

## Administrative Investigations Overview

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Administrative Investigations = Commander's information tool and combat multiplier

- Commanders have **inherent authority to investigate** any matter under their responsibility, unless otherwise prohibited or limited, if undertaken for the purpose of furthering the good order and discipline of their command.
- Administrative investigations are different from criminal investigations and are usually conducted by non-law enforcement personnel. However, administrative investigations may form the basis for criminal charges, or may lead to criminal investigation. (See Appendix B, AR 195-2, *Criminal Investigation Activities*, to determine which UCMJ offenses are investigated by CID, MPI, or unit commander.)

### Basic Terminology

Convening Authority (CA): A commander with the authority to convene a court-martial

General Court-Martial Convening Authority (GCMCA): A General Officer commander with the authority to convene a general court-martial

Special Court-Martial Convening Authority (SPCMCA): A commander with the authority to convene a special court-martial. Usually a colonel (O6) brigade commander or equivalent

Summary Court-Martial Convening Authority (SCMCA): A commander with the authority to convene a summary court-martial. Usually a lieutenant colonel (O5) battalion commander or equivalent

Investigating Officer (IO): Person tasked with conducting an investigation

Appointing Authority: Person with authority to appoint an IO

Approval Authority: Person with authority to approve an investigation

Delegation of Authority: Process by which a superior gives appointing and/or approval authority to a subordinate

Army Regulation (AR)

Rapid Action Revision to AR (RAR)

Department of the Army Pamphlet (DA PAM)

Department of Defense Instruction (DoDI)

Department of Defense Directive (DoDD)

In Accordance With (IAW)

Under Provisions of (UP)

General Officer (GO)

### What do we investigate?

- Training accidents
- Operational accidents
- Combat operations (e.g. friendly fire, hostile deaths)
- Garrison operations
- Minor misconduct
- Serious misconduct
- Suicides
- Complaints and inquiries
- Property damage
- Off-duty and on-duty incidents

### Why do we investigate?

- To gather, analyze, and record relevant information.
- To collect, assemble, analyze, and record available evidence about a particular matter.
- To discover information upon which to make decisions.
- To ascertain facts and to report them to the appointing authority.

- To learn lessons and correct mistakes.

**\*\*Treat every investigation as if it might be reviewed by Congress or released to the public\*\***

### General considerations for good investigations

- Carefully consider the scope-what is the goal of the investigation?
  - What subjects will be covered and what questions will be answered?
  - Should make appointment memo specific, but don't hamstring IO → you don't know what you don't know
  - Judge advocates must be involved in the appointment memo drafting process
  - An investigation with improper/insufficient scope may lead to additional investigation or scrutiny
- Select the right IO
  - DA6 (duty roster) *may* be okay for simple investigations
  - Hand-pick IO for complex, sensitive, or technical investigations
  - Consider requesting investigator from outside of command if possibility or appearance of command culpability. But if time is of the essence, investigator from command can be appointed and can turn over initial evidence to outside investigator
  - IO must be senior (at least by date of rank) to anyone who may be investigated
- IO should carefully develop investigative plan with JA prior to beginning investigation
- Ensure IO is properly resourced
  - Should have admin support and SMEs, if necessary
  - IO should be able to go to scene of incident/accident
- Intellectual integrity in the analysis of evidence
  - Consistency: IOs should apply the same analytical standards to all facts/evidence
  - Critical examination: IO must consider all relevant evidence, even if inconvenient. Gaps in evidence that cannot be filled must be identified, and not glossed over
  - Following leads to logical end points: Credible investigations must follow all leads to logical conclusions, fleshing out and examining all reasonable implications of evidence, even if evidence leads higher up the chain than originally suspected
- Report of investigation
  - "Four-corner integrity" → Findings must be supported by, and point to, evidence included in the report. Recommendations should be supported by findings. JA should ensure this prior to report going to appointing authority
  - IO should *usually* not include specific disciplinary recommendations (because of UCI possibility)
- Approved recommendations must be implemented
- Let the process work
  - Do not deviate from normal processes, especially in high-profile cases
  - Consider carefully the rationales for any exceptions to normal process
  - Commanders should not attempt to influence the investigation once it is underway

### AR 15-6 Investigation

- Formal
  - Involves formal fact-finding, hearings, lawyers, and usually a named respondent.
  - Appointing Authority:
    - GCMCA/SPCMA
    - Any general officer
    - State adjutant general
    - Commander/principal staff officer O6 or above at installation/activity/unit level
    - GS-14 or above agency head or division chief
- Informal
  - More flexible, less time/resource intensive, simple, preferred over formal
  - Most AR 15-6 investigations are informal
  - Appointing authority:
    - Anyone who can appoint a formal 15-6 investigation
    - Any commander

- A principal staff officer in the rank of major or above
- Special situations
  - Only a GCMCA can appoint a 15-6 investigation if:
    - Property destruction of \$1M or more
    - Loss or destruction of Army aircraft or missile
    - Injury or illness likely to result in death or permanent total disability
    - Death of one or more people (hostile death investigations can be delegated to SPCMCA)
    - Death of one or more people by friendly fire
  - Check local policies and regulation supplements for additional guidance
  - Appointing errors nullify investigation, unless ratified by proper appointing authority
- How and whom to appoint as IO
  - The appointment memorandum
    - Written memorandum is preferred (required for formal 15-6)
    - Describe the facts as they are known at the time
    - Be specific in what the IO should try to accomplish
    - Give adequate guidance and special instructions
  - IO/board members
    - Commissioned/warrant officer & GS-13 or above
    - Senior to person being investigated
    - Best qualified by reason of education, training, experience, length of service, and temperament
- Suspension of Favorable Personnel Actions (Flags)
  - “The suspension of favorable actions on a Soldier is mandatory when military or civilian authorities initiate any investigation or inquiry that may potentially result in disciplinary action, financial loss, or other loss to the Soldier’s rank, pay, or privileges.” (AR 600-8-2, para. 2-1(e))
  - Consider this language in the appointment memo: “Should you determine in the context of your investigation that a Soldier’s status has changed from favorable to unfavorable, as defined in AR 600-8-2, Suspension of Favorable Personnel Actions (Flags), coordinate with the appropriate officials to initiate a FLAG.”
- Conducting the investigation
  - Mandatory legal brief
  - Must be thorough and impartial
  - Investigative plan is crucial → who, what, where, when, why, and how
  - Rules of evidence generally do not apply → **evidence must be relevant and material**
    - Limits: privileged communications, evidence of polygraph only with consent of subject, no involuntary admissions, no bad faith searches (formal proceedings)
- Legal review
  - Required for –
    - Serious/complex cases
    - When adverse action is contemplated
    - When the investigation is relied upon by higher headquarters
  - Determine
    - Whether the proceedings comply with legal requirements and the appointment memo
    - What effects any errors have
    - Whether sufficient evidence supports the findings
    - Whether the recommendations are consistent with the findings
  - JA should consider *detailed* legal review for complex or high-profile investigation
- Appointing authority action
  - May approve as is, disapprove, return for additional investigation, substitute findings and recommendations
  - Recommendations:
    - Treat like findings—approving/disapproving accordingly
    - Be alert to potential unlawful command influence
    - Follow through with recommendations. Task to staff/subordinate commands as appropriate. Consider publishing results (for correction/lessons learned purposes).
- Freedom of Information Act (FOIA)
  - Approved investigations may be released under FOIA

- IO should carefully consider what to include in report → should carefully consider whether to include information that is not necessary to support findings (especially if sensitive, like autopsy photos)

### Preliminary Inquiry (Commander's Inquiry)

- Can be appointed orally or in writing by any commander
- Should be considered where commander needs information but 15-6 investigation not warranted (when there is no need for findings and recommendations)
- Can become 15-6 investigation if necessary
- Sometimes done UP RCM 303

### Joint Investigations

- No joint publication on investigations except:
  - DOD Instruction 6055.07 allows joint safety investigation
- Look for command/local guidance
- Consider entire situation
  - What is the command relationship
  - Which service has the most at stake
  - How will the investigation be used
  - Are there service-directed mandatory investigations
- Pick a regulation and stick to it – Do not create a hybrid
- Note that officer from one service can be appointed to conduct another service's investigation

### Friendly Fire

- Definition: A circumstance in which members of a U.S. or friendly military force or mistakenly or accidentally **killed or injured** in action by U.S. or friendly forces
- Fratricide (literally means "killing one's brother") is subset of friendly fire
- If no injury or death results, it's not "friendly fire"
- Reporting → Units must report and investigate all suspected friendly fire incidents as soon as evidence leads personnel on the ground to believe that friendly fire may be involved
  - Immediate telephonic report to CMAOC
  - Submit casualty report
  - Operational report to Combatant Commander
  - Notify Combat Readiness/Safety Center (CRC)
  - Notify Criminal Investigation Division (CID)
  - Notify force providers and parent units
  - Notify CENTCOM SJA
- Investigation requirements
  - Services must conduct a legal and a safety investigation into all friendly fire mishaps
  - Investigations must be convened and approved/endorsed by Combatant Commander or his designee
    - Service Component Commanders
    - General/Flag officer in command of subordinate Joint Command or JTF
    - General/Flag officer commanders with GCMCA

### Combat Fatality Investigations

- All hostile deaths must be investigated (AR 638-8)
  - GCMCA initiates death investigation UP AR 15-6. This is delegable to SPCMCA.
  - Field grade officer from the command must update Casualty and Mortuary Affairs Operation Center (CMAOC) every 30 days.
  - Investigation must be forwarded to CMAOC within 60 days of initiation (MILPER Message 07-233)
  - No PNOK briefing

## Suspected Suicide

- Army requires formal Line of Duty (LOD) investigation (AR 600-8-4)
- Army also requires AR 15-6 investigation and family brief (if suicide confirmed)
  - RAR to AR 600-63, Army Health Promotion (20 Sep 09)
  - Army Directives 2010-01 (investigating) & 2010-02 (reporting and redacting) (26 Mar 10)

## Allegation of Hazing or Bullying

• Commanders must refer incidents of hazing and bullying that they believe are criminal in nature to law enforcement. All other allegations of hazing or bullying will be investigated UP AR 15-6 or by the use of a Commander's Inquiry as a possible violation of Article 92, UCMJ.

## Army Safety Program – AR 385-10

- Requires investigations into all Army accidents
- Anticipate multiple investigations into same incident, each serving specific purpose Safety, legal/collateral (AR 15-6), criminal, line of duty, financial liability
- Safety accident investigation
  - Function is to prevent future accidents; it cannot be used to take adverse action
  - Multiple member boards, single-member boards, or investigations depending on accident
    - For serious accidents: Boards convened by GCMCA, CDR USARC (USAR), state adjutant general (ARNG)
  - For Class A and B accidents (most serious), Director of Army Safety determines whether board will be centralized (board personnel come from CRC) or local (board personnel from local command).
- Legal accident investigation
  - Purpose is to obtain and preserve evidence for use in litigation, claims, disciplinary action, or adverse administrative action
  - Typically an AR 15-6 investigation that must be completed within 30 days
  - When is it required?
    - For all Class A accidents (damage totaling \$2M or more; accidents involving aircraft; injury/occupational illness resulting in fatality or permanent total disability, including friendly fire)
    - As directed by the SJA IAW the claims regulation
    - When there is a potential claim or litigation for or against the government or government contractor
    - When there is a high degree of public interest or anticipated disciplinary/adverse action
- Priority of investigations: 1) Criminal; 2) Safety; 3) Legal
- Family Briefing – AR 600-34
  - Provide results of fatal training or operational accident investigations to PNOK
  - PNOK must be informed of death investigations
  - Briefer is deceased Soldier's colonel or brigade-level commander

## Line of Duty Determination – AR 600-8-4

- Required when service interrupted by injury, disease, or death
- Three possible outcomes (and consequences)
  - **In line of duty** – may receive Army disability retirement, separation compensation, DVA compensation & hospitalization, incapacitation pay (USAR & ARNG)
  - **Not in line of duty - not due to own misconduct** – may lose disability retirement, separation compensation, DVA disability or hospitalization, civil service preference
  - **Not in line of duty - due to own misconduct** – must make up lost days, lost days excluded from longevity and retirement pay computations, forfeit pay (for days lost due to disease resulting from intemperate use of drugs/alcohol), loss of disability and severance pay, loss of DVA benefits

- Analysis
  - Did the Soldier's misconduct proximately cause the injury, illness, or disease?
    - Injury, illness, or death caused by the Soldier's own misconduct can never be in the line of duty.
  - What was the Soldier's duty status? → present for duty, leave, pass, AWOL, deserter
- Informal LOD Investigation
  - Company commander completes DA Form 2173 and provides to appointing/approving authority
  - No misconduct or negligence suspected
  - MTF rep and commander sign a DA Form 2173
  - SPCMCA is the appointing/approving authority (*except*: ARNG appointing authority is BN/squadron commander and approving authority is state AG).
  - Can only result in a finding of ILD (unless condition existed prior to entry on service, then NLD-NDOM)
- Formal LOD Investigation
  - IO appointed, findings and recommendations on DD Form 261
  - Strange or doubtful circumstances
  - Injury or death involving drugs or alcohol abuse
  - Self-inflicted injuries/suicide
  - Injury or death while AWOL
  - Often required for RC Soldiers when on duty for less than 30 days
  - Appointing authority is SPCMCA; approving authority is GCMCA (*except*: ARNG appointing authority is BN/squadron commander; reviewing authority is state AG; and final approving authority is CNGB).

#### Financial Liability Investigations of Property Loss (FLIPL) – AR 735-5 & DA PAM 735-5

- Alternatives to FLIPL: statement of charges, cash sale, damage statement, abandonment order
- Mandatory FLIPL
  - Negligence/willful misconduct and no admission of liability
  - Value of loss, damage, destruction, or theft (LDDT) exceeds monthly base pay
  - LDDT of controlled items (e.g. classified/sensitive) → mandatory AR 15-6
  - Outgoing accountable officer does not voluntarily reimburse lost inventory
  - LDDT from fire, theft, or natural disaster; bulk petroleum over \$500; public funds or negotiable instruments; certain recovery codes
- Initiating the FLIPL
  - Initiator → hand receipt holder, accountable officer, person with most knowledge
  - Initial inquiry
  - DD Form 200
  - Decision by approving (or appointing) authority to appoint financial liability officer or conduct short FLIPL
- Short FLIPL
  - Approving authority may relieve all individuals from liability when initial information indicates no negligence involved
  - Approving authority may assess financial liability without further investigation if initial investigation indicates negligence or willful misconduct was the proximate cause of LDDT of Government property → Must provide Soldier with notice and opportunity to respond
- Approving/Appointing Authority
  - Approving Authority
    - LDDT \$5,000 or less (except COMSEC, sensitive items, or PII) – O5 if delegated by O6
    - LDDT more than \$5,000, but less than \$100,000 – first O6 or GS-15 in rating chain
    - LDDT of \$100,000 or more, or loss of controlled item - first GO or SES in rating chain
  - Appointing Authority
    - Is the approving authority unless delegated
    - May be delegated in writing to O5 (or O4 in O5 billet) or DOD civilian GS-13 (or GS-12 in GS-13 billet)
- Conducting the investigation
  - Financial Liability Officer (FLO)
    - Senior to person subject to possible liability (at least by date of rank)

- Commissioned officer, warrant officer, SFC or above, GS-7 or above
  - Mandatory briefing (not necessarily from legal)
  - Thorough and impartial
  - Uses DA PAM 735-5
- Assessing liability
  - Person may be held liable if he/she was negligent or engaged in willful misconduct, and the negligence/willful misconduct was the proximate cause of the LDDT
  - Liability = Loss, Responsibility, Culpability, Proximate Cause
  - Loss
    - The facts must show that a loss to the Government occurred
      - Actual loss
      - Loss of accountability
    - Value of the loss
      - Actual
      - Depreciation
  - Responsibility
    - Type of responsibility a person has for Government property determines the obligations incurred by that person
      - **Command:** Commanders at all levels → Responsibility for all property within their command
      - **Supervisory:** All supervisors → Responsibility for all property in the possession of personnel under their supervision
      - **Direct:** Anyone who has signed for property, accountable officers, primary/sub-hand receipt holders → Responsibility for all property for which they have signed a hand receipt
      - **Custodial:** Supply sergeant, supply custodian, supply clerk, or warehouse person → Responsibility for property in storage awaiting issue or turn-in
      - **Personal:** Anyone who has physical possession of property → Responsibility for property in their possession
  - Culpability
    - The facts must show that through negligence or willful misconduct, the person violated a duty involving the care of LDDT property
    - Consider age, rank, experience, etc., when determining negligence
  - Proximate cause
    - The negligence or willful misconduct must be the proximate cause of the LDDT
    - Proximate cause = the cause which, in a natural and unbroken sequence, unbroken by a new cause, produces the LDDT, and without which the LDDT would not have occurred
    - Focus is on whether the LDDT was a reasonably foreseeable result of the negligence or misconduct
- Imposing liability
  - When the FLO recommends liability, respondent gets notice and opportunity to respond
  - Approving authority decision → Not bound by recommendation of FLO
  - If approving authority imposes liability
    - Mandatory legal review
    - Respondent again notified and informed of appellate rights
    - Collection begins 30 days after decision
- Reducing liability: Approval authority may reduce liability in whole or in part if warranted by "the nature and circumstances surrounding the loss or damage" (AR 735-5, para. 13-41 b)
- Appeal rights
  - Request for reconsideration and appeal
    - Based on legal error
    - Stops collection
    - Reconsideration denied becomes an appeal to next higher commander
  - Request for remission or cancellation of debt (AR 600-4)(includes officers)
  - Application to the Army Board for the Correction of Military Records (ABCMR)
- Limits to liability
  - Liability limit: one month's base pay at the time of the loss
  - Exceptions (full amount of loss)
    - Personal arms and equipment

- Accountable officers
  - Government quarters (gross negligence/misconduct)
  - Loss of public funds
  - Loss attributable to an accountable officer
  - Contractors
  - Non-appropriated fund activities
- Collective liability → Make more, pay more
- FLIPL timelines
  - Total processing time
    - Active Army: 75 calendar days
    - Army Reserve: 240 calendar days
    - ARNG: 240 calendar days
  - Initiation (upon discovery of LDDT):
    - Active Army: 15 calendar days
    - Army Reserve: 75 calendar days
    - ARNG: 75 days
  - Investigation and recommendation
    - Active Army: 40 calendar days
    - Army Reserve: 75 calendar days
    - ARNG: 75 calendar days
  - Adjudication
    - Active Army: 20 calendar days
    - USAR: 80 calendar days
    - ARNG: 30 calendar days

#### Other Possible Investigations

- Intelligence Interrogation Incident: DoDD 3115.09
  - Reportable Incident: Any suspected or alleged violation of DoD policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings or tactical questioning, for which there is credible information.
  - It is DoD policy that: All captured or detained personnel shall be treated humanely, and all intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy. Acts of physical or mental torture are prohibited. All reportable incidents, allegedly committed by any DoD personnel or DoD contractors, shall be:
    - Promptly reported
    - Promptly and thoroughly investigated by proper authorities
    - Remedied by disciplinary or administrative action, when appropriate
- Questionable Intelligence Activity: DoD 5240.1-R; AR 381-10
  - Conduct during or related to an intelligence activity that may violate law, Executive Order or Presidential Directive, or applicable DOD or Army policy, including this regulation. Includes: improper collection, retention, or dissemination of U.S. person information; misrepresentation (using one's status as an MI member to gain access for non-MI purposes); questionable intelligence activity constituting a crime; misconduct in the performance of intelligence duties.
  - "Procedure 15" (so called because it is in para. 15 of the DoD Pub and AR 381-10): A command may choose to conduct an inquiry under the provisions of AR 15-6 or through an appropriate IG. Initial report must be made to TIG within 5 days (5 day report) with updates every 30 days.
- Actual or Potential Compromise of Classified Information: DoD 5200.1-R; AR 380-5
  - Unauthorized disclosure of classified information
  - Per AR 380-5, conduct a preliminary inquiry/report and then AR 15-6 investigation if further investigation required.
- Law of War Violations: DoDD 2311.01E; AR 190-8
  - A possible, suspected, or alleged violation of the law of war
  - All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action. Report allegations of criminal acts or war crimes committed by or against EPW/RP to the supporting element of the U.S. Army Criminal Investigation Command (USACIDC).

Significant events and Death resulting from other than natural causes will be investigated by USACIDC. Other events investigated by command.

- Whistleblower Reprisal/Interference Allegations: 10 U.S.C. 1034, DODD 7050.06, AR 20-1
  - Allegation of reprisal must be reported to DODIG (copy DAIG) within 2 working days
  - Reprisal includes taking or threatening to take or withhold personnel action for making or preparing to make protected communication (defined broadly in regulation as good faith reporting of law/regulation violation to IG, congress, law enforcement, chain of command, etc.

#### Tom Taylor's six tips for handling high-profile cases

1. Ask what the normal rules are and why you would not follow them in the high profile case. That becomes your best defense against later claims of preferential treatment or double standards.
2. Ask the question, "Who else needs to know?" Keep your headquarters and oversight bodies in the information loop. Err on the side of over-reporting to enhance your credibility. And take advantage of the experience of others who have "been there, done that, and have the t-shirt."
3. Conduct your investigation as if you will have to account to an oversight authority for every decision and action you take.
4. Consider how to handle press inquiries and don't mislead anyone. Step up to defend the system, even when you cannot defend the specific decision.
5. Exercise leadership in coordinating multiple investigations, and keep a balanced perspective on who should conduct investigations.
6. Think carefully about accountability.

#### References

DoDM 5200.01-V1, *DoD Information Security Program*, 24 February 2012  
DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that affect United States Persons*, 7 December 1982  
DoDD 2311.01E, *DoD Law of War Program*, 9 May 2006 (Ch. 1 15 November 2010)  
DoDD 3115.09, *DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, 11 October 2012 (Ch. 1 15 November 2013)  
DODD 7050.06, *Whistleblower Protection*, 23 July 2007  
DODI 1300.18, *DoD Personnel Casualty Matters, Policies, and Procedures*, 8 January 2008 (Ch. 1 14 August 2009)  
DoDI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping*, 6 June 2011  
AR 15-6, *Procedure for Investigating Officers and Boards of Officers*, 2 October 2006  
AR 20-1, *Inspector General Activities and Procedures*, 20 November 2010 (RAR 3 July 2012)  
AR 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, 1 October 1997  
AR 195-2, *Criminal Investigation Activities*, 9 June 2014  
AR 380-5, *Department of the Army Information Security Program*, 29 September 2000  
AR 381-10, *U.S. Army Intelligence Activities*, 3 May 2007  
AR 385-10, *The Army Safety Program*, 27 November 2013  
AR 638-8, *Army Casualty Program*, 23 July 2015  
AR 600-8-2, *Suspension of Favorable Personnel Actions (Flags)*, 23 October 2012  
AR 600-8-4, *Line of Duty Policy, Procedures, and Investigations*, 4 September 2008  
AR 600-20, *Army Command Policy*, 18 March 2008 (RAR 20 September 2012)  
AR 600-63, *Army Health Promotion*, 7 May 2007 (RAR 7 September 2010)  
AR 638-34, *Army Fatal Incident Family Brief Program*, 19 February 2015  
AR 735-5, *Policies and Procedures for Property Accountability*, 10 May 2013 (RAR 22 August 2013)

DA Pam 735-5, *Financial Liability Officer's Guide*, 9 April 2007  
DA Personnel Policy Guidance for Overseas Contingency Operations (OCO), 1 July 2009 (Updated 9 August 2013)  
AFI 90-301, *Inspector General Complaints*, 23 August 2011 (Ch. 1, 6 June 2012)  
JAGINST 5800.7F, *Manual of the Judge Advocate General*, (JAGMAN) chapter II, 26 June 2012  
COMDTINST M5830.1A, *Administrative Investigations Manual*, September 2007  
Army Directives 2010-01 & 02, 26 March 2010