determining losses under a state's wrongful death statute. The claimant

must prove economic reliance on the deceased and provide corroborating evidence—such as witness statements and financial documents that show support. A comprehensive inquiry should be made into the claimant's sources of income before and after the death. Additionally, the deceased's medical records before the death-related injury are important in determining the deceased's life expectancy and work-life expectancy. The investigation should determine whether the deceased had chronic health conditions unrelated to the cause of death, what medications the deceased took, whether the deceased had been hospitalized for any condition, and whether the deceased had any disabilities. The United States Army Claims Service (USARCS) has access to several insurance companies that will review the medical records of a deceased to determine that person's life expectancy. Federal publications also are an excellent resource in evaluating life and work-life expectancy.

Absent a specific FTCA provision prohibiting a particular type of damage, state law establishes the method for calculating damages. Generally, lost future wages should be adjusted for personal consumption and income taxes and then reduced to present value. Personal consumption is that money which the deceased would have spent and from which the claimants would not have benefited. Several published tables are available that predict personal consumption, based on family size, gross family income, and gender. Present value is the value of today's dollar in tomorrow's market allowing for inflation and interest. Some states have statutory guidelines for reduction to present value while others rely on economic expert testimony. Finally, other legal doctrines may limit the liability of the United States. The investigation should address the application of collateral source, statutory employer, and workers' compensation laws. The area action officer at the USARCS has significant resources available to help in evaluating the economic loss in wrongful death cases. Lieutenant Colonel Caldwell.

1 28 U.S.C. § 1346 (1995).

2 28 C.F.R. § 14.3 (1995).

3 COLO. REV. STAT. § 13-21-201 (1995).

4 28 U.S.C. § 2674 (1995).

5 VITAL STATISTICS OF THE UNITED STATES, LIFE TABLES, vol. II, § 6.

6 See Consumption Cost Calculator, Lawyers and Judges Publishing Co., P.O. Box 30040, Tucson, Arizona 85751, (602) 751-1500.

Personnel Claims Note

A Comparison of the Authority to Ship Household Goods Versus Filing a Claim

The legal standard to authorize shipment of household goods differs from the legal standard to file a claim for household goods damaged or lost in transit. The administrative requirements for a spouse to ship a soldier's household goods are much less than the requirements for a spouse to file a claim for damage or loss to a soldier's household goods.

Shipment of Household Goods

Army policy allows a spouse or designated agent to ship household goods if the soldier has authorized the spouse or designated agent to do so. This authorization may be in any form that clearly indicates the soldier's intent. The soldier's intent may be reflected by a specific or general power of attorney, a letter of authorization, completion of a form letter provided by the transportation office, or a letter authenticated by the soldier's commander. A spouse or designated agent may hand carry the authorization to the transportation office or the soldier may mail, electronic mail, or facsimile the authorization to the transportation office.

Authorization to ship household goods also may be inferred from the inclusion of family members on an order to an assignment other than the continental United States provided the shipment is to the soldier's new duty station, or the property is placed in storage. These orders are all a spouse needs to ship and store household goods.

Filing a Claim

The authorized agent or legal representative of a proper claimant may file a claim on behalf of the claimant if the agent provides a power of attorney complying with local law. If the power of attorney is a limited power of attorney, and not a general power of attorney, the limited power of attorney must specifically grant the authority to file a claim. A power of attorney that only authorizes the agent to accept a shipment does not authorize filing of a claim.

Additionally, a spouse may file a claim on behalf of a proper party claimant if the spouse provides a written signed authoriza-

tion from their claimant. Any writing signed by the claimant, such as a letter, which authorizes the spouse to file a claim, will be accepted in lieu of a power of attorney. However, claims personnel should take great care in evaluating such a writing, especially when claims personnel are aware that the spouse is estranged from the claimant. In these instances, claims personnel should contact the claimant to confirm that the spouse has the authority to act. Regardless of whether a power of attorney or a letter of authorization is used, payment is still made in the claimant's name and sent to the address indicated. Major Polk.

Pursuing Carrier Recovery for the Cost of Reupholstering a Matched Set of Furniture When Items Within the Set Are Damaged

Where furniture is made in matched sets, damage to the upholstery of individual items within the set may justify reupholstering the entire set. Claims adjusters for the carrier industry often resist paying these claims because they believe that they can only be held liable for damage to individual pieces of furniture within the set. However, when a piece of furniture within a set cannot be reupholstered to match other pieces in the set, the carrier can be held liable for reupholstering the entire set. The following notes are based on a summary of arguments, cases, and authorities that have been accepted by the General Accounting Office to enforce the Army's right to recover these costs. Field claims offices can use this information to facilitate settlements of similar claims.

As a general rule, the measure of damages to repair or replace an item damaged in shipment is the reasonable cost of putting it in as good a condition as it was in prior to the damage. "The primary object of an award of damages in a civil action, and the fundamental principle or theory on which it is based, is just compensation, indemnity, or reparation for the loss or injury sustained by the injured party, so that he may be made whole, and restored, as nearly as possible, to the position or condition he was in prior to the injury."⁷ The evidence reasonably necessary to prove value varies with the nature of the item and other facts. Courts have emphasized that the actual economic value to the owner should be used when household goods are damaged or destroyed.⁸ When items are made in matched sets, at least one appellate court, in *Gugert v. New Orleans Independent Laundries, Inc.*,⁹ has ruled that destruction to items within a set are grounds for replacing the entire set.

⁷ 25 C.J.S. *Damages* § 3 (1966 & Supp. 1994). See also RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1977 & Supp. 1993).

⁸ See *Valuation of Wearing Apparel or Household Goods Kept by Owner for Personal Use, in Action for Loss or Conversion of, or Injury to, Such Property*, 34 A.L.R. 3d, at 816, § 2 (1970 & Supp. 1994).

⁹ See *Gugert v. New Orleans Independent Laundries, Inc.*, 181 So. 653, 656 (La. App. 1938) (damage to some drapes in a matched set warranted replacement of the entire set). Although *Gugert* was decided in a civil law jurisdiction, the applied principal is the well established common law principal of restoring the victim to the position that he or she was in before the injury occurred.

The Army policy allows the reupholstering of an entire set of furniture when a damaged piece cannot be reupholstered in matching fabric.¹⁰ This Army policy is in consistent with the case law of *Gugert* and many other cases stating that the victim must be restored as closely as possible to the condition prior to the injury.¹¹ The Comptroller General has held that an estimate of repair obtained by a military member reflects the measure of damages if the estimate is not unreasonable in comparison with the local market price of the repair service or the value of the article.¹² Therefore, if a claimant obtains an estimate of repair stating that the fabric for a piece of furniture in a matched set cannot be reupholstered in matching fabric and the damage is bad enough to warrant reupholstering the set, then it is proper for the field claims office to pay the claimant for the cost of reupholstering the entire matched set. The cost, minus appropriate depreciation for the fabric, should be recovered from the carrier.

Reupholstering an entire matched set is not appropriate in all circumstances when an item within the set is damaged. If the damage is slight or not easily observable or the cost of repair would exceed the replacement cost but the set is still usable, then an award for a loss of value is more appropriate. Captain Koonin.

Turn-In of IRV Shipment Items With Salvage Value

The following information supplements the guidance in *Department of the Army Pamphlet 27-162*, paragraphs 2-44, 2-55a(8), 3-8d(4), and Appendix E, Section I.

On increased released valuation (IRV) shipments, carriers have a right to pick up "destroyed" items, that is, items for which the claimant was paid the depreciated replacement value rather than a loss of value or repair cost. The carrier will pick up those items

directly from the claimant and may do so whether or not the carrier ever fully pays for the item.

In most cases, claimants will *not* be directed to turn in destroyed items from IRV shipments to the Defense Reutilization and Marketing Office (DRMO) because the carrier is entitled to those items. If the claimant wishes to keep the items, a reasonable salvage value will be deducted from the amount otherwise payable when the claim is adjudicated. The carrier has no right to pick up items for which salvage value has been deducted.

However, when dealing with high value items on IRV shipments, such as Lladro figurines or *schranks*, where the carrier has stated that it does not intend to exercise its salvage rights, and the field claims office has determined that the item may have some salvage value, it would be appropriate to direct the claimant to turn the item in to the DRMO. Otherwise, the claimant may be unjustly enriched by receiving payment for the items and keeping them. Annotate the chronology sheet of actions when this is done.

The claims instruction packets given to the claimants should mention the need to retain all property for at least ninety days after final settlement, unless the claims office determines it to be hazardous, and the need to call the field claims office for authorization to dispose of the items. Additionally, the final settlement letter to the claimant should identify the items that the carrier would be entitled to if he decides to exercise his salvage rights within the prescribed time frame.

Claims offices must identify files in which the carrier is entitled to salvage and must process these claims for recovery action within thirty days so that the claimant does not dispose of salvageable items before the end of the period allotted for carrier pickup. For guidance on this point, see *Department of the Army Pamphlet 27-162*, para 3-8d(4)(a). Ms. Holderness.

¹⁰ DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, para. 2-43c (15 Dec. 1989). This publication is currently being redrafted, but the policy will remain the same.

¹¹ See, e.g., *Stills v. Gratton*, 55 Cal. App. 3d 704, 706 (1976); *Rodriguez v. State*, 472 P.2d 509, 517 (1970); *Incollingo v. Ewing*, 282 A.2d 206, 228 (1970); *Mays v. Witt*, 387 S.W.2d 688, 690 (Tex. Civ. App. 1965).

¹² *Interstate Int'l, Inc.*, B-197911.6, May 25, 1989.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys 5F-F10

Class Number—133d Contract Attorneys' Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1996

July 1996

- 1-3 July: Professional Recruiting Training Seminar
- 1-3 July: 27th Methods of Instruction Course (5F-F70).
- 8-12 July: 7th Legal Administrators' Course (7A-550A1).
- 8 July-13 September: 140th Basic Course (5-27-C20).
- 22-26 July: Fiscal Law Off-Site (Maxwell AFB) (5F-12A).
- 24-26 July: Career Services Directors Conference.
- 29 July-9 August: 137th Contract Attorneys' Course (5F-F10).
- 29 July-8 May 1997: 45th Graduate Course(5-27-C22).
- 30 July-2 August: 2d Military Justice Managers' Course (5F-F31).

August 1996

- 12-16 August: 14th Federal Litigation Course (5F-F29).
- 12-16 August: 7th Senior Legal NCO Management Course (512-71D/40/50).
- 19-23 August: 137th Senior Officers' Legal Orientation Course (5F-F1).
- 19-23 August: 63d Law of War Workshop (5F-F42).
- 26-30 August: 25th Operational Law Seminar (5F-F47).

September 1996

- 4-6 September: USAREUR Legal Assistance CLE (5F-F23E).

- 9-11 September: 2d Procurement Fraud Course (5F-F101).
- 9-13 September: USAREUR Administrative Law CLE (5F-F24E).
- 16-27 September: 6th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1996

July 1996

- 21-26, APA: 31st Annual Seminar/Workshop
New Orleans, LA

For further information on civilian courses, please contact the institution offering the course. Addresses of sources of CLE courses are as follows:

- AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

- CLESN:** CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744 (800) 521-8662
- ESI:** Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3203
(703) 379-2900
- FBA:** Federal Bar Association
1815 H Street, NW., Suite 408
Washington, D.C. 20006-3697
(202) 638-0252
- FB:** Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 222-5286
- GICLE:** The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664
- GII:** Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250
- GWU:** Government Contracts Program
The George Washington University
National Law Center
2020 K Street, N.W., Room 2107
Washington, D.C. 20052
(202) 994-5272
- IICLE:** Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080
- LRP:** LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510 (800) 727-1227
- LSU:** Louisiana State University
Center of Continuing Professional Development Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837
- MICLE:** Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533 (800) 922-6516
- MLI:** Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100
- NCDA:** National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA
- NITA:** National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(800) 225-6482
(612) 644-0323 in (MN and AK).
- NJC:** National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747
- NMTLA:** New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003
- PBI:** Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(800) 932-4637 (717) 233-5774
- PLI:** Practising Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700
- TBA:** Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421
- TLS:** Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900
- UMLC:** University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762
- UT:** The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually

Jurisdiction	Reporting Month
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the February 1996 issue of *The Army Lawyer*.

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 unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is 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, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, VA 22060-6218, telephone: commercial (703) 767-9087, DSN 427-9087.

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. These publications are for government use only.

Contract Law

- AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
- AD A301095 Government Contract Law Deskbook, vol. 2 JA-501-2-95 (503 pgs).
- AD A265777 Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).
- AD A263082 Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).
- AD A305239 Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (80 pgs).
- AD B164534 Notarial Guide, JA-268-92 (136 pgs).
- AD A282033 Preventive Law, JA-276-94 (221 pgs).
- AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).
- AD A297426 Wills Guide, JA-262-95 (517 pgs).
- AD A268007 Family Law Guide, JA 263-93 (589 pgs).
- AD A280725 Office Administration Guide, JA 271-94 (248 pgs).
- AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).
- AD A289411 Tax Information Series, A 269-95 (134 pgs).
- AD A276984 Deployment Guide, JA-272-94 (452 pgs).
- AD A275507 Air Force All States Income Tax Guide, April 1995.

Administrative and Civil Law

- AD A285724 Federal Tort Claims Act, JA 241-94 (156 pgs).
- AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).
- AD A298443 Defensive Federal Litigation, JA-200-95 (846 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).
- AD A298059 Government Information Practices, JA-235-95 (326 pgs).
- AD A259047 AR 15-6 Investigations, JA-281-92 (45 pgs).

Labor Law

- AD A303539 The Law of Federal Employment, JA-210-96 (312 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD 302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

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

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes all Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and DA Form 12-99 through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 through their supporting installation and TRADOC

DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA Form 12-99 through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Room 1040, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the St. Louis USAPDC at (314) 263-7305, ext. 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the telephone order publications system (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 1655 Woodson Road, St. Louis, MO 63114-6181. You may reach this office by telephone at (314) 263-7305, ext. 268.

3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic online information service (often referred to as a BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS Online Information Service, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 134.11.743 or Domain Names `laawsbbs@otjag.army.mil`):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D),

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps,

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues,

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: OIS Sysop
9016 Black Rd., Ste 102
Fort Belvoir, VA 22060-6208

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud (9600 or more recommended).

Novelle LAN setup: Server = LAAWSBBS (Available in NCR only)

TELNET setup: Host = 134.11.74.3 (PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 134.11.74.3

Host Name = `laawsbbs@otjag.army.mil`

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and down-

load desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by filename. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400-4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download files from the OIS, substituting the appropriate file name as applicable.

e. To use the decompression program, you will need to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where the program is located (PKZ110.EXE). Then type PKZ110. The program will then execute, converting its files to usable format. Once this process is completed, your hard drive will have an exploded version of the PKUNZIP utility program. You will need to move or copy the files to the directory of the compression or decompression utilities. You will need to move or copy the files to the directory if you want to use them anywhere.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA267.ZIP	January 1996	Uniform Services World-wide Legal Assistance Office Directory, February 1996.
JA268.ZIP	January 1996	Legal Assistance Notarial Guide, April 1994.
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses Protection Act Outline and References, November 1992.
JA275.ZIP	August 1993	Model Tax Assistance Program, August 1993.
JA276.ZIP	January 1996	Preventive Law Series, December 1992.
JA281.ZIP	January 1996	15-6 Investigations, November 1992 in ASCII text.
JA301.ZIP	January 1996	Unauthorized Absences Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1995.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook Volume 1, March 1996.
01-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Co. Deskbook, Volume 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA5082.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.

Contract Law
3, March

NOTICE

FILE NAME	UPLOADED	DESCRIPTION
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review.
JAS09-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JAS09-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
OPLAW95	January 1996	Operational Law Deskbook 1995.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review text, 1994 Symposium.

Reserve and National Guard organizations without or computer telecommunications capabilities and individualization augmentees (IMA) having bona fide military need these publications may request computer diskettes containing these publications listed above from the appropriate proponent division (Administrative and Civil Law, Criminal Law, Law, International and Operational Law, or Development, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch blank, formatted diskette for each file. Additional requests from IMAs must contain a statement verifying the requested publications (purposes related to their military of law).

Questions or suggestions on the availability of publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Division, JAGS-DDL, Charlottesville, VA 22903-1781. For information concerning the LAAWS BBS,