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The words "he," "him," and "his" when used in this publication represent both the masculine and the feminine genders unless otherwise specifically stated.

Chapter 1

Composition of the Army

1-1. Components and Branches of the Army

The United States Army is a complex merger of various types of military organizations. This merger is a reflection of our history. The United States was born through the efforts of citizen armies and state militias. To this day, there is an aversion by the American people to a large standing army. As a result, the United States Army is now made up of various organizations or components; each of which plays an important part in military personnel law.

a. Components. There are five components of the Army, but several of them overlap with each other to some degree. These five components are--[1]

(1) The Regular Army (RA).

(2) The United States Army Reserve (USAR).

(3) The Army National Guard of the United States (ARNGUS).

(4) The Army National Guard while in the service of the United States.

(5) The Army of the United States (AUS). All persons appointed or enlisted in, or conscripted into the Army without component.

[1] 10 U.S.C. § 3062(c).

The United States Army Reserve and the Army National Guard of the United States are the Reserve Components of the Army,[2] and their members are referred to as the "Reserves of the Army."

b. *Branches.* Within the components, personnel are appointed, assigned, or detailed to serve in a particular branch. There are twelve basic branches of the Army specified by statute.[3] These are--

(1) Infantry.

(2) Armor.

(3) Artillery.

(4) Corps of Engineers.

(5) Signal Corps.

(6) Adjutant General's Corps.

(7) Quartermaster Corps.

(8) Finance Corps.

[2] 10 U.S.C. § 10101.

[3] 10 U.S.C. § 3063.

(9) Ordnance Corps.

(10) Chemical Corps.

(11) Transportation Corps.

(12) Military Police Corps.

The Secretary of the Army may establish other basic branches as he deems necessary, and may discontinue or consolidate basic branches for the duration of war or a national emergency declared by Congress.[4] In 1962 the Secretary established the Army Intelligence and Security branch,[5] which is now the Military Intelligence branch.[6] In 1968 the Air Defense Artillery branch was created[7] and the Artillery basic branch was designated as the Field Artillery and in 1984 the Secretary of the Army established the Aviation branch.[8]

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[4] *Id.*

[5] Gen. Order No. 38, Hq, Dep't of Army (3 July 1962).

[6] *See* AR 10-6, para. 1-4*a*.

[7] Gen. Order No. 25, Hq, Dep't of Army (14 June 1968).

[8] Gen. Order No. 37, Hq, Dep't of Army (12 June 1969). This redesignation is strictly for internal administrative purposes following the creation of the Air Defense Artillery. Gen. Order No. 6, Hq, Dep't of Army (15 February 1984) (Aviation Branch).

The following eight special branches of the Army, which are the professional corps, are--[9]

(1) The Judge Advocate General's Corps.

(2) The Chaplains.

(3) The Medical Corps.

(4) The Dental Corps.

(5) The Veterinary Corps.

(6) The Army Nurse Corps.

(7) The Medical Service Corps.

(8) The Army Medical Specialist Corps.

The last six of these special branches comprise the Army Medical Department, headed by The Surgeon General.[10] The Secretary of the Army may establish other special branches, and may assign commissioned officers (other than officers of the Regular Army) and members to those branches. Regular Army commissioned officers may be appointed in a special branch,

[9] 10 U.S.C. §§ 3064, 3067.

[10] 10 U.S.C. § 3067. The special functions of several of the Army Medical Department branches are stated in statutes. 10 U.S.C. §§ 3068-70 and 10 U.S.C. § 3081.

but the Secretary of the Army may not assign Regular Army commissioned officers to any special branch.[11]

The branches are further categorized by regulation as being "arms" or "services," based on their normal functions within the Army. The Infantry, Corps of Engineers, Air Defense Artillery, Field Artillery, and Armor are the combat arms, while the Corps of Engineers, Signal Corps, Military Police Corps and Military Intelligence are combat support arms. The other branches are all designated as services.[12] In addition, officers may be assigned to duty as general staff officers and as inspectors general,[13] but neither of these groups is a branch of the Army.

Any member of the Army not on active duty may be assigned to any basic or special branch or to such other branches as the Secretary deems appropriate.[14] The United States Army Reserve has the same branches as the active Army, plus two other branches to which only Reserve personnel may be assigned. These are--[15]

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[11] 10 U.S.C. § 3064(b).

[12] AR 10-6, para. 1-4*b*.

[13] 10 U.S.C. § 3065(a). These two assignments include the wearing of distinctive insignia in lieu of branch insignia.

[14] 10 U.S.C. § 3065(d). *See supra* text accompanying note 4.

[15] AR 135-100, sections VI-VII, ch. 3; AR 140-108.

(1) Staff Specialist.

(2) Civil Affairs.

c. Distribution of personnel. Warrant officers and enlisted personnel do not have branches but are utilized in duty assignments in accordance with their military occupational specialties.[16] Commissioned officers are distributed in the various branches in the following ways:

(1) Appointment. Each Regular Army commissioned officer in a special branch is specifically appointed in that branch[17] and may not be assigned to a basic branch[18] or to any other special branch.[19]

(2) Assignment. Except for those appointed in each of the special branches and as professors or the director of admissions of the United States Military Academy, commissioned officers in the Regular Army are appointed without specification of branch.[20] They are assigned to basic branches according to their qualifications and the needs of the Army.[21]

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[16] *See* AR 611-201 (enlisted personnel) and AR 611-112 (warrant officers).

[17] 10 U.S.C. § 3064.

[18] 10 U.S.C. § 3063(c).

[19] 10 U.S.C. § 3064.

[20] 10 U.S.C. § 3283(a).

[21] 10 U.S.C. § 3283(b).

Commissioned officers in the Reserve and the Army of the United States without component are assigned to an appropriate branch on appointment.[22]

(3) Transfer. A branch transfer takes place when an officer is relieved from his assignment to one branch and is assigned to another branch.[23] By law, Regular Army commissioned officers may be transferred between basic branches only,[24] although a change between a basic and special branch, or between two special branches, may be accomplished by reappointment.[25] The same rule applies, as a matter of policy, to Reserve commissioned officers.[26]

(4) Detail. Branch detail is the temporary relief of an officer from duty with and control of the branch to which assigned, or in which appointed, for service with and control by another branch.[27] A commissioned officer of any branch may be detailed to any other branch,[28] except for certain restrictions in the case of Chaplains and the Army Medical Department.[29]

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[22] AR 614-100, para. 1-5*c*.

[23] AR 614-100, para. 4-1.

[24] *See* 10 U.S.C. § 3064(c); AR 614-100, para. 4-2*a*.

[25] *See* AR 614-100, para. 1-5*b*.

[26] *See* AR 140-10, chap. 3.

[27] AR 614-100, glossary, section II.

[28] 10 U.S.C. § 3065(c).

[29] AR 614-100, paras. 3-1*a, b*.

Regardless of the specific manner of distribution involved, no officer may, absent exigent circumstances, be assigned to perform technical, scientific, or professional duties unless the officer is qualified to perform those duties.[30]

1-2. The Regular Army

The Regular Army consists of those persons whose continuous service on active duty in both peace and war is contemplated by law, and of those having retired from such continuous service.[31] More specifically, the Regular Army includes[32] --

(1) Officers appointed in or retired in the Regular Army.

(2) Enlisted members enlisted in or retired in the Regular Army.

(3) The professors, director of admissions, and cadets of the United States Military Academy.

The Regular Army has an authorized strength in commissioned officers (other than retired officers) of 63,000.[33] Within that limit, there are restrictions on field grade and general officer strengths. The maximum number of officers who may be serving on active duty as of

[30] 10 U.S.C. § 3065(e).

[31] 10 U.S.C. § 3075(a).

[32] 10 U.S.C. § 3075(b).

[33] 10 U.S.C. § 522.

the end of each fiscal year in the grades of major, lieutenant colonel, and colonel is established by reference to the total number of commissioned officers serving on active duty at year end; since the field grade maximum strengths apply to the aggregate of Regular and non-Regular officers in the affected grades, they may effectively place a somewhat lower ceiling on Regular strength in those grades.[34] The authorized strength of the Regular Army in general officers on the active-duty list is 75/10,000 of the authorized strength of the Regular Army in commissioned officers on the active-duty list.[35] For each corps of the Army Medical Department and the Chaplains, the authorized strength in Regular Army general officers of each branch on the active-duty list is 5/1,000 of the authorized strength of Regular Army commissioned officers on the active duty list of that branch.[36] The Regular Army active-duty list strength of each officer category is determined by the Secretary of the Army.[37]

[34] 10 U.S.C. § 523. In computing and determining the authorized strengths, certain officer categories (such as general officers, certain Reserve and retired officers, and medical and dental officers) are excluded. *See* 10 U.S.C. § 523(b).

[35] 10 U.S.C. § 3210(a). The maximum number of Regular Army generals authorized for the active-duty list is subject to the limits imposed by the authorized strength for Army general officers on active duty. *See* 10 U.S.C. §§ 3210(a), 3202(a).

[36] 10 U.S.C. § 3210(b).

[37] 10 U.S.C. § 521(b).

1-3. The Reserve Components

Prior to the enactment of the Armed Forces Reserve Act of 1952,[38] persons were appointed or enlisted in one of the Reserve components. Under current law, persons are appointed or enlisted as Reserves of the armed forces concerned and then assigned to one of the Reserve components.[39]

a. United States Army Reserve (USAR).

(1) General. The USAR includes all Reserves of the Army who are not members of the Army National Guard of the United States (ARNGUS).[40] The mission of the USAR is to meet Department of the Army mobilization requirements by providing units in strength, state of training and equipment readiness sufficient to be deployed with a minimum of post-mobilization training and by providing trained individual officers and enlisted personnel reinforcements for units.[41] Within the USAR, personnel are placed in one of the following three categories: the Ready Reserve, the Standby Reserve, or the Retired Reserve.[42]

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[38] 66 Stat. 481.

[39] 10 U.S.C. §§ 12201 (appointments), 12102 (enlistments). Unless otherwise provided by law, no person can be a member of more than one Reserve component at the same time. 10 U.S.C. § 10141.

[40] 10 U.S.C. § 10104.

[41] AR 140-1, para. 1-8; 10 U.S.C. § 10102.

[42] 10 U.S.C. § 10141(a).

(2) Ready Reserve. The Ready Reserve is composed of both units and individual Reserves who are liable for involuntary active duty in time of war or national emergency or as otherwise provided by law.[43] Placement in the Ready Reserve will be accomplished as follows:[44]

(a) Each person required by law to serve in a Reserve component is placed in the Ready Reserve for his prescribed term of service, unless he is transferred to the Standby Reserve.

(b) All Reserves assigned to units organized to serve as units and designated as units in the Ready Reserve are in the Ready Reserve.

(c) Under such regulations as the Secretary may prescribe, any qualified Reserve may be placed in the Ready Reserve upon his request.

These members of the USAR and all units and members of the ARNGUS are the Ready Reserve of the "Reserves of the Army" and have the same active duty obligation in time of war or national emergency.[45] Within the Ready Reserve, there is a force called the Selected

[43] 10 U.S.C. § 10142; AR 140-10, para. 2-1*a*.

[44] 10 U.S.C. § 10145. The circumstances under which a Ready Reservist may be transferred to the Standby Reserve are set forth in DOD 1200.7-R.

[45] *See* 10 U.S.C. § 10147. The training requirements of the various categories of the Ready Reserve are prescribed in DOD 1215.6-R.

Reserve.[46] It consists of the active members of the ARNGUS,[47] all the USAR units organized to serve as units,[48] and certain individual USAR members so designated by the Secretary of the Army. Individual Mobilization Augmentees (IMA) are also part of the Selected Reserve.[49] Selected Reserve members differ from other members of the Ready Reserve because they have additional training requirements and may be more readily mobilized.[50] Most of the USAR Ready Reservists who are not assigned to units organized to serve as units are assigned to the several control groups of the Individual Ready Reserve.[51]

(3) Standby Reserve. All members of the Reserve components who are not in the Ready Reserve or Retired Reserve are in the Standby Reserve.[52] This includes--

(a) Members who have fulfilled their entire military obligation and who are transferred to the Standby Reserve upon their request.[53]

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[46] 10 U.S.C. § 10143.

[47] *See* 32 U.S.C. § 502(a). Members of the Inactive Army National Guard are not part of the Selected Reserve.

[48] These units are called the Troop Program Units of the USAR. *See* AR 140-1, para. 2-1.

[49] *See* 10 U.S.C. § 10143; AR 140-10, para. 2-2*d.*

[50] *See* 10 U.S.C. §§ 10143, 10147 (training, unless otherwise provided by the Secretary of Defense, is a minimum of 48 drills and 14 days of active duty for training annually). *See infra* text accompanying note 83 concerning mobilization.

[51] *See* AR 140-1, para. 2-14.

[52] 10 U.S.C. § 10151.

(b) Key Federal, state, or local governmental employees who are members of the Ready Reserve must be transferred to the Standby Reserve, unless they elect to be discharged or transferred to the Retired Reserve, if eligible, or possess a critical military skill needed in the Ready Reserve.[54]

(c) Regardless of military obligation, certain other Reserves may be transferred to the Standby Reserve upon their request on the basis of occupation, studies, or hardship.[55] However, if they have not fulfilled their Ready Reserve obligation, they may be transferred to the Ready Reserve when the reason for their transfer to the Standby Reserve no longer exists.[56] An inactive status list is maintained in the Standby Reserve. A member of the Standby Reserve who is not required to remain a Reserve, and who is unable to participate in prescribed training, may be transferred to the inactive status list.[57] A member of the ARNGUS may be transferred to the Standby Reserve only with the consent of the governor or other appropriate authority.[58]

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[53] *See* DOD 1200.7-R, para. D.3; AR 135-133, paras. 2-3*b* and 2-4. The normal statutory service obligation for persons entering the service after 31 May 1984 is eight years. 10 U.S.C. § 651(a).

[54] *See* 10 U.S.C. § 10149; AR 135-133, ch. 2, section III.

[55] *See* 10 U.S.C. § 10149; AR 135-133, table 2-1.

[56] 10 U.S.C. § 10150.

[57] 10 U.S.C. § 10152.

[58] 10 U.S.C. § 10146.

(4) Retired Reserve. The Retired Reserve consists of certain Reserves who are retired on the basis of 20 years of active military service, or who have been transferred to the Retired Reserve upon their request, retaining their status as Reserves and meeting certain other qualifications.[59] However, no member of ARNGUS may be transferred to the Retired Reserve because of reaching maximum age or because of physical limitations without the consent of the governor or other appropriate authority.[60] The Retired Reserve also includes Regular Army enlisted soldiers retired upon their request after at least 20, but less than 30, years of active service; a soldier so retired must remain in the Retired Reserve until the soldier's total service (to include retired service as a member of the Army Reserve) equals 30 years.[61]

b. The Army National Guard of the United States (ARNGUS). The ARNGUS is a Reserve component comprising all members of the Reserves of the Army who are also members of the Army National Guard of a state or territory.[62] The ARNGUS also comprises all units and organizations of the Army National Guard which are federally recognized.[63] When

[59] 10 U.S.C. § 10154. *See also* AR 140-10, ch. 6.

[60] 10 U.S.C. § 12644.

[61] *See* 10 U.S.C. § 3914; AR 635-200, para. 12-4*a*; AR 140-1, para. 2-16.

[62] 10 U.S.C. §§ 101(c)(3), 10105.

[63] 10 U.S.C. § 10105.

not on active duty, members of ARNGUS are administered, equipped, and trained in their status as members of the Army National Guard.[64]

The ARNGUS was established in 1933[65] to enable the Federal Government to order trained National Guard personnel into the active Army for purposes other than the three for which the National Guard can be called into Federal service under the Constitution.[66] The authority to order National Guard personnel into active service is the Federal recognition of units and individual, thus making them members of the "Reserves of the Army," as well as members of the Army National Guard of a state or territory. The Chief, National Guard Bureau, acting for the Secretary of the Army, extends Federal recognition to an organization when it has been determined by Federal inspection that the prescribed requirements have been met.[67] If it is subsequently determined that the organization does not meet prescribed standards, Federal recognition may be withdrawn.[68]

A person becomes federally recognized as an enlisted soldier simply by enlisting in a federally recognized organization of the Army National Guard and taking the prescribed oath of

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[64] 10 U.S.C. § 10107.

[65] 48 Stat. 155.

[66] U.S. CONST. art. I, § 8, cl. 15. The three purposes set out in the Constitution are: to execute the laws of the union, suppress insurrection, and repel invasions.

[67] NGR 10-1, para. 7*a*.

[68] NGR 10-1, para. 7*d*.

enlistment.[69] A member of the Army Reserve who is enlisted in the Army National Guard in a Reserve grade and is a member of a federally recognized unit or organization thereof becomes a member of the ARNGUS and ceases to be a member of the Army Reserve.[70]

The Constitution provides that the appointment of officers in the militia is reserved to the states.[71] Upon appointment as an officer of the Army National Guard of a state, and subscribing to the oath of office, an individual has a state status under which the individual can function. The officer becomes a member of the ARNGUS when federally recognized and duly appointed as a Reserve in the grade in which federally recognized for service as a member of the ARNGUS.[72] An officer of the Army Reserve who is appointed in the same grade in the Army National Guard, and who is federally recognized in that grade, becomes an officer of the ARNGUS and ceases to be an officer of the Army Reserve.[73] A second lieutenant in the Army National Guard is automatically extended Federal recognition if he is promoted to the grade of first lieutenant to fill a vacancy in a federally recognized unit and has at least three years of

[69] 10 U.S.C. § 12107(a); 32 U.S.C. §§ 301, 304.

[70] 10 U.S.C. § 12107(c).

[71] U.S. CONST. art. I, § 8, cl. 16.

[72] 10 U.S.C. § 12211. *See also* 32 U.S.C. §§ 307-9.

[73] 10 U.S.C. § 12211.

service.[74] In certain cases, a promotion to a higher grade to fill a vacancy in a federally recognized unit carries automatic Federal recognition.[75]

Federal recognition must be withdrawn from an individual whenever the individual ceases to have the prescribed qualifications or ceases to be a member of a federally recognized unit or organization of the Army National Guard.[76] Unless also discharged from the Reserve, the person then becomes a member of the USAR.[77]

c. Liability for active duty. In time of war or national emergency declared by Congress, or as otherwise provided by law, the Secretary of the Army or designee may order any members and units of the Reserves to involuntary active duty for the duration of that war or national emergency and for 6 months thereafter.[78] In time of national emergency declared by the President after 1 January 1953, or when otherwise authorized by law, the Secretary may order any Ready Reserve member or unit to involuntary active duty for not more than 24

[74] 32 U.S.C. § 310(a).

[75] 32 U.S.C. § 310(b).

[76] 32 U.S.C. § 323(a).

[77] 10 U.S.C. §§ 12106 (enlisted personnel), 12213 (officers).

[78] 10 U.S.C. § 12301. Before Reserve members in an inactive or retired status can be involuntarily ordered to active duty, a special determination of need by the Secretary of the Army and approval of the Secretary of Defense are required.

months.[79] The Secretary may also order any unit or member in an active status to involuntary active duty for not more than 15 days, and may order any member to active duty with the consent of that member.[80] However, no member of the ARNGUS may be ordered to active duty under either of these last two provisions without the consent of the governor or other appropriate authority.[81] A member of the Ready Reserve may be ordered to active duty for 24 months less any prior active duty service if he has not performed satisfactorily in his unit or is not assigned to a unit, unless he has already completed his service obligation.[82] Finally, the President may authorize the involuntary order to active duty of members and units of the Selected Reserve totaling not more than 200,000 persons, when it is necessary to augment active forces for any operational mission, for not more than 270 days.[83] A member of the Reserves who is on active duty other than for training may be detailed or assigned to any duty authorized by law for members of the regular component concerned.[84]

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[79] 10 U.S.C. § 12302. No more than 1,000,000 members of the Ready Reserve may be on active duty under this statute at any one time.

[80] 10 U.S.C. § 12301.

[81] 10 U.S.C. § 12301(b), (d).

[82] 10 U.S.C. § 12303. Current Army policy, in AR 135-91, ch. 6, provides that such personnel will be transferred to the IRR (if enlisted) or considered for elimination (if officer).

[83] 10 U.S.C. § 12304.

[84] 10 U.S.C. § 12314.

d. Discipline in the Reserves. Whenever a reservist is ordered to active duty, or accepts orders for inactive duty training which specify that the reservist is subject to the Uniform Code of Military Justice,[85] the reservist comes within the Federal court-martial jurisdiction.[86] When court-martial jurisdiction is not present, or a court-martial is not appropriate, a reservist may be disciplined through the use of several administrative measures. Among these are reduction,[87] elimination,[88] and denial of attendance credit for unsatisfactory performance.[89]

The most contested of these disciplinary measures in recent years was the last rating, since such unsatisfactory performance could result in a reservist being ordered to active duty for up to 24 months.[90] An individual present at a prescribed unit training assembly[91] will not receive credit for attendance unless the individual is in the prescribed uniform, presents a neat and soldierly appearance and performs duties satisfactorily.[92] A member fails to participate

[85] 10 U.S.C. § 801-940.

[86] 10 U.S.C. § 802(a)(1) (3).

[87] AR 140-158, para. 7-10*a* (inefficiency), para. 7-9*b* (misconduct), and para. 7-9*e* (civil conviction).

[88] AR 135-178.

[89] AR 135-91, para. 3-1*a*.

[90] 10 U.S.C. § 12303.

[91] *See supra* text accompanying note 45 for training requirements in Ready Reserve.

[92] AR 135-91, para. 3-1*a*.

satisfactorily when the member accrues nine or more unexcused absences (including those for which no credit is received) from scheduled training assemblies in a 1-year period.[93]

When a member of ARNGUS has unsatisfactorily participated, the member is discharged from the National Guard, thus terminating his ARNGUS status.[94] The member may then be ordered to active duty in his status as a Reserve of the Army.

1-4. The National Guard in Federal Service

a. General. The Army National Guard as such is not a component of the Army, but it is considered to be a component of the Army when called into Federal service.[95] The Army National Guard is part of the organized militia of the several states and territories, Puerto Rico, and the District of Columbia.[96] The Constitution gives Congress the following authority over the militia:

> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and

[93] AR 135-91, para. 4-9*b*.

[94] AR 135-91, ch. 6.

[95] 10 U.S.C. § 3062(c).

[96] 10 U.S.C. § 101(c)(2); U.S.C. § 101(c)(4).

the Authority of training the Militia according to the discipline prescribed by Congress.[97]

The President is "Commander in Chief" . . . of the Militia of the several States, when called into the actual Service of the United States."[98] However, when not in the service of the United States, the Army National Guard of each state is a state force under the command of the governor of the state as commander in chief.

b. Federal service. The Constitution empowers Congress to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.[99] Pursuant to this provision, Congress has authorized the President to call members and units of the Army National Guard into Federal service for each of these three purposes.[100] Any part of the Army National Guard entering Federal service pursuant to the President's call becomes a component of the Army.[101] The President is also empowered to call the National Guard into

[97] U.S. CONST. art. I, § 8, cl. 16.

[98] U.S. CONST. art II, § 2, cl. 1.

[99] U.S. CONST. art. I, § 8, cl. 15.

[100] 10 U.S.C. § 12406. *See* 10 U.S.C. §§ 331-33.

[101] 10 U.S.C. §§ 10106, 3062(c)(1).

Federal service at the request of the legislature or governor of a state in case of insurrection against the State government.[102]

c. Organization. The organization of the militia, even when not in the service of the United States, is a responsibility of Congress.[103] Congress has provided that the organization of the Army National Guard and the composition of its units shall be the same as those prescribed for the Army, subject in time of peace to such general exceptions as the Secretary of the Army may authorize.[104]

The President may assign the Army National Guard to divisions or other tactical units and may detail officers of the Army National Guard or the Regular Army to command such units. However, the commanding officer of a unit organized wholly within a state may not be displaced.[105] The President may also detail a Regular Army officer to perform the duties of chief of staff for each fully organized division of the Army National Guard.[106]

d. Discipline. Congress has the responsibility for providing for the discipline of the militia.[107] A court-martial system similar to that of the Army, except as to punishments, has

[102] 10 U.S.C. § 331.

[103] U.S. CONST. art. I, § 8, cl. 16.

[104] 32 U.S.C. § 104(b).

[105] 32 U.S.C. § 104(d).

[106] 32 U.S.C. § 104(e).

[107] U.S. CONST. art. I, § 8, cl. 16.

been established by each state for the Army National Guard when not in Federal service.[108] The provisions of the Uniform Code of Military Justice are applicable to members of the Army National Guard in Federal service.[109]

1-5. The Army of the United States Without Component (AUS)

a. General. In addition to the components already discussed, the Army also consists of "all persons appointed or enlisted in, or conscripted into, the Army without component."[110]

Although the wording quoted above may create that impression, the Army of the United States without component is not limited to Army personnel who are not members of any other component. Members of the Regular Army or Reserve may be members of the Army of the United States without component at the same time.[111]

b. Officers. Because temporary appointments are not appointments in the Regular Army or the Reserve components, they are made in the Army of the United States without component.[112] The statutory provisions for temporary appointments were completely

[108] 32 U.S.C. §§ 326-33.

[109] 10 U.S.C. § 12405; 10 U.S.C. § 802(a).

[110] 10 U.S.C. § 3062(c)(2).

[111] *See* 10 U.S.C. §§ 601-03.

[112] *See* 10 U.S.C. §§ 601-03. Temporary appointments under prior law were expressly defined as made in the Army of the United States without component. *See* 10 U.S.C. § 3441 (repealed).

overhauled by the Defense Officer Personnel Management Act[113] in 1981 and may now be divided into two categories.

(1) Commissioned officers. In time of war or national emergency, the President, without the consent of the Senate, may appoint a qualified person (whether or not already a member of the armed forces) to a commissioned officer grade not higher than a major general.[114] If the appointment is an original appointment, service credit for prior active commissioned service or constructive service credit for certain other education, experience or training is authorized.[115] Such temporary appointments may be held only while on active duty,[116] are of limited duration,[117] may be vacated by the President at any time,[118] and do not change the permanent military status, if any, of the person appointed.[119]

[113] 94 Stat. 2835. This act, however, did not purport to revoke temporary appointments properly made under prior law.

[114] 10 U.S.C. § 603(a).

[115] 10 U.S.C. § 603(c)(1). The credit is used for determination of initial grade, rank in grade, and service in grade for promotion eligibility. *See* 10 U.S.C. § 533(c).

[116] *See* 10 U.S.C. § 603(c)(2) and (f)(3).

[117] *See* 10 U.S.C. § 603(f).

[118] 10 U.S.C. § 603(b).

[119] 10 U.S.C. § 603(d).

(2) Lieutenant generals and generals. Although permanent appointments may not be made in a grade above major general,[120] the President may designate positions of importance and responsibility to carry the grade of general or lieutenant general, and assign to such position an officer serving on active duty in a grade above colonel.[121] When so assigned, the officer may be appointed by the President, with the consent of the Senate, to the grade specified for the position.[122] The appointment is temporary in that it generally ends on the date of the assignment to that position is terminated[123] and does not vacate the permanent grade held by the officer.[124]

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[120] *See* 10 U.S.C. §§ 3281, 592.

[121] 10 U.S.C. § 601(a).

[122] *Id.*

[123] *See* 10 U.S.C. § 601(a), (b).

[124] *See* 10 U.S.C. § 601(c).

c. Enlisted personnel. Persons inducted into the Army become members of the Army of the United States without component for the term of their active duty.[125] There is also provision for temporary enlistments in time of war or national emergency for the duration of the war or emergency and six months thereafter.[126]

[125] *See* 10 U.S.C. § 3062(c)(2); 62 Stat. 605 (1948), as amended by 50 U.S.C. § App. 454(a). Although they incur a Reserve obligation upon induction, inductees do not become Reserves until their release from active duty. *See* 10 U.S.C. § 651.

[126] 10 U.S.C. § 519.

Chapter 2

Commissioned and Warrant Officers

2-1. The Military Officer

The term "officer" has several meanings when applied to a member of the armed forces. First, it means any commissioned or warrant officer.[1] It also means one who holds an office of the United States under the authority granted by the Constitution.[2] It can also be used as part of a title to indicate authority or rank, as in "commanding officer," "officer of the day," or "officer-in-charge."

The military office, like any Federal office, involves the constitutional provision that:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States whose Appointments . . . shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[3]

This provision establishes, within the Army, two levels of military offices: Those appointed by the President with the consent of the Senate and those appointed by the President

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[1] 10 U.S.C. § 101(b)(1). "Non-commissioned officers" are not "officers" in the sense in which the latter term is used in the statutes. Babbit v. United States, 16 Ct. Cl. 202 (1880).

[2] U.S. CONST. art. II, § 2, cl. 2.

[3] *Id.*

or the Secretary of the Army. Under this constitutional grant, Congress has no power to restrict which individual may be appointed by the President or other officials except in those cases where its advice and consent is required.[4] Congress may, however, set out qualifications for those officers "whose appointments shall be established by law."

The military office is unique among offices of the United States in that it has two distinct characteristics. First, an officer must be appointed into one of the components which make up a particular armed force.[5] Secondly, the officer must be appointed to a particular grade within that component.[6] Thus, each grade and component to which an individual is appointed constitutes an appointment to a separate office. A promotion to a higher grade in a component is an appointment to a new office. As long as they are not incompatible an individual may hold several offices at the same time.[7]

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[4] 41 Op. Atty. Gen. 291 (1956) (nomination of officer not selected under statutory procedures for promotion can be made by President as Congress cannot restrict constitutional grant of authority). *See* Wood v. United States, 107 U.S. 414 (1883) (rank and pay are separate from an office, and while Congress may not appoint officers, it may pass legislation affecting the pay and rank of officers). *But see* Jamerson v. United States, 185 Ct. Cl. 471 (1968) (*see also* 10 U.S.C. § 12203. Statute giving President "alone" authority to make Reserve officer promotions is not absolute. Senior officer appointments are with advice and consent of Senate, and all promotions must be in accord with statutory qualifications).

[5] Officers may be Federally appointed in the Regular Army, as a Reserve (for assignment to the USAR or ARNGUS), or in the Army of the United States without specification of component (commonly referred to as AUS). *See* 10 U.S.C. §§ 531, 12201, 601, 603; 10 U.S.C. § 3062(c)(2). National Guard appointments are governed by state law. U.S. CONST. art. 1, § 8, cl. 16; National Guard Reg. No. 600-100, para. 2-2.

[6] *See, e.g.*, 10 U.S.C. § 3283(a).

[7] *See, e.g.*, 10 U.S.C. §§ 601, 603.

2-2. Appointment of Officers

a. General. Military office is vested in an individual by the process of appointment.[8] The requirements for completion of this process are: Making of the appointment by proper authority; tender of the appointment to the individual; and acceptance of the appointment by the individual.

(1) Making of appointment.

(a) Original appointments. The original appointments of all Regular Army commissioned officers,[9] and of Reserve commissioned officers above the grade of major,[10] are made by the President with the advice and consent of the Senate. The original appointments of Reserve commissioned officers below the grade of lieutenant colonel[11] and, in time of war or national emergency, the original temporary appointments in commissioned officer grades below lieutenant general[12] are made by the President alone. The distinction between appointment

[8] *See, e.g.*, 10 U.S.C. §§ 531, 12203, 601, 603, 624.

[9] 10 U.S.C. § 531.

[10] *See* 10 U.S.C. § 12203.

[11] *Id.*

[12] *See* 10 U.S.C. § 603(a).

authorities has little initial significance, but the Reserve officer has less statutory protection in cases of a reduction in force.[13]

(b) Warrant Officers. Appointments in the grade of regular and reserve warrant officer, W-1, are made by warrant of the Secretary of the Army.[14] Upon promotion, appointments in regular chief warrant officer grades (W-2 and above) are made by commission by the President.[15] Appointments to the permanent reserve grade of chief warrant officer are made by commission by the Secretary of the Army.[16]

(2) Tender of appointment. An appointment may not be effectively accepted prior to the time that it is tendered. The original initial appointment of an Army officer is ordinarily tendered by furnishing the individual with a letter of appointment and the oath of office.[17]

In the case of a promotion, which is an appointment to a new grade and thus a new office, the tender of appointment is made either by a letter of promotion[18] or by a Department of

[13] 10 U.S.C. § 681(a).

[14] 10 U.S.C. §§ 571, 12241.

[15]10 U.S.C. §§ 571.

[16] 10 U.S.C. § 12241.

[17] *See* AR 601-100, para. 5-4; AR 135-100, para. 2-7.

[18] AR 135-155, para. 4-13.

the Army promotion order.[19] The tender in this case is not terminated by a declination, but only by a withdrawal of an officer's name from the promotion list.[20]

(3) Acceptance of appointment. Provided the other necessary elements are satisfied, an appointment is perfected upon acceptance by the individual[21] and may not thereafter be revoked. However, the purported appointment (under the statutory scheme of Title 10, U.S.C.) of one who fails to meet appointment criteria established by statute (*e.g.*, §§ 532, 591, 619, title 10 U.S.C.) or regulation in implementation of statute (*e.g.*, AR 135-100, 135-101, 601-102, DOD Dir. 1310.2) is void. Since acceptance is a voluntary act, officer status may not be conferred on an individual against the officer's will.

Acceptance may be either express or implied. Execution of the oath of office constitutes an express acceptance and is the normal and most reliable means of establishing acceptance. However, any act which evidences an intent to accept the appointment may be regarded as an acceptance and vests the office in the individual notwithstanding the failure to take the oath. In such a case, the individual is not entitled to pay and allowances until the oath

[19] AR 600-8-29, para. 1-12.

[20] AR 624-100, para. 1-8*b*. *See* AR 135-155, para. 4-23.

[21] AR 601-100, para. 5-6 (Regular Army); AR 135-100, para. 2-7 (Reserves).

is in fact executed[22] but the execution of the oath relates back to the original date of acceptance and entitles the appointee to all pay and allowances for the intervening period.[23]

Acceptance of a promotion is presumed by the publication of orders unless the officer expressly declines promotion.[24] A new oath of office is not required if the officer has continuous service since the last oath.[25]

(4) Date of appointment. Since the appointment process is completed by acceptance, the effective date of an appointment to an office is ordinarily the date of acceptance.[26] An earlier or later effective date may be specified by the terms of the appointment. However, an appointment may not be made retroactive in the absence of clear and express statutory authority to do so.[27] There is statutory authority to make the appointment of an officer as a Reserve for service in the National Guard of the United States retroactive to the date of temporary Federal recognition[28] and to make promotions of Reserve officers

[22] 21 Comp. Gen. 817 (1942).

[23] 21 Comp. Gen. 819 (1942).

[24] 10 U.S.C. §§ 603(e)(1), 626(a); 10 U.S.C. § 3394(a).

[25] 10 U.S.C. §§ 603(e)(2), 626(b); 10 U.S.C. § 3394(b).

[26] AR 601-100, para. 1-4*i* (Regular Army); AR 135-100, para. 2-7 (Reserves).

[27] 26 Comp. Gen. 475 (1947).

[28] 10 U.S.C. § 3351(b).

effective before, on, or after the date on which the promotion is made.[29] The effective date of appointment when promoted is normally specified in the orders announcing the promotion.[30]

b. Regular Army appointments.

(1) Commissioned officers. The commissioned officer grades in the Regular Army are--[31]

(a) Second Lieutenant.

(b) First Lieutenant.

(c) Captain.

(d) Major.

(e) Lieutenant Colonel.

(f) Colonel.

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[29] 10 U.S.C. § 3363(d). This does not apply to promotion of Reserves on the active-duty list. 10 U.S.C. § 3396.

[30] AR 624-100, para. 1-8 (RA, AUS, and ADL promotions). Provisions concerning the promotion dates of Reserves are found in AR 135-155, ch. 4, section III.

[31] 10 U.S.C. § 3281. Additionally, recently enacted legislation provides for the commissioning of warrant officers. This law primarily expands the duties that may be performed by warrant officers (*e.g.*, administer oaths) because of their "commissioned" status. 10 U.S.C. §§ 555(b) and 597(b).

(g) Brigadier General.

(h) Major General.[32]

Appointments in the commissioned grades of the Regular Army are made without specification of branch, except for officers commissioned in the special branches and certain personnel of the United States Military Academy.[33] Officers commissioned without a branch specification are then assigned by the Secretary of the Army to any of the basic branches.[34] To be eligible for original appointment in the Regular Army, a person must be a citizen of the United States, be able to complete 20 years of active commissioned service before his 55th birthday, be of good moral character and be physically qualified for active service.[35] In addition, the Secretary of the Army may prescribe other qualifications.[36] A cadet at the United States Military Academy who completes the prescribed course of instruction may, upon graduation, be appointed a second lieutenant in the Regular Army without regard to other

[32] *See supra* text accompanying notes 121 to 124, para. 1.5 for treatment of Lieutenant Generals and Generals.

[33] 10 U.S.C. § 3283(a).

[34] 10 U.S.C. § 3283(b).

[35] 10 U.S.C. § 532; DOD 1310.2-R; AR 601-100. The ability to complete 20 years of active service is not required for persons appointed in the Medical or Dental Corps or as chaplains. 10 U.S.C. § 532(d).

[36] 10 U.S.C. § 532(a)(5).

statutory qualifications.[37] Special qualifications are prescribed for Regular Army appointments in the Medical and Dental Corps.[38]

Upon original appointment in the Regular Army, a commissioned officer (other than a commissioned warrant officer grade) is credited with certain active commissioned service for advanced education or training or special experience.[39] On the basis of such service credit, the appropriate grade, rank in grade (date of rank), and service in grade for promotion eligibility are established.[40] A Reserve commissioned officer who receives an original appointment in the Regular Army as a commissioned officer is appointed in the same grade and with the same date of rank held (or would have held) on the active-duty list immediately before the Regular Army appointment.[41]

(2) Warrant officers. The warrant officer grades in the Regular Army are--[42]

(a) Warrant officer, W-1.

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[37] 10 U.S.C. § 4353(b).

[38] 10 U.S.C. § 532(b).

[39] *See* 10 U.S.C. § 533. Currently, the Army regulation for RA appointments does not address the RA appointments of civilians in grades other than 2LT. *See* AR 600-100.

[40] *See* 10 U.S.C. §§ 533(a)(1), (c), 741(d)(1); DOD 1310.2-R.

[41] *See* 10 U.S.C. § 533(f).

[42] 10 U.S.C. § 555(a).

(b) Chief warrant officer, W-2.

(c) Chief warrant officer, W-3.

(d) Chief warrant officer, W-4.

Original appointments as warrant officers in the Regular Army are made only to persons having at least one year of active duty in the Army.[43] There is also authority for a service credit to a warrant officer upon the original appointment in the Regular Army.[44]

c. Reserve appointments. Reserve officers are not appointed into either of the Reserve components, but are appointed into the "Reserves of the Army."[45] A Reserve officer who is appointed and federally recognized in the same grade in the Army National Guard is a member of the Army National Guard of the United States.[46] All others are members of the United States Army Reserve.[47]

Reserve commissioned and warrant officer grades are the same as those established for the Regular Army.[48] Appointments in the Reserves are for an indefinite time and are held at the

[43] 10 U.S.C. § 3310.

[44] 10 U.S.C. § 556. Service credit is prescribed by the Secretary of the Army. *See* AR 601-100, ch. 6.

[45] 10 U.S.C. § 591(a).

[46] 10 U.S.C. §§ 591(a), 3351(a).

[47] 10 U.S.C. § 3076.

[48] 10 U.S.C. §§ 592, 597(a).

pleasure of the President.[49] No person may be originally appointed as a Reserve in a commissioned grade above major unless the person was formerly a commissioned officer or the appointment is recommended by a board of officers.[50]

Whenever the ARNGUS is ordered to active duty, any Army National Guard officer who is not a member of the Reserves (ARNGUS) may be appointed as a Reserve and assigned to the ARNGUS in the grade that the officer holds in the National Guard.[51] With the consent of the governor concerned, an officer of the ARNGUS may be transferred to the United States Army Reserve in the ARNGUS grade.[52]

A service credit for prior service as a commissioned officer on active duty or in an active status or for certain advanced education, training, or special experience is awarded upon original appointment as a Reserve commissioned officer (or assignment to certain officer categories when a Reserve commission is already held); the credit for education, training, or experience, which is commonly called "constructive service credit," is authorized only upon

[49] 10 U.S.C. §§ 593(b), 597(c). In the case of warrant officers, the appointments are held at the pleasure of the Secretary.

[50] 10 U.S.C. § 594(a).

[51] 10 U.S.C. § 3351(c).

[52] 10 U.S.C. § 3352(a). A transferred officer may be advanced to the highest Army grade ever held unless the Secretary determines it is not in the best interests of the service.

appointment in, or assignment to, an officer category for which education beyond the baccalaureate level is a prerequisite.[53]

d. Temporary appointments. Temporary appointments in commissioned and warrant grades are made in the Army without component.[54] Warrant officers on active duty may be promoted by temporary appointments in time of war or peace.[55] A general officer on active duty may be given a temporary appointment as a lieutenant general or general for service in a designated position of importance and responsibility.[56] (These latter appointments may not result in more than 15 percent of Army general officers on active duty being in grades above major general.[57] Since 1981, temporary appointments in commissioned officer grades below lieutenant general are authorized only in time of war or national emergency.[58]

e. Irregular appointments. The fact that there are irregularities in the making of an appointment does not necessarily make it void. The actual validity of an officer's status may depend on the nature of the irregularity.

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[53] 10 U.S.C. § 3353; DOD 1312.2-R, DOD 1312.3-R, and DOD 1320.7-R; AR 135-100 and AR 135-101, ch. 3.

[54] *See supra* text accompanying note 112, para. 1.5.

[55] *See* 10 U.S.C. § 602; *see infra* text accompanying note 114, para. 6.8.

[56] *See* 10 U.S.C. § 601; *see supra* text accompanying notes 121 through 125, para. 6.5.

[57] *See* 10 U.S.C. § 525(b)(1). Not more than 25 percent of the general officers on active duty in the grades of lieutenant general and general may be serving in the grade of general.

[58] *See* 10 U.S.C. § 603; *see supra* text accompanying notes 115 through 120, para. 6.5.

(1) Attempted appointment. When a person who is not qualified for appointment is appointed, the appointment is only an attempted appointment and is void as prohibited by law. The disqualification must be one which is statutory or statutorily derived such as age or citizenship.[59] Subjective disqualifications, such as physical condition, will not invalidate an otherwise valid appointment. Even when there is a factual disqualification, the appointment may be validly accepted once the disqualification is removed[60] if the tender of appointment has not been withdrawn in the meantime. For example, suppose that one under 21 years of age is not eligible for Regular Army appointment (as was formerly the case);[61] if that person assumes the office and there is no knowledge of the disqualification until after his 21st birthday, that person may be deemed to have accepted the appointment legally on that day and the status of an officer begins at that time.

(2) Incomplete appointments. For the vesting of an appointment to be valid, all three elements (appointment, tender, and acceptance) must relate to the same office. Otherwise, the appointment process is incomplete, although it is not prohibited by law. The leading case on incomplete appointments of Army officers is *United States v. Royer*, [62] which involved a promotion appointment. First Lieutenant Royer was recommended for promotion to major but

[59] *See, e.g.*, 10 U.S.C. § 532.

[60] 21 Comp. Gen. 819 (1942).

[61] *See* 10 U.S.C. § 3285 (repealed).

[62] 268 U.S. 394 (1925).

was, in fact, promoted to captain. However, The Adjutant General erroneously sent a message that Royer had been promoted to major and Royer accepted this nonexistent appointment. The error was not discovered until Royer was properly promoted to major some time later. When the difference between the pay of the captain and that of a major for the period in question was deducted from his pay, Royer sued to recover. This case generated the theory of *de facto* officers.

(3) De facto officers. The theory of *de facto* officers has never been clearly delineated with respect to its applicability to either incomplete or attempted appointments. In *Royer*, only an incomplete appointment was involved, there being no statutory prohibition to his being appointed as a major. The problem is that later cases and administrative decisions vary depending upon whether the claim is for pay or service credit. The Comptroller General denied service credit to an alien who was in the Marine Corps contrary to statute, saying his appointment was in effect prohibited by law and that the law would not reward what the law prohibits.[63] The companion case involved a Marine ordered to active duty after having been discharged (without his knowledge) and it was decided that he was a *de facto* officer as his service was not prohibited by law.[64] In a later case involving service after the expiration of an officer's commission, the Comptroller General stated that the officer had rendered the service in

[63] 32 Comp. Gen. 397 (1953).

[64] *Id.*

good faith in a *de facto* status and it was not service prohibited by law.[65] However, in a case where the service was prohibited by statute, the Comptroller General allowed the retention of pay actually received, saying that the service was "at best performed in a *de facto* status."[66] In several cases the Court of Claims has held that where an appointment was contrary to a statutory requirement, no office was conferred.[67] Generally, it can be concluded that *de facto* status applies in the case of an incomplete appointment. When there is an attempted appointment in violation of a statute the officer is entitled only to pay actually received by virtue of having "acted as" a *de facto* officer. In the case of an incomplete appointment, service credit for pay and retirement longevity may be granted.[68]

To have a valid *de facto* status, certain principles must be applied to the facts of the case. These principles, enunciated by the Supreme Court in the *Royer* case, have been consistently followed in subsequent administrative opinions,[69] and are usually condensed to the following:

(a) The office must actually exist.

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[65] 44 Comp. Gen. 277 (1964).

[66] 44 Comp. Gen. 284 (1964).

[67] Aikins v. United States, 66 Ct. Cl. 662 (1929); Beeman v. United States, 65 Ct. Cl. 431 (1928); Garrison v. United States, 59 Ct. Cl. 919 (1924); Lawless v. United States, 59 Ct. Cl. 224 (1924).

[68] *Compare* 44 Comp. Gen. 277 (1964) *with* Comp. Gen. 284 (1964).

[69] *See, e.g.,* 34 Comp. Gen. 266 (1954).

(b) The officer must occupy it under "color of right," that is, the officer must not be a mere usurper or volunteer.

(c) The officer must actually discharge the functions of the office.

(d) The officer must do so in good faith.

The requirement of good faith is a continuing one and *de facto* status terminates when the individual's good faith does.[70]

Examination of the many administrative opinions indicates that both the color of right and the individual's good faith commonly arise from the same factor, which is usually some direct, affirmative notification from an authoritative source that an appointment has been made.

f. Recess appointments. The Constitution provides that the President "shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[71] Recess appointments would be made only in those instances where the appointments require the advice and consent of the Senate.[72] When the Senate reconvenes, a nomination for a regular appointment can be

[70] *See* 27 Comp. Gen. 730 (1948).

[71] U.S. CONST. art. II, § 2, cl. 3.

[72] *See supra* text accompanying notes 11 and 12.

sent to the Senate. If the Senate gives its consent, the regular appointment will be tendered to the holder of the recess appointment.

g. Vacation of temporary appointments. Officers, as a general rule, are neither "demoted," nor "reduced in rank." This power is even denied a general court-martial.[73] However, Congress has given the President the authority to vacate, at any time, a temporary appointment in a commissioned grade below lieutenant general.[74] When the person involved has a permanent appointment, that person will revert to that permanent (RA, USAR, ARNGUS) grade, which in most cases will be a lower grade. There is no regulation dealing with this authority, but the Secretary of the Army has exercised this power, acting for the President. This is done by the Secretary without express delegation, either on the theory of an implied delegation or under the *alter ego* doctrine.[75] Action to terminate a temporary appointment may be for any cause deemed sufficient and, most commonly, is based on misfeasance or dereliction in the higher office.

[73] Rule 1003(c)(d), Manual for Courts-Martial, 1984.

[74] 10 U.S.C. § 603(b).

[75] *See* Russell Motor Car Co. v. United States, 261 U.S. 514 (1923). United States ex rel. French v. Weeks, 259 U.S. 326 (1922); Runkle v. United States, 123 U.S. 543 (1887) (cannot delegate judicial functions); Seltzer v. United States, 98 Ct. Cl. 554 (1943).

Officers serving in a higher grade solely because of their assignment to a position for which that grade is authorized (*e.g.*, generals and lieutenant generals) generally lose their higher grade upon the termination of the assignment.[76]

2-3. Promotion of Officers

a. The promotion system. One of the most important personnel actions in terms of money, morale, and career motivation is promotion. Over the years the Army has developed a logical, practical, and carefully planned promotion system. The system is designed to provide a fair and equitable opportunity for advancement with due regard being given for age, seniority, and selection based on ability and efficiency.

The Army has used a number of different methods of establishing eligibility for promotion. Prior to 1890, promotions were made according to the grades required to provide officers for the various regiments and separate units. An officer, upon joining a unit, generally remained so assigned for his entire career and was promoted according to attrition in the higher grades within that unit.

In 1890, a branch promotion system was established and it continued until the end of World War I. Under this system, each branch was allocated a certain number of grades, and

[76] *See* 10 U.S.C. § 601(a). The appointment as a lieutenant general or general may continue for a limited time despite the termination of the assignment where that occurs because of assignment to another designated position of importance and responsibility, hospitalization, or retirement. *See* 10 U.S.C. § 601(b).

promotions were made as vacancies occurred. However, there was a great disparity among the various branches in years of service required for promotion.

Following World War I, this system was discontinued. All officers, with the exception of those serving in the medical services and chaplains, were then placed on a single promotion list, with seniority the criterion for promotion. A lack of attrition in the higher grades, however, combined with the large increase in the junior grades after the war, tended to stagnate promotions.

To remedy this, changes in statutes affecting promotions were made by Congress in 1935 and 1940. The 1935 legislation permitted promotions to first lieutenant and captain without respect to vacancies after 3 and 10 years total commissioned service respectively. In 1940, further amendments authorized promotion to major after 17 years service and to lieutenant colonel after 23 years under the same conditions.

A strict limitation, however, remained on the number of officers who could serve in the grade of colonel, and, as a result, stagnation continued in promotions to this grade, although there was a continued flow to and including lieutenant colonel.

Following World War II, the officer promotion system was completely reexamined, resulting in the Officer Personnel Act of 1947[77] and the Reserve Officer Personnel Act of 1954.[78]

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[77] 61 Stat. 795.

[78] 68 Stat. 1147.

The 1947 law provided the statutory framework governing temporary promotion of all officers serving on active duty until it was replaced by the Defense Officer Personnel Management Act in 1981.[79] The 1947 Act also provided for the permanent promotion of Regular officers and prescribed the size and grade structure of the Regular Army officer corps. The promotion system it established was predicated on forced attrition in two forms: (1) of senior officers who completed a certain amount of service in the higher grades; and (2) of those officers found not qualified for promotion after a certain number of years in a lower grade.

The Reserve Officer Personnel Act provided a system for the permanent promotion of Reserve officers, both to fill local unit and overall force vacancies, with an attrition system somewhat similar to that for the Regular officer corps.[80]

Until 1981, these laws resulted in three separate promotion systems. Regular and Reserve officers were covered by separate permanent promotion systems; in addition, Regular and Reserve officers serving on active duty competed for temporary promotions which generally provided advancement in grade more rapidly than did the permanent promotion systems. By the enactment of the Defense Officer Personnel Management Act,[81] Congress replaced the three systems with two commissioned officer systems in peacetime: an active-duty list promotion system for most officers on active duty, whether Regular or Reserve, and a

[79] 94 Stat. 2835.

[80] 68 Stat. 1147.

[81] 94 Stat. 2835.

Reserve promotion system for Reserve officers not covered by the active-duty list promotion system. In addition, there is statutory authority for the President alone to make temporary appointments in commissioned officer grades below lieutenant general in time of war or national emergency. [82]

As part of its revision of the promotion systems for commissioned officers on active duty, Congress also encouraged the services to avoid what it considered to be the "anomaly of career active-duty reservists" by increasing the maximum number of Regular commissioned officers permitted to be serving on active duty. The increased number of Regulars allowed to each service was intended to permit the integration of career Reserve officers into the Regular officer force.[83] The Army has established a policy under which Reserve officers on the active-duty list will generally be offered integration into the RA upon selection for promotion to major; officers who entered their active duty tour after 30 September 1981 and who decline such RA integration are subject to release from active duty upon completion of any remaining service obligation.[84]

b. Promotion of active-duty list commissioned officers. The peacetime active duty promotion system provides the means by which commissioned officers serving on the active-duty list are advanced in permanent grade.[85] The active-duty list of the Army is a single list of

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[82] *See supra* text accompanying notes 111 through 120, para. 1-5.

[83] *See* H.R. Rep. No. 96-1462, 96th Cong., 2d Sess. 12-13, 24 (1980); 10 U.S.C. § 522.

[84] *See* AR 600-8-24, para. 2-21.

[85] Chapter 36, Title 10, U.S.C.

all officers serving on active duty, excluding certain categories[86], arranged in order of seniority.[87] Although the active-duty list generally includes each officer on active duty, whether a Regular, a Reserve, or a person holding only a temporary appointment, it does not include warrant officers, retired officers on active duty, and certain faculty members of the Military Academy.[88] Among other categories of officers excluded from the active-duty list are Reserves on active duty for training and those on active duty for certain purposes connected with support of the Reserve components or administration of the Selective Service System.[89]

The officers on the active-duty list are further divided for promotion purposes into several competitive categories, established by the Secretary of the Army under regulations prescribed by the Secretary of Defense.[90] The following paragraphs discuss the statutory scheme for the promotion of active-duty list officers to the permanent grades of captain through major general; the promotion of officers to the permanent grade of first lieutenant is governed by Army regulations;[91] however, no officer may be promoted to the permanent grade of first

[86] 10 U.S.C. § 641. The categories include reserve officers on active duty for training, permanent professors at the United States Military Academy, warrant officers, and students at the Uniformed Services University of the Health Sciences.

[87] 10 U.S.C. § 620.

[88] 10 U.S.C. §§ 620(a), 641(2)-(4).

[89] 10 U.S.C. §§ 620(a), 641(1).

[90] *See* 10 U.S.C. § 621, DOD 1320.12. The Army competitive categories are listed in the glossary of AR 600-8-29.

[91] *See* 10 U.S.C. § 624(a)(2).

lieutenant until the officer has a minimum of eighteen months time in grade as a second lieutenant.[92]

Officers in a competitive category compete among themselves for promotion,[93] and those recommended are promoted from the promotion list of that competitive category as additional officers of that grade and competitive category are needed.[94]

Selection boards are convened for promotions to each of the permanent grades above first lieutenant whenever the Secretary determines that the needs of the Army so require;[95] each board considers a single competitive category of officers.[96]

The first step in the promotion process is the determination by the Secretary of the maximum number of officers in a given competitive category who may be recommended for promotion to a certain permanent grade.[97]

The second step in the promotion process is the determination of which officers are eligible to be considered for promotion. Based on several factors related to the need for officers of the next higher grade and for similarity of promotion opportunity over a five-year period, the

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[92] *See* 10 U.S.C. § 619(a)(1)(A).

[93] 10 U.S.C. § 621.

[94] 10 U.S.C. § 624(a)(2).

[95] 10 U.S.C. § 611(a).

[96] 10 U.S.C. § 611(a); DOD 1320.9-R, para. D.1.

[97] 10 U.S.C. § 622.

Secretary establishes a "promotion zone" for each of the competitive categories for which promotions are needed.[98] The promotion zone consists of officers of the next lower grade who have not yet been considered and whose seniority in that grade is within the range designated by the Secretary.[99] The Secretary also may establish the period of service in grade which is required to be eligible for consideration as an officer "below the promotion zone."[100] Based on the seniority established as the upper limit of the promotion zone, there is also a category of "officers above the promotion zone".[101] Unless the Secretary prescribes a longer period of service in grade for eligibility for consideration,[102] officers may be considered from above, in, or below the promotion zone only after completion of specified periods of service in grade.[103] Officers holding permanent appointment in the grades of captain through lieutenant colonel must have completed three years of service in the grade in which permanent appointment is held, in order to be eligible for consideration.[104] Officers holding permanent appointment in the grades of colonel or brigadier general must have completed one year of service in the grade in

[98] *See* 10 U.S.C. § 623.

[99] *See* 10 U.S.C. § 645(1). *Compare* 10 U.S.C. § 645(1) *with* 10 U.S.C. § 645(2)(C), (3)(C).

[100] *See* 10 U.S.C. §§ 619(a)(3), 645(3).

[101] 10 U.S.C. § 645(2).

[102] 10 U.S.C. § 619(a)(3).

[103] 10 U.S.C. § 619(a)(2).

[104] 10 U.S.C. § 619(a)(2)(A).

which permanent appointment is held, in order to be eligible for consideration.[105] The three years of service in grade requirement may be waived by the Secretary to allow below the zone consideration of officers for promotion to major, lieutenant colonel, or colonel.[106] For officers holding permanent appointment as first lieutenant, there is no minimum period of service in grade before eligibility for consideration for promotion but such officers may not be promoted to captain until they have completed at least two years of service in grade.[107]

The Secretary next convenes a selection board to recommend officers to be promoted in the competitive category to the grade concerned.[108] The board consists of five or more active-duty list officers, appointed by the Secretary, all of whom are serving in grades higher than major and higher than the officers under consideration.[109] The board must generally include at least one officer from the competitive category being considered[110] and, if Reserve

[105] 10 U.S.C. § 619(a)(2)(B). However, service in a grade because of assignment to a position is counted as service in the grade which would otherwise have been held but for such assignment. 10 U.S.C. § 619(a)(5).

[106] 10 U.S.C. § 619(a)(4).

[107] *See* 10 U.S.C. § 619(a)(1)(B).

[108] *See* 10 U.S.C. § 611(a).

[109] *See* 10 U.S.C. § 612(a)(1). Under certain circumstances, officers not on the active-duty list may be appointed as board members. *See* 10 U.S.C. § 612(a)(4).

[110] 10 U.S.C. § 612(a)(2)(A). However, in the event that there are no officers of that competitive category on the active-duty list in a grade senior to the officers under consideration, this requirement does not apply. The Secretary has discretion to appoint a board member from the same competitive category who is senior in grade to those under consideration but who belongs to one of several non-active-duty list groups of officers. *See* 10 U.S.C. § 612(a)(2)(B).

officers are being considered, must include appropriate Reserve membership.[111] The Secretary is required to inform the selection board of the maximum number of officers of the competitive category who may be recommended for promotion[112] and to establish the maximum number of officers who may be recommended from below the zone.[113] Notice of the upcoming promotion board, including the convening dates and the names and dates of rank of the most junior and senior officers in the promotion zone, must be given at least 30 days before it is convened.[114]

Acting under oath and upon guidance provided by the Secretary,[115] the board recommends the best qualified (within the numerical constraints set by the Secretary) of the officers found by it to be fully qualified for promotion,[116] and submits the recommended list in a written report to the Secretary.[117] After reviewing the report, the Secretary submits it with his

[111] 10 U.S.C. § 612(a)(3). The Secretary of the Army determines the exact number, in his discretion, which may not be less than one.

[112] 10 U.S.C. § 615(1).

[113] *See* 10 U.S.C. § 616(b).

[114] *See* 10 U.S.C. § 614(a).

[115] *See* 10 U.S.C. §§ 613, 615.

[116] *See* 10 U.S.C. § 616(a) and (c). When the maximum number of officers who may be selected by the board equals or exceeds the number of officers eligible for consideration, the selection method is termed "fully qualified." When the board may select fewer than the total number of officers eligible for consideration, the selection method is known as "best qualified." *See* AR 600-8-29, para. 1-35.*a.*(3).

[117] 10 U.S.C. § 617.

recommendations to the President for approval, modification, or disapproval.[118] Only the President may remove the name of an officer from the report of the selection board.[119]

When the report of the selection board has been approved by the President, the names of the approved officers are placed on a promotion list for that competitive category in order of seniority on the active-duty list.[120] An officer's name may be removed from the list by the President or be removed as a consequence of the Senate's failure to consent to the appointment of that officer.[121] After exhaustion of previous lists, recommended officers are promoted in the order they appear on the promotion list, as additional officers in the higher grade of that competitive category are needed.[122]

Although the active-duty list promotion system applies to both Regular Army and non-Regular Army commissioned officers, the consequences of nonpromotion vary somewhat depending on the component of the officer concerned. Both Regular Army and USAR second lieutenants on the active-duty list found not qualified for permanent promotion must be

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[118] 10 U.S.C. § 618(b)(1).

[119] 10 U.S.C. § 618(c).

[120] 10 U.S.C. § 624(a)(1).

[121] *See* 10 U.S.C. § 629. Promotions to the grade of first lieutenant and captain require no Senate confirmation. *See* 10 U.S.C. § 624(c).

[122] *See* 10 U.S.C. § 624(a)(2). The promotion of an officer who is under criminal charges, being investigated for disciplinary action, or under RA elimination proceedings, or who is believed to be mentally, physically, morally or professionally unqualified for the grade for which selected, may be delayed with notice to, and opportunity for response from, the officer concerned. *See* 10 U.S.C. § 624(d).

discharged within 18 months from the date found not qualified.[123] Regular Army officers holding the permanent grades of first lieutenant through major must be discharged or retired, if eligible, not later than approximately seven months following the approval of the board report resulting in the second failure of selection, unless then on a list of officers recommended for promotion.[124] However, if on the date he is to be discharged, the officer is within two years of qualifying for voluntary retirement, the officer will be retained on active duty until qualified and then retired.[125] There is no similar provision for removal due to failure of selection for promotion to grades above lieutenant colonel. Additionally, the foregoing provisions for mandatory discharge or retirement do not apply to an officer in the Regular Army grade of captain or above who is approved, on the basis of board selection, for continuation on active duty (and who does not decline such continuation).[126] An officer who, despite selection by a board for promotion, is removed from the list of recommended officers either by the President or because the officer was not confirmed by the Senate, continues to be eligible for consideration by the next board. If not selected by the next board or if removed from the recommended list, the officer is treated as if twice nonselected.[127]

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[123] 10 U.S.C. §§ 630, 14503. However, if the officer has been promoted, he will not be discharged on account of having been initially found not qualified.

[124] 10 U.S.C. §§ 631, 632.

[125] 10 U.S.C. §§ 631(a)(3), 632(a)(3).

[126] *See generally* 10 U.S.C. § 637; DOD 1320.12; and AR 600-8-29, para. 1-14.

[127] *See* 10 U.S.C. § 629(c).

For non-Regulars, the broad statutory authority of the Secretary to release any Reserve from active duty[128] has been implemented by regulations providing that a Reserve commissioned officer who twice fails of selection for active-duty list promotion to captain, major, or lieutenant colonel will be released from active duty unless selected for continuation on active duty or the officer has, on the scheduled release date, completed eighteen or more years of active Federal service, in which case the officer will be retained until completion of twenty years of active Federal service.[129]

c. Warrant officers. Provisions governing the permanent promotion of Regular Army warrant officers are similar to those concerning commissioned officers.[130] Regular promotions are made on the recommendation of selection boards.[131]

A warrant officer, W-1, who is found not qualified for Regular Army promotion is discharged or retired.[132] A chief warrant officer who is considered by a selection board, but not recommended for promotion, is considered again by each later selection board until retired, separated, or selected for promotion.[133]

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[128] *See* 10 U.S.C. § 12313.

[129] *See* AR 600-8-24, para. 2-41.

[130] 10 U.S.C. §§ 571-583. *See* AR 600-8-29.

[131] 10 U.S.C. § 573.

[132] AR 600-8-29, ch. 3 and 10 U.S.C. § 1165.

[133] 10 U.S.C. § 574.

d. Reserve promotion.

(1) General. The Reserve promotion system underwent a huge change on October 1, 1996, when the Reserve Officer Personnel Management Act (ROPMA) took effect. Part of the FY 95 Defense Authorization Act, ROPMA was the first major change in reserve officer management since 1954. [134] One of the main purposes of ROPMA is to align the Reserve promotion system with that used in the active component.

To align the reserve system, ROPMA eliminated mandatory time-in-grade requirements for promotion. ROPMA, instead sets a minimum and maximum time-in-grade for each rank, with the promotion zone falling in-between.[135] ROPMA also provides a below zone promotion option, based on the needs of the service, for captains, majors, and lieutenant colonels.[136] In addition, reserve officers will now be promoted based on "best qualified" standards, as opposed to the past "fully qualified" standards.[137] Procedures for promotion of Reserve warrant officers are not provided by statute but are governed by regulations the Secretary of the Army prescribes.[138]

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[134] *See generally* Reserve Officer Personnel Management Act (Title XVI of P.L. 103-337; 108 Stat. 3026).

[135] 10 U.S.C. §§ 14303-14304.

[136] 10 U.S.C. §§ 14302-14304.

[137] 10 U.S.C. § 14108.

[138] 10 U.S.C. § 12242.

(2) Promotion to fill unit vacancies. A commissioned officer of any unit of the Army Reserve or of a federally recognized unit of the Army National Guard may be promoted to fill a vacancy in the officer's unit in a grade from captain through colonel. Position vacancy promotions replaced the old unit vacancy system in the USAR and includes both TPU and IMA positions.[139] The Army National Guard retained the old unit vacancy promotion system. There is also authority to fill unit vacancies in the grades of brigadier general and major general by promotion of USAR officers having at least two years promotion service in the next lower grade.[140]

(3) Officers not promoted. Officers considered for promotion to the grades of captain, major, or lieutenant colonel, but not recommended by two successive selection boards, may be discharged or transferred to the Retired Reserve. There is no provision for removal due to failure of selection for promotion to grades above lieutenant colonel or to fill unit vacancies.[141] The Secretary of the Army may delay the promotion of a Reserve commissioned officer who is under investigation or against whom court-martial or board proceedings are pending.[142]

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[139] 10 U.S.C. § 14101a (2).

[140] 10 U.S.C. § 14315.

[141] 10 U.S.C. §§ 14501-14517.

[142] 10 U.S.C. § 14311.

2-4. Retirement of Officers

a. General. The term retirement, for the purposes of this paragraph, is used to refer to the placing of a member of the Army in a retired status with entitlement to retired pay for nondisability reasons.[143] The laws governing retirement of commissioned and warrant officers are extremely complex. Eligibility for retired pay and the amount thereof in any specific case should be determined by consulting the applicable statutes. The following summaries are only for the general purpose of familiarization.

b. Retirement from active service. Although there are more than 20 separate statutes under which an Army officer may be retired from active service, the provisions may be divided into two broad categories: voluntary retirement and mandatory (also called "involuntary") retirement.

(1) Voluntary retirement. Retirement is said to be voluntary when it is initiated by the request or application of the officer concerned. The Secretary of the Army may, upon such application, retire a Regular or Reserve commissioned officer who has 20 years of service, at least 10 years of which have been active service as a commissioned officer.[144] This is the most used provision for the retirement of officers from active duty, largely because it is the only one authorizing the retirement of Reserve commissioned officers on the basis of active service.

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[143] *See generally* AR 600-8-24, ch. 6.

[144] 10 U.S.C. § 3911.

Similarly, the Secretary may retire any warrant officer having at least 20 years of active service, who so requests.[145]

In addition, a Regular commissioned officer who has at least 30 years of service may be retired upon the officer's request, in the discretion of the President.[146] A Regular commissioned officer who has at least 40 years of service must be retired upon request.[147] Generally, only active military service is considered in determining eligibility for retirement under any of these provisions.[148]

An application for voluntary retirement will normally be approved unless the officer is subject to a service obligation due to schooling, promotion, or the receipt of continuation pay.[149]

(2) Mandatory retirement. Retirement is said to be mandatory when it is required by law regardless of whether the person concerned submits a request or application.[150] Only officers of the Regular Army are subject to mandatory retirement provisions.

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[145] 10 U.S.C. § 1293.

[146] 10 U.S.C. § 3918.

[147] 10 U.S.C. § 3924 (except as provided in 10 U.S.C. § 1186).

[148] *See* 10 U.S.C. § 3926.

[149] AR 600-8-24, para. 6-14.

[150] The classification of certain retirements as "mandatory" does not directly reflect statutory terminology. It is, however, a term of Army usage. *See* AR 600-8-24, ch. 6, Section II. There are certain statutory references which distinguish between "voluntary" and "involuntary" retirement. *See, e.g.,* 10 U.S.C. §§ 637(a)(6) and 638(d) (retirement after expiration of selective continuation period and selective early retirement characterized as "involuntary"); 10 U.S.C. § 1370 (distinction for purposes of retired grade determination).

(a) Commissioned officers. Regular Army commissioned officers are subject to mandatory retirement based on service in grade or total years of active commissioned service under several related statutes, depending on the permanent grade held. This is the most commonly used provision applicable to Regular Army officers aside from the voluntary retirement for years of service.

A major general will be retired upon completing five years in grade or 35 years of service, whichever is later,[151] and a brigadier general will be retired upon completing five years in grade or 30 years of service, whichever is later.[152] A colonel will be retired upon completing 30 years of service.[153] In the latter two cases, the officer is not retired if the officer's name is on the recommended list for promotion to the next higher Regular grade and, if promoted, accrues "tenure" for a minimum of five years of active service.[154] A lieutenant colonel with 28 years of service will be retired unless on the recommended list for promotion to the Regular grade of colonel.[155] The Secretary may retire any permanent professor of the Military Academy who has more than 30 years of commissioned service.[156] Additionally, whenever the Secretary

[151] 10 U.S.C. § 636.

[152] 10 U.S.C. § 635.

[153] 10 U.S.C. § 634.

[154] *Id.*

[155] 10 U.S.C. § 633.

[156] 10 U.S.C. § 3920.

determines that the needs of the service so require, a board may be convened to recommend officers on the active-duty list for selective early retirement, from among Regular lieutenant colonels who have twice failed of selection to colonel or from among Regular officers holding the permanent grades of colonel through major general who have served specific periods of active duty in their permanent grade.[157]

Regular commissioned officers will be mandatorily retired for age, generally at age 62,[158] but such retirements are rare.[159]

A Regular Army commissioned officer who is removed from active duty for substandard performance of duty, misconduct, moral or professional dereliction or in the interest of national security, and who is eligible for voluntary retirement on the date of removal from active duty, shall be retired in the grade and with the retired pay for which the officer would be eligible if retired upon application.[160]

An officer who must be removed from active duty for failure of selection for Regular promotion is retired rather than discharged, if eligible for retirement under any provision of law.[161] However, if not yet eligible for retirement, but within two years of becoming eligible

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[157] 10 U.S.C. § 638; DOD 1332.32-R.

[158] 10 U.S.C. § 1251. Mandatory retirement is at age 64 for certain USMA personnel and may be deferred to age 64 for a limited number of lieutenant generals and generals.

[159] *See* 10 U.S.C. § 532 which generally requires that a person be able to complete 20 years of active commissioned service before age 55 in order to receive an RA appointment.

[160] 10 U.S.C. § 1186(b).

[161] 10 U.S.C. §§ 631(a)(2), 632(a)(2).

for retirement under 10 U.S.C. § 3911, the officer is retained on active duty until completing the service necessary to qualify for such retirement or until otherwise retired or discharged.[162]

(b) Warrant officers. Regular warrant officers are subject to mandatory retirement for age,[163] length of service,[164] failure of selection for Regular promotion,[165] unfitness, or unsatisfactory performance of duty.[166]

A Regular warrant officer who is mandatorily retired for length of service will have 30 years of service; one mandatorily retired for age must have at least 20 years of service.[167] The provision authorizing a warrant officer to be retired, rather than discharged, for unfitness or unsatisfactory performance of duty, provides that the officer must be eligible for retirement under some other provision of law.[168]

A warrant officer who has twice failed of selection for promotion to the next higher Regular grade is retired, rather than discharged, if the officer has at least 20 years of service. If

[162] 10 U.S.C. §§ 631(a)(3), 632(a)(3).

[163] 10 U.S.C. § 1263 (age 62).

[164] 10 U.S.C. § 1305.

[165] 10 U.S.C. § 580.

[166] 10 U.S.C. § 1166.

[167] *See* 10 U.S.C. § 1305 (length of service); 10 U.S.C. § 1263(a) (age).

[168] 10 U.S.C. § 1166(a).

the officer has at least 18 but less than 20 years, the officer is retained until completing 20 years of service.[169]

Generally, only active service is creditable in determining eligibility for retirement under any of these provisions.[170]

(3) Retired grade. A Regular commissioned officer, and a Reserve commissioned officer other than one who retires under provisions for "retired pay for non-Regular service,"[171] is generally retired (other than for physical disability) in the highest grade in which the Secretary determines the officer served satisfactorily[172] on active duty, for not less than six months, unless entitled to some higher retired grade by other provision of law.[173] However, in order to retire voluntarily in a grade above major and below lieutenant general, an officer must have served on active duty in that grade for not less than three years.[174] An officer who has

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[169] 10 U.S.C. § 580.

[170] *See* 10 U.S.C. § 564.

[171] *See generally* 10 U.S.C., ch. 69.

[172] *See generally* AR 15-80 for the procedures used in determining "satisfactory service."

[173] *See* U.S.C. §§ 3961(a), 1370(1). However, a Reserve officer who was on active duty on 14 September 1981 and who retires after that date under 10 U.S.C. § 3911 is entitled to retire in the Reserve grade held or to which the officer had been selected for promotion on 14 September 1981. *See* 94 Stat. 2835, as amended by 95 Stat. 135.

[174] 10 U.S.C. § 1370(a)(2). This requirement may be waived by the President in individual cases under certain circumstances. In addition, an officer retired upon request for voluntary retirement after being notified he will be involuntarily released from active duty is considered to be retired involuntarily. *See* 10 U.S.C. § 1370(a)(3). In the case of certain officers who were on active duty on 14 September 1981, "two years" is substituted for the three year requirement of 10 U.S.C. § 1370(a)(2), and the requirement of that section may be waived by the Secretary.

served in certain designated positions, such as Chief of Staff of the Army, or in a position of importance and responsibility designated to carry the grade of lieutenant general or general, may, in the discretion of the President and with the consent of the Senate, be retired in the highest grade in which the officer served on active duty.[175]

Unless entitled to a higher retired grade under some other provision of law, a warrant officer retires, as determined by the Secretary of the Army, in the Regular or Reserve warrant officer grade held on the day before the date of retirement, or in any higher warrant officer grade in which the officer has served satisfactorily on active duty for a period of more than 30 days.[176] In addition, when active service plus service on the retired list total 30 years, a warrant officer is entitled to be advanced to the highest temporary grade in which the officer has served satisfactorily on active duty.[177]

(4) Retired pay. The basic formula for computing the amount of retired pay is the same for all of the foregoing types of retirement and is as follows:[178]

Basic pay[179] x 2 1/2 percent[180] x years of service. However, retired pay may not be more than 75 percent of the basic pay.[181]

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[175] *See* 10 U.S.C. §§ 3962(a), 1370(c). *See also* 10 U.S.C. § 3962(b) (retirement of USMA permanent professors in the grade of brigadier general).

[176] 10 U.S.C. § 1371.

[177] 10 U.S.C. § 3964. *See also* 10 U.S.C. § 3965 (restoration to former grade).

[178] 10 U.S.C. §§ 1401, 3991. For an alternate method of computation, *see* 10 U.S.C. § 1401a.

[179] For a person who first became a member of a uniformed service before 8 September 1980, the monthly basic pay used in the computation is specified in column 1 of the table at 10 U.S.C. § 1401, for

A complicating factor in the computation of retired pay is that the years of service in the above formula are not necessarily the same years of service used to determine eligibility for retirement. The years of service used in computing the retired pay of warrant officers,[182] and of commissioned officers voluntarily retired or retired through selective early retirement,[183] or mandatorily retired by reason of age,[184] failure of selection,[185] length of service,[186] or for substandard performance of duty, for misconduct or moral or professional dereliction, or in the interest of national security,[187] include the following periods:[188]

(a) Active service.

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each formula. For a person who first became a member of a uniformed service after 7 September 1980, the basic pay used in the computation is the "monthly retired pay base" as computed under 10 U.S.C. § 1407(b). *See* 10 U.S.C. § 1401.

[180] For soldiers who first became a member after July 31, 1986 and who retire with less than 30 years service, the effective multiplier is reduced. 10 U.S.C. § 1409.

[181] In the case of officers who were on active duty on 14 September 1981 and later retired under 10 U.S.C. § 1251 (for age), retired pay will be not less than 50 percent of the basic pay upon which retired pay is based. *See* 94 Stat. 2952, as amended by P.L. 95 Stat. 134.

[182] 10 U.S.C. § 1401 (Formula 4).

[183] 10 U.S.C. § 3991 (Formula A); 10 U.S.C. § 638(b).

[184] 10 U.S.C. § 1401 (Formula 5).

[185] 10 U.S.C. § 3991 (Formula A); 10 U.S.C. §§ 631, 632.

[186] 10 U.S.C. § 1401 (Formula 5) (under 10 U.S.C. §§ 633-36); 10 U.S.C. § 3991 (Formula A) (under 10 U.S.C. § 3920).

[187] 10 U.S.C. § 3991 (Formula A) made applicable by 10 U.S.C. § 1186(b).

[188] 10 U.S.C. § 1405.

(b) Certain constructive service for medical and dental officers.[189]

(c) Time creditable toward longevity for pay purposes before 1 June 1958, and not counted above.

(d) One day for each retirement point[190] for Reserve participation, if such time is not counted above.

(5) Date of retirement. The date of retirement is the date that an officer's name is placed on the retired list, pursuant to retirement orders.[191] An officer may remain on active duty subsequent to the retirement date because of pending court-martial action, delay in publication of orders, or for exigencies of the service.[192]

Prior to the effective date of the retirement order, the Secretary of the Army may revoke the order at any time. However, when the order becomes fully executed, if regular and valid, it may not be revoked or amended in the absence of fraud, manifest error, mathematical miscalculation, mistake of law, or substantial new evidence which was previously unavailable.[193]

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[189] *See* 94 Stat. 2952.

[190] 10 U.S.C. § 12733.

[191] AR 600-8-4, para. 6-3.

[192] This subsequent service will not, in cases of mandatory retirement, increase creditable service for pay. 43 Comp. Gen. 742 (1964).

[193] *See* 39 Comp. Gen. 312 (1959) (administrative finality).

(6) Retired status. Regular officers remain members of the Regular Army following retirement.[194] As such, they continue to be subject to the Uniform Code of Military Justice[195] and may be ordered to active duty by the Secretary at any time.[196]

Reserve officers retired from active service must retain military status in order to remain eligible for the receipt of retired pay.[197] They ordinarily become members of the Retired Reserve[198] and may be ordered to active duty by the Secretary of the Army at any time.[199] Except when on active duty, they are ordinarily not subject to the Uniform Code of Military Justice.[200]

c. Retired pay for non-Regular service. Under certain circumstances, a person may be entitled to retired pay on the basis of service performed, in whole or in part, while not on active duty. To be entitled to such retired pay, the person must meet the following requirements:[201]

(1) At least 20 years of service.

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[194] *See* 10 U.S.C. § 3075(b)(3).

[195] 10 U.S.C. § 802(a)(4).

[196] 10 U.S.C. § 688.

[197] 41 Comp. Gen. 715 (1962).

[198] *See* 10 U.S.C. § 10154.

[199] 10 U.S.C. § 688.

[200] There are some exceptions. *See* 10 U.S.C. § 802(a)(3), (5).

[201] 10 U.S.C. § 12731.

(2) The last 8 years of qualifying service were as a member of a non-Regular component.[202]

(3) At least 60 years of age.

(4) Not entitled to military retired pay under any other provision of law.

(5) Must apply for such pay.

d. Military status requirement. There is no requirement that the individual have any military status at the time the individual applies for or receives this retired pay. The years of service creditable in determining eligibility for retired pay generally include all military service before 1 July 1949, regardless of the amount of active duty or Reserve participation, and each subsequent year in which at least 50 retirement points have been credited.[203] Since there is no requirement that an individual have military status to be eligible for retired pay for non-Regular service, the individual does not necessarily have a retired grade. Retired pay for non-Regular service is:[204]

(1) Basic pay[205] x 2 1/2 percent x years of service, but may not exceed 75 percent of the basic pay.

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[202] The last 8 years of qualifying service need not necessarily be an individual's last 8 years of military service, nor do they have to be 8 consecutive years. 32 Comp. Gen. 225 (1952).

[203] 10 U.S.C. § 12732.

[204] 10 U.S.C. § 1401 (Formula 3).

[205] For a person who first became a member of a uniformed service after 7 September 1981, the basic pay used in the computation is the "monthly retired pay base," as computed under 10 U.S.C. § 1407(b)(3); for other persons, the monthly basic pay used in the computation is that of the highest grade held satisfactorily at any time in the armed forces. *See* 10 U.S.C. § 1401 (Formula 3).

(2) Years of service creditable in the computation of retired pay include the following, divided by 360.[206]

(a) Days of active service.

(b) Days of active duty for training.

(c) One day for each retirement point creditable for inactive duty training and Reserve membership but not to exceed 60 in any one year.

(d) 50 days for each prior to 1 July 1949, and proportionately for each fraction of a year of service (other than active service) in a non-Regular component.

2-5. Separation of Officers

The term "separation" is used in this paragraph to mean a complete termination of an officer's military status in a particular component. Separation may not necessarily end all military status if the individual holds a commission or warrant in another component which is not affected by the separation action. An officer's separation may be effected by:[207]

(1) Dismissal.

(2) Discharge.

(3) Resignation.

(4) Operation of law.

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[206] 10 U.S.C. § 12733.

[207] *See supra* para. 2-3.b. for a discussion of the effect of promotion nonselection upon the separation of an officer.

(5) Dropping from the rolls.

Additionally, military status is terminated in all components upon an officer's death.

a. Dismissal. Congress has provided that no commissioned officer may be dismissed from the Armed Forces except.[208]

(1) By sentence of a general court-martial.

(2) In commutation of a sentence of a general court-martial.

(3) By the President in time of war.

Any commissioned officer dismissed by the President in war may request trial by general court-martial if the officer believes the dismissal was wrongful and, if no court-martial is convened within six months, an administrative discharge will be issued in lieu of the dismissal.[209] If tried and acquitted or the final sentence does not contain a dismissal or death, an administrative discharge will be substituted for the original dismissal.[210]

There are some questions as to the constitutionality of the dismissal limitation established by Congress since the President has the inherent power to dismiss certain officers of

[208] 10 U.S.C. § 1161(a). The only sentence commutable to dismissal is the death sentence, and this authority is reserved to the President. *See* 10 U.S.C. § 871(a).

[209] 10 U.S.C. § 804(a), (b).

[210] 10 U.S.C. § 804(a).

the executive department as a part of the power to appoint them.[211] However, this limitation has not been contested.

b. Discharge. Separation by discharge is the most general form of separation. It is used to effect separation in all cases in which none of the more specific forms of separation are applicable. There are numerous statutory provisions relating to the discharge of officers, some dealing with specific circumstances[212] and others in very general terms.[213] These are implemented by Army regulations.[214]

Particularly important are the provisions for discharge of officers pursuant to elimination proceedings. Elimination procedures are established by statute for Regular commissioned officers in the case of substandard performance of duty, and in the case of misconduct, moral or professional dereliction, or in the interests of national security.[215] Army regulations provide substantially uniform elimination procedures for all officers on active duty, except those who are probationary officers.[216] These procedures include show cause

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[211] Myers v. United States, 272 U.S. 52 (1926). *See also* Humphrey's Executor v. United States, 295 U.S. 602 (1935); Colby, *The Power of the President to Remove Officers of the Army*, 15 Geo. L.J. 168 (1927).

[212] *See, e.g.,* 10 U.S.C. § 12641 (Reserves not qualifying to remain in active status), 10 U.S.C. §§ 630-32 (Regular officer–failure of promotion), 10 U.S.C. § 14501 (Reserve officers–failure of promotion).

[213] *See, e.g.,* 10 U.S.C. § 14503 (Reserve officers); 10 U.S.C. § 630 (Regular officer in first 5 years).

[214] *See* AR 600-8-24 (active duty officers); AR 135-175 (Reserve officers).

[215] 10 U.S.C. § 1181.

[216] "Probationary" officers include Regular Army and Reserve commissioned officers with less than 5 years of active commissioned service (*see* 10 U.S.C. §§ 630 and 12683, respectively). "Probationary"

notification, referral to a board of inquiry convened by a major commander, review by a board of review at Department of the Army, and final action by the Secretary of the Army.[217] The officer is offered, at several stages in the proceedings, the options of resignation, discharge (if a Regular commissioned officer), or retirement in lieu of elimination (if eligible).[218]

Separation by discharge is characterized by the issuance of a discharge certificate. Present regulations authorize the following types of discharges for officers:[219]

(1) Commissioned and Warrant Officers holding commission.

(a) An Honorable Discharge Certificate is issued for an honorable discharge given by administrative action.

(b) A General Discharge Certificate is issued for a discharge under honorable conditions given by administrative action.

(c) A discharge Under Other Than Honorable conditions is an administrative separation from the service given by administrative action. A discharge certificate will not be issued.

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officers also includes Regular Army warrant officers within 3 years of original permanent appointment (10 U.S.C. § 1165). (*See also* AR 600-8-24, para. 4-20.)

[217] AR 600-8-24, ch. 4.

[218] AR 600-8-24, para. 4-11(h); *see* 10 U.S.C. § 1186 (Regular commissioned officers).

[219] AR 600-8-24, para. 1-21.

(2) A Dishonorable discharge is issued only to a warrant officer, who does not hold a commission, as a result of a sentence by court-martial. A discharge certificate will not be issued.

c. Resignation.

(1) General. Resignation is a nonstatutory form of separation based on the voluntary request of an officer to give up his military office.[220] Resignation may be accepted by the Secretary of the Army, but it is general policy to refuse resignations when--[221]

(a) The officer is under investigation, is being court-martialed, is insane, is absent without authority, or is in debt to the United States.

(b) War is imminent or in progress, a national emergency exists, or armed forces are involved in some form of conflict.

(c) The officer has not fulfilled service obligations.

(d) The Secretary determines that the needs of the service require a delay of favorable action on the resignation.

Approval of a resignation will generally be delayed when an officer is suffering from a physical or mental condition which makes the officer medically incapacitated for further duty.[222] There are three steps to separation by resignation: Submission of the resignation,

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[220] *See* AR 600-8-24, ch. 3.

[221] AR 600-8-24, para. 3-5.

[222] AR 600-8-24, para. 1-11c.

acceptance by proper authority, and notice to the resigning officer of the acceptance.[223] Ordinarily, separation is effective at the time the officer is notified that his resignation has been accepted, and status terminates at that time.[224]

While there are several grounds for resignations, they are generally classified as unqualified, in lieu of elimination, and for the good of the service, depending on the circumstances under which they are submitted.

(2) Unqualified resignation.[225] Although an officer may submit an unqualified resignation at any time, this type of resignation is used primarily by officers who elect to be separated when they are free to retain their officer status. There is no stigma attached to an unqualified resignation, and an honorable discharge certificate is ordinarily issued, although a general discharge certificate is also authorized.

(3) Resignation in lieu of elimination.[226] An officer who is the subject of elimination proceedings may submit this resignation at any time before final action. The elimination proceedings are suspended pending action on the resignation. The type of discharge certificate issued is dependent on the grounds for which elimination proceedings were brought, as well as the circumstances of the particular case.

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[223] Mimmack v. United States, 97 U.S. 426 (1878).

[224] *Id.*

[225] AR 600-8-24, para. 3-5.

[226] AR 600-8-24, para. 4-24.

(4) Resignation for the good of the service. A resignation for the good of the service may be submitted by an officer who is facing general court-martial charges, by an officer under a suspended sentence to dismissal,[227] or by an officer because of homosexuality.[228] There is no requirement that court-martial proceedings be suspended pending action on a resignation. Normally, a resignation for the good of the service is accepted as under other than honorable conditions. However, the resignation may be accepted as under honorable conditions and an honorable or general discharge certificate furnished.[229]

d. Separation by operation of law. Under certain circumstances, the appointment of an officer is terminated by operation of law without the necessity of any formal action to effect his separation.

(1) Expiration of appointment. If an officer is appointed only for a designated term, the officer is separated by the expiration of that term. At present only certain temporary appointments in the Army of the United States without component are limited as to term.[230]

(2) Incompatible office or status. The appointment of an officer in the regular component to a civil office no longer results in the automatic termination of the officer's appointment. This prohibition was removed by the amendment of the Dual Office Act by the

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[227] AR 600-8-24, para. 3-13.

[228] AR 600-8-24, para. 3-15.

[229] *See* AR 600-8-24, paras. 3-13(i) and 3-15(e).

[230] 10 U.S.C. §§ 601, 603. *See also* 44 Comp. Gen. 277 (1964).

Defense Authorization Act of 1984.[231] On the other hand, acceptance of citizenship in a foreign country, with the resultant loss of United States citizenship, is inconsistent with an Army officer's oath and the qualifications of office and terminates his military status.[232]

A Federal district court has issued a declaratory judgment[233] to the effect that Article I, Section 6, Clause 2, of the Constitution renders a member of Congress ineligible to hold a commission in the Reserves while a member of Congress, on grounds of constitutional incompatibility. The court refused, however, to issue an injunction or similar order against Reservists in Congress. In practice, following Desert strom, there were Reservists elected to Congress.

(3) Conviction of certain offenses. An officer may forfeit the office upon conviction of certain offenses against the United States.[234] In most cases the office is automatically

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[231] 10 U.S.C. § 973(b). An officer may not hold, or exercise the functions of, a civil office in the Government of the United States that is an elective office, that requires appointment by the President by and with advice and consent of the Senate, or that is a position in the Executive Schedule under Title 5. Likewise, an officer may not hold or exercise, by election or appointment, the functions of a civil officer in the government of a State, the District of Columbia, or a territory, possession, or Commonwealth of the United States. A civil office is defined as "a specific position created by law, which has certain definite duties imposed by law on the incumbent, and which involves the exercise of some portion of the sovereign power." 44 Comp. Gen. 830 (1965).

[232] 41 Comp. Gen. 715 (1962). *See* 10 U.S.C. § 532(a).

[233] Reservists Committee to Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), *aff'd*, 495 F.2d 1075 (D.C. Cir. 1972), *rev'd due to lack of standing*, 418 U.S. 208 (1974).

[234] 18 U.S.C. §§ 592-93 (interfering in election), 1901 (collection or disbursement officer trading in public funds or debts), 2071 (custodian concealing, destroying, falsifying, etc., public records), 2381 (treason), 2385 (advocating overthrow of Government), 2387 (encouraging insubordination, disloyalty, mutiny or refusal of duty by member of the military).

terminated upon conviction, but in others some further action appears to be necessary to effect the officer's separation.[235] An officer dropped from the rolls does not have the right to trial by court-martial as is provided for commissioned officers dismissed from the service.[236]

2-6. Removal of Reserve Officers

a. Release from active duty. The Secretary of the Army may release a Reserve officer from active duty at any time.[237] In time of war or national emergency, certain procedures must be followed prior to such a release from active duty.[238] Certain circumstances, of more general applicability, under which a Reserve officer may be released from active duty have been specified by the Secretary.[239]

b. Removal from active status. The term active status refers to the status of a Reserve officer who is in neither an inactive status nor a retired status.[240] It should not be

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[235] In some statutes it is clearly provided that the person "shall forfeit" his office. 18 U.S.C. § 2071. Others provide that he "shall be incapable of holding" the office, 18 U.S.C. §§ 1901, 2381, or "shall be disqualified from holding" the office, 18 U.S.C. §§ 592-93. This language has been held to result in an automatic loss of office upon conviction, even in spite of subsequent reversal on appeal. McMullen v. United States, 100 Ct. Cl. 323 (1943), *cert. denied*, 321 U.S. 790 (1944). A similar result seems likely where it is provided that the person "shall be ineligible for employment." 18 U.S.C. §§ 2385, 2387. However, 18 U.S.C. § 201 (1976) (bribery) provides that the officer "may be disqualified from holding any office." This language is clearly permissive and would appear to require affirmative action to effect separation.

[236] *See* 10 U.S.C. § 804.

[237] 10 U.S.C. § 12313(a).

[238] 10 U.S.C. § 12313(b).

[239] *See generally* AR 600-8-24, ch. 2.

[240] 10 U.S.C. § 10141.

confused with the term active duty, which means full-time military service.[241] Generally, only service in an active status is creditable for purposes of retired pay for non-Regular service.[242] Reserve officers also must be in an active status to be eligible for Reserve promotion[243] or for pay for Reserve participation, other than retired pay.[244] To be retained in an active status, a Reserve officer must conform to prescribed standards and qualifications and must attain the number of yearly retirement points prescribed by the Secretary of the Army. Otherwise, the officer is transferred to the Retired Reserve, if the officer is qualified and applies, or the officer is transferred to inactive status or discharged.[245] A Reserve officer who has been retired under 10 U.S.C. § 3911 belongs to the Retired Reserve,[246] and is therefore no longer in an active status.[247]

Removal of Reserve officers from active status is also required upon their failure of selection twice for certain Reserve promotions,[248] upon their reaching certain ages,[249] or upon

[241] 10 U.S.C. § 101(d)(1).

[242] 10 U.S.C. § 12734.

[243] *See* 10 U.S.C. §§ 14004, 10153.

[244] *See* 10 U.S.C. § 10153.

[245] 10 U.S.C. § 12642.

[246] 10 U.S.C. § 10154.

[247] *See* 10 U.S.C. §§ 101(d)(5), 10141.

[248] 10 U.S.C. §§ 14504-14507.

[249] 10 U.S.C. §§ 14509-14511.

their completing certain years of service.[250] In each case, the officer must be transferred to the Retired Reserve, if qualified and a request is made, or be discharged.[251] There is a statutory prohibition, however, against transferring Reserve officers from an active status under these provisions when they have between 18 and 20 qualifying years for retired pay for non-Regular service.[252] In certain cases, a Reserve officer on active duty who is within two years of qualifying for retirement under 10 U.S.C. § 3911 may be retained on active duty for as long as two years beyond his normal date of removal from active status; in that event, he may not be removed from active status during such active duty.[253]

[250] 10 U.S.C. § 14508.

[251] 10 U.S.C. § 14514.

[252] 10 U.S.C. § 12646 (a), (b).

[253] 10 U.S.C. § 12646 (e).

Chapter 3

Enlisted Personnel

3-1. Enlistment

a. General. The term "enlistment" is generally defined as a voluntary contract for military service entered into between an individual and the United States, which results in changing the status of the individual from that of a civilian to that of a soldier.[1] A more detailed description of enlistment is given by Colonel Winthrop, as follows:

> [T]he contract of enlistment is peculiar in that it is a contract made with the State, under the specific authority of the Constitution, and thus governed by those principles or considerations of expediency and economy, expressed in the term "public policy." Thus, while the necessities of military discipline require that the soldier should be strictly obliged by the compact, the State, on the other hand, is not bound by the conditions though imposed by itself. Thus it may put an end to the term of enlistment at any time before it has regularly expired and discharge the soldier against his consent. So pending the engagement, it may reduce the pay, or curtail any allowance, which formed a part of the original consideration. The contract of enlistment is thus a transaction in which private right is subordinated to the public interest. In law, it is entered into with the understanding that it may be modified in any

[1] United States v. Grimley, 137 U.S. 147 (1890); Pfile v. Corcoran, 287 F.Supp. 554 (D. Colo. 1968); *cf.* Bell v. United States, 366 U.S. 393 (1961).

> of its terms, or wholly rescinded, at the discretion of the State. But this discretion can be exercised only by the legislative body, or under an authority which that body has conferred.[2]

The Constitution of the United States grants to Congress the power to raise and support armies.[3] Consequently, the terms and conditions of the contract of enlistment are within the plenary and exclusive control of the Congress. The President and the Secretary of the Army have no power to vary the contract of enlistment unless statutory authority exists therefor.[4]

The peculiar nature of the enlistment "contract" is best described in the leading case of *United States v. Grimley*,[5] in which the Supreme Court compared the enlistment contract with the marriage contract. Marriage is a contract of mutual faithfulness, and the breach of that obligation does not dissolve the marriage or change the status of the parties as husband and wife. Similarly, the enlistment contract changes the civilian's status to that of a soldier, and a "breach of the [enlistment] contract" does not destroy that status or remove a soldier's

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2 WINTHROP, MILITARY LAW AND PRECEDENTS 538-39 (2d ed. 1920 reprint).

3 U.S. CONST. art. 1, § 8, cl. 12.

4 4 Op. Atty. Gen. 537 (1846). An example of such statutory authority is 10 U.S.C. § 1169, which permits the Secretary of the Army to prescribe policy and procedure for the discharge of enlisted personnel before the expiration of the enlistment.

5 137 U.S. 147 (1890).

obligations, anymore than does infidelity dissolve the marital *res*.[6] This same rationale is found in *Bell v. United States*,[7] involving a soldier's entitlement to pay. In *Bell*, the Supreme Court held military pay was a statutory right based upon military status and the common law rules had no place in deciding such issues.[8]

Enlistment is a voluntary act on the part of the individual and no bounty may be paid to induce any person to enlist in an Armed Force.[9] Enlistment is also a bilateral contract, which means there must be a mutual understanding of the terms between the individual and the United States; one cannot create military status merely by masquerading as a member of the service.[10]

An enlistment or reenlistment in the Regular Army may be for a period of at least two but not more than six years.[11] Enlistment and reenlistment are at the discretion of the service; no one is entitled to reenlistment as of right.[12] An enlistment in the Regular Army in effect at

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6 137 U.S. at 151. Note, however, that in both cases, breach of the contract by one party may amount to legal justification to take action to dissolve the contractual relationship.

7 366 U.S. 393 (1961).

8 366 U.S. at 401.

9 10 U.S.C. § 514(a).

10 UCMJ art. 2(c) (constructive enlistment) *overruling* United States v. King, 11 C.M.A. 19, 28 C.M.R. 243 (1959).

11 10 U.S.C. § 505(c). The Secretary may also enlist a minor for the period of his minority. *Id.*

12 Maier v. Orr, 754 F.2d 973, 980 (Fed. Cir. 1985); Austin v. United States, 206 Cl. Ct. 719, 723-24 (1975).

the outbreak of a war, or entered into during a war, continues in effect until six months after termination of that war, unless sooner terminated by the President.[13]

The United States Code provides for Reserve enlistments of "not less than six years and not more than eight years," with at least the first two years to be served on active duty, and the balance in the Ready Reserve.[14] This provision accounts for most routine enlistments in the active component. In addition, the Secretary of the Army may prescribe other periods of reserve enlistment.[15] An enlistment in the Reserve that is in effect at the beginning of a war or national emergency declared by Congress, or entered into during the war or emergency, continues in effect until six months after termination of that war or emergency, unless sooner terminated by the Secretary of the Army.[16]

Temporary enlistments in the Army of the United States without component are only permitted in time of war or emergency and are for the duration of the war or emergency plus six months.[17]

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13 10 U.S.C. § 506.

14 10 U.S.C. § 12103(b).

15 10 U.S.C. § 12103(a).

16 10 U.S.C. §§ 12103(a) and (c).

17 10 U.S.C. § 519.

Every person enlisting in a U.S. armed force is required to take an oath of enlistment before a commissioned officer of any U.S. armed force.[18] The taking of the oath is the pivotal event in changing an individual's status from civilian to soldier.[19] The status created by enlisting in the Army continues until the soldier properly is issued a discharge certificate and receives final pay; status does not automatically terminate upon the expiration of the term of the enlistment contract.[20] Usually, enlisted soldiers are entitled to be discharged upon the expiration of their terms of service.[21] Under certain circumstances enlisted soldiers may be retained beyond their terms of service. For example, they may be retained to make up for lost time.[22] Also, enlisted soldiers may be retained beyond their term of service pending final disposition of court-martial charges against them, pending their return from overseas to permit certain necessary medical or dental treatment, and, under certain circumstances, pending final disposition of criminal charges in a foreign court.[23] When soldiers are retained beyond their

18 10 U.S.C. § 502.

19 United States v. Grimley, 137 U.S. 147, 157 (1890).

20 10 U.S.C. § 1168 (a); United States v. Batchelder, 41 M.J. 337, 339 ¶ 13 (C.A.A.F. 1994).

21 DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, paras. 1-23 to 1-29 (5 July 1984) (C15, 26 June 1996) [hereinafter AR 635-200].

22 10 U.S.C. § 972; AR 635-200, *supra* note 21, para. 1-23.

23 *See* 10 U.S.C. § 507 (medical care); AR 635-200, *supra* note 21, paras. 1-24 to 1-29; Taylor v. United States, 711 F.2d 1199 (3d Cir. 1983) (foreign criminal charges).

terms of service, military status continues; they are obligated to perform duties and obey orders.[24]

b. Qualifications and disqualifications.

(1) General. In general, persons enlisted in the Regular Army must be--

> qualified, effective, and able-bodied persons who are not less than seventeen years of age, nor more than thirty-five years of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control.[25]

No person who is insane, intoxicated, a deserter from an armed force, or a convicted felon may be enlisted, except that the Service Secretary may authorize exceptions in either of the latter two situations in meritorious cases.[26] In time of peace, no person may be accepted for an original enlistment in the Army unless the person is a United States citizen or an alien lawfully admitted for permanent resident alien status.[27] No one may be reenlisted if his prior service was not honest and faithful, except that the Service Secretary may authorize

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24 United States v. Handy, 14 M.J. 202 (C.M.A. 1982).

25 10 U.S.C. § 505(a).

26 10 U.S.C. § 504.

27 10 U.S.C. § 3253.

reenlistment when a person's subsequent conduct has been good.[28] Most physical, mental, moral, professional, and educational qualifications for enlistment or reenlistment are prescribed by the Secretary of the Army in Army regulations.[29]

Whether the enlistment of a person who fails to meet prescribed qualifications is void or valid but subject to recision by one of the parties is important for purposes of court-martial jurisdiction as well as entitlement to pay, allowances, and other benefits. These concepts will be discussed below.

(2) Minority. A person who enlists while below the minimum age prescribed by law is void. The person does not acquire military status.[30] If the Army discovers the minority enlistment before the individual reaches age 17, release from Army custody and control is mandatory.[31] If, however, the individual reaches age 17 before the Army discovers the invalid enlistment, and if the individual voluntarily submits to military authority, is mentally

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28 10 U.S.C. § 508(a).

29 *See generally* DEP'T OF ARMY, REG. 601-210, PERSONNEL--PROCUREMENT: REGULAR ARMY AND ARMY RESERVE ENLISTMENT PROGRAM (1 Aug. 1991) [hereinafter AR 601-210], *and* DEP'T OF ARMY, REG. 601-280, PERSONNEL PROCUREMENT: ARMY RETENTION PROGRAM (29 Sep. 1995) [hereinafter AR 601-280].

30 United States v. Blanton, 7 C.M.A. 664, 23 C.M.R. 128 (1957); AR 635-200, *supra* note 21, para. 3-9*b* (1)(*b*).

31 AR 635-200, *supra* note 21, para. 7-4*a*.

competent, receives pay or allowances, and performs military duties, the individual obtains military status and is a member of the Army for all purposes.[32]

The enlistment of a 17 year-old without parental consent is also prohibited by law.[33] Such enlistment, however, is not void but is merely subject to recision at the government's option.[34] If the soldier is not under charges for a serious offense committed after attaining age 17, and the soldier has not reached his 18th birthday, the soldier will be discharged if the soldier's parents or guardian apply within 90 days of the individual's enlistment.[35] Because this provision is at the option of the soldier's parents, the soldier continues to have a military status until the option is exercised. Where the parent has attempted to secure release of the 17 year-old soldier from military service, a court-martial lacks jurisdiction to try the soldier for a subsequently committed offense. Where the demand for the release of the soldier is not made until after commission of an offense, court-martial jurisdiction over the soldier is not defeated by such demand.[36] Even though the soldier's parents did not consent to the enlistment, they

32 UCMJ, art. 2(c).

33 10 U.S.C. § 505(a).

34 AR 635-200, *supra* note 21, para. 7-4*b*.

35 10 U.S.C. § 1170; AR 635-200, para. 7-4*b*.

36 United States v. Valadey, 5 M.J. 470 (C.M.A. 1978); United States v. Bean, 13 C.M.A. 203, 32 C.M.R. 203 (1962). *But see* AR 635-200, *supra* note 21, para. 7-7 (ordinarily desirable to avoid board action or court-martial when the soldier is otherwise eligible for minority discharge).

may waive their right to demand his release if they are aware of and acquiesce in the enlistment.[37]

Individuals who enlisted before their 17th birthday (or 18th birthday, without parental consent), and who made false representation as to their age will not be separated for fraudulent entry.[38] If those individuals remain in the Army beyond their 18th birthday, they will not be separated for erroneous enlistment because the defect no longer exists.[39] In both situations they may be retained at the option of the Army.

(3) Mental incompetency. The enlistment of any "insane" person is specifically prohibited by statute.[40] The Supreme Court has indicated that an enlistment by an insane person is void.[41] But, unless the enlistee is subject to a prior judicial determination of mental incompetence, "there is no substantial basis for regarding him as an insane person."[42] Therefore, an enlistment by a person subject to a prior judicial determination of mental incompetence is void. Otherwise the enlistment is valid and the person is a member of the Army until the date

37 United States v. Scott, 11 C.M.A. 655, 29 C.M.R. 471 (1960).

38 AR 635-200, *supra* note 21, para. 7-17*a*. Enlistment of a minor with fake identification as to age and without proper consent will not, in and of itself, be considered fraudulent enlistment.

39 AR 635-200, *supra* note 21, para. 7-15*a*(3).

40 10 U.S.C. § 504.

41 United States v. Grimley, 137 U.S. 147, 153 (1890) (dictum). *But see* Becton v. United States, 489 F. Supp. 134 (D. Mass. 1980).

42 39 Comp. Gen. 742, 747 (1960); *see also* 54 Comp. Gen. 291 (1974).

of the soldier's separation, even though qualified doctors are of the opinion the soldier was insane at the time of enlistment.[43]

(4) Intoxication. An enlistment of an individual who is intoxicated at the time of the enlistment to the extent that the individual lacked capacity to understand the significance of the event and to voluntarily consent is void,[44] and prohibited by statute.[45] In most cases, however, the void enlistment is followed by a valid constructive enlistment that creates military status and preserves court-martial jurisdiction.[46]

(5) Other disqualifications. Various statutes and regulations prescribe other disqualifications for enlistment.[47] The existence of these other disqualifications will not render an enlistment void. They will, however, subject the enlistment to recision by one of the parties, usually the Army.[48] Only minority, mental incompetence, and intoxication, which have a direct

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43 *Id.*

44 AR 635-200, *supra* note 21, para. 3-9*b*(1)(a).

45 10 U.S.C. § 504.

46 UCMJ art. 2(c); AR 635-200, *supra* note 21, para. 3-9*b*(2).

47 *See* 10 U.S.C. §§ 504-05, 3253, and AR 601-210, *supra* note 29.

48 *See* AR 635-200, *supra* note 21, ch. 7, which prescribes discharge procedures for persons disqualified for enlistment or who fraudulently enlisted. Many disqualifications are waivable. AR 601-210, *supra* note 29. In United States v. Grimley, 137 U.S. 147 (1890), enlistment by one over the maximum statutory age was held voidable only, as over age was not a condition which disabled the person from changing status or entering into new relations. *Grimley*, 137 U.S. at 152-3.

bearing on the capacity to contract for enlistment, desertion from another service, and force or coercion will render an enlistment void.[49]

c. Constructive enlistments. Although most enlistments are contracted without problems, some enlistment contracts are defective, either because the individual lacked the capacity to enlist (minority, mental incompetency, or intoxication) or because the individual was coerced into enlisting. Because these situations result in void enlistments, the individuals concerned are without military status and therefore are not subject to the jurisdiction of the Uniform Code of Military Justice, unless some event creates military status and jurisdiction over the individual. Constructive enlistment does just that. A long recognized doctrine[50] that is now codified in Article 2(c) of the Uniform Code of Military Justice,[51] constructive enlistment arises, creating status and preserving jurisdiction, when an individual serving with the Army submits voluntarily to military authority, meets the age and other competency qualifications at the time of submitting to authority, receives pay or allowances, and performs duties.[52]

In the case of an individual who lacked capacity to contract at the time of enlistment, constructive enlistment is based upon conduct after the capacity-related defect is removed. For

49 AR 635-200, *supra* note 21, para. 3-9*b*(1).

50 *See* Dig. Ops. J.A.G. 1912, Enlistments, para. 1A-3c, at 603-04 (1896), indicating that as early as 1896, constructive enlistment was a recognized concept creating status and jurisdiction.

51 UCMJ art. 2(c).

52 *Id.*

example, if a 16-year-old individual enlists, that enlistment is void. If that individual voluntarily serves beyond the age of 17 before the Army discovers the defective enlistment (and the parents do not apply for discharge), a constructive enlistment arises if the other criteria are established.[53]

An involuntary enlistment (or sometimes called the "forced volunteer" or "carrot and stick" case) exists when an individual is given the choice by a civilian judge of going to jail or joining the Army.[54] Because the coercion created by the choice between going to jail or joining the Army option is sufficient to render the enlistment involuntary, the enlistment is void. If the coercive element (the possibility of jail) is removed (dismissal of charges), then voluntary service and submission to authority and the other conduct discussed will give rise to a constructive enlistment.[55]

Congress, in 1979, by amending Article 2 of the Uniform Code of Military Justice, codified the elements of the long standing concept of constructive enlistment and conclusively

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53 United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974); United States v. Harrison, 3 M.J. 1020 (N.C.M.R. 1977).

54 United States v. Wagner, 3 M.J. 898 (A.C.M.R. 1977) (enlistment held voluntary by the Court of Military Appeals at 5 M.J. 461; constructive enlistment issue not reached); *compare* United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (alternative between Army and jail presented by judge; enlistment void) with United States v. Lightfoot, 4 M.J. 262 (C.M.A. 1978) (alternative of the Army in lieu of jail suggested by individual; enlistment valid).

55 *Wagner*, 3 M.J. at 902. *See also* United States v. Bachand, 16 M.J. 896 (A.C.M.R. 1983) and United States v. Boone, 10 M.J. 715 (A.C.M.R. 1981).

established that public policy favors the finding of military status and jurisdiction of one who voluntarily serves, except in very unusual cases.[56]

d. Breach of the enlistment agreement. Unlike defective enlistments where the emphasis by the military courts has been on the creation of military status in resolving the issue of personal jurisdiction over the individual for purposes of court-martial, the courts (usually federal courts), in breach of enlistment cases, look to the contractual nature of the enlistment to determine whether there has been a breach, and, if so, whether the parties have a remedy.[57]

Misconduct by the soldier might be considered a breach of contract because the soldier has agreed to serve for a definite term in accordance with the service's rules and regulations. The Army in that situation has a remedy: it may separate the soldier under statutory authority[58] and regulations promulgated thereunder,[59] or it may discipline the soldier under the Uniform Code of Military Justice and retain the soldier until the end of the term of service.

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56 For the military courts' interpretation of the effect of the Article 2 amendment, *see, e.g,* United States v. McGinnis, 15 M.J. 345 (C.M.A. 1983); United States v. Marsh, 15 M.J. 252 (C.M.A. 1983); United States v. McDonagh, 14 M.J. 415 (C.M.A. 1982); United States v. Bachand, 16 M.J. 896 (A.C.M.R. 1983).

57 *See* Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. 1 (1977) *and* Annot., 62 A.L.R. Fed. 860 (1980).

58 10 U.S.C. § 1169.

59 *See generally* AR 635-200, *supra* note 21.

A better example of breach of contract, however, arises when the Army (or other service) acts in a manner inconsistent with the terms of the agreement. Enlistments are often made with commitments or promises that the soldier will receive a certain assignment or training or serve at a certain grade or rank. When the Army fails to fulfill these commitments or promises, the soldier may have a remedy--rescission of the contract--if the soldier acts promptly. Army regulations authorize separation of personnel when a written enlistment commitment cannot be fulfilled.[60] Even unfulfilled oral promises or commitments may give rise to the remedy of rescission if they can be proven and if they are material and substantial in nature so as to affect the very essence of the contract.[61]

In breach of contract cases, if the soldier believes that the Army has not fulfilled its end of the bargain, he may not use the Army's action or inaction as a defense to misconduct.[62] The soldier's remedy will be either separation under Army regulation or release from the Army by means of a writ of habeas corpus in federal court.[63] While breach of contract will give rise to a rescission type remedy, it does not terminate military status and relieve the soldier from the

60 AR 635-200, *supra* note 21, para. 7-16*d* and *e*. Request for discharge will only be honored if made "within 30 days after the defect was discovered or reasonably should have been discovered by the soldier." *Id.* at *e*(4).

61 *See generally* Annot. 62 A.L.R. Fed. 860 (1980).

62 *See, e.g.,* United States v. Bell, 48 C.M.R. 572 (A.F.C.M.R. 1979).

63 Military service is considered a sufficient deprivation of liberty to be "custody" for purposes of habeas corpus. *See* Jones v. Cunningham, 371 U.S. 236 (1962).

obligation to perform military service. The soldier must affirmatively request rescission; until the Army takes formal actions to separate the soldier, military status continues.[64]

3-2. Induction

a. General. Conscription has existed since man realized that group living is advantageous to survival. The obligation of individual service to the family, group, or tribe apparently outdates the birth of modern civilization and appears as a natural outgrowth of the basic life conditions of prehistoric man. This universal contribution to the group effort carried over when groups (tribes, villages, etc.) began to merge into larger composites that eventually provided the basis and identification of the state.

Conscription in the United States initially was enacted during the colonial period when sporadic and widely varied steps were undertaken to mobilize the manpower resources of the colonies. Legislation was passed by Congress in 1792 establishing a uniform militia to include all able-bodied men between the ages of 18 and 45. Lacking penalties to enforce compliance and leaving each state to control its own troops, the law produced fifteen paper armies, one for each recognized political entity.

The question of conscription was not seriously raised again until the Civil War. The Confederacy adopted the draft to make the most of its scarce manpower resources. In answer to

64 United States v. Grimley, 137 U.S. 114 (1890); Morrissey v. Perry, 137 U.S. 157 (1890). *See infra* text accompanying note 123 concerning unfulfilled enlistment commitment separations.

the growing need and a lack of volunteers, President Abraham Lincoln requested Congress to enact a similar system for the United States. Enforcement of this law encountered bitter resistance, culminating in several days of rioting in New York City at an estimated cost of hundreds of lives and many millions of dollars property damage. Following the Civil War, dormancy in the area of conscription again prevailed.

World War I, the next major military personnel crisis for the United States, saw the Selective Service Act of May 1917 enacted. Overall policies and the integration of major details became the functions of the Federal Selective Service Board. Registration and selection were duties of local civilian boards. Subsequent changes to this law raised the total enrollment, but the basic principles remained unaltered. Until September 1940, when the Selective Service Training Act was passed, the United States Selective Service System remained at status quo. This Act, described as the first peacetime military conscription law in the United States, was appealed in vain by many individuals and groups. It closely paralleled that passed in 1917 for World War I. The 1940 Act, with various modifications concerning age requirements and the question of who should be deferred, remained in effect after World War II.

The Korean War era introduced the Universal Military Training and Service Act, the Armed Forces Reserve Act, and finally the Reserve Forces Act. These laws provided various ways in which individuals could fulfill their required military obligations. The Selective

Service System implements the basic law that is presently found in the Military Selective Service Act.[65]

The term "induction" is defined as a "transition from civilian to military status, for a period of definite obligation under the Military Selective Service Act" of 1967.[66] Induction is a function of the Armed Forces and should be distinguished from the preliminary procedures and processing conducted by the Selective Service System, a civilian agency.[67] Induction processing is accomplished at Military Entrance Processing Stations by military personnel.[68]

Civilians become members of the military when they undergo the prescribed induction ceremony.[69] While there is no induction process at the present time, the normal ceremony has been simply a step forward for the individual as the individual's name is called.[70] An oath is administered, thereafter, but it is not a part of the induction.[71] There is no forcible induction

65 62 Stat. 604, 50 U.S.C. App. §§ 451-73. Even though induction is not presently in use, the Selective Service Act still exists and can be implemented by Congress repealing 50 U.S.C. App. § 467c.

66 DEP'T OF ARMY, REG. 601-270, MILITARY ENTRANCE PROCESSING STATION (MEPS), para. 9-2*I* (15 Apr. 1986) [hereinafter AR 601-270].

67 50 U.S.C. § App. 460.

68 *See* AR 601-270, *supra* note 66, ch. 9.

69 Billings v. Truesdell, 321 U.S. 542 (1944); United States v. Scheunemann, 14 C.M.A. 479, 34 C.M.R. 259 (1964).

70 AR 601-270, *supra* note 66, para. 9-38.

71 *Id.* at para. 9-39 (substantial break in time required between step-forward induction ceremony and oath ceremony, so inductees are able to distinguish the two).

into the Armed Forces, and an individual who refuses to submit to the induction ceremony is not subject to court-martial jurisdiction,[72] although the individual may be prosecuted in a United States District Court for violation of the Military Selective Service Act, a felony.[73] Even though the prescribed ceremony is not performed, or even if there are other substantial irregularities in the induction procedure, the individual may acquire military status if the individual is regarded by the military as a member and the individual "voluntarily accepted the benefits and assumed the obligations incident to membership in the armed forces."[74] Irregularities in the induction process generally have been held to void an induction only if they actually prejudiced the substantial rights of the inductee.[75]

b. Qualifications and disqualifications. A person whose acceptability in all respects, including the person's physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense may be involuntarily inducted if the person is at least 18 1/2 years of age.[76] Any person between the ages of 18 and 26 may

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72 50 U.S.C. App. § 462(a); Billings v. Truesdell, 321 U.S. 542 (1944); United States v. Hall, 17 C.M.A. 88, 37 C.M.R. 352 (1967); *see also* AR 601-270, *supra* note 66, para. 9-12 (uncooperative registrants).

73 50 U.S.C. App. § 462; *see also* AR 601-270, *supra* note 66, at para. 9-40. *But see* Proclamation No. 4483, Pardon for Violations of Act, August 4, 1964 to March 28, 1973.

74 Mayborn v. Heflebower, 145 F.2d 864 (5th Cir. 1944); United States v. Hall, 17 C.M.A. 88, 37 C.M.R. 352 (1967); United States v. Scheunemann, 14 C.M.A. 479, 34 C.M.R. 259 (1964).

75 Lipsitz v. Perez, 372 F.2d 468 (4th Cir. 1967), *cert. denied*, 389 U.S. 838 (1967).

76 50 U.S.C. App. § 454(a).

volunteer for induction; a person 17 years of age may also volunteer, but only with the written consent of the person's parents.[77] Only males are subject to conscription.[78] The rule in the case of induction of disqualified persons is quite different from that for enlistments. Induction in violation of statute or regulation is void, and a person who, because of some disqualification, should not have been inducted would be able to obtain his release from the Army by a writ of habeas corpus[79] or by administrative request.

3-3. Grade of Rank

a. The enlisted grades of rank are prescribed by regulation and correspond generally to the nine enlisted pay grades established by statute.[80] Enlisted personnel may be either privates, specialists, or noncommissioned officers, with precedence based upon their pay grade and date of rank. The one exception is that a Specialist ranks immediately below a Corporal.[81] Enlisted ranks, by rank and pay grade, are as follows:[82]

77 50 U.S.C. App. §§ 454(c)(3), (4).

78 50 U.S.C. App. § 453(a). Constitutionality upheld in Rostker v. Goldberg, 453 U.S. 57 (1981).

79 United States *ex rel.* Weidman v. Sweeney, 117 F. Supp. 739 (E.D. Pa. 1953).

80 37 U.S.C. § 1009.

81 DEP'T OF ARMY, REG. 600-20, PERSONNEL--GENERAL: ARMY COMMAND POLICY, table 1-1, note 4 (30 Mar. 1988) [hereinafter AR 600-20]

82 *Id.* at table 1-1.

Rank	Pay Grade	Abbreviation
Sergeant Major of the Army	E-9	SMA
Command Sergeant Major	E-9	CSM
Sergeant Major	E-9	SGM
First Sergeant	E-8	1SG
Master Sergeant	E-8	MSG
Platoon Sergeant	E-7	PSG
Sergeant First Class	E-7	SFC
Staff Sergeant	E-6	SSG
Sergeant	E-5	SGT
Corporal	E-4	CPL
Specialist	E-4	SPC
Private First Class	E-3	PFC
Private	E-2	PV2
Private	E-1	PV1

Apply the following rules to determine rank or precedence among enlisted soldiers of the same grade of rank:[83]

(1) According to date of rank.

(2) Then by length of Active Federal Service in the Army.

(3) Then by length of total Active Federal Service.

(4) Then by age.

b. An enlisted soldier's date of rank in a grade is the date that is specified in the orders of appointment or promotion.[84] When a Specialist is appointed to Corporal, the date of

83 *Id.* at para. 3-3.

84 *Id.* at para. 3-4*d.*

rank as a Corporal is the date originally appointed to Specialist.[85] When an enlisted soldier is reduced for inefficiency or for failure to complete a school course, the date of rank in the lower grade is that held when last serving in that grade; but if reduced for any other reason, the date of rank is the date of reduction.[86] If an enlisted soldier is later restored to a grade of rank from which reduced, the date of rank is that which was held prior to the reduction.[87]

3-4. Promotions

a. General. The promotions of enlisted personnel in the Army are, by statute, left to the discretion of the Secretary, except that the Secretary may not promote any enlisted personnel to pay grades E-8 or E-9 until they have eight or ten years of enlisted service, respectively.[88] Therefore, the enlisted promotion system is prescribed wholly by regulation.

Army Regulation 600-200, chap. 7,[89] sets out the procedures and criteria for enlisted promotions. To be eligible for promotion, enlisted soldiers must meet certain time in grade and time in service requirements and demonstrate that they have developed the skills and abilities to perform duties and assume the responsibilities of the higher grade.

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85 *See id.* at para. 3-4*e*.

86 *Id.* at paras. 3-4*g* and *h*.

87 *Id.* at para. 6-6*i*.

88 37 U.S.C. § 201(f).

The authority to promote is delegated to different levels of command depending upon the rank to which the soldier is being promoted. Generally, soldiers may be promoted to the ranks of Private (pay grade E-2) through Staff Sergeant (pay grade E-6) by field commanders. Only Headquarters, Department of the Army, may promote soldiers to the ranks of Sergeant First Class (E-7), Master Sergeant or First Sergeant (E-8), and Sergeant Major (E-9).[90]

b. Void promotions. Whenever a commander who made a promotion or a higher commander determines that a promotion was not authorized by applicable regulations or other criteria established by the Department of the Army, the commander will issue orders revoking that promotion.[91] For example, a promotion may be unauthorized if the commander making it did not have promotion authorization, if the individual did not meet time in service or time in grade requirements, or if the individual was in a nonpromotable status.

89 DEP'T OF ARMY, REG. 600-200, PERSONNEL--GENERAL: ENLISTED PERSONNEL MANAGEMENT SYSTEM, ch. 7 (17 Sep. 1990) [hereinafter AR 600-200].

90 *Id.* at para. 7-4*a*.

91 *Id.* at para. 7-5*f*.

(1) Nonpromotable status. One requirement common to all promotions is that the individual to be promoted must be in a promotable status. A soldier is in a nonpromotable status when:[92]

(a) Absent without leave, in confinement, a deserter, confined by civil authorities, under arrest, or ill or injured not in line of duty.

(b) Under court-martial charges, until they have been dismissed or withdrawn, or the soldier has been tried and acquitted.

(c) Serving a court-martial sentence, including a suspended sentence.

(d) Undergoing administrative separation proceedings that may result in an other than honorable discharge.

(e) Under a current suspension of favorable personnel action under Army Regulation 600-8-2 or when a general court-martial convening authority or superior commander determines that favorable personnel action should have been suspended.

(f) A written recommendation has been sent to the promotion authority to reclassify the soldier for inefficiency or disciplinary reasons.

92 *Id.* at para. 7-6.

(g) Being punished (includes period of suspension) under Article 15, UCMJ, except when being punished under summarized proceedings under the provisions of Army Regulation 27-10, paragraph 3-16.

(h) Ineligible for reenlistment due to nonwaivable grade disqualification (or when a waiver has been denied).

(i) Without the appropriate security clearance or favorable security investigation for promotion to the soldier's rank and military occupation specialty.

(j) A written recommendation has been sent to the promotion authority (E-5 and below) for possible board action that may result in removal from a recommended promotion list or reduction to a lower grade.

(k) Failing to qualify for reenlistment or extension of their current enlistment to meet the service remaining obligation for promotion to grade E-5 or E-6.

(l) Pending a DA or locally imposed bar to reenlistment is pending or approved.

(m) Selected for an assignment and removed from that assignment for declining reenlistment or extension.

(n) Their voluntary retirement application has been approved.

(o) A recommendation has been written to remove the soldier (E-6--E-8) from the recommended list.

(p) They exceed the body fat standard or maximum allowable weight established in Army Regulation 600-9, and there is no underlying disease causing the overweight condition.

(q) They have failed the Army Physical Fitness Test (APFT) or have not taken an APFT within the last nine months.

(r) When in the Army Alcohol and Drug Abuse Prevention and Control Program.

(2) De facto status.[93] When a promotion has been determined to be unauthorized and is revoked, the soldier is liable for the difference in pay received under the void promotion since there was no entitlement to the rank or that rank's higher compensation.[94] To ameliorate this situation, the promotion authority, or a higher authority, may determine that the soldier occupied the higher grade in a de facto status. The promotion authority must find that promotion orders were published, and that the soldier held the higher grade, actually performed in the higher grade, received pay at the higher grade, and accepted the promotion in good faith. The de facto status may exist from the time of the invalid promotion to the date on which the soldier received notice that the promotion was ineffective, or the date of orders revoking the

93 *Id.* at para. 7-5*f*(1).

94 Erroneous overpayment collectable without member's consent upon determination of actual error. *See* DOD Military Pay & Allowances Entitlement Manual, para. 70704 and table 7-7-1.

promotion. De facto status allows the individual to retain pay received and to have a refund of any overpayment that had been recouped by the government.[95]

3-5. Reduction

A reduction is a change to a lower rank and pay grade, usually due to misconduct or inefficiency.[96] A soldier may be reduced one or more ranks for misconduct as punishment under Article 15 of the Uniform Code of Military Justice,[97] as part of a court-martial sentence, by operation of law as a result of a sentence of a court-martial,[98] or as a result of an administrative action taken in response to a conviction by a civil court.[99] Soldiers may also be administratively reduced one rank for inefficiency.[100]

The authority to reduce administrativey enlisted soldiers for misconduct (conviction by civil court and inefficiency) is held by different levels of commanders depending on the rank from which the soldier is being reduced. Commanders of company-size units have the authority to reduce soldiers from the ranks of corporal (pay grade E-4), specialist (E-4), private

95 *See* 41 Comp. Gen. 293, 296-98 (1961).

96 AR 600-200, *supra* note 89, at ch. 6.

97 10 U.S.C. § 815. *See* DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES--MILITARY JUSTICE, para. 3-19*b*(6) (24 June 1996).

98 MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1003 (1994) [hereinafter MCM].

99 AR 600-200, *supra* note 89, para. 6-3*c*.

100 *Id.* at para. 6-4.

first class (E-3), or private (E-2).[101] Field grade commanders of organizations authorized a commander in the rank of lieutenant colonel or higher may reduce soldiers from sergeant (pay grade E-5) and staff sergeant (E-6).[102] Commanders of organizations authorized to have a colonel or higher in command may reduce soldiers from the rank of sergeant first class (E-7) or higher.[103]

a. Conviction by civil court.[104] Reduction to the lowest enlisted grade is mandatory for soldiers convicted by a civil court and sentenced to death or an unsuspended confinement of one year or more. Also, reduction is mandatory upon initial conviction for certain offenses if sentencing is delayed for over 30 days. Reduction *must* be considered if the sentence of the civilian court is for unsuspended confinement of more than 30 days, but less than one year, or suspended confinement of one year or more. Reduction *may* be considered for less severe offenses. These reduction provisions also apply to adjudication as a juvenile offender. For soldiers in the rank of sergeant (pay grade E-5) and above, the reduction authority must refer the matter to a reduction board, except where reduction is mandatory.[105] The soldier will be

101 *Id.* at para. 6-1a.

102 *Id.* at para 6-1b.

103 *Id.* at para. 6-1c (but note that a commander's authority to reduce these so-called "senior" NCOs under UCMJ, Article 15, is more limited).

104 *See generally id.* at para. 6-3c.

105 For the composition of reduction boards, procedures, and rights of the soldier, *see id.* at paras. 6-6 through 6-8.

reduced without regard to whether an appeal of the conviction has been filed. If the conviction is later reversed, the soldier will be restored to the soldier's prior grade.

b. Inefficiency.[106] A soldier who has served in a unit for at least 90 days may be reduced one rank for inefficiency by the commander having reduction authority. Inefficiency is defined as the demonstration of characteristics that show an inability to perform the duties and responsibilities of a grade and military occupational specialty (MOS).[107] Inefficiency may also be evidenced by acts of misconduct that bear on the soldier's efficiency, including long standing indebtedness that the individual is not making reasonable attempts to pay. The individual must be notified in writing of the contemplated reduction action and allowed to submit matters in rebuttal. A reduction board is required for enlisted soldiers in the ranks of sergeant (pay grade E-5) and above. A soldier may waive the board appearance in writing, in which case the soldier will be deemed to have accepted the reduction board's action.

c. Reduction for other reasons. While most administrative reductions are for inefficiency or conviction by a civil court, there are several other ways in which an administrative reduction may occur.

(1) By operation of law. A court-martial sentence of a soldier that includes a punitive discharge, confinement, or hard labor without confinement, will result in a reduction to

106 *Id.* at para. 6-4.

107 *Id.* at Glossary, Section II ("Inefficiency").

the lowest enlisted pay grade on the date of approval by the convening authority.[108] If execution of the sentence is suspended, the soldier may be probationally retained in the grade held at time of sentence or in any intermediate grade, at the discretion of the convening authority.

(2) Approved discharge under other than honorable conditions. If a soldier is discharged administratively from the Army, and the soldier's service is characterized as under other than honorable conditions, the soldier is reduced to the lowest enlisted grade when the discharge is ordered by the separation authority.[109] No separate reduction board is required. If the discharge is suspended, the soldier is not reduced while the discharge is under suspension.

(3) Failure to complete training. Enlisted personnel who were appointed to a higher grade upon entering or while attending a school, and who fail to complete the course successfully, are subject to reduction.[110] Normally, reduction will be to the grade held upon entry to the school.

(4) Enlistment in erroneous grade. Some soldiers are granted a higher rank upon enlistment or reenlistment. If the grant is erroneous, the Army will reduce the soldier.[111]

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108 10 U.S.C. § 858*a*; AR 600-200, *supra* note 89, para. 6-3*d*.

109 AR 600-200, *supra* note 89, para. 6-11.

110 *Id.* at para. 6-12.

111 *Id.* at para. 6-2.

3-6. Separation

a. General. Separation is a broad term applied to several administrative personnel actions including discharge, release from active duty, retirement, dropped from the rolls, release from military control of personnel without a military status, or death.[112] Congress has given the Secretaries of the military departments very broad authority to prescribe for the administrative separation of enlisted personnel.[113] Consequently, the specific grounds for administrative separation and the procedure to be followed are found in Department of Defense and Army regulations.[114]

A discharge certificate or certificate of release from active duty must be given to each lawfully inducted or enlisted soldier upon the soldier's discharge or release from active duty.[115] Present regulations authorize the following types of discharge and characterizations of service.[116]

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112 AR 635-200, *supra* note 21, Glossary, Section II ("Separation").

113 10 U.S.C. § 1169.

114 DOD 1322.14-R, Enlisted Administrative Separations; AR 635-200, *supra* note 21.

115 10 U.S.C. § 1168.

116 AR 635-200, *supra* note 21, at ch. 3. Discharge certificates are given only for Honorable and General Discharges. All soldiers receive a DD Form 214, Certificate of Release or Discharge from Active Duty. *Id.* at para. 3-2.

Type of Discharge	Character of Service	Given by
Honorable	Honorable	Administrative Action
General	Under honorable conditions	Administrative Action
Under Other Than Honorable ("UOTH" or "OTH")	Under conditions other than honorable	Administrative Action
Entry Level Separation	Uncharacterized	Administrative Action
Release from Custody and Control of the Army	Uncharacterized	Administrative Action
Bad Conduct	Bad Conduct	Sentence of special or general court-martial
Dishonorable	Dishonorable	Sentence of general court-martial

Under the pertinent statutes, the Secretary of the Army has broad discretion to prescribe the type of discharge certificate or certificate of release to be issued in administrative separation actions. This is subject to the direction, authority, and control of the Secretary of Defense.[117] Certain restrictions have been imposed by the Department of Defense, primarily regarding grounds for separation and the procedures to be followed. The Army has implemented this guidance in one comprehensive regulation, Army Regulation 635-200.

b. Voluntary separations. Soldiers may request to be separated from the Army before the expiration of their terms of service.

117 *See, e.g.*, DOD 1332.14, Enlisted Administrative Separations.

(1) Dependency or hardship. A soldier may request separation because of circumstances of genuine hardship or dependency.[118] To warrant separation, the circumstances must have arisen or been aggravated to an excessive degree after the soldier entered active duty; any hardship or dependency claimed must not be of a temporary nature; soldier must have made every reasonable effort to alleviate the dependency or hardship condition without success; and separation is the only readily available means of eliminating or materially alleviating the dependency or hardship conditions. "Dependency" is a condition caused by the death or disability of a member of the soldier's (or spouse's) immediate family that causes other family members to rely on the soldier for principal care or support. "Hardship" exists when, in circumstances not involving death or disability of a soldier's (or spouse's) immediate family, the soldier's separation will materially affect the care or support of the family by alleviating undue and genuine hardship. The supporting evidence normally will be in affidavit form and must substantiate the dependency or hardship conditions. There is no provision for a board hearing on a discharge of this nature.

(2) Conscientious objection. Any soldier with a firm, fixed, and sincere objection to participation in any form of war or to the bearing of arms because of religious training or belief, may apply for separation as conscientious objector.[119] An objection based solely on

118 AR 635-200, *supra* note 21, ch. 6.

119 DEP'T OF ARMY, REG. 600-43, PERSONNEL--GENERAL: CONSCIENTIOUS OBJECTION (1 Aug. 1983).

policy, pragmatism, or expediency will not support an application for conscientious objector status. In order to succeed, the applicant must establish, by clear and convincing evidence, that the objection is sincere and based on beliefs that either did not exist or did not become fixed until after entry into the service. There are two classes of conscientious objectors. Class 1-A-0 includes soldiers who sincerely object to participation as a combatant in any form of war, but whose convictions permit military service in a noncombatant status. Class 1-0 includes soldiers who sincerely object to participation of any kind in any form of war, and are normally discharged for the convenience of the government. Soldiers must set forth in their application which conscientious objector status they are requesting. After applying to their immediate commander, soldiers will be interviewed by a chaplain and a psychiatrist. Following these procedures, they will then have the opportunity to appear before an investigating officer (who must be a captain or higher and knowledgeable in the policies and procedures of conscientious objections) who will make a recommendation on the request. After the investigation, the case record is referred to the applicant for comment. The applicant's commander recommends appropriate disposition. The SJA reviews the case for legal sufficiency and recommends a disposition. The general court-martial convening authority may approve a request for 1-A-0 status, and may recommend disapproval for 1-A-0 cases and recommends disposition on 1-0 cases. The Department of the Army Conscientious Objector Review Board, on behalf of the Secretary of the Army, makes the final determination on all discharge applications (1-0 conscientious objectors) and on all 1-A-0 requests not approved by the general court-martial

convening authority. While the application is being processed, the soldier will be retained in the unit. Commanders are encouraged to assign applicants to duties providing the minimum practicable conflict with the soldier's asserted beliefs, but the soldier remains subject to the UCMJ and available for all duty until the application reaches final approval.

(3) Pregnancy.[120] Enlisted female soldiers may request separation because of pregnancy. When an enlisted woman becomes pregnant, the unit commander must counsel her concerning her options, entitlements, and responsibilities. If the soldier elects to separate, she will be entitled to prenatal care, delivery, and regular postnatal care in a military medical facility (but not in civilian facilities at government expense). If the soldier elects to remain on active duty, she will be required to continue to perform duties until eligible for maternity leave, unless a physician directs otherwise. A soldier choosing to remain on active duty will be informed that she will be considered available for unrestricted world-wide assignment upon completion of post-partum care, that she must have an approved family care plan on file within two months of being counseled on parenthood responsibilities (single parents and military

120 AR 635-200, *supra* note 21, ch. 8.

spouses with dependents only),[121] and that if duty performance is affected adversely by parenthood, involuntary separation may result.[122]

(4) Unfulfilled enlistment commitments.[123] Enlisted soldiers may request separation from the Army when enlistment or reenlistment commitments made by the Army have not been fulfilled. Soldiers must establish that they received a written commitment,[124] that it remains unfulfilled and incapable of being fulfilled, and that they did not knowingly take part in the creation of the unfulfilled commitment. The soldier's eligibility for separation under this provision expires if the soldier fails to bring the defect or unfulfilled commitment to the attention of his commander within 30 days after it was discovered or reasonably should have been discovered.

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121 *See* AR 600-20, paras. 5-35 and 5-36. AR 601-280, para. 6-4c, requires a commander to initiate bars to reenlistment against soldiers who have been counseled according to AR 600-20, ch. 5, and who do not have an approved family care plan on file within two months after counseling.

122 *See* AR 635-200, *supra* note 21, para. 5-8.

123 AR 635-200, *supra* note 21, para. 7-16. A soldier's request for separation for an unfulfilled enlistment commitment is simply an administrative remedy for rescission of the enlistment contract. Some of the actions that are denied by the Army administratively eventually result in litigation in the federal court system where the issues are resolved by looking at common law principles of contract.

124 Although the Army regulation requires that the commitment be a written one, federal courts have permitted rescission when oral promises have not been fulfilled by the services. *See* Annot., 62 A.L.R. Fed. 860 (1980).

(5) Discharge in lieu of trial by court-martial.[125] Soldiers who commit certain offense may request discharge in lieu of trial by court-martial. To be eligible for this provision, the maximum punishment for at least one of the offenses with which the soldier is charged must include a punitive discharge, under the Uniform Code of Military Justice and the Manual for Courts-Martial. This request for discharge must be completely voluntary. Therefore, before any request is made, the soldier must be afforded the opportunity to seek advice from an appointed counsel for consultation, who must be a member of the Judge Advocate General's Corps.[126] The request for discharge may be submitted anytime after preferral of charges, except where referral is required,[127] until final action is taken on the court-martial case by the convening authority. Once submitted, the request may not be withdrawn without the consent of the commander exercising general court-martial convening authority unless the trial results in an acquittal or a conviction with a sentence that does not include a punitive discharge, even though one could have been adjudged by the court. If the request for discharge is approved, the soldier will normally receive a discharge under other than honorable conditions.

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125 AR 635-200, *supra* note 21, ch. 10.

126 The advice required to be provided by counsel for consultation is covered in AR 635-200, *supra* note 21, para. 10-2*b*. Usually this advice will be provided by the appointed trial defense counsel who has already entered into an attorney-client relationship with the soldier as a result of the court-martial charges.

127 In court-martial cases where the provisions of R.C.M. 1003(d), MCM 1984, are used to authorize a punitive discharge, the charges must actually be referred to a court-martial that authorized to adjudge a punitive discharge before the soldier may submit a request for discharge.

c. Involuntary separations. When a soldier's conduct or performance is unsatisfactory and does not meet Army standards, and when there is no potential for further military service, the Army may, under regulations promulgated by the Secretary of the Army, involuntarily separate the soldier prior to the expiration of the term of service. Because these separation actions are involuntary, and because they result in an early termination of service, certain procedures are required to ensure that the separation action is warranted and that the soldier's interests are protected.

(1) Procedures.[128] All involuntary separations are initiated and processed under either a notification procedure or an administrative board procedure. Which procedure is used depends upon the specific basis for the separation, the soldier's time in service, and the most severe separation and characterization of service that may result.

(a) Notification procedure.[129] The notification procedure is used in a majority of the involuntary separation actions. When a separation action is initiated under this procedure, the soldier is entitled to written notification, an opportunity to consult with counsel for consultation, copies of documents that will be considered by the separation authority, and an opportunity to submit written statements on the soldier's behalf. If the soldier has six or more years of total active and reserve military service, the soldier has the right to request the case be

128 AR 635-200, *supra* note 21, ch. 2.

129 *Id.* at ch. 2, section II.

presented to an administrative separation board. The soldier may waive these rights in writing. Failure to respond within seven days will constitute a waiver. The soldier may withdraw this waiver of rights any time prior to the date the separation authority orders, directs, or approves the separation.

(b) Administrative board procedure.[130] The administrative board procedure is a more complicated procedure. The soldier (now termed the respondent) is entitled to present his case to an administrative separation board. The remainder of the procedures (notification, counsel for consultation, and copies of documents) are identical to those in the notification procedure.

(2) Categories of separations. The categories of separations generally break down into performance-related categories, conduct (usually misconduct) related categories, and status-related categories.

(a) Entry level performance and conduct.[131] As its title suggests, the entry level separation category can be both a performance and conduct category. Certain soldiers may be separated under this category when either their duty performance is unsatisfactory or they have engaged in minor disciplinary infractions (minor misconduct) or both. This performance or

130 *Id.* at ch. 2, section III. Soldiers who have a right to a hearing may waive the hearing -- either outright, or conditioned upon receiving a more favorable discharge. AR 635-200, para. 2-5*b*.

131 *Id.* at ch. 11.

conduct may be evidenced by inability, lack of reasonable effort, or failure to adapt to the military. In order to be eligible for separation under this category, the soldier must be in entry level status at the time the separation action is initiated. Entry level status is a probationary-type period that normally consists of the soldier's first 180 days of continuous active duty.[132] Enlisted women who become pregnant after entering the Army will be separated under this chapter if their pregnancy interferes with completing entry-level training. All separations under this chapter are initiated and processed under the notification procedure and may be approved at a relatively low level of command.[133] Before initiating action, the commander must ensure that the soldier receives adequate counseling and rehabilitation opportunities.[134] Soldiers who are separated under this category will receive an uncharacterized separation description--the entry level separation.[135] If a soldier being separated under this category has completed basic training

132 *Id.* at Glossary, Section II ("Entry Level Status"). The entry level status period is computed differently for reserve component personnel.

133 *Id.* at para. 1-21*c* and *d*. Entry level separation actions can be approved by lieutenant colonel (pay grade O-5) commanders and commanders in the rank of major who have been selected for promotion to lieutenant colonel of units authorized a lieutenant colonel commander.

134 AR 635-200, *supra* note 21, paras. 11-4 and 1-18. Separation counseling must be conducted at least once prior to initiation of separation action. Other counseling is discretionary. The rehabilitation transfer to a new unit is required but may be waived by the separation authority under certain extremely limited circumstances.

135 *Id.* at paras. 11-6 and 3-9*a*. The soldier will not be issued a discharge certificate and service will not be characterized as honorable, under honorable conditions, or under conditions other than honorable.

or eight weeks of one-station unit training, the separation authority must consider transferring the soldier to the Individual Ready Reserve as a mobilization asset.[136]

(b) Unsatisfactory performance.[137] Soldiers may be separated for unsatisfactory duty performance. If the commander determines that the soldier will not progress or develop sufficiently to become a satisfactory soldier and it is likely that the poor performance or service will continue, the criteria for separation exists. Before initiating separation action, however, the commander must ensure that the soldier has been adequately counseled and given a meaningful opportunity for rehabilitation.[138] Separation actions based on unsatisfactory performance are initiated and processed under the notification procedure.[139] Soldiers separated under this category will be discharged or transferred to the Individual Ready Reserve and have their active service characterized as either honorable or under honorable conditions.[140]

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136 *Id.* at para. 1-36*b*.

137 *Id.* at ch. 13.

138 *Id.* at paras. 13-4 and 1-18.

139 The separation authority for unsatisfactory performance separations is the lieutenant colonel commander or commander in the rank of major who has been selected for promotion to lieutenant colonel of a unit authorized a lieutenant colonel commander when either the soldier is not entitled to an administrative board or the soldier waives the administrative board. When the soldier is eligible for the administrative board and elects to present his case to a board, the special court-martial convening authority is the separation authority. *Id.* at paras. 1-21*c* and *d*.

140 *Id.* at paras. 13-11, 13-12, and 1-36.

(c) Misconduct.[141] Enlisted soldiers may be separated for misconduct when they have engaged in patterns of minor military disciplinary infractions, have discreditable involvement with military or civil authorities, have committed a serious offense, or have been convicted by a civil court. Normally, soldiers separated for misconduct will be discharged with an "under other than honorable conditions" characterization of service.[142]

1. Minor military disciplinary infractions.[143] Soldiers whose misconduct consists solely of a pattern of minor military disciplinary infractions may be separated and issued an other than honorable discharge certificate. Minor military disciplinary infractions include offenses such as failure to repair, failure to obey an order of a superior, short periods of AWOL, and other uniquely military offenses that are minor in nature. Before initiating separation action under this category the commander must ensure that adequate counseling and rehabilitation efforts have been accomplished.[144] Separation action premised on this category of misconduct may be initiated and processed under either the notification procedure or the administrative board procedure. The notification procedure may be used only if a characterization of service of "under other than honorable conditions" is *not* warranted.[145] If the action is initiated and

141 *Id.* at ch. 14.

142 *Id.* at para. 14-3.

143 *Id.* at para. 14-12*a*.

144 *Id.* at paras. 14-2*d* and 1-18.

145 *Id.* at para. 14-13.

processed under the administrative board procedure the separation authority (and board convening authority) will be the general court-martial convening authority.[146] If the action is initiated and processed under the notification procedure the separation authority (and board convening authority, if any) will normally be the special court-martial convening authority.[147]

2. *Pattern of misconduct.*[148] Soldiers who have engaged in a pattern of conduct consisting of discreditable involvement with civilian or military authorities or conduct that is prejudicial to good order and discipline may be separated under this category of misconduct. Such conduct can be conduct that violates standards of conduct found in the Uniform Code of Military Justice, Army regulations, civil law, or time-honored customs and traditions of the Army. Adequate counseling and rehabilitation efforts must be accomplished before separation action can be initiated.[149] The procedural option and separation authorities for this category of misconduct are identical to those pertaining to minor disciplinary infractions discussed previously.

3. *Commission of a serious offense.* Soldiers who have committed a serious military or civilian offense may be separated under this category of misconduct if the

146 *Id.* at paras. 14-14, 1-21*a*, and 1-21*c*(2)(b).

147 *Id.* at paras. 14-14 and 1-21*c*(2). The special court-martial convening authority may order an honorable discharge only after the general court-martial convening authority has authorized the exercise of separation authority in the case.

148 *Id.* at para. 14-12*b*.

149 *Id.* at para. 14-2*d*.

circumstances warrant separation and a punitive discharge would be authorized under the Manual for Courts-Martial for the same offense or a closely related offense.[150] Conviction, civil or military, is not needed to establish the basis for separation. Therefore, the possibility exists that soldiers may be administratively separated for committing a criminal offense for which they are never prosecuted and convicted.[151] Separation actions based on the commission of a serious offense must be initiated and processed under the administrative board procedure unless a discharge under other than honorable conditions is not warranted, in which case the notification procedure may be used.[152] In actions initiated under the administrative board procedure the separation authority (and board convening authority) normally will be the general court-martial convening authority.[153] In actions initiated under the notification procedure, the special court-martial convening authority will be the separation authority. Counseling and other rehabilitation efforts need not be accomplished prior to initiating a misconduct action based on the commission of a serious offense.

4. Conviction by civil court. Soldiers may be separated for misconduct when they are initially convicted by civil authorities or when action is taken that is tantamount to a finding

150 *Id.* at para. 14-12*c*.

151 Civilian authorities, military authorities, or both may decide not to proceed with prosecution due to insufficient evidence to meet the burden of proof in a criminal trial or because the evidence needed to secure a conviction is inadmissible at trial, or for other reasons.

152 AR 635-200, *supra* note 21, para. 14-13.

153 *Id.* at paras. 14-14, 1-21*a*, and 1-21*c*(2)(b).

of guilty, provided, a punitive discharge would be authorized under the Manual for Courts-Martial for the same or a closely related offense or the sentence by the civil authorities includes confinement for 6 months or more, regardless of suspension or probation.[154] This basis for separation includes adjudication in a juvenile proceeding. Separation based upon convictions by civilian courts normally will be initiated under the administrative board procedure[155] and the separation authority usually will be the general court-martial convening authority.[156] If a discharge under other than honorable conditions is not warranted, separation action may be initiated under the notification procedure, and the special court-martial convening authority will be the separation authority. Commanders do not have to accomplish counseling and other rehabilitation efforts prior to initiating separation actions based on a conviction by a civil court.

(d) Homosexual conduct. The Department of Defense revised its homosexual conduct policy late in 1993,[157] in response to congressional direction contained in the 1994

154 *Id.* at para. 14-5. Note that although the procedure for civil court actions in foreign countries is different, the criteria is the same. *See* para. 14-9.

155 *Id.* at para. 14-5. Soldiers who are confined by civil authorities are not entitled to be present at the administrative board hearing, however, they can be represented by their counsel for representation at that hearing. *See* para. 2-14.

156 *Id.* at para. 1-21*a* and 1-21*c*(2)(b). *See* para. 14-9 for the authority to separate soldiers convicted by a foreign civil court.

157 *See* Memorandum, Secretary of Defense, for Secretaries of the Military Departments et al., subject: Implementation of DoD Policy on Homosexual Conduct in the Armed Forces (21 Dec. 1993), and accompanying revisions to DoD directives and instructions.

Defense Authorization Act.[158] There are three general bases for separation for homosexual conduct: homosexual acts, homosexual statement, and homosexual marriages. All of these include pre-service, prior service, and current service conduct.[159] Soldiers will be separated if they engage in, attempt to engage in, or solicit another to engage in homosexual acts.[160] A homosexual orientation alone is not a basis for separation. "Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service, unless manifested by homosexual conduct."[161] A soldier who *states* he is a homosexual, however, will face separation action, because the statement gives rise to the presumption that the soldier "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[162] The soldier may attempt to rebut the presumption, and persuade the separation board or separation authority that he "does not engage in, attempt to engage in, or intend to engage in homosexual acts"; if the soldier does so successfully, the soldier may be retained.[163] Finally, a soldier who marries or attempts to marry a member of the

158 Codified in pertinent part at 10 U.S.C. § 654.

159 *See* AR 635-200, *supra* note 21, para. 15-2a (C15, 26 June 1996).

160 *See* 10 U.S.C. § 654(b)(2); DoD Dir. 1332.14, *supra* note 160, at para H.1.b(2); AR 635-200, *supra* note 21, para. 15-3b (C15, 26 June 1996).

161 DEP'T OF DEFENSE, DIRECTIVE 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION, Encl. 2, para. 8a (Feb. 5, 1994).

162 *See* 10 U.S.C. § 654(b)(2); DoD Dir. 1332.14, *supra* note 160, at para H.1.b(2); AR 635-200, *supra* note 21, para. 15-3b (C15, 26 June 1996).

163 *See* DoD Dir. 1332.14, *supra* note 160, at para H.1.b(2); AR 635-200, *supra* note 21, para. 15-3b (C15, 26 June 1996).

same biological sex will be separated.[164] If it is established that a soldier has attempted, engaged in, or solicited another to engage in a homosexual act, separation is mandatory unless there are further findings that the soldier is *not* a homosexual.[165] Separation actions for homosexuality are initiated and processed under the administrative board procedure.[166] Separation with an "under other than honorable conditions" characterization of service will only be approved when it is established that the soldier committed, attempted, or solicited a homosexual act during the current term of service under certain aggravating circumstances.[167] In all other homosexual conduct separations (including homosexual statements and homosexual marriages), the soldier's service will be characterized as warranted by the soldier's overall service record.[168] In most homosexual conduct separations, the separation authority will be the special court-martial

164 *See* 10 U.S.C. § 654(b)(3); DoD Dir. 1332.14, *supra* note 160, at para H.1.b(3) ("as evidenced by the external anatomy of the persons involved," *id.*; AR 635-200, *supra* note 21, para. 15-3c (C15, 26 June 1996).

165 *See* AR 635-200, *supra* note 21, para. 15-3a (C15, 26 June 1996). Soldiers who have engaged in a homosexual act may be retained if they demonstrate the act was a departure from their usual behavior; it is unlikely to recur; it was not accomplished by use of force, coercion, or intimidation; retention is consistent with discipline, good order and morale; and the soldier does not have the propensity or intent to engage in homosexual acts. *Id.*

166 *Id.* at para. 15-9.

167 *Id.* at para. 15-4*a*. Aggravating circumstances include when the act is committed, attempted, or solicited by the use of force, coercion or intimidation; with a person under the age of 16; with a subordinate; openly in public view; for compensation; aboard an aircraft or vessel; or, in any other location under military control under circumstances likely to have an adverse impact on discipline, good order or morale. *Id.*

168 *Id.* at para. 15-4*b*. Soldiers in entry level status will be given an entry level separation with no characterization of service.

convening authority. If a discharge under other than honorable conditions is warranted, however, the general court-martial convening authority will convene the board and act on the separation.[169]

(e) Alcohol or drug abuse rehabilitation failure. Soldiers who have been identified as alcohol or drug abusers and who have been enrolled in rehabilitation under the Alcohol and Drug Abuse Prevention and Control Program[170] may be separated when they are determined to be rehabilitation failures by their commanders after consulting with the rehabilitation personnel.[171] A soldier's immediate commander may initiate separation under this chapter if the commander determines the soldier is unable to (or refuses to) participate in, cooperate in, or successfully complete the rehabilitation program, and lacks potential for further military service and rehabilitation efforts are no longer practical, or long term rehabilitation is necessary and the soldier is transferred to a civilian medical facility for rehabilitation.[172] Enrollment in the rehabilitation program does not prevent the commander from separating the soldier under other grounds, such as misconduct or unsatisfactory performance. Separation actions based on this

169 *Id.* at paras. 15-5, 1-21*a* and *c*.

170 DEP'T OF ARMY, REG. 600-85, PERSONNEL--GENERAL: ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM (21 Oct. 1988).

171 *See* AR 635-200, *supra* note 21, ch. 9.

172 *Id.* at para. 9-2.

chapter are initiated and processed under the notification procedure.[173] Soldiers may have their service characterized as honorable or under honorable conditions.[174]

(f) Defective enlistments. Soldiers whose enlistments or reenlistments are defective may be separated involuntarily. The most common grounds for separation under this category are minority, discussed previously, erroneous enlistment or reenlistment, and fraudulent entry.

1. Erroneous enlistments. Erroneous enlistments are those enlistments that would not have occurred had certain relevant information been known by the Army or had appropriate directives or regulations been followed.[175] The most common defects giving rise to this type of separation are prescribed in the regulations dealing with enlistment and reenlistment dealing with those programs.[176] A soldier whose enlistment was erroneous may be retained in the Army if the defect no longer exists or if the defect may be waived, and it is in the best interests of the Army to retain soldier.[177] Erroneous enlistment separations are initiated and processed under the notification procedure.[178] Most soldiers separated will receive either an entry level

173 *Id.* at para. 9-3*a*. The separation authority for rehabilitation failure is a lieutenant colonel level commander. *See id.* at para. 1-21*d*.

174 *Id.* at para. 9-4. If the soldier is in entry level status, the soldier will be separated and given an entry level separation with no characterization of service.

175 *Id.* at ch. 7, section III (para. 7-15).

176 *See generally* AR 601-210 and AR 601-280, *supra* note 29.

177 AR 635-200, *supra* note 21, para. 7-15*c*(3) and (4).

178 *Id.* at para. 7-15*i*.

separation (if in entry level status) or an honorable discharge.[179] Soldiers who procured the enlistment fraudulently will not be separated for erroneous enlistment. Rather, they are separated for fraudulent entry.

2. *Fraudulent entry*. Fraudulent entry is the procurement of an enlistment, reenlistment, or period of active service through any deliberate material misrepresentation, concealment, or omission of information which, if known and considered by the Army at the time, might have caused the Army to reject the individual.[180] Soldiers who fraudulently procured their terms of service should be retained only if the defect is waivable. Headquarters, Department of the Army, will approve retention only in meritorious cases and only when the separation authority personally determines retention is desired.[181] Fraudulent entry separation actions may be initiated and processed under the notification procedure. If, however, an "under other than honorable conditions" characterization of service is appropriate, the administrative board procedures must be followed.[182]

179 *Id.* at para. 7-15*j*.

180 *Id.* at para. 7-17. Examples of fraudulent entry are concealment of prior service, concealment of conviction by civil court, and concealment of medical defects. *Id.*

181 *Id.* at para. 7-18*b*.

182 *Id.* at para. 7-18*c* and *d*.

(g) Convenience of the government. There are a number of involuntary separation categories that are considered separations for the convenience of the government.[183] The most common actions are those based upon a soldier's inability to perform duties due to parenthood,[184] personality disorder that interferes with assignment to or performance of duties,[185] and concealment of an arrest record.[186] These actions are initiated and processed under the notification procedure.[187]

d. Separation upon expiration of term of service (ETS). Previous sections of this deskbook chapter covered involuntary and voluntary separation. What happens if a soldier does not apply for voluntary discharge, and the command does not initiate an involuntary discharge? If a soldier serves out his term of service, the soldier is entitled to be separated at the expiration of their term of service. Such soldiers normally will be separated unless action is taken to retain the soldiers beyond their ETS.[188] Soldiers who are separated at ETS are either discharged or released from active duty and transferred to a reserve component. Their service is characterized

183 *Id.* at ch. 5.

184 *Id.* at para. 5-8.

185 *Id.* at para. 5-13.

186 *Id.* at para. 5-14.

187 *Id.* at paras. 5-8*c*, 5-13*f*, and 5-14*d*.

188 *Id.* at ch. 4 and ch. 1, section IV.

as honorable.[189] Although the regulation indicates that separation will be effective at 2400 hours on the date of the discharge or release from active duty,[190] case law indicates that discharge will be effective upon delivery of the discharge certificate or other valid notice of termination of the individual's status as a soldier.[191]

Retention beyond ETS may be either voluntary or involuntary. Soldiers may voluntarily remain beyond their terms of service if they are undergoing required health care or they are being processed for physical disability separation.[192] A soldier may also consent to remain beyond the normal term of service if he is subject to criminal jurisdiction of a foreign court but not physically confined by that country.[193] Soldiers may be involuntarily retained beyond their terms of service only in a limited number of situations. Among these the most common are:

189 *Id.* at para. 4-4.

190 *Id.* at para. 1-31. For Reserve Component personnel who entered active duty from that component and are reverting to reserve component control, the separation is effective at 2400 hours of the last day of authorized travel time.

191 United States v. Howard, 20 M.J. 353 (C.M.A. 1985); United States v. Scott, 11 U.S.C.M.A. 646, 29 C.M.R. 462 (1960).

192 *Id.* at para. 1-26.

193 *Id.* at para. 1-29. Taylor v. United States, 711 F.2d 1199 (3d Cir. 1983).

(1) To make up time lost during the term of service.[194]

(2) When action with a view toward trial by court-martial has been taken by the appropriate authorities before the expiration of the term of service.[195]

Soldiers properly held beyond the expiration of their terms of service, whether voluntarily or involuntarily, retain their military status and continue to be subject to the Uniform Code of Military Justice until formally discharged by the appropriate authorities.[196]

Soldiers otherwise eligible for separation at the expiration of their terms of service will not be retained to satisfy a debt to the United States government or an individual, or to process and complete an involuntary administrative separation action.[197] On the other hand, if the Army does not affirmatively act to separate a soldier and the soldier does not demand separation, but

194 10 U.S.C. § 972; AR 635-200, *supra* note 21, para. 1-23. "Lost time" consists of periods of more than one day when duty cannot be performed because of desertion, AWOL, confinement under sentence, intemperate use of alcohol or drugs, and disease or injury due to the soldier's misconduct.

195 MCM, *supra* note 98, R.C.M. 202(c); AR 635-200, *supra* note 21, para. 1-24. Action with a view toward court-martial includes preferral of charges, investigation, apprehension, confinement or other restriction by appropriate authorities. *See* United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983); United Staes v. Handy, 14 M.J. 202 (C.M.A. 1982); United States v. Self, 13 M.J. 132 (C.M.A. 1982); United States v. Douse, 12 M.J. 473 (C.M.A. 1982); United States v. Hutchins, 4 M.J. 190 (C.M.A. 1978).

196 10 U.S.C. § 802(1) and 802(2)c. *See generally* cases cited *supra* in note 191, and United States v. Meadows, 13 M.J. 165 (C.M.A. 1982).

197 AR 635-200, *supra* note 21, paras. 1-27 and 1-28.

rather remains on duty and accepts pay and benefits, the military status of that soldier continues.[198]

3-7. Retirement[199]

a. Soldiers of the Regular Army with 30 years of active service shall be retired on their request.[200] Regular Army enlisted soldiers with at least 20, but less than 30, years of active service may be retired on their request under Army regulations.[201] In the latter case, the retirees become members of the Army Reserve (retired) until their combined active and retired service equals 30 years. Nevertheless, all retired Regular Army soldiers under either of the above provisions remain subject to court-martial jurisdiction.[202]

b. Regular Army soldiers will retire in the enlisted grade in which they are serving on the date of retirement.[203] Enlisted personnel, however, are entitled to be advanced on the

198 United States v. Hout, 19 C.M.A. 299, 41 C.M.R. 299 (1970).

199 AR 635-200, *supra* note 21, ch. 12.

200 10 U.S.C. § 3917; AR 635-200, *supra* note 21, para. 12-5.

201 10 U.S.C. § 3914; AR 635-200, *supra* note 21, para. 12-4.

202 10 U.S.C. § 802(a)(4).

203 10 U.S.C. § 3961(b); AR 635-200, *supra* note 21, para. 12-3*b*.

retired list to the highest grade satisfactorily held on active duty when their active service plus service on the retired list totals 30 years.[204]

c. Only active service is creditable in determining the eligibility of enlisted soldiers for retirement and in computing their retired pay.[205] Active service as an officer or warrant officer in the Army is creditable for retirement purposes.[206] Retired pay is computed according to formulas contained in federal statute.[207]

204 10 U.S.C. § 3964; AR 635-200, *supra* note 21, para. 12-6*b*.

205 10 U.S.C. § 3925. A listing of service creditable for retirement is found in AR 635-200, *supra* note 21, para. 12-26.

206 AR 635-200, *supra* note 21, para. 12-26.

207 10 U.S.C. § 3991.

Chapter 4

Boards of Officers

4-1. General

The board of officers is one of the most important and unique elements of military administrative law. It fulfills the functions normally delegated to agencies, commissions, and hearing examiners in the civilian administrative sphere, drawing on the unique military experiences of members of the Army to assist commanders with resolving administrative decisions. Generally, a "board" is a "body of persons, either military or civilian, or both, appointed to act as a fact-finding agency or as an advisory body to the appointing authority."[1] In some cases, a board of officers may be composed of just one officer.[2] The subjects that a board of officers may investigate are, aside from criminal matters, unlimited.

a. Historical background. The precise origin of the board of officers is not known, although it is believed to be an offspring of the court of inquiry. The British Rules of Procedure in the nineteenth century defined a court of inquiry as an assembly of persons directed by a commanding officer to collect evidence, but such a court had no judicial power.[3] In the American Articles of War of 1786, the court of inquiry could be called to examine into the nature of any transaction of, or accusation against, an officer or soldier, but only on the demand

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1 DEP'T OF ARMY, REG. 310-25, MILITARY PUBLICATIONS: DICTIONARY OF UNITED STATES ARMY TERMS, at 48 (21 May 1986).

2 DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 1-2 (11 May 1988) [hereinafter AR 15-6].

3 W. WINTHROP, MILITARY LAW AND PRECEDENTS, at 517 (1920).

of that officer or soldier.[4] Today the court of inquiry is empowered to investigate any matter, whether or not requested by the person involved,[5] and to make findings of fact; opinions or recommendations are given only if requested by the appointing authority.[6] The court has a counsel appointed as a legal advisor, has subpoena powers, and maintains records of its proceedings.[7] Its nature, however, is not that of a judicial tribunal. "It is instituted solely for the purpose of investigation, as an assistance to . . . the commanding officer. . . . There is no issue joined between parties, and its proceedings are not judicial."[8]

The present board of officers, a creature of Army regulations rather than the Articles of War or the Uniform Code of Military Justice, is very similar to the court of inquiry. It is not a judicial body; it is composed of officers appointed by a commander, or other authorized individual, to investigate and make recommendations, not final adjudications. In certain cases, the individual under consideration (respondent) can appear before the board, can cross-examine witnesses, and can present his own witnesses.[9] On the other hand, boards of officers do not

4 *Id.* at 516.

5 10 U.S.C. § 935(a).

6 10 U.S.C. § 935(g).

7 10 U.S.C. § 935(e), (f), and (h).

8 The W.B. Chester's Owners v. United States, 19 Cl. 681, 683 (1884).

9 AR 15-6, *supra* note 2, para. 5-8*a*.

have subpoena powers and not all have a legal advisor appointed as a formal member.[10] Thus, the board of officers is a more flexible, less formal administrative body and is used far more today than is the court of inquiry.[11]

b. Types of boards. Boards of officers may be categorized, according to the authority for their appointment, as statutory and nonstatutory boards.

(1) Statutory boards. A statutory board is one that is either directed or authorized by Congress to perform special functions in the military administrative process. The statutory authority for these boards can be found in the United States Code, and the specific powers, jurisdiction, and procedures are in the statutes or in Army regulations implementing the statutes. Examples of statutory boards are the Army Disability Review Board,[12] the Army Discharge Review Board,[13] the Army Board for Correction of Military Records,[14] and the boards used in officer elimination cases.[15]

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10 AR 15-6, *supra* note 2, at paras. 2-1c(2) and 5-1d.

11 This less formal, administrative nature of the board of officers has led to its use in some cases, such as involuntary separations, being criticized on the basis of a lack of legal safeguards. *See* United States v. Phipps, 30 C.M.R. 14, 16 (1960) (concurring opinion); Lane, *Evidence and the Administrative Discharge Board*, 55 MIL. L. REV. 95 (1972).

12 10 U.S.C. § 1554; DEP'T OF ARMY, REG. 635-40, PERSONNEL SEPARATIONS: PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION (1 Sep. 1990).

13 10 U.S.C. § 1553; DEP'T OF ARMY, REG. 15-180, BOARDS, COMMISSIONS, AND COMMITTEES: ARMY DISCHARGE REVIEW BOARD (15 Oct. 1984) [hereinafter AR 15-180].

(2) Nonstatutory boards. A nonstatutory board is one that is authorized by regulation of the Secretary of the Army,[16] or by a commander. The latter type of nonstatutory board is known as the "command prerogative" board and is traditionally said to be inherent in the authority of a commander to inquire into the readiness and activities of his command. The enlisted personnel separation board is a nonstatutory board authorized by various Army regulations.[17] While the general authority of the Secretary of the Army to discharge enlisted personnel is granted by statute,[18] the use of a board to accomplish these discharges is neither required nor specifically authorized by the statute.

4-2. Composition of Regulatory Boards

a. General. Only commissioned or warrant officers will be members of a board of officers unless a statute or regulation specifically provides otherwise.[19] If the board is appointed to examine a soldier's conduct or performance of duty, or to make findings or recomendations

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14 10 U.S.C. § 1552; DEP'T OF ARMY, REG. 15-185, BOARDS, COMMISSIONS, AND COMMITTEES: ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (18 May 1977)[hereinafter AR 15-185].

15 10 U.S.C. § 1182; DEP'T OF ARMY, REG. 600-8-24, PERSONNEL--GENERAL: OFFICER TRANSFERS AND DISCHARGES (21 July 1995)[hereinafter AR 600-8-24] (boards of inquiry for officer separations).

16 The Secretary has statutory to promulgate regulations to carry out his assigned responsibilities. 10 U.S.C. § 3012(g).

17 *See* DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (5 July 1984) (C15, 26 June 1996) [hereinafter AR 635-200].

18 10 U.S.C. § 1169.

19 AR 15-6, *supra* note 2, para. 2-1*c*.

that may be adverse to the soldier, all voting members of a board will all be senior in rank to the person under investigation unless it is impracticable due to military exigencies.[20] A majority of the members appointed to a formal board will constitute a quorum and must be present at all sessions of the board.[21] Additionally, if a particular regulation applicable to a board proceeding requires a minimum number of officers present at all sessions,[22] this requirement must also be met. Whenever a member who was absent from a prior session of the board is present, the member must become thoroughly familiar with the record of any proceedings during the absence.[23] The composition of the board is also set out in the regulations.[24] Alternate members may be appointed to a board, provided that the appointing order specifies that an alternate member may serve only in the absence of an appointed member and also sets forth the order in which alternate members are to be called by the board president.[25] Unless required by a specific regulation applicable to the proceedings, the members of the board need not be sworn.[26]

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20 *Id.* at para. 2-1*c*(3).

21 *Id.* at para. 5-2.

22 *See* AR 635-200, *supra* note 17, para. 2-7*a*.

23 AR 15-6, *supra* note 2, para. 5-2*d*.

24 *Id.* at para. 5-1; AR 635-200, *supra* note 17, para. 2-7*a*.

25 AR 15-6, *supra* note 2, para. 5-2*c*.

26 *Id.* at para. 3-1*a*.

Regulations prescribe that it is the duty of the board to make a complete and impartial investigation of the facts for the appointing authority.[27]

b. *Personnel.* Personnel involved in a board of officers proceeding and their general duties include the following:

(1) The president is the senior voting member present.[28] When no legal advisor has been appointed, challenges made after the board is in session are ruled upon by the president (or senior unchallenged member) and questions of admissibility of evidence are ruled on by the president, subject to objection by any member of the board, in which case a majority vote of the members present is controlling.[29]

(2) A judge advocate may be appointed as a legal advisor by the memorandum of appointment. A legal advisor is a non-voting member of the board. The legal advisor rules finally on all challenges for cause (except a challenge against the legal advisor) and on all evidentiary and procedural matters.[30]

(3) The board members are all persons specifically appointed to hear a case and to vote upon findings and recommendations. Members with special technical knowledge may be

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27 *Id.* at para. 1-3*a*.

28 *Id.* at para. 5-1*b*.

29 *Id.* at para. 3-4.

30 *Id.* at para. 5-1*d*.

appointed to the board as voting members or, unless there is a respondent, as advisory members without vote. These members need not be commissioned officers.

(4) The recorder is a commissioned or warrant officer, usually designated in the appointing memorandum. The recorder's duties are similar to those of the trial counsel of a court-martial; the recorder does not have a vote. The recorder is obligated to present the evidence and to examine witnesses so as to make as complete and impartial a presentation of the evidence on both sides as possible. If no recorder is designated, the junior member of the board acts as recorder and retains a vote.[31]

(5) The respondent is the person, designated by the appointing authority, who appears before a formal board, normally because prejudicial matters against that person are alleged or arise and become an issue. For example, the respondent may be a soldier being considered for elimination or an individual under investigation for an alleged security violation.

(6) The respondent's counsel is the person detailed or selected to assist the respondent in presenting his case. Counsel may be either available military personnel or civilian counsel obtained at the respondent's own expense.[32]

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31 *Id.* at paras. 5-1*c*, 5-3.

32 *Id.* at paras. 5-6*a* and *b* (certain restrictions apply to government civilian employees acting as counsel; an appointed military counsel will not be furnished to persons who are not civilian employees or members of the military).

(7) The reporter is a person detailed to record and transcribe the board hearing. A civilian contract reporter is employed only when authorized by the specific regulation under which a formal board is convened and then only when an enlisted or government civilian employee is not available for this purpose.[33]

(8) The appointing authority is the commander, or other authorized individual, who appoints the board and who initially takes action on the board's report.

(9) The reviewing authority is the commander who, in some instances, is required to review a board's report together with the initial action of the appointing authority and to take final action in the matter.

4-3. Procedures for Regulatory Boards

To a limited extent the procedure of regulatory boards is prescribed by the specific regulations under which the boards are appointed. More often, the regulations under which the board is convened will prescribe that the procedure set forth in Army Regulation 15-6 will apply.[34]

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33 *Id.* at para. 2-2.

34 *See, e.g.,* AR 635-200, *supra* note 17, para. 2-10*e*.

Although portions of the Administrative Procedure Act[35] are applicable to the military and civil functions of the Army, the provision on hearings is not applicable to the Army's military functions and thus not applicable to the proceedings of a board of officers.[36]

a. Appointment.[37] A memorandum appointing a board of officers or an investigating officer (a one-person board) must state the purpose and scope of the investigation or board and the nature of required findings and recommendations.[38] All personnel should be listed with specific reference as to their function in the proceeding. If the board is appointed under a specific regulation authorizing action by a board of officers, that regulation must also be cited in the orders. An example of an appointing memorandum for an enlisted separation board is found in Army Regulation 15-6.[39] An informal investigation or board may be appointed orally or in writing.[40] When warranted by the circumstances, a formal board of officers may be appointed orally, but such appointment must later be confirmed in writing. The appointing

35 5 U.S.C. § 551-59, as amended by Act of October 13, 1978, PL 95-454, and Act of March 27, 1978, PL 95-251.

36 The section regarding hearing is directly related to the sections on rulemaking and adjudications that are expressly inapplicable to military functions. 5 U.S.C. § 553-56, as amended by Act of March 27, 1978, PL 95-251. *But see* Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974).

37 *See* AR 310-10 regarding limitations on the use of orders.

38 AR 15-6, *supra* note 2, para. 2-1b.

39 *Id.* at figures 2-1, 2-3, 2-4, and 2-5.

40 *Id.* at para. 2-1*b*.

memorandum is important because a board of officers has no power beyond that vested in it by the appointing authority.

b. Privileges accorded the respondent in formal proceedings. An appointing authority may designate one or more persons as respondents if the proceeding is a formal investigation.[41] The appointing authority may do so to provide a hearing for a person with a direct interest in the proceedings.[42] The fact that an adverse finding may be made or adverse action recommended does not mean that the appointing authority must designate a respondent.[43] The appointing authority may choose to have the board fulfill its primary function, to find facts and make recommendations, rather than to provide a hearing to an interested party. An individual may be a designated respondent at the outset of the investigation or at any later stage in the conduct of the investigation; that is, when the findings or recommendations of the board may reflect questionable or unsatisfactory conduct, inefficiency, unfitness, or when the individual's pecuniary responsibility may be affected.[44] When the board believes that an individual should be designated a respondent, it will so recommend to the appointing authority.[45] Prior to the board proceedings, the respondent is entitled to reasonable notice of the

41 *Id.* at para. 1-7. Respondents may not be designated in informal investigations.

42 *Id.* at para. 5-4*a*.

43 *Id.*

44 *See id.*

45 *Id.* at para. 5-4.

hearing, including the time and place of the hearing, the name and address of each witness expected to be called, the specific matter to be investigated, and the respondent's rights to be present, present evidence, be represented by counsel, and call witnesses.[46] A respondent is entitled to have counsel, either military or civilian. A respondent who declines the services of a qualified designated counsel is not entitled to have a different counsel designated.[47] Civilian counsel retained by the respondent will be no expense to the government.[48] The respondent is entitled to a hearing before impartial board members and is permitted to challenge members for cause.[49] Usually the respondent is entitled to be present at the hearing to present evidence, to cross-examine adverse witnesses, and to object to government evidence.[50] Judicial rules of evidence do not apply. With few exceptions, anything deemed relevant and material to an issue before the board is admissible.[51] No military witness or military respondent will be compelled to incriminate themselves, to answer any question the answer to which could incriminate them, or to make a statement or produce evidence that is not material to the issue and that might tend to degrade them.[52] No witnesses or respondents not subject to the UCMJ will be required to

46 *Id.* at para. 5-5.

47 *Id.* at para. 5-6*b*(2).

48 *Id.* at para. 5-6*b*(1).

49 *Id.* at para. 5-7*a*.

50 *Id.* at para. 5-8*a*.

51 *Id.* at para. 3-6*a*.

52 *Id.* at para. 3-6c(5)(a), (d). *See* UCMJ art. 31.

make a statement or produce evidence that would deprive them of rights against self-incrimination under the Fifth Amendment or the U.S. Constitution.[53] The respondent may otherwise be called upon to answer questions from the board.

c. Rules of evidence. Because the proceedings of a board of officers are administrative rather than judicial in nature, the board is not bound by the rules of evidence prescribed for trials by courts-martial. Accordingly, with a few exceptions, any oral or written matter deemed relevant and material by the board may be admitted in evidence without regard to the technical rules of admissibility. Wherever possible, the highest quality of evidence obtainable and available will be used by the board. The few limitations involve bad faith, unlawful searches, the results of polygraph tests, and privileged communications.[54]

During the board proceedings, the board members should refrain from all unnecessary informal conversations concerning the matters before the board, nor should any witness be allowed to make statements to the board members "off the record."[55] When no legal advisor has been appointed, all questions of admissibility will be ruled upon in open session by the president, subject to objection by any member of the board in which case the determination will

53 AR 15-6, *supra* note 2, para. 3-6c(5)(b), (d).

54 *Id.* at para. 3-6a and c.

55 *Id.* at para. 3-6c(3).

be by majority vote of the members present. If a legal advisor is appointed, the legal advisor will rule finally on the admissibility of evidence.[56]

d. Witnesses. The personal appearance of witnesses should be obtained whenever possible. The recorder will arrange for the presence of all reasonably available government witnesses and will assist the respondent in arranging for the presence of witnesses. The respondent is entitled to the compulsory attendance, at government expense, of witnesses who are military or federal civilian employees. Because boards have no subpoena power, other civilian witnesses cannot be compelled to testify, but those who do so voluntarily will be issued invitational travel orders and will be reimbursed by the Government. When the recorder believes, however, that the testimony of a particular witness is irrelevant, cumulative, or disproportionate to the delay, expense, or difficulty in obtaining the witness, the board president will decide whether the Government must provide and pay for the witness's presence.[57]

e. Report of the hearings. Following the hearings by the board, the voting members will meet in private to arrive at their findings and recommendations.[58] The findings of a board must be supported by a greater weight of evidence than supports any different conclusion. The evidence must point to a particular conclusion as being more credible and

56 *Id.* at paras. 3-4 and 5-1*d*.

57 *Id.* at para. 3-7.

58 *Id.* at para. 3-11.

probable than any other conclusion.[59] The findings of the board are their conclusions of fact and must be directly established by evidence in the record of the hearing or be readily deducible therefrom.[60] The recommendations of the board must also be appropriate to and based on the findings.[61] A minority report may be submitted by any member who does not agree with the findings or recommendations of the board.[62]

Unless prescribed otherwise by specific regulations, the record of the proceedings may be summarized.[63] In some cases, the findings and recommendations are required to be reported verbatim even though the record of the hearings is in summary form.[64] The recorder for the board is responsible for preparing the report of the proceedings.[65] The record is authenticated by the investigating officer or by the recorder and all members of the board present at its deliberations.[66]

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59 *Id.* at para. 3-9*b*.

60 *Id.* at para. 3-9*a*.

61 *Id.* at para. 3-10.

62 *Id.* at para. 3-12.

63 *Id.* at paras. 2-2 and 3-13. Summarized records may be prepared using DA Forms 1574 (Report of Proceedings) and 2823 (Witness Statement).

64 *See, e.g.* AR 635-200, *supra* note 17, para. 2-12*c*.

65 AR 15-6, *supra* note 2, para. 5-3*c*.

66 *Id.* para. 2-3*a*.

f. Review and final actions. Boards exist to advise commanders. The findings and recommendations of any board are advisory only, unless made conclusive by law or regulation. In most cases, the appointing authority may approve, modify, set aside, or wholly ignore the findings and recommendations of a board. In some cases the governing regulation limits the action that the appointing authority may take on the findings and recommendations of boards.[67]

In many cases, a judge advocate is called upon to review the proceedings of a board of officers for legal sufficiency.[68] While the appointing authority may not properly take an illegal action, the appointing or reviewing authority's action need not reflect the advice of the judge advocate in every case. An appointing or reviewing authority acting on a board's findings and recommendations must exercise discretion, a decision-making function that usually involves extra-legal considerations.

Generally, procedural errors or irregularities in an investigation or board do not invalidate the proceeding or any action based on it.[69] The three types of errors and the effect of each noted below:[70]

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67 *See, e.g.,* AR 635-200, *supra* note 17, para. 2-6*d*. This provision severely limits discharge when a board recommends retention and prohibits giving a discharge of a less favorable character than that recommended by the board.

68 AR 15-6, *supra* note 2, para. 2-3*b*. *See* AR 635-200, *supra* note 17, para. 2-6*a* (requires a judge advocate to review all recommendations for a discharge under other than honorable conditions or when the soldier identifies specific legal issues for consideration by the separation authority).

69 AR 15-6, *supra* note 2, para. 2-3*c*.

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

(2) Appointing errors -- Appointing errors occur when an investigation is convened or directed by an official without authority to do so. In such cases, the proceedings are a nullity, unless an official with the authority to appoint such an investigation or board ratifies the appointment. If an official who is authorized to convene an informal investigation or board, nonetheless, convenes a formal investigation or board, only action that may be taken based on an informal investigation may be taken.

(3) Substantial errors -- Substantial errors are those that have a material adverse effect on an individual's substantial rights, e.g., denial of counsel or improper board composition. When these errors can be corrected without substantial prejudice to the individual concerned, the appointing authority may return the case to the same investigating officer or board for corrective action. The individual should be notified of the error, of the proposed correction, and of the individual's right to comment. If an error cannot be corrected without substantial prejudice to the individual concerned, the appointing authority may:

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70 *Id.*

(a) Set aside all findings and recommendation and refer the case to a new investigating officer or new board.

(b) Take action on the findings and recommendations that are not affected by the error, set aside the affected findings and recommendations, and refer the affected part of the case to a new investigating officer or board.

In any case, no error is substantial if there is a failure to object or otherwise bring the error to the attention of the legal advisor or board president. Even a substantial error may be treated as harmless if the respondent fails to object.[71]

4-4. Limitations on Boards of Officers Proceedings

The most important and frequently encountered limitations are those placed on enlisted administrative separation boards. These limitations, which are basically rules against administrative double jeopardy, are:[72]

(1) No soldier will be considered for administrative separation because of conduct that has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof. The determination whether an action has the effect of an acquittal will be

71 *Id.* para. 3-3*c*(4).

72 AR 635-200, *supra* note 17, para. 1-19*b*.

determined solely by Headquarters, Department of the Army, pursuant to a request submitted by the appointing authority through command channels.

(2) No soldier will be considered for administrative separation because of conduct that has been the subject of a prior administrative board in which the board entered an approved finding that the evidence did not sustain the factual allegations concerning the conduct.

(3) No soldier will be considered for administrative separation because of conduct that has been the subject of administrative proceedings resulting in a final determination by the separation authority that the soldier should be retained in the service, except:[73]

(a) When the soldier's subsequent conduct or performance forms the basis, in whole or in part, for a new proceeding.

(b) When fraud or collusion is discovered, and it will probably result in a much less favorable result for the individual at the new hearing.

(c) When substantial new evidence is discovered that was not known at the time of the original proceeding.

Nonetheless, a separation authority may forward a case to Headquarters, Department of the Army, when a board has recommended retention and the separation authority believes,

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73 *Id.*

due to unusual circumstances, that discharge is warranted and in the Army's best interests. Headquarters, Department of the Army, may discharge the individual for the convenience of the government, with issuance of an honorable or general discharge certificate, or entry level separation.[74]

4-5. Statutory Boards

a. General. As previously stated in this chapter, a statutory board of officers is one which is either expressly authorized or directed by statute. Generally, these boards are convened at Headquarters, Department of the Army.

b. Selection boards. Boards of officers appointed by the Secretary of the Army to consider commissioned officers and warrant officers for Active Duty List promotions,[75] and to select officers to show cause for retention are known as selection boards.[76]

c. Army Discharge Review Board. The Army Discharge Review Board was established to review, upon request or its own motion, the discharge or dismissal of any former member of the Army.[77] The statute, however, specifically exempts from review all discharges

74 *Id.* at para. 2-6*e*.

75 *See supra*, ch. 2, section 2-3, for a discussion of the officer promotion system.

76 *See, e.g.*, 10 U.S.C. §§ 573, 611, and 1181.

77 10 U.S.C. § 1553(a).

and dismissals given as the sentence of a general court-martial.[78] When the Board determines that a discharge or dismissal was not equitably and properly given, it will issue a directive, in the name of the Secretary of the Army, to The Adjutant General, to change, correct, or modify such discharge or dismissal, and to issue a new discharge certificate. Such action is subject to review by the Secretary of the Army.[79] The Board does not, however, have authority to revoke any discharge or dismissal and to reinstate any person in the military service. A motion or request for review, to be heard, must be made within 15 years of the date of the discharge or dismissal.[80]

The Board consists of several panels located in Washington, D.C., and at field installations designated by the Secretary of the Army or the President of the ADRB.[81] The minimum membership of a Board panel is five officers,[82] with the senior line officer member acting as presiding officer. Panels assemble in open or closed session for the consideration and determination of cases presented to them.[83] The applicant is entitled to be represented by

78 *Id.*

79 10 U.S.C. § 1553(b).

80 10 U.S.C. § 1553(a).

81 DEP'T OF DEFENSE, DIRECTIVE 1332.28, DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS (Aug. 11, 1982), Encl. 3, para. B.2. [hereinafter DoD Dir. 1332.28].

82 *Id.* Encl. 3, para. B.1; AR 15-180, *supra* note 13, para. 3c.

83 DoD Dir. 1332.28, *supra* note 81, Encl. 3, para. B.2.

counsel at the applicant's expense.[84] If an applicant does not request a hearing, a panel in Washington, D.C., will consider the case in closed session on the basis of available documentary evidence.[85] At the applicant's request, the Board will conduct a hearing in accordance with the DoD procedures.[86] The board also includes a Secretary Recorder, an Administrative Specialist, and other administrative personnel who assist the Board by scheduling the sessions and ensuring that the proceedings of the cases are accurately reported and transcribed.[87] An applicant may withdraw a request for review without prejudice any time before the scheduled review.[88]

d. Army Board for Correction of Military Records. The Board with the most power and widest jurisdiction is the Army Board for Correction of Military Records. In 1946, Congress sought to rid itself of the many private bills submitted annually on behalf of members and former members of the Armed Forces. To accomplish this, Congress empowered the secretaries of the military departments, acting through boards of civilian officers of their respective departments, to change any military or naval record when necessary to correct an

84 10 U.S.C. § 1553(c); DoD Dir. 1332.28, *supra* note 81, Encl. 2, para. C.

85 DoD Dir. 1332.28, *supra* note 81, Encl. 3, paras. B.3.b. and B.6.b.

86 *Id.* Encl. 3, para. B.11. Individuals unable to appear in person may request a hearing with an Army Discharge Review Board Hearing Examiner. If such a hearing is granted, the Examiner will record the entire presentation, including cross-examination on videotape. AR 15-180, *supra* note 13, para. 2c.

87 AR 15-180, *supra* note 13, para. 3d, e, and f.

88 DoD Dir. 1332.28, *supra* note 81, Encl. 3, para. B.5.

error or to remove an injustice.[89] At the same time Congress prohibited the consideration of a private bill to correct a military record.[90] Pursuant to this legislation the Secretary of the Army established the Army Board for Correction of Military Records.[91] Any type of military record may be corrected by the Board, unless it involves an action which cannot legally be taken by the Secretary of the Army, such as Regular Army promotion.[92] The Board does have authority to correct an error or remove an injustice resulting from a trial by court-martial,[93] to promote officers in the Reserves,[94] to correct retirement dates,[95] and to change a discharge or dismissal given by a general court-martial.[96]

Correction of errors constitutes only a part of the Board's business. The Board also decides what is an error, and to do so it may substitute its own judgment for that of any official

89 10 U.S.C. § 1552(a). The military record concerned by such a board of a Department must be a "military record of that department."

90 2 U.S.C. § 190(g).

91 AR 15-185, *supra* note 14, para. 3*a*.

92 *See* 10 U.S.C. § 531 (President appoints RA officers with Senate confirmation); 41 Op. Atty. Gen. 10 (1948).

93 41 Op. Atty. Gen. 49 (1949).

94 41 Op. Atty. Gen. 71 (1951). *Compare* 41 Op. Atty. Gen. 10 (1948) (requirement of Senate confirmation of Reserve appointments above the grade of major).

95 41 Op. Atty. Gen. 94 (1952).

96 41 Op. Atty. Gen. 504 (1947).

or group which made a previous determination of the same manner.[97] However, in many cases, corrections of errors in records may be accomplished administratively without reference to the Board.

An important aspect of the Board's jurisdiction is involved when the records accurately state the facts but the applicant has nonetheless suffered an injustice. In this situation the Board could be the individual's only source of relief.

The Board consists of at least three civilian officers or employees of the Department of the Army appointed by the Secretary, which constitutes a quorum.[98] The Chairman of the Board presides at the proceedings and rules on interlocutory questions.[99] The proceedings of the Board are required to be recorded verbatim.[100]

Action to correct military records may not be taken unless the claimant, an heir, or the legal representative has filed a request for correction.[101] That request must be made within three years after discovery of the error or injustice, but the Board may waive the time requirement in

97 For discussion on the scope of "error," see 41 Op. Atty. Gen. 94 (1952). The error does not even have to be one made by the Army.

98 AR 15-185, *supra* note 14, para. 3*b*.

99 *Id.* para. 17*a*.

100 *Id.* para. 17*d*.

101 10 U.S.C. § 1552(b).

the interest of justice.[102] Before the application will be accepted, the claimant must have exhausted all effective administrative remedies.[103] The Board may deny any application if it determines that insufficient evidence has been presented to indicate probable material error or injustice[104] or that effective relief cannot be granted. In cases in which a hearing is authorized, the applicant is entitled to appear before the Board, either personally or by counsel, or in person with counsel.[105] The applicant may present witnesses,[106] and will be given a full and fair hearing. Official records necessary to presentation of the case will be made available to the applicant insofar as statutes and regulations permit.[107] If the applicant declines a hearing or fails to appear for a scheduled hearing, the Board may consider his case on the basis of the records and evidence before it, or if necessary, may obtain such further information as it may consider essential to complete and impartial determination of the facts and issues.[108] The Board may

102 *Id.* AR 15-185 states that "If the claimant, the heir, or legal representative files an application more than 3 years after he discovers the error or injustice, he must include in the application the reasons why the Board should find it is in the interest of justice to excuse the failure to file application within the time prescribed. . . ." AR 15-185, *supra* note 14, para. 7.

103 AR 15-185, *supra* note 14, para. 8.

104 *Id.* para. 10*b*.

105 *Id.* para. 11.

106 *Id.* para. 14. Note that AR 15-185 provides that no expenses incurred by the applicant, his counsel, his witnesses, or by other persons acting on his behalf will be paid by the Government. *Id.* para. 28.

107 *Id.* para. 15.

108 *Id.* at para. 17*b* and *c*.

permit the withdrawal of an application without prejudice at any time before the record is sent to the Secretary of the Army.[109]

The Secretary may overrule the Board when its findings are not supported by the evidence. The Secretary may not, however, act capriciously and arbitrarily and overrule the recommendations of the Board where the findings and recommendations are supported by the record.[110] The Board may reconsider a case finally approved by the Secretary only upon presentation of newly discovered relevant evidence and then only upon recommendation of the Board and approval of the Secretary.[111] Corrections made by the Secretary pursuant to Board recommendations are termed "final and conclusive on all officers of the United States," except when procured by fraud.[112] The decision of the Board and the action taken by the Secretary of the Army are subject to judicial review, and thus finality runs only to other agencies of the Government, not to the courts.[113]

109 *Id.* at para. 19*d*.

110 Hertzog v. United States, 167 Ct. Cl. 377 (1964); Proper v. United States, 139 Ct. Cl. 511 (1957).

111 AR 15-185, *supra* note 14, para. 22.

112 10 U.S.C. § 1552(a)(4).

113 Friedman v. United States, 141 Ct. Cl. 239 (1958).

Chapter 5

Complaints Under Article 138, UCMJ

5-1. General

Article 138, Uniform Code of Military Justice,[1] provides that:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings thereon.

While actions of a commanding officer are generally presumed to have been done properly and without abuse of discretion, this article provides a means for an administrative review upon application by the soldier. Although infrequently used over the years, a recent

[1] 10 U.S.C. § 938.

increase in challenges to command authority reflects greater awareness of Article 138 by most members of the Armed Forces.[2]

The right to complain is available only to members of the Active Army and members of the United States Army Reserve on inactive duty training.[3] It does not apply to members of the Army National Guard when not in active duty on Federal status. The "wrong" which may be the subject of an Article 138 complaint is not enumerated in the article. However, the Army Regulation defines the "wrong" as a discretionary action or omission by a commanding officer, under color of Federal military authority, which adversely affects the party complaining personally and violates law or regulation, is beyond the legitimate authority of the commanding officer, is arbitrary, capricious, or an abuse of discretion, or is materially unfair.[4] The commanding officer who can commit the wrong is an Army officer in the complainant's chain of command who is authorized to impose nonjudicial punishment on the complainant, including the first officer exercising general court-martial jurisdiction over the complaint.[5]

It is Department of the Army policy that each member of the Army has a statutory right to complain which shall not be restricted by commanders. However, it is also Department

2 Since calendar year 1980, substantial if thereAdvocate General has processed an average of 45 Article 138 complaints per year.

3 AR 27-10, paras. 20-2 and 20-4*a*

4 *Id.* at para. 20-4*e*.

5 *Id.* at para. 20-4*b*.

of the Army policy to resolve complaints at the lowest level of command. Article 138 is only one of several methods available for complaining of wrongs. For many adverse actions there are other more specific channels to be used. If there is a more effective and efficient method for resolving the complaint, that procedure will be utilized instead of Article 138. Examples of inappropriate subject matters for Article 138 complaints are listed in the Army Regulation.[6]

5-2. Making the Complaint

A two step procedure is used. The complainant must first make a request for redress in writing to the commanding officer against whom the complainant has a grievance (the Respondent). The complainant must clearly identify the commanding officer, the date and nature of the alleged wrong, and the specific redress requested. A recommended format is provided.[7] The request for redress is submitted through command channels to the commanding officer who is alleged to have committed the wrong. The commanding officer has ten working days in which to respond in writing. If a response cannot be made within this time, an interim reply with the estimated date of final reply should be provided.[8] If the request is denied or no response received within the ten day time limit, the complainant may present the complaint in writing under the provisions of Article 138, provided that it is submitted within 90 days after the

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6 *Id.* at para. 20-5.

7 *Id.* at App. G.

8 *Id.* at para. 20-6*b*.

discovery of the alleged wrong.[9] The complaint must be in writing, signed by the complainant, and identify the complainant as a soldier on active duty or on inactive duty for training and subject to the UCMJ. The complaint must also identify the complainant's active duty military unit, the respondent commander, and state the date of written request for redress and action thereon. The complaint must state it is submitted under Article 138, clearly and concisely describe the specific wrong, and state the specific redress requested.[10] The complainant is entitled to consult a military lawyer for advice and assistance in drafting the complaint.[11] The complaint must be addressed through channels to the commander exercising General Court-Martial jurisdiction over the respondent.[12] The prior request to the respondent for redress will be attached as well as any supporting information or documents the complainant desires to be considered.

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9 *Id.* at para. 20-7*b*. The officer exercising court-martial jurisdiction over the respondent commander may waive this defect if good cause exists. Excluded from the 90 days is any time the request for redress was in the hand of the respondent, and any time in which a defective complaint was in military channels before its return to the complainant for correction. *Id.*

10 *Id.* at para. 20-7*a*. *See* App. H and I.

11 *Id.* at para. 2-8. Since the complainant has no right to participate in proceedings after submitting the complaint (*id.* at para. 20-3*d*), a military lawyer is provided only for advice and assistance in drafting the complaint but will not represent the complainant in any ensuing Article 138 proceedings. The military lawyer should include in the advice whether, under the circumstances, an Article 138 complaint is authorized and appropriate, and other laws or regulations under which redress may be sought. *Id.* at para. 20-8*a*(1).

12 Commanders may deviate from strict adherence to command channels when that will facilitate action on the complaint. *Id.* at para. 20-3*f*.

5-3. Action on the Complaint

Article 138 tasks the General Court-Martial Convening Authority over the respondent at the time of that alleged wrong (GCMCA) with the responsibility for resolution of the complaint.[13] The GCMCA must first determine that the complaint meets administrative requirements. If the complaint is defective because (a) the complainant was not a member of the Armed Forces on active duty or inactive duty for training and subject to the UCMJ; or (b) the wrong complained of was not a discretionary act or omission; or (c) the respondent was not the complainant's commanding officer, or the wrong was not under color of Federal military authority; or (d) the wrong did not adversely affect the complainant personally; or (e) the complaint does not adequately identify a respondent or a wrong,[14] the defect cannot be waived and the complaint will not be processed as an Article 138 complaint.[15] If the complaint is defective because the complaint was not delivered to the complainant's superior commissioned officer within 90 days of the date of discovery of the wrong or redress has not been requested and denied or the complaint is repetitive in that it is substantially the same as a previous complaint by the same complainant on which official action has been taken, the defect is waivable by the GCMCA but only for good cause.[16] All other defects are waivable by the GCMCA when considered

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13 *Id.* at paras. 20-10 and 20-11. Withdrawal of complaint before receipt of the complaint by the General Court-Martial Convening Authority may be oral, thereafter it must be in writing.

14 *Id.* at para. 20-10*b*(3).

15 The complainant will be advised of the deficiency. *Id.* at para. 20-10*a*.

16 *Id.* at para. 20-10*b*(2).

necessary in the interest of fairness. If the defect is not waived, the complainant will be informed of the deficiency and how it may be corrected. The complaint will not be processed as an Article 138 complaint nor will it be forwarded to Headquarters, Department of the Army unless the complainant corrects the deficiency.[17]

Upon determination by the GCMCA that the complaint is administratively correct, the GCMCA must inquire into the complaint and take appropriate action. If the GCMCA believes other channels are more appropriate and available for resolving the complaint, the GCMCA will advise the complainant that either the alleged wrong is being considered in other channels, or that there is a more appropriate channel for redressing the wrong. The GCMCA also advises the complainant of the applicable regulations and any Army assistance available.[18] This is considered "proper measures for redressing the wrong complained of" within the meaning of Article 138. Such action is treated as final action by the GCMCA.[19]

In all other cases, the general court-martial convening authority will cause an investigation under AR 15-6 to be conducted to determine the circumstances giving rise to the complaint. The investigating officer should be senior to the respondent, except for good cause, but never someone under the command authority of the respondent. Informal procedures are

17 *Id.* at para. 20-10*a*.

18 *Id.* at para. 20-11*b*(1).

19 *Id.* at para. 20-5*c*.

encouraged. Specific findings will be made as to whether the act of omission complained of was in violation of law or regulation, beyond the legitimate authority of the respondent, arbitrary, capricious, abuse of discretion, or materially unfair. Specific recommendations as to the appropriateness of the requested redress and other corrective action will be made. The GCMCA will take appropriate action on the complaint and will notify the complainant in writing of the action taken. The GCMCA must personally act on the complaint.

Upon completion of the action on the complaint, the GCMCA will forward the case file to Headquarters, Department of the Army.[20] The Article 138 file is reviewed by The Judge Advocate General on behalf of the Secretary of the Army. The complainant, respondent, and GCMCA are informed of final disposition of the complaint.[21]

The provision for review of the complaint at the highest levels of the Army makes the Article 138 complaint a viable channel for the redress of wrongs. The importance attached to the article was best summarized in the opinion of the Court of Military Appeals in *Tuttle v. Commanding Officer*:[22]

> The right to seek redress of wrongs is an integral part of the complex of rights granted by the Congress to those subject to military law. Those to

20 *Id.* at para. 20-11*d* (also lists the items to be forwarded).

21 *Id.* at para. 20-12.

22 21 C.M.A. 229, 45 C.M.R. 3 (1972).

whom an application for relief under the provisions of this Article is submitted may not lightly regard the right it confers, nor dispose of such application in a perfunctory manner. Its provisions should not be construed . . . in a manner calculated to lead anyone to believe that the right of redress of wrongs is of minor importance and one which may be disregarded entirely or perfunctorily complied with.[23]

23 *Id.* at 230, 45 C.M.R. at 4.