



Office of Command Counsel Newsletter

February 2002, Volume 02-01

CLE 2002

The annual AMC Continuing Legal Education Program is scheduled for 21-24 May 2002 at the Grosvenor Hotel, Lake Buena Vista, Florida.

The CLE Planning Committee is in full swing after compiling suggested topics and speakers from AMC field legal offices.

The CLE Planning Committee is chaired by **Steve Klatsky**. Members of the committee are **COL Dave Howlett, Dave Harrington, Vera Meza, Lisa Simon, Mike Lassman** and, of course, **Holly Saunders**.

This year our CLE theme is **AMC Attorneys: Supporting the Objective Force**.

This is a highly visible mission for AMC and one of **General Kern's** main thrusts.

The CG will address us subject, of course, to his availability.

The Pentagon has new leadership and we hope to

have JAG and DA OGC representation.

The Awards Program is always a CLE highlight, and the nomination package is on its way to Chief Counsels. Please carefully consider personnel and recognize outstanding legal work and initiative.

Several suggestions were raised asking that we address the future--DA realignment and the impact on AMC. We agree this is on the mind of everyone. We will see where we are as we get closer to the CLE to determine whether important information is available.

We are designing the program for a mixture of plenary sessions, electives--with the goal of matching last year's total of 15, and legal focus sessions devoted to Acquisition, Employment, Intellectual Property and Environmental.

Much more information to come soon.

Korte Receives 30 year pin...see Faces in the Firm

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Miscellaneous

LINKING, FRAMING and CACHING: Internet Law and More

Linking permits Web users to click their way from one Web site to another.

Framing permits a Web site user to view material from another Web site within a "frame" on the original site.

Caching is the creation of a copy of a Web site by storing data on a computer.

To learn about Internet Addresses, permission and privacy issues, infringement, and copyright hyper-link infringement, and other neat stuff you rarely see good information about, we have enclosed an excellent discussion by CECOM counsel **Raymond Ross**, DSN 992-9792 (Encl 1)

Mountain Warfare School: Between Law School and Combat

"It began in February 2001 when I read an article in *The Warrior*, a Soldier Systems Center publication, describing the challenges posed by the Vermont Army National Guard Mountain Warfare School. (MWS) <http://www.natick.army.mil/warrior/01/janfeb/soldpers.htm>.

The article, depicting the mental and physical demands of the course, appealed to my innate sense of adventure. Since I had previously participated in an Army "greening" program, I was especially captivated by one sentence describing the "greening" as a "walk in the park" compared to MWS. "

So starts the interesting saga of Natick counsel **Srikanti Dixit**, DSN 256-5971 (Encl 2).

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Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Acquisition Law Focus

Introduction to CRADAs, Etc.

Although Cooperative Research and Development Agreements (CRADAs), Grants, Cooperative Agreements and Other Transactions have been available for use for some time now, if you don't use them often you may feel a little ill at ease when a customer asks you a question concerning them (Encl 3).

To help avoid these moments, this article includes brief descriptions of the circumstances in which each of these types of vehicles might be appropriate.

This note is not intended to be exhaustive or highly refined. It will, however, allow you to give a quick summary to your customer subject to expansion and refinement later.

CRADA

A "cooperative research and development agreement" is an arrangement authorized by 15 USC §3710a. It does not include procurement contracts, grants, cooperative agreements (these have a similar name but are different vehicles) or other transactions.

It is an agreement between one or more Federal

laboratories and one or more non-Federal parties under which the Government provides personnel, services, facilities, equipment or other resources with or without reimbursement (but NOT funds to non-Federal parties) and the non-Federal party provides funds, personnel, services, facilities, equipment or other resources toward the conduct of specified research or development efforts consistent with the mission of the laboratory. (NOTE: A CRADA must be entered into by a Federal Laboratory.)

A similar description is supplied for Grants, Cooperative Agreements and Other Transactions.

Other Transactions

An "other transaction" is a contract, other than a procurement contract, cooperative agreement or grant, whereby the Government purchases R&D or prototypes. It is outside the FAR and DFARS and certain procurement statutes and has associated with it certain reporting and other requirements.

POC is CECOM's **Mike Zelenka**, DSN 992-4112

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Acquisition Law Focus

Funding and Cancellation Dates in Multiyear Contracts-Lessons Learned in FY 02

A multiyear contract, as defined in FAR section 17.103, is "... a contract for the purchase of supplies or services for more than 1, but not more than 5, program years.... The key distinguishing difference between multi-year contracts and multiple year contracts is that multi-year contracts, defined in the statutes cited at [FAR] 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first."

Further, "[a] multi-year contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to the contractor if appropriations are not made."

It is this provision that performance is contingent upon the appropriation of funds, together with delayed and reduced funding during

repeated continuing resolutions, that has caused unanticipated problems this year.

Among the many requirements

The lessons learned concern the date(s) selected for funding of the subsequent program years in multiyear contracts.

Failure of the government to obligate the total amount of funds by the date(s) specified in the multiyear contract will result in complete cancellation of all subsequent (unfunded) program years of the contract unless the contractor agrees to extend the date(s) via a bilateral contract modification. Unfortunately, the agreement to change the date(s) is entirely at the contractor's discretion, and the government has little or no "leverage." (This is true especially in a sole source contractor situation.)

Other lessons learned and practice ideas are presented in this article by AMCOM's **Diane Beam**, DSN 788-0545 (Encl 4).

Affirmative Duty to Report Inventions

At TACOM-ARDEC the Intellectual Property Law Team prepared and distributed a notice to alert the scientific and technical staff concerning their duty to report inventions and also to raise the level of awareness of inventive contributions so that patents can be obtained as one of the mission functions.

This awareness is considered to be an important aspect of the culture of TACOM-ARDEC in maximizing the benefit and recognition of the way we perform our mission for the soldier as a research and development organization for munitions and weapon systems.

POC is **John Moran**, DSN 880-6590 (Encl 5).

Acquisition of Information Technology Commercial Items

The procedures of FAR Part 12 for acquisition of commercial items are an important tool for acquiring reliable, fully developed information technology (IT) in a comparatively speedy and simple manner. Therefore, acquisition-professionals who regularly buy IT products, as well as their attorneys, should be familiar with the commercial item acquisition procedures.

This paper discusses those procedures, along with some examples of practices followed by the CECOM Acquisition Center-Washington (CAC-W) in such procurements

Authority for commercial item acquisition is found in the Federal Acquisition Streamlining Act (FASA) of 1994 (P.L. 103-355, Oct. 13, 1994), and in the Clinger Cohen Act of 1996 (formerly known as the Federal Acquisition Reform Act) (P.L. 104-106, Feb. 10, 1996). These statutes are implemented by FAR Part 12 and its DFARS and AFARS supplementation. FAR Part 12 is to be used in

conjunction with FAR Parts 13, 14, or 15, as appropriate. (FAR 12.102(b).)

A lengthy definition of “commercial item” is set forth in FAR 2.101. It is important to note that “item” includes commercial services as well as concrete objects such as equipment and supplies.

An item of equipment or supplies is deemed to be commercial if it is customarily used for non-governmental purposes, or if it has evolved from such an item through advances in technology or performance, even if it is not yet available in the marketplace, although it will be available to meet the Government’s delivery requirements.

This article includes an excellent discussion of the law and statutory design, defines and explores the term “market research” and has loads of other practical information.

POC is CECOM’s **Richard McGinnis**, DSN 221-5981, and **Percival Park** DSN 221-3304 (Encl 6).

Process for Maintaining Our Patent Portfolio

As part of the harmonization of the US patent system to make it more in line with the patent systems of European countries, a requirement of periodic payment of fees was introduced so that only valuable patents are kept in force. Under the provisions of 35 USC 41(b), three separate fees must be paid to maintain a patent in force.

The fees are due 3 years and 6 months, 7 years and 6 months, and 11 years and 6 months from the date of issuance of the patent. Failure to pay these maintenance fees results in the lapse of the patent.

As it is DA policy to maintain in force only those Army-owned patents in which an Army agency or activity has a substantial interest and for which a clear commercial potential can be demonstrated, TACOM-ARDEC utilizes the enclosed memorandum to ensure timely payment of fees.

POC is TACOM-ARDEC’s **Kathryn Vander Sande**, DSN 880-3449 or **John Moran**, DSN 880-6590 (Encl 7).

Employment Law Focus

Guide to Adverse Actions....

The Civil Service Reform Act, at 5 USC Chapter 75, provides the legal framework for formally addressing employee misconduct problems. Misconduct includes, but is not limited to, actions violating laws, regulations, and Department policies.

Some examples of actionable misconduct include: violation of criminal statutes; abuse of leave; falsification of travel vouchers, time and attendance records, or other official documents; making false statements; misuse of Government time or property; violation of Standards of Conduct; disruptive behavior; disrespectful conduct; failure to follow instructions; and insubordination.

An employee may be disciplined only for such cause as will promote the efficiency of the service. This means that the employee's misconduct interferes with the Department's ability to carry out its mission.

Chapter 75 relates specifically to adverse actions, that is, suspensions of 14 days or less, suspensions of 14 days or more, removals, and reductions in grade or pay.

This short Guide is not intended to be all-inclusive. Applicable laws, rules and regulations may change, and case law further defines the requirements (Encl 8).

Automation Tools of Interest

Lots of great internet sites for CSRS & FERS calculations, employee/applicant issues, travel information, and other miscellaneous sites of interest.

Thanks to HQ AMC IP Counsel **Bill Adams** who found this useful resource. Originally from Gloria Johnson, Ft. Myer TDS paralegal. Enclosure 9

...& Guide to Performance Problem Issues...in the Workplace

The Civil Service Reform Act, at 5 USC Chapter 43, provides the legal framework for monitoring and evaluating employee performance, and for taking corrective action if an employee's performance is unacceptable.

If an employee's performance is unacceptable, the Department may remove or reduce in grade the employee, following appropriate procedures.

The Department's OPM-approved General Performance Appraisal System (GPAS) forms the basis for taking action against an employee for unacceptable performance. The GPAS provides the means for a supervisor to monitor and evaluate an employee's work.

This short Guide is not intended to be all-inclusive. Applicable laws, rules and regulations may change, and case law further defines the requirements (Encl 10).

Computer Crimes in the Fed Workplace

Supreme Court on EEOC Authority to Seek Victim-Specific Relief

The United States Supreme Court held 6-3 (opinion by Stevens; dissent by Thomas) that an employment agreement to arbitrate employment-related disputes does not limit the authority of the Equal Employment Opportunity Commission (EEOC) to bring suit in federal court.

In June 1994, Eric Baker completed a job application with Waffle House in Columbia, South Carolina. The application contained an agreement for the applicant to submit to binding arbitration.

Eventually, Baker started working at another Waffle House in West Columbia without signing a new application. Baker was terminated in September 1994, after suffering a seizure. Waffle House in its termination letter determined that, for the safety of guests and co-workers, it was proper for Baker to be let go.

EEOC

EEOC filed suit on behalf of Baker to "correct unlawful

employment practices on the basis of Baker's disability."

Specifically, the employee sought injunctive relief, backpay-reinstatement and punitive damages.

9th Circuit

The Ninth Circuit held that when an employee signs a mandatory arbitration agreement, the EEOC is limited to injunctive relief because federal policy in favor of enforcement of the agreement outweighs the public interest of the EEOC to proceed in federal court to enforce a private interest.

Supreme Court

The Supreme Court reversed, holding that the private agreement does not bar the EEOC from seeking victim-specific remedies. It determined that the Title VII of the Civil Rights Act of 1964 authorizes the EEOC to enforce the ADA.

EEOC v. Waffle House, Inc

The number of computers and technology-related devices has increased exponentially in the Federal workplace and these devices have become an indispensable part of our daily work routine. Less than twenty years ago, a personal computer (PC) was a luxury reserved for high-ranking officers and civilians. Now, virtually every employee has a PC on his or her desk, or has access to one.

Moreover, the advent of communications technologies such as pagers, cell phones, e-mail and the Internet have provided us with the unprecedented ability to communicate instantaneously and efficiently with people over vast distances.

At the same time the explosive growth in computer usage has brought along with it a wide range of problems and concerns.

The unique nature of the computer and more particularly the Internet, is such that the ability to commit certain crimes has actually increased. POC is CECOM's **CPT Michael Stephens**, DSN 992-9813 (Encl 11).

Environmental Law Focus

John German Joins the Environmental Law Team: New Team--New Assignments

We are very pleased to announce that the new Headquarters AMC Environmental Law Specialist (ELS), **John German**, is on board. John is generally familiar with our command having worked on a variety of AMC related environmental issues in his capacity as the former chief of the Army Environmental Center.

The AMC ELS responsibilities will be divided as follows:

Compliance:

RCRA/CAA/CWA/SDWA
NEPA/ESA/NHPA
Conventional & Chemical Munitions
Unexploded Ordnance
Safety/Radiological
Pollution Prevention

Restoration

Real Estate

Litigation Support

Primary

Stan Citron
John German
Stan Citron
John German
Stan Citron
John German
John German
Stan Citron
John German

Backup

John German
Stan Citron
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If you have any questions, please do not hesitate to contact **Stan Citron** (DSN 767-8043) or **John German** (DSN 767-8082).

DOD Land Use Control Workshops

DoD will be holding three regional workshops to better acquaint DoD personnel with Land Use Controls Associated with Environmental Restoration Activities. These workshops will focus on issues such as the implementation and management of land use controls at active

and BRAC installations, the land use control tools, as well as future direction in the national land use control issues. The workshop dates and locations are as follows:

- February 26-27, 2002 - Dallas, Texas
- April 16-17, 2002 - Charleston, South Carolina

- May 21-22, 2002 - Seattle, Washington

To learn more details about the workshops and to register, please visit the following website - <http://www.denix.osd.mil/LUCsWorkshop>. POC is **Stan Citron**, DSN 767-8043.

Environmental Law Focus

Miscellaneous Metal Parts and Plastic Parts Air Standards

The EPA is developing National Emission Standards for Hazardous Air Pollutants (NESHAPs) for Miscellaneous Metal Parts/Products and Plastic Parts/Products.

While these rules are not expected to take effect until May 2005, they are likely to have a significant impact on the AMC mission capabilities.

These NESHAPs are likely to regulate the painting of most Army materiel, including tactical vehicles, ground combat vehicles, and munitions. AMC is currently investigating different ways to reduce the impact of these rules (about \$300M in one time capital expenditure and

an annual maintenance cost of \$60M), including participating in the NESHAP rule-making process and developing new HAP-free materials and processes.

AMC will be requesting each MSC to develop a plan to comply with the NESHAPs for each of its installations. Note - Resources necessary to resolve NESHAP issues must be put into the budget process this year in order to execute either a control or prevention solution.

The HQ, AMC POC is Mr. **George Terrell**, Director, Army Acquisition Pollution Prevention Support Office, DSN 767-9488.

Endangered Species and Emergencies

Expedited procedures for conducting emergency consultations are outlined in 50 CFR Part 402, Section 402.05 and the USFWS's ESA Section 7 Consultation Handbook, Sections 8.1 and 8.2. The emergency consultations can be accomplished in about 48 hours. Essentially, this

streamlined procedure allows the action to take place with notification and lets the installation proceed with formal consultation after the action is taken. The key step is early notification of the local USFW Ecological Services Office. Please contact **Bill Woodson** at (703) 693-0680.

Historic Preservation: Extension of Emergency Standards

Emergency situations affecting historic properties are addressed at 36 CFR 800.12. Prior to the Advisory Council's 26 October 2001 decision, this provision was applicable only to undertakings implemented within 30 days following the formal declaration of emergency. However, due to the nature of the current emergency, the Council has extended the period of applicability for use of its emergency provisions "until further notice."

Emergency undertakings must be directly associated with the continuing and immediate threat of further attacks as stated in the presidential declaration. Installations need not make a formal request to operate under these provisions.

For further information, please contact **David Berwick**, Army's Advisory Council Liaison, at (202) 606-8531.

Frequent Flyer Benefits--Retaining the Benefit

It is official now. Section 1116 of the National Defense Authorization Act for Fiscal Year 2002, signed into law on December 28, provides for employees (among others) to retain promotional items (such as frequent flyer miles) received as a result of government travel.

These changes have been reflected in the Joint Travel Regulations.

The text of Section 116 includes :

“To the extent provided under subsection (c), a Federal employee, member of the Foreign Service, member of a uniformed service, any family member or dependent of such an employee or member, or other individual who receives a promotional item (including frequent flyer miles, upgrade, or access to carrier clubs or facilities) as a result of using travel or transportation services obtained at Federal Government expense or accepted under section 1353 of title 31, United States Code, may retain the promotional item for personal use if the promotional item is obtained under the same terms as those of-

ferred to the general public and at no additional cost to the Federal Government.”

There are exceptions and limitations of course that will require interpretation and rulings (Encl 12).

The Per Diem, Travel and Transportation Allowance Committee issues a memo on 31 December that contains a great deal of useful information (Encl 13).

Additionally, the DA Standards of Conduct Office has promulgated guidance on a host of issues related to this important development.

Implementing Regulations

The statute has been implemented by the following applicable regulations. For DoD military and civilian personnel, the Joint Federal Travel Regulation and Joint Travel Regulation, respectively, have been revised and can be found at <http://141.116.74.201/regchgs.htm>.

The Joint Ethics Regulation, DoD 5500.7-R, has been changed as of January 10,

2002, to be consistent with the Act. The change will be posted shortly on the SOCO web site under the Joint Ethics Regulation and is also attached below.

Application to 31 U.S.C. 1353

P.L. 107-107 states that promotional benefits that result from travel accepted pursuant to 31 U.S.C. 1353 (official travel paid by a non-Federal entity) may be retained by the employee. The Joint Travel Regulation and Joint Federal Travel Regulation no longer address this issue, and the Joint Ethics Regulation does not offer additional guidance. Thus, provided that the entity that paid for the travel does not object, Federal military and civilian personnel may retain frequent flyer miles that are derived from such travel.

There are other interesting issues such as taxability of the benefit and supervisory challenges--sure to impact employment law practice (Encl 14).

POC is **Bob Garfield**

Application of Ethics Laws to IPAs

For those of you whose agencies utilize state and local government employees under the Intergovernmental Personnel Act (IPA), the FY 2002 DOD Authorization Act, section 1117 extends the reach of ethics laws to detailees.

Section 1117 amends 5 USC 3374(c)(2), making the Ethics in Government Act and the Procurement Integrity Act applicable to detailees to the Federal government agency under the IPA.

This amendment means agencies now have the authority to require detailees to file financial disclosure reports and to attend annual ethics training.

Acceptance of Travel Expenses: Teaching, Speaking, and Writing Activities

On 30 November 2001, OGE issued its final rule amending 5 CFR 2635.807(a) to allow employees, other than noncareer employees, to accept from outside sources travel expenses incurred in connection with certain outside teaching, speaking, and writing activities considered "related to official duties" under the rule.

The amendment brings the cited regulation into conformity with the decision in *Sanjour v. Environmental Protection Agency*, 56 F.3d 85 (D.C.Cir. 1995) (*en banc*), clarified on remand, 7 F.Supp.2d 14 (D.D.C. 1998).

Section 2635.807(a) generally prohibits employees from accepting compensation from any source other than the Federal government for teaching, speaking, or writing that "relates to the employee's official duties."

The amendment is intended to allow those identified employees who are involved in teaching, speaking, or writing *in their private capacities* to accept travel reimbursements incurred in connection with those activities. The intent is not to facilitate official travel.

See Federal Register at 66 FR 59673 (30 November 2001).

Status of Trustees of a Private Trust under 18 USC 208

In DAEOgram DO-01-029 dated 19 December 2001, the Office of Government Ethics (OGE) calls attention to a recent Office of Legal Counsel (OLC), Department of Justice opinion concerning the application of 18 USC 208 to individuals serving as trustees of a private trust.

OLC opines the mere fact that a trustee is technically the legal owner of the trust property under the common law of trusts, does not give the trustee a personal financial interest in particular matters affecting the trust property.

The example given is the spouse of an employee who serves as trustee of a trust for the benefit of a neighbor. The spouse does not automatically have a financial interest in particular matters affecting the stock holdings of the trust.

For this reason, the employee would not invariably be disqualified from participating in particular matters that directly and predictably affect the holdings of the trust for which the spouse serves as trustee.

Legal Assistance Page

Two excellent items from CECOM's Pamela McArthur, DSN 992-4760.

Transitional Compensation Program

Military and civilian families alike can face the issues of spousal or dependent abuse. No one likes to be faced with that situation, talk about it, admit it, or deal with its consequences.

Sometimes, the loss of financial and medical benefits to the military family is a disincentive for that family to report the abuse. The family members sometimes choose to suffer with the abuse; they avoid seeking medical treatment and never report the situation to avoid financial "penalty" associated with the service member's potential discipline or discharge.

Fortunately, Congress has provided some relief to military families that are confronted with this difficult and often debilitating circumstance.

Congress established the Transitional Compensation (TC) program for abused dependents of military personnel in order to counter economic barriers and increase the likelihood that family members will report the abuse.

The legislation authorized temporary payments, at the rate specified for Dependency and Indemnity Compensation (DIC), for families in which the service member has been (1) discharged administratively or by court-martial for a dependent-abuse offense or (2) been sentenced to a forfeiture of all pay and allowances by a court-martial for a dependent-abuse offense after November 29, 1993. Dependent abuse offenses include, but are not limited to, sexual assault, rape, sodomy, assault, battery, murder and manslaughter.

Benefit entitlement begins on the date the administrative separation is initiated or the court-martial sentence is approved. Payments are for a minimum of 12 months or until the soldier's ETS date, whichever is longer, but may not exceed a maximum of 36 months. The current monthly DIC rate is \$911 for a dependent spouse and \$229 for each dependent child in the care of the spouse. Other benefits include retention of

the family member ID card, access to exchanges and commissaries, and medical, dental and TRICARE enrollment (for the purposes of abuse-related care only) for one year following the service member's discharge(Encl 15).

FAQ re Wills & Estates

The passing of a loved one is an emotionally difficult time under the very best of circumstances. The prospect of going through the probate or administration process only aggravates an already overwhelming situation. First and foremost, "probate" is not a dirty word. It is simply the proving of the validity of a will. Second, by planning ahead, having a will and other documents in order, and understanding the basics of the process, you can ease some of your fears and your fears for your beneficiaries and loved ones (Encl 16).

The Lexis Corner

New LEXLink™ Feature:

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If you would like to have access to LEXLink, contact your DoD Account Team of **Corrin Gee-Alvarado** at (202) 857-8236 or **Rachel Hankins** at (202) 857-8258.

Faces In The Firm

Hello & Goodbye

HQ AMC

Gail Barham joined the General Law Division as legal assistant. Gail most recently assisted in the transition of AMC Commander General Coburn.

John German is a new environmental counsel and part of the Environmental Law team. John recently retired from a distinguished career in the Judge Advocate General's Corps.

CECOM

Barbara Lamb has recently joined the Legal Services Branch as a Claims Examiner. Barbara comes to the Legal Office from the CECOM Research, Development and Engineering Center.

CECOM

Cruz Febres-Ferrer is retiring from the Federal Service after twenty-two years as an attorney-advisor.

During her tenure, Cruz successfully handled hundreds of complex matters in the acquisition and contract administration areas of the CECOM Legal Office, and most recently served as agency counsel in a number of Labor/EEO actions.

Over the years, Cruz has gained a reputation for her professionalism, friendliness and cooperativeness and will be sorely missed.

HQ AMC

Sam Shelton is returning to work at the Army Research Laboratory, where he worked before assuming an employment law position at HQ AMC.

Awards & Recognition

HQ AMC

Major Ed Beauchamp was presented with the Army Commendation Medal for his outstanding fiscal law work and the Army Achievement Medal for his work on the LOGCAP Program.

Debbie Arnold received the Commander's Award for Civilian Service for her work supporting both the Protest Litigation Division and the Intellectual Property Law Branch.

Lisa Simon received the Commander's Award for Civilian Service for her contributions to the Future Combat Systems Program.

Ed Korte was recognized for 30 years of government service.

Promotion

CECOM

LTC Donna Wright, Staff Judge Advocate, was recently selected for promotion to Colonel. The actual pin-on date will be sometime this spring.

LINKING, FRAMING and CACHING

Internet Law and status re same:

Linking permits Web users to click their way from one Web site to another.

Framing permits a Web site user to view material from another Web site within a “frame” on the original site.

Caching is the creation of a copy of a Web site by storing data on a computer.

LINKING

Currently, linking can take three forms:

1. Hypertext Reference (HREF) Links: A simple text hyperlink to the home page of the linked site, implemented through Hypertext Markup Language (HTML), in which a hypertext link is marked as a highlighted word or different colored word on the linking site.
2. Graphic hyperlink: A link in which a graphic (logo, button, etc.) on the linking site alerts the user of the linking site to the existence of a link.
3. Deep linking: A text hyperlink to an internal page of the linked site.

TEXT HYPERLINKS

Copyright Infringement

When a Web site user clicks on a link to the home page of another site, the user is transferred to the linked site. Because the user is actually transferred to the linked site, the linking function does not appear to involve reproduction or public display of the linked site. Linking to the home page of another site also does not appear to be an exercise of the copyright owner’s modification, distribution or public performance rights. Accordingly, copyright law does not require that permission be obtained for linking.

Other Rights

If a Web page says, “ask permission before linking,” it is possible that linking to the site without the owner’s permission may be trespass. *Ebay, Inc. v. Bidder’s Edge, Inc.*, 2000 U.S. Dist LEXIS 7287 (ND Cal 2000).

GRAPHIC HYPERLINKS

If you own or have the right to use the graphic, copyright law does not require you to get permission for a link to the home page of the linked site, but it is considered good practice to ask

permission. If you use a copyrighted graphic image from the linked site as the graphic hyperlink, you will be reproducing and displaying copyrighted material you do not own (the graphic). You need the copyright owner's permission to use the graphic image, unless your use of the graphic is fair use.

DEEP LINKING

Whether deep linking (linking to an internal page of the linked site) requires permission is unclear.

Copyright Infringement

Whether deep linking is copyright infringement is unclear. An argument can be made that deep linking changes the way a Web user who follows a deep link to a linked site experiences the linked site. This could be viewed as an exercise of the linked site owner's modification right.

Other Rights

Even if deep linking is not copyright infringement, linking without permission could violate other rights of the linked site's owner, e.g., trespass, if permission is required.

In the case of *Ticketmaster Corp. v. Ticket.com, Inc.*, 54 USPQ2d 1344 (CD Cal 2000), the Court held that defendant's linking to plaintiff's Web site did not involve a violation of the Copyright Act because no copying is involved. However, the Court did not distinguish between linking to a site's home page and deep linking, nor did it address the question of whether deep linking is an exercise of the linked site owner's modification right. The Court did dismiss the plaintiff's cause of action for trespass and unfair competition. As to the trespass claim, the Court indicated that it was hard to see how entering a publicly available Web site could be called a trespass since all are invited to enter. As to the unfair competition claim, the Court said that deep linking by itself, without confusion of source, did not necessarily involve unfair competition.

However, the Court did not dismiss three other causes of action leaving same to go to trial:

1. Copyright infringement: Ticketmaster's claim that defendant reproduced numerous copies of interior Ticketmaster pages in order to extract data from them.
2. Passing off, false association, and false advertising claims: Ticketmaster claimed defendant's site falsely suggested an association with Ticketmaster and gave misleading information.
3. Tortious interference with prospective business advantage: Ticketmaster claimed defendant's link diverted Web users from plaintiff's home page, depriving plaintiff of ad revenue which is based upon the number of "hits."

REQUIRING PERMISSION

For all three types of linking, if a site to which you want to link states that you should get permission before linking to the site, it's best to obtain permission. Otherwise, one could be liable for breach of contract.

LINKS TO YOUR WEB SITE

If you want others to get permission before linking to your site, post a “request permission” notice prominently on your home page. If you prefer to include this notice in your Terms of Use document, then

1. indicate that permission is required for linking to the site
2. state that if one does not accept the terms stated here, they cannot use the site
3. make sure that the Terms of Use document must be read before one can proceed past the home page
4. require users to show agreement to the terms by clicking “I agree” before going on.

LIABILITY ISSUES

Linking may expose you to liability for wrongs done by the owner of the linked site under several legal theories, three of which are as follows:

Affiliation with Other Sites

Web viewers may get the impression that you are affiliated with the owners of sites to which your site links or is linked, with shared responsibility for the other site’s product and marketing claims. Accordingly, if your site contains links, you should provide a statement in your Terms of Use or on your home page that:

1. your site provides links to sites not under your control
2. links should not be interpreted as endorsements of the linked sites or the linked sites’ products.

Graphic Hyperlink Copyright Infringement

If you use a graphic from the linked site as a graphic hyperlink, you may be liable for copyright infringement if the linked site’s owner does not own the copyright in the graphic.

Linked Site’s Infringing Content

It is possible that a Web site owner who links to a site containing infringing material may be liable for contributory copyright infringement. Contributory copyright infringement is established when a defendant, with knowledge of another party’s infringing activity, causes or materially contributes to the infringing conduct. See *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 FSupp2d 1290 (D Utah 1999).

FRAMING

Framing permits viewers from one Web site to view material from another Web site within a frame without leaving the “framing” site. Framing changes the way the viewer experiences the framed site because the frame on the framing site covers up part of the framed site. Thus, framing may be an exercise of the linked site owner’s modification right.

In *Futuredontics, Inc. v. Applied Anagramics, Inc.*, 45 USP2d 2005 (CD Cal 1998), the Court refused to dismiss plaintiff’s copyright infringement suit, holding that the framed site may

constitute a derivative work, i.e., a work created by modifying a copyrighted work. This case is still pending.

CACHING

Caching is the creation of a copy of a Web site by storing data on a computer.

Server-level Caching

Caching at the server level is done to facilitate quick linking to a popular site, to maximize site “uptime,” and for security reasons (as part of a firewall). This type of caching is also called proxy caching. In copyright terms, caching a Web site is an exercise of the Web site copyright owner’s reproduction and display rights.

Temporary Caching

Temporary caching occurs within the computer’s random access memory (RAM) when one views a Web site, i.e., your browser caches each Web page you visit in your computer’s RAM. Presumably, by posting material, Web site owners grant Web viewers implied licenses for the RAM copy without which viewers cannot access material on the Web.

Linking vs. Caching

To a Web site user there does not appear to be any difference between clicking on an icon that takes the user to a linked site and clicking on an icon that brings up a cached site. One may ask why copyright law requires permission for caching and not for linking. The reason is that caching involves the creation of a copy of the cached site whereas linking does not.

INTERNET TECHNOLOGY

Every location on the Internet has an address composed of four groups of digits separated by decimal points, for example, 207.68.137.43. This address is referred to as an Internet Protocol (IP) address. However, because it is easier for Internet users to remember an address composed of words, each numeric IP address also has an alphanumeric counterpart. When an Internet user types into a computer the Internet address for the Web site located at <http://www.acme.com>, a top level domain server will match the alphanumeric address with its numeric IP address and direct the user’s computer to the computer hosting that Web site.

The alphanumeric address www.acme.com is read by a computer from right to left and is composed of three distinct parts. First, the [.com](http://www.acme.com) portion is the top level domain name and indicates the purpose of the organization or individual registering the site. Second, the [acme](http://www.acme.com) portion is the second level domain name and identifies who owns the Internet address. This portion of the domain name is the subject of most Internet domain name trademark disputes. Third, the [www](http://www.acme.com) portion is the host name of the specific computer at the [acme.com](http://www.acme.com) site. The [www](http://www.acme.com) indicates that the server is referred to as the “World Wide Web” server.

HTML Code – HTML coding provides display instructions to the Web browser, such as “Internet Explorer” or “Netscape Navigator,” viewing the file that generates a particular Web page. Through these HTML codes, a Web browser is instructed where to implement line breaks, new paragraphs and other display attributes that determine the appearance of the documents to the Internet user. Although this HTML coding is hidden from the normal view of a Web page, it can be viewed with the “View Source” function.

Metatags – One particular type of HTML text coding is the “metatag.” Metatags contain information about the document, such as the author, its expiration date, a description of the content of the Web page, and relevant keywords. It is these keywords which are embedded into a Web site’s computer code that allow search engines to identify the subject matter of that site. Internet search engines operate by identifying metatags and then compiling a list of Uniform Resource Locator (URL) addresses of Web pages whose metatags match the chosen search terms. Cases have proliferated in which defendants are enjoined or damages are imposed for using another’s trademark or trade name as a metatag.

The Point of Contact for this subject in the CECOM Legal Office is Mr. Raymond Ross, (732) 532-9792; DSN 992-9792.

KATHRYN T. H. SZYMANSKI
Chief Counsel

It began in February 2001 when I read an article in The Warrior, a Soldier Systems Center publication, describing the challenges posed by the Vermont Army National Guard Mountain Warfare School (MWS). <http://www.natick.army.mil/warrior/01/janfeb/soldpers.htm>. The article, depicting the mental and physical demands of the course, appealed to my innate sense of adventure. Since I had previously participated in an Army "greening" program, I was especially captivated by one sentence describing the "greening" as a "walk in the park" compared to MWS. The "greening" program is a one-week course geared to expose civilians to military life by immersing them into the soldiers' environment. After reading the comparison, I felt inexorably drawn to participating in the challenges offered by MWS. After I passed the Army PT test, consisting of sit-ups, push-ups, and a two-mile run without difficulty, and had a medical screening, I was ready for the course, or so I naively thought.

Upon arrival at the school, I checked in and proceeded to a room for a height and weight check. I curtailed any self-conscious thoughts as soon as I heard my weight communicated, in what I perceived to be a thunderous roar in a room full of soldiers, to another individual who subsequently memorialized it on my official MWS record. I continued to the supply room to get the requisite gear for the next two weeks. The supplies included a rucksack, climbing gear consisting of a rope, numerous snaplinks, a Kevlar helmet, raingear, and canteens to carry at least four quarts of water. I reviewed the itinerary for the next 14 days, which revealed the course's demanding schedule. The training included a grueling 14-15 hour day without any days off. I also learned that, in a class of forty-four students, there were two civilians, including me, and I was the only female student.

The first day's schedule was characteristic of most. It started early with an optional visit to the medic at 0530, breakfast at 0600, a 3-5 kilometer mountain walk, a block of instruction with practical application, a 3-5 kilometer mountain walk back to the school, dinner, and study or class time ending between 2000 to 2100 hours.

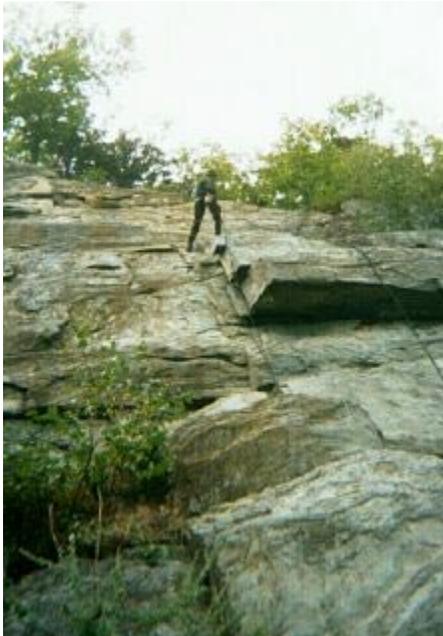


On that first day, we prepared the rucksack, weighing in at approximately sixty pounds, with all the requisite gear, water, and Meals, Ready-to-Eat (MRE). We were ready for what the school coined a "mountain walk" in its itinerary. In fact, this walk consisted of ascending and descending steep terrain at a rapid pace. As I hiked alongside soldiers, they wondered what types of trouble I instigated at work to cause my participation in this class. I explained I volunteered for the course and they reluctantly accepted my explanation. They were accustomed to civilians living what they recognized as a comfortable 9-5 lifestyle. I told them about Natick's capabilities and my work as a Procurement Attorney. They understood this was my opportunity to get hands on experience wearing the clothes and using the gear that I typically read about in a solicitation or contract and to better understand the needs of the ultimate users of that equipment. They shared their thoughts on improving existing capabilities including, placing the slit on the long side of a MRE rather than the short end for easier access to food, enclosing coffee packets in every MRE, and the universal comment to develop lighter equipment.

The instruction varied daily and included Altimeter Land Navigation, Cliff Evacuation, Mountaineering Safety, Climbing, and Map Reading/Interpretation. The instructors tested each day's lesson at some time during the two-week period. Each test counted for a certain number of points cumulatively leading to graduation, assuming you made it that far. The instructors also randomly conducted spot checks to ensure we had all our supplies, especially the water. In the past, soldiers carried all the gear but kept their water supply at a minimum to reduce the load of an already heavy rucksack. Although I empathized with this state of mind, I knew water is crucial to survival and appreciated the gravity of such an error.

One fundamental lesson included tying knots. We learned to tie eighteen knots including lesser-known knots such as the Bowline, Clove Hitch, and Prusik. The test for each knot consisted of tying it, stating all the checkpoints, and the purpose of the knot within two minutes. If a student neglected to mention or improperly stated a checkpoint or purpose, or did not tie the knot properly within the two-minute timeframe, the instructor/tester did not give any points for that knot. Once we proficiently tied all eighteen knots and passed the corresponding test, we applied this knowledge to building complicated rope systems including a Suspension Traverse, Vertical Haul Lines, and A-Frame Construction. These systems would eventually be the basis of team testing.

Another essential block of instruction included rock-climbing. The instructors reiterated the significance of tying knots properly since it is essential for safety. We learned the military climbing commands, various belaying techniques, and methods to tie harnesses with rope instead of donning a standard harness. We tested our climbing prowess by climbing a 70-120 foot vertical rock face at different grades of difficulty. The instructors taught various methods of rappelling, including rappelling at night, and belaying to enable soldiers to perform under any circumstances. For example, if you lost "necessary" gear, the soldiers could rappel or belay using an alternative method not requiring a belay or rappel device.



The instruction emphasized teamwork. If a team quarreled and it led to problems in their rope systems, both the team and consequently, the individuals in that team, would lose

points. One lesson emphasizing teamwork was known as, Cliff Evacuation. The instructors first taught us to configure a litter, or stretcher, from our climbing ropes. Afterwards, we used it to enable our assigned team, which varied from 6-10 individuals, to evacuate casualties from a cliff. My team practiced evacuating a log, known to us affectionately as, "Woody," from the side of a cliff. On a sad note, I must report Woody did not make it down the cliff in one piece. Practice makes perfect.

This course took place during September 2001. It was during this period the tragic events of September 11 transpired in New York City and Washington D.C. On September 11, the Commander called the group together to tell us about the events that were on going at that time. Despite the horrible

events of that day, the instruction went forward in full force. There was no rest, physically, mentally, or emotionally for the military under any circumstances.

By the second week, hiking with sixty pounds did get easier. Perhaps easier is not the correct terminology; in reality, it was not as difficult. My blistered feet and sore body adjusted to the additional weight after some time. After completion of the course and participation in the graduation ceremony, I felt euphoric from my accomplishment and thanked the instructors, an elite group of professionals who provided excellent instruction every step of the way. As a result of attending MWS, I am a better person, mountaineer, and lawyer for our soldiers. I reflected back to the moment I read the article in the Warrior and knew the comparative statement was accurate. But, I always liked walking in the park.

Introduction to CRADAs, Grants, Cooperative Agreements and Other Transactions

Although Cooperative Research and Development Agreements (CRADAs), Grants, Cooperative Agreements and Other Transactions have been available for use for some time now, if you don't use them often you may feel a little ill at ease when a customer asks you a question concerning them. To help avoid these moments, set forth below are brief descriptions of the circumstances in which each of these types of vehicles might be appropriate. This note is not intended to be exhaustive or highly refined. It will, however, allow you to give a quick summary to your customer subject to expansion and refinement later.

CRADA

A "cooperative research and development agreement" is an arrangement authorized by 15 USC §3710a. It does not include procurement contracts, grants, cooperative agreements (these have a similar name but are different vehicles) or other transactions. It is an agreement between one or more Federal laboratories and one or more non-Federal parties under which the Government provides personnel, services, facilities, equipment or other resources with or without reimbursement (but NOT funds to non-Federal parties) and the non-Federal party provides funds, personnel, services, facilities, equipment or other resources toward the conduct of specified research or development efforts consistent with the mission of the laboratory. NOTE: A CRADA must be entered into by a Federal Laboratory.

GRANT

A "grant" under 31 USC §6304 is a legal instrument between the United States and a recipient (which could be a state or local government) and may be properly used when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose (as differentiated from acquiring something for the direct benefit of the United States Government); AND substantial involvement IS NOT expected between the United States agency and the recipient in carrying out the activity contemplated by the agreement.

COOPERATIVE AGREEMENT

A "cooperative agreement" under 31 USC §6305 may be used in the same circumstances as a grant EXCEPT that substantial involvement IS expected between the US agency and the recipient.

Note that neither a grant nor a cooperative agreement is a procurement contract under 31 USC §6303 and hence the FAR and DFARS are not applicable.

While the terms cooperative agreement, contract and grant are found (and quasi-defined) in Title 31 United States Code (31 USC), those terms are again used in 10 USC §2358 which, although it doesn't specifically modify the "definitions" of 31 USC, allows for the use of these arrangements for certain research and development projects for military needs. This statute then expands on the permitted uses of grants and cooperative agreements set out in 31 USC.

OTHER TRANSACTIONS

The notion of "other transactions" comes about as a result of 10 USC §2371 which provides authority in addition to that set out in 10 USC §2358. §2371 provides that the military may enter into transactions OTHER THAN (hence the "other transaction" moniker) contracts, cooperative agreements and grants to carry out the research and development projects set out in §2358. This authority was expanded by section 845 (hence an "845 transaction") of the Authorization Act for 1994 to allow the use of the "other transaction" authority to buy prototypes (in addition to R&D authorized by §2371).

An "other transaction" is a contract, other than a procurement contract, cooperative agreement or grant, whereby the Government purchases R&D or prototypes. It is outside the FAR and DFARS and certain procurement statutes and has associated with it certain reporting and other requirements (including a 1/3 cost sharing mandate for traditional defense contractors making a prototype pursuant to "845" authority).

The point of contact for this subject in the CECOM Legal Office is Mr. Michael Zelenka, (732) 532-4112; DSN 992-4112.

KATHRYN T. H. SZYMANSKI
Chief Counsel

Funding and Cancellation Dates in Multiyear Contracts-Lessons Learned in FY 02

A multiyear contract, as defined in FAR section 17.103, is "... a contract for the purchase of supplies or services for more than 1, but not more than 5, program years.... The key distinguishing difference between multi-year contracts and multiple year contracts is that multi-year contracts, defined in the statutes cited at [FAR] 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first."

Further, "[a] multi-year contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to the contractor if appropriations are not made." It is this provision that performance is contingent upon the appropriation of funds, together with delayed and reduced funding during repeated continuing resolutions, that has caused unanticipated problems this year.

Among the many requirements unique to multiyear contracts, FAR section 17.109(a) requires that the clause at FAR 52.217-2 be inserted in the solicitation and contract whenever a multiyear contract is contemplated (although FAR section 17.104(b) allows the agency head to authorize modification of the clause).

Paragraph (a) of this clause provides that "[c]ancellation,' as used in this clause, means that the Government is canceling its requirements for all supplies or services in program years subsequent to that in which notice of cancellation is provided. Cancellation shall occur by the date or within the time period specified in the Schedule, unless a later date is agreed to, if the Contracting Officer-

(1) Notifies the Contractor that funds are not available for contract performance for any subsequent program year; or

(2) Fails to notify the Contractor that funds are available for performance of the succeeding program year requirement." In addition, all program years except the first are subject to cancellation, and a cancellation ceiling must be established for each program year subject to cancellation (See FAR sections 17.103, 17.106-1(c), and 52.217-2.).

The lessons learned concern the date(s) selected for funding of the subsequent program years in multiyear contracts. Failure of the government to obligate the total amount of funds by the date(s) specified in the multiyear contract will result in complete cancellation of all subsequent (unfunded) program years of the contract unless the contractor agrees to extend the date(s) via a bilateral contract modification.

Unfortunately, the agreement to change the date(s) is entirely at the contractor's discretion, and the government has little or no "leverage." (This is true especially in a sole source contractor situation.)

Because of the nature of a multiyear contract, it is very likely that if the contract is cancelled and a subsequent contract must be awarded to fulfill the cancelled requirements, the subsequent contract will be awarded with higher prices. Thus, the contractor's willingness to extend the funding and cancellation date(s) in the multiyear contract will depend upon whether it is more advantageous to the contractor to continue performance under the current multiyear contract or "gamble" on being awarded a subsequent contract with higher prices. Unlike termination for the convenience of the government, in this situation continuance or cancellation of the multiyear contract is at the contractor's convenience.

Therefore, the lesson to be learned is to consider very carefully when choosing the date(s) by which the government must obligate the funds for subsequent program years in multiyear contracts to prevent cancellation. Until this fiscal year, a date in December was assumed to be relatively "safe," because it was anticipated that this was long enough after the beginning of the fiscal year for the annual appropriation and authorization acts to have been passed and the funds to have been made available for obligation.

This fiscal year has proven that assumption to be false. In light of this experience, it is strongly recommended that the dates for obligation of funds for subsequent program years and, consequently, the cancellation dates, in multiyear contracts be no earlier than the second quarter of the fiscal year to prevent contract cancellation by failing to "...notify the Contractor that funds are available for performance of the succeeding program year requirement."

Other problems also arise when the total amount of funds for the succeeding program year of a multiyear contract is not available by the contract cancellation date. This may occur when there is a continuing resolution because the appropriations and authorization acts have not been passed and signed for the new fiscal year.

One problem is that if the government and the contractor bilaterally agree to obligate part of the succeeding program year funds when extending the contract cancellation date of the multiyear contract, any items acquired with that partial funding must comply with the DoD full funding policy. (See DoD Financial Management Regulation 7000.14-R, Volume 2A, section 010202 and DoDD 7200.4 regarding the DoD full funding policy. See DoD Financial Management Regulation 7000.14-R, Volume 2A, section 010203 regarding multiyear contracts, especially at "C. DoD Requirements," which states that "...multiyear procurement contracts will comply with full funding" except for economic order quantity procurement and advance procurement for long leadtime items.) A second problem is that while under a continuing resolution authority, any funding provided may be restricted to

prevent acquisition of "more" of any type of units in a subsequent program year than were acquired in the previous fiscal year.

(See an explanation of the "current rate," as used continuing resolutions, in Chapter 8 of the GAO Principles of Appropriations Law: Second Edition ("red book").)

This may be inconsistent with the requirements of the multiyear contract which, again, would require the contractor's agreement and a bilateral contract modification to resolve.

In summary, careful consideration of the subsequent program years' funding and cancellation dates before award of a multiyear contract may prevent very difficult and frustrating "one-sided" negotiations with the contractor later.

Diane Beam, DSN 788-0545

AFFIRMATIVE DUTY TO REPORT INVENTIONS

At TACOM-ARDEC the following notice was distributed to alert our scientific and technical staff concerning their duty to report inventions and also to raise the level of awareness of inventive contributions so that patents can be obtained as one of the mission functions. This awareness is considered to be an important aspect of the culture of TACOM-ARDEC in maximizing the benefit and recognition of the way we perform our mission for the soldier as a research and development organization for munitions and weapon systems.

AMSTA-AR-GCL

22 January 2002

MEMORANDUM FOR ARDEC TECHNICAL COMMUNITY

SUBJECT: AFFIRMATIVE DUTY TO REPORT INVENTIONS

This notice is being distributed as a reminder to our technical staff, particularly S&Es, of their obligation to report to the Picatinny Legal Office all inventions developed or related to their job description.

On a number of occasions, particularly in dealing with contractors, there has been a failure to report inventions to the Legal Office in accordance with ARMY REGULATION 27-60. Just as contractor employees are obligated to report inventions made in the course of their employment to their employers, Federal employees are obligated to report inventions to the Army acting on behalf of the United States Government or for that matter the Agency that employs them. Typically in the private sector, technical employees are required to sign an agreement giving the company the right of ownership or title to all inventions and other intellectual property developed or related to their work duties.

How important is the execution of such a document? Well if the prospective employee fails to agree to assign these rights when first joining the company, the usual course of action is that they are simply not hired on. In the case of the Army there is the foregoing regulation placing a similar obligation on the Federal employee.

Almost every day in the business news we hear about issues of intellectual property often concerning patent matters where patent rights are being asserted by one company against another or being acquired in a given technology. The impact of such developments is so crucial to their business outlook that there is an immediate

impact on its stock price that determines the market evaluation of the publicly traded company.

Patents are very important to the Government too. Congress requests that information on patents being granted to the various government agencies be reported to them each year. This information is collected for quarterly System Measurement Reviews for the Commander and reported up through the chain of command since it is a measure of the Intellectual Activity of the various Federal Laboratories such as TACOM-ARDEC. It is taken as an indication of productivity to see how we compare to the research and development activity of other organizations in the government and also to outside entities such as companies.

Although our major function is to develop munitions and weapon systems for the soldier, the protection of the innovative aspects of such developments shows how creative we are as an organization in forging ahead with those new designs. Patent protection of these innovative aspects is a clear recognition of their value that has significance in terms of the recognition of intellectual achievement as well as potential licensing for commercial markets.

It was in recognition of this research and development activity that Congress passed the Technology Transfer Act. The Technology Transfer Act encourages licensing of government technology to industry. Through licensing of government patents to industry, the private sector benefits from advances in technology developed by the Federal Laboratories.

The best way you can fulfill this obligation and ensure these benefits is to alert us by timely filing an invention disclosure. Do not rely on the contractor to notify us on your behalf. Sometimes there are cases where the government inventors' contribution is not even recognized by failing to include them as inventors. If you are named as an inventor, your signing of legal documents such as a declaration of inventorship and an assignment will be required as part of the application process. Never execute such papers without first consulting with one of the patent attorneys in building 3 (Picatinny Legal Office). If you have reason to suspect that a patent is being filed and you are not presented with legal papers requiring your signature then your contribution is most likely not even being acknowledged, as indicated by the failure to name you as an inventor. When inventions are formulated from the exchange of thoughts/ideas from discussions at meetings, the identity of inventorship contributions can be problematic. The best practice would be for the government employees to discuss and review what

occurred at the meeting to identify who made inventorship contributions and agree that one of them will record or document the invention as part of an invention disclosure form for all to sign as inventors for submission to the Legal Office. Remember that most inventions are improvements to existing technology and are not totally new. They typically provide an advancement of some kind such as one or more new features or a better way of doing a known function, etc. If you are not clear or have a doubt whether an invention was actually made or who qualifies as an inventor, please contact us to discuss the matter.

Invention disclosures forms should be filed electronically. The forms may be accessed through the following link:
<https://w4.pica.army.mil/legal/IP.htm>

JOHN F. MORAN
Lead Patent Attorney X6590
Intellectual Property Law Team
Picatunny Legal Office Bldg.3

COMMERCIAL ITEMS ACQUISITION OF INFORMATION TECHNOLOGY UNDER FAR PART 12

The procedures of FAR Part 12 for acquisition of commercial items are an important tool for acquiring reliable, fully developed information technology (IT) in a comparatively speedy and simple manner. Therefore, acquisition professionals who regularly buy IT products, as well as their attorneys, should be familiar with the commercial item acquisition procedures. This paper discusses those procedures, along with some examples of practices followed by the CECOM Acquisition Center-Washington (CAC-W) in such procurements.

Authority for commercial item acquisition is found in the Federal Acquisition Streamlining Act (FASA) of 1994 (P.L. 103-355, Oct. 13, 1994), and in the Clinger Cohen Act of 1996 (formerly known as the Federal Acquisition Reform Act) (P.L. 104-106, Feb. 10, 1996). These statutes are implemented by FAR Part 12 and its DFARS and AFARS supplementation. FAR Part 12 is to be used in conjunction with FAR Parts 13, 14, or 15, as appropriate. (FAR 12.102(b).)

A lengthy definition of “commercial item” is set forth in FAR 2.101. It is important to note that “item” includes commercial services as well as concrete objects such as equipment and supplies. An item of equipment or supplies is deemed to be commercial if it is customarily used for non-governmental purposes, or if it has evolved from such an item through advances in technology or performance, even if it is not yet available in the marketplace, although it will be available to meet the Government’s delivery requirements. Such an item may have any knowledge/information modifications customarily available in the commercial marketplace, or minor modifications not customarily available. Services may be considered commercial items if they are normally provided for support of a commercial item of equipment or supplies. Such services include, but are not limited to, installation, maintenance, repair, and training. To be considered commercial, these services must be provided contemporaneously to the Government and the general public, under similar terms and conditions, and using the same work force. Services may also be considered commercial items if they are sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks. Excluded are services sold based on hourly rates without an established price for a specific task performed.

Market research is defined at FAR 2.101 as “collecting and analyzing information about capabilities within the market to satisfy agency needs.” Such research is required for acquisitions in excess of the simplified acquisition threshold (\$100,000 under most circumstances). (FAR 10.001(a)(2), 2.101.) It is essential for commercial item acquisitions. (FAR 12.202(a).) Market research is used to determine the availability of commercial items, and the nature of any customary commercial practices concerning customization, warranty, financing, discounts, and other matters. (FAR 10.002(b)(1).) To the maximum extent practicable, acquisition officials are required to define requirements to allow for provision of commercial items. If commercial items meeting the Government’s requirements appear to be unavailable, the agency must consider a

reasonable restatement of its requirements to accommodate available commercial items. (FAR 11.002(a)(2).) If such restatement is not possible, then the agency will not use FAR Part 12. However, under current Army policy, issued by the Acting Assistant Secretary of the Army (Acquisition, Logistics and Technology) on 26 March 2001, almost all services are presumed to be commercial. In accordance with that policy, for those services where the results of market research indicate that the service is not commercial, the local Competition Advocate must approve that determination before the acquisition can be processed as a non-FAR Part 12 acquisition.

Contracts for commercial items may be firm-fixed-price or fixed-price with economic price adjustment. Indefinite-delivery contracts may be used, but only when the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. All other types are prohibited. (FAR 12.207.) For example, labor-hour type contracts and task orders are prohibited at this time, although there is a move afoot to amend FAR Part 12 to allow for them.

Commercial item acquisitions are synopsisized in accordance with FAR Subpart 5.3. However, the Contracting Officer may release the solicitation less than 15 days after the synopsis. (FAR 12.204.) In addition, the Contracting Officer may require proposals to be submitted less than 30 days after release of the solicitation, unless the acquisition is subject to the North American Free Trade Agreement (NAFTA) or the Trade Agreements Act. (FAR 12.205(c).) To save more time, the Contracting Officer may issue a combined synopsis and solicitation not exceeding 3-1/2 single-spaced pages. (FAR 12.603.)

Solicitations for commercial items are simpler than those for non-commercial acquisitions. The Contracting Officer normally must use Standard Form 1449, Solicitation/Contract/Order for Commercial Items. (FAR 12.204(a).) Five standard provisions, FAR 52.212-1 through 52.212-5, are provided for use. (FAR 12.301(b), (c).) Some of these provisions may be tailored, and within limits the solicitation as a whole may be tailored by addenda containing additional FAR provisions and clauses, and agency provisions and clauses. (FAR 12.301(e), (f).) By law, solicitations or contracts for commercial items shall, to the maximum extent practicable, include only those clauses required to implement provisions of law or executive orders applicable to commercial items, or determined to be consistent with customary commercial practice. (FAR 12.301(a).)

Among the required provisions, two are not tailorable. These are: FAR 52.212-3, Offeror Representations and Certifications—Commercial Items; and FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items. (FAR 12.301(b)(2) and (4).) Two other required provisions may be tailored in whole or part. These are: FAR 52.212-1, Instructions to Offerors—Commercial Items; and FAR 12.212-4, Contract Terms and Conditions—Commercial Items. (FAR 12.301(b)(1) and (3).) The second of these clauses contains some sections that may not be tailored. (FAR 12.302(b).) A fifth provision, FAR 52.212-2, Evaluation-Commercial Items, is optional and may be tailored. (FAR 12.301(c)(1), 12.602.)

Other FAR provisions and clauses may be included in the solicitation, by addendum, when their use is consistent with the limitations of FAR 12.302. These include, for example, indefinite delivery and option provisions. (FAR 12.301(e).) Any such provisions considered for inclusion must not be inconsistent with customary commercial practice for the item being acquired. (FAR 12.302(c).)

As mentioned, the clauses at FAR 52.212-1 and 52.212-4 may be tailored. (FAR 12.302(a).) In addition, discretionary FAR provisions and clauses may be tailored in accordance with the instructions for their use. All such tailoring must not be inconsistent with customary commercial practice, unless a waiver for inconsistent tailoring is approved in accordance with agency procedures. (FAR 12.302(c).) Within DOD, the head of the contracting activity is the approval authority for such waivers. (DFARS 212.302(c).)

Agencies may supplement the prescribed clauses as necessary to reflect agency unique statutes or as approved by the senior procurement executive or FAR Council representative. (FAR 12.301(f).) The DOD has exercised this authority in DFARS 212.301. Two provisions used in all solicitations are DFARS 252.212-7000, Offeror Representations and Certifications—Commercial Items; and DFARS 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items. (DFARS 212.301(f)(ii) and (iii).) Other provisions to be used when prescribed concern Central Contractor Registration, Trade Agreements, and the prohibition against award to companies owned by the People’s Republic of China. (DFARS 212.301(f)(i), (iv) and (v).)

Inspection and acceptance are discussed in the clause at FAR 52.212-4, at paragraph (a). Contracts for commercial items normally will not provide for in-process inspection by the Government, relying instead on the contractors’ quality assurance systems, unless in-process inspection is a customary commercial practice. (FAR 12.208.) However, the Government always has the right to reject non-conforming items before acceptance. (12.402(a).) The Government may require repair or replacement of non-conforming supplies or re-performance of non-conforming services at no increase in price. These rights may be exercised before or after acceptance. However, if after acceptance, they must be exercised within a reasonable time after any defect was or should have been discovered, and before any substantial change occurs in the condition of the item unless the change is due to the defect in the item. (FAR 52.212-4(a).) Alternative inspection procedures may be included in the solicitation, as appropriate, considering the complexity or criticality of the commercial item. (FAR 12.402(b).)

Paragraph (o) of FAR 52.212-4 provides for implied warranties of merchantability for ordinary purposes, and fitness for a particular purpose described in the contract. (See also FAR 12.404(a).) In addition to the warranty coverage in the clause, the FAR requires Contracting Officers to take advantage of express warranties offered by vendors. To the extent possible, the solicitation should require that express warranties provided to the Government be at least equal to commercial warranties provided to the public. The Government may specify minimum terms, such as minimum duration. (FAR 12.404(b).) Note that a contractor is permitted to offer an

express warranty that excludes the implied warranties as long as provision is made for repair or replacement of defective items discovered within a reasonable time after acceptance. (FAR 12.404(b)(2).)

Under the prescribed Changes provision, a unilateral change(s) to contract terms and conditions is not authorized. Changes may be made only by mutual agreement of the parties. (FAR 52.212-4(c).)

For commercial items, termination is governed by FAR Part 12. FAR Part 49 does not apply, although it may be used for guidance to the extent not inconsistent. (FAR 12.403(a).) In termination for cause (i.e., default), the Government is not liable for any amount for supplies or services not accepted. The Government has available against the contractor all rights and remedies available at law. (FAR 52.212-4(m).) The preferred remedy is recovery of excess procurement costs. (FAR 12.403(c)(2).) The process for convenience termination is simplified. The Government is liable to the contractor for a percentage of the price reflecting the percentage of work performed prior to the notice of termination, plus reasonable charges resulting from the termination. The contract cost principles of FAR Part 31 and the cost accounting standards are not applicable, and the Government has no right to audit the contractor's records. (FAR 12.403(d), FAR 52.212-4(l).) Generally, the parties should mutually agree on the requirements of the termination proposal. (FAR 12.403(d)(2).)

For commercial item acquisitions, certain laws have been modified or have been made inapplicable. These laws are listed at FAR 12.503 for contracts, and at FAR 12.504 for subcontracts. Examples include the Walsh-Healey Public Contracts Act, the Truth in Negotiations Act, and the Cost Accounting Standards. The FAR Part 12 provisions reflect the inapplicability, or the modified applicability, of these laws to contracts and subcontracts for commercial items.

Instructions to offerors are set forth in the clause at FAR 52.212-1. These include information about the applicable small business size standard; how to prepare an offer; the period within which the Government can accept an offer; any requirements for submission of samples; permission to submit multiple offers; rules on late submissions; evaluation, selection, and award procedures; the right of the Government to make multiple awards; and where to obtain Government-issued requirements documents. Additionally, it should be noted that, if an offer is submitted electronically, it must be received "at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for the receipt of offers." (FAR 52.212-1, para. (f)(2)(i)(A).)

As required by paragraph (b), Submission of Offers, in FAR 52.212-1, offers must show the solicitation number; the time specified for receipt of offers; the offeror's name, address and telephone number; a technical description of the items offered, including product literature; the terms of any express warranty; the price and any discount terms; a remittance address for receipt of payments from the Government; a completed copy of the representations and certifications in

FAR 52.212-3; acknowledgement of solicitation amendments; past performance information; and a statement indicating the extent of the offeror's agreement with all terms, conditions, and provisions in the solicitation.

In the clause at FAR 52.212-2, a standard evaluation provision is provided for use when evaluation criteria or factors are specified. (Ref. FAR 12.301(c)(1).) It assumes that the basis for award will be best value with a tradeoff process. The clause should be used substantially as written in the FAR (FAR 12.602(a)), but it must also be tailored to set forth the desired evaluation criteria and indicate their relative importance or weight. Depending on the complexity of the commercial items being procured, the criteria need not be more detailed than Technical, Past Performance, and Price. For the Technical factor, the Government need not list subfactors if the solicitation adequately describes the item to be acquired; it may be sufficient to consider simply how well the proposed products meet the Government's requirements. (FAR 12.602(b).)

Concerning acquisition of commercial computer software and commercial software documentation, the Government is to acquire these under the licenses customarily provided by the vendor to the public, unless the licenses do not meet agency needs, or are inconsistent with federal law. (FAR 12.212(a), DFARS 227.7202-1(a).) In addition, the Government is subject to two general prohibitions, each of which has an exception. (1) Vendors shall not be required to furnish technical information not customarily provided to the public, except for information documenting specific modifications made at Government expense. (2) Vendors shall not be required to relinquish, to the Government, the rights to use, modify, reproduce, release, perform, display or disclose software or documentation, except for a transfer of such rights by mutual agreement. (DFARS 227.7202-1(c).) In general, the Government has only the rights set forth in the license. If additional rights are needed, they must be negotiated and described in the license or an addendum thereto. (DFARS 227.7202-3.) No clause setting forth the Government's rights in commercial computer software or documentation is prescribed. (DFARS 227.7202-4.)

CAC-W has been acquiring commercial IT for many years, beginning long before passage of the commercial item statutes, and issuance of the commercial item regulations, noted above. The remainder of this paper discusses some of the practices followed by CAC-W in its conduct of those acquisitions.

Government users desire quality computers and related products. In order to provide this quality, two provisions are normally included in solicitations issued by CAC-W. (1) A preference is specified for the computer products of manufacturers listed in a "Tiering" model maintained by Gartner Group. Solicitation evaluation criteria provide that extra value will be granted for proposals offering the products of tier manufacturers, companies that, according to the Gartner Group model, manufacture quality computer products. The criteria also provide for evaluation credit for products that can be shown to be equivalent under the model that the Gartner Group uses in making its tier listings. (2) Deferred compliance is specified for International Standards Organization (ISO) 9000 or 9002 registration by the successful

contractor. In other words, the offerors are not required to be registered at the time of proposal submission or award, or sometimes even at the time of the first delivery. For offerors that have already achieved ISO registration, or have made significant progress toward achieving it, the solicitation evaluation criteria allow for the assignment of added value.

Computer processor chips are largely standardized on Intel. While Intel products are preferred by Government users, purchase of such products on a sole source basis cannot necessarily be justified. To avoid imposing overly restrictive requirements on vendors, a processor requirement is normally stated as “Intel or equal.” A specified commercial benchmark test is sometimes required and, in that event, a performance benchmark target is specified against which the offered processor is measured. Other chips exist, such as those manufactured by AMD, and Intel is not always offered, so competition is promoted by this approach.

Computer equipment is required to comply with certain standards. Examples of these standards include Federal Communications Commission Class B, Underwriters Laboratories, and EPA Energy Star. Computer technology changes continuously, and the definition of commercial items necessarily embraces newly evolved, as well as modified, products. Due to regulatory drag, newly evolved commercial products may not have confirmation that they comply with all of the standards by the date of proposal submission, or even award. In the past, disappointed offerors would sometimes seize upon such noncompliance with one of the standards at the time of award, and file a protest. To counter this, solicitations issued at CAC-W sometimes specify compliance by the date of first delivery for requirements such as these. Later compliance dates may be specified for other requirements that may be expensive or time-consuming, such as ISO registration.

Historically, some CAC-W solicitations for commercial item IT have resulted in large, fixed-price, indefinite-delivery indefinite-quantity (IDIQ) contracts that contain shopping lists of computer products. For many of these acquisitions, multiple contract awards are made. The concept behind this is to provide contractors with an incentive for competitive pricing and excellent performance, at the risk of losing business to the other awardee, order by order. The number of contract awards is limited, generally to two. To have more than two has generally been deemed undesirable as it may result in a volume of orders for each contractor that is insufficient to make the contractors responsive and cooperative.

When a contractor is preparing to ship items from its facility to the Government, a representative of the contract administration office ordinarily signs or stamps the shipping papers to release them for shipment. For shipments of commercial items, alternate release procedures are available under which the contractor assumes the responsibility for releasing the items for shipment without waiting for contract administration personnel to sign the papers. (DFARS 246.471(a).) At CAC-W, alternate release procedures have typically been authorized for IDIQ commercial item IT contracts. This makes possible the avoidance of unnecessary delays.

Most CAC-W IDIQ contracts provide for decentralized ordering, which means that ordering is generally done at contracting offices other than CAC-W. In the past, contractors had some difficulty in obtaining timely payment under such contracts because the local ordering offices did not provide the paperwork supporting payment in a timely manner. The contractors ended up with huge amounts owed to them by the Government, and concomitant cash flow difficulties. CAC-W often had to intervene to solve the problem. As a result, CAC-W's IDIQ contracts typically provide for acceptance at origin, to help contractors receive payment for their deliveries more quickly.

As mentioned above, the FAR prescribes broad, general warranties for commercial item contracts, but allows for Government specification of minimum warranty terms. (FAR 12.404.) CAC-W's large IT contracts generally set forth a number of minimum Government requirements for equipment warranty. These requirements include on-site repair or replacement within CONUS and certain key OCONUS locations, with offerors given the choice of service type (e.g., mail-in) for remote locations. The turn-around time for repairs is normally two days for CONUS, and longer times for other locations. Provision is also made that insertion by the Government of third-party components, into the system provided by the offeror, will not void the warranty. Duration of warranty periods has typically been specified as three to five years. Offerors have been able to support the five-year warranty. However, the longer term has a higher cost, and technological changes occur at a rapid pace. A shorter warranty period may, therefore, be more appropriate. For software, a commercial warranty typically provides for releases or iterations, based on the original product, which correct problems and add some functionality. CAC-W contracts normally require this level of support, as a minimum. Government warranty requirements beyond the commercial warranty are also set forth. Further, in order to distinguish a normal software release from an upgrade that is a new product and, therefore, not subject to the warranty, CAC-W solicitations typically make clear that the software warranty covers only releases that are provided at no extra charge to the public, and are not regarded by the vendor as new products.

Minimum software license rights are specified by CAC-W solicitations in accordance with FAR 12.212 and DFARS 227.7202-1. Generally, the Government's software requirements can be satisfied by a license to use one copy of the software on a single computer. Many CAC-W offerors are not manufacturers, but integrators who will buy software from the manufacturers. As a result, the CAC-W solicitation typically states that the licenses for such software will be in the name of the U.S. Government, not that of the offeror. Also, perpetual licenses are often prescribed. These permit the Government to continue using the software even after it may no longer be supported commercially, without any further payment such as an annual license fee. The up-front cost of a perpetual license, however, will typically be higher. In addition, offerors sometimes propose licenses under which computer manufacturers pre-load software onto equipment. Although these are cheaper than standalone licenses bought separately from equipment, they may not satisfy the needs of the user. If so, the solicitation should require the standalone software licenses. Finally, Original Equipment Manufacturer (OEM) commercial

licenses provided by vendors need to be carefully reviewed for provisions that are inconsistent with federal law.

Due to the rapid pace of advances in IT, and the equally rapid obsolescence of most products, a technology refreshment provision is an essential term of any IT acquisition for commercial items. CAC-W IT procurements include a provision that permits additions and substitutions that are within the scope of the contract as awarded. Additions include upgrades of existing items covered by the contract, or new advances in technology. The price for such additions is negotiable. Substitutions cover replacement of existing items, generally those that have gone out of production, or are no longer supported by the manufacturer. Substitutes must have equal or better functionality than the replaced items, and generally must be offered at no increase in price. The price cap on substitutions is intended to preserve the value of the original competition. The contractor is obliged to provide a product, at the price originally proposed, for the entire ordering period of the contract. However, the commercial marketplace is not absolutely predictable. Therefore, when through no fault of its own, a contractor cannot feasibly substitute a product at the price originally proposed, the technology refreshment provision authorizes the parties to proceed as mutually agreed. When justified, this may result in the reservation of the CLIN for the discontinued product, or the inclusion of a substitute at an increase in price.

Technical acceptability of offered products may be established by a global certification executed by the offeror. With this technique, the offeror certifies that its offer complies with all technical requirements. Global certification reduces the need for lengthy technical proposals, large numbers of evaluators, and the time needed for evaluation. The General Accounting Office has decided that global certification is an adequate substitute for a more comprehensive technical evaluation of acceptability, unless the Government has reason to know that the proposal is noncompliant in some respect. When using global certification, CAC-W does not solicit detailed proposal information on acceptability, or technical literature. If technical literature is received, however, it would have to be scrutinized for noncompliance in order to eliminate protest risk.

CAC-W solicitations often include a matrix allowing offerors to identify features of their offered products deemed worthy of favorable consideration under the evaluation criteria. Offerors fill in blanks in the matrix, identifying the benefits they believe the Government should reflect in its evaluation report.

In some procurements, offerors have been required to provide sample computer configurations. Examination of such samples can be useful when the physical durability of the system or its performance capabilities are important evaluation considerations. However, such a requirement adds time to the evaluation process. Other more efficient ways to address the underlying concerns may be available. For example, if the offers come from the Gartner Group tiering model and ISO-compliant firms, there is a strong indication of quality.

In the past, offerors have disrupted the evaluation process by unexpectedly changing their solutions without Government prompting and after the evaluation was substantially complete. CAC-W has dealt with this by occasionally implementing a “freeze” rule. The rule is intended to discipline offerors to complete their homework before proposals are submitted, and to select solutions that will not substantially change. The freeze rule forbids any change in technical solutions except in response to a specific item for negotiation or a solicitation amendment that changes solicitation requirements.

Flat pricing is a technique used by CAC-W in commercial item IT procurements to prevent offerors from unrealistically discounting out year pricing to gain a price evaluation advantage. In the past, some offerors proposed low prices for products in the later years of a contract with the expectation that they would never have to deliver those products because user demand for them would disappear as a result of obsolescence or advances in technology. At the same time, higher base-year prices ensured that these offerors would earn a larger portion of their revenue early in the lives of their contracts. In these ways, they would often obtain an advantage over offerors who seriously undertook to provide the proposed product or a substitute at a reasonable price over the entire contract period. This practice made it difficult for the Government to conduct a fair price evaluation. In response, CAC-W has sometimes imposed a requirement that a single, or “flat,” price be proposed for a CLIN over the life of the contract, usually five years or less, and that the contractor explicitly agree to provide the product proposed or an equivalent substitute over the contract term. Vendor response has been favorable, and flat pricing has worked well during contract administration.

In conclusion, it is important for acquisition professionals who acquire commercial item IT, and their counsel, to be aware of FAR Part 12. The potential benefits to the Government from use of the commercial item procedures cannot be overestimated.

The Points of Contact for this subject in the CECOM Legal Office are Richard McGinnis, (703) 325-5981; DSN 221-5981, and Percival Park, (703) 325-3304; DSN 221-3304.

KATHRYN T. H. SZYMANSKI
Chief Counsel

Process for Maintaining Our Patent Portfolio

As part of the harmonization of the US patent system to make it more in line with the patent systems of European countries, a requirement of periodic payment of fees was introduced so that only valuable patents are kept in force. Under the provisions of 35 USC 41(b), three separate fees must be paid to maintain a patent in force. The fees are due 3 years and 6 months, 7 years and 6 months, and 11 years and 6 months from the date of issuance of the patent. Failure to pay these maintenance fees results in the lapse of the patent. As it is DA policy to maintain in force only those Army-owned patents in which an Army agency or activity has a substantial interest and for which a clear commercial potential can be demonstrated, TACOM-ARDEC utilizes the following memorandum to ensure timely payment of fees. A link to the patent on the USPTO web page and the relevant section on maintenance fees from AR 27-60 conveniently is provided.

SAMPLE MEMORANDUM

SUSPENSE :

AMSTA-AR-GCL

DATE

MEMORANDUM FOR ORGANIZATION

SUBJECT: MAINTENANCE FEES ON PATENT 1,234,456, ISSUED ON
DATE, BY INVENTOR NAME FOR TITLE OF PATENT

1. This inquiry will aid in determining whether the Government should pay, or continue to pay, the periodic fees required by the United States Patent Office in Washington, to keep this patent in force. Several thousand dollars must be paid on three occasions, starting 3 _ years following the issue date of the patent, or else the patent will lapse. Observance of the suspense date will allow the Army to avoid additional surcharge fees due to the late payment of the basic fees.

2. If you believe that payment of these fees should be continued by the Government, please briefly indicate that decision together with your reasoning. Facts that might be taken into consideration include: that the invention in the patent is used or is expected to be put into actual use by

the Government, or if the patent is expected to be licensed out by the U.S. Army to commercial companies to bring in royalty income for the Government. You may view the patent at the link below.

3. Thank you for your response. If there is any question, please contact the undersigned at ext. 3449, or Mr. John F. Moran, Chief of Intellectual Property at ext. 6590.

KATHRYN VANDER SANDE
Paralegal Specialist Patents
Intellectual Property Law Team

[http://Patent Link](#)



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Maintenance Fe...

GUIDE TO ADVERSE ACTIONS

Introduction

The Civil Service Reform Act, at 5 USC Chapter 75, provides the legal framework for formally addressing employee misconduct problems.¹ Misconduct includes, but is not limited to, actions violating laws, regulations, and Department policies.

Some examples of actionable misconduct include: violation of criminal statutes; abuse of leave; falsification of travel vouchers, time and attendance records, or other official documents; making false statements; misuse of Government time or property; violation of Standards of Conduct; disruptive behavior; disrespectful conduct; failure to follow instructions; and insubordination.²

An employee may be disciplined only for such cause as will promote the efficiency of the service. This means that the employee's misconduct interferes with the Department's ability to carry out its mission.

Chapter 75 relates specifically to adverse actions, that is, suspensions of 14 days or less, suspensions of 14 days or more, removals, and reductions in grade or pay.³

This short Guide is not intended to be all-inclusive. Applicable laws, rules and regulations may change, and case law further defines the requirements.

Procedural Requirements

Suspensions for 14 days or less require a written notice from the proposing official (generally the first-line supervisor) with specific reasons for the proposal; the right to review the material relied on to support the reasons for the action; a reasonable time within which to answer orally and/or in writing, and to furnish affidavits and other documents in support of the evidence;⁴ the right to be represented; and a written decision by a deciding official (at a higher

¹ OPM has established government-wide standards implementing the provisions of Chapter 75. These are found at 5 CFR Part 752. Moreover, the Department has issued Personnel Management Instructions (PMIs) relating to Discipline (PMI 751-1), Adverse Actions (PMI 752-1), and Courtesy (PMI 735-1).

² In certain instances, the provisions of Chapter 75 can also be used to discipline an employee for unacceptable performance.

³ Informal disciplinary actions outside of Chapter 75 are also available to supervisors. These include counseling, oral and written admonishments, and reprimands. Supervisors should consult PMI 751-1, Discipline, and the Collective Bargaining Agreement (CBA), if applicable, regarding procedures for taking these actions.

⁴ Departmental policy is to provide 7 calendar days for non-bargaining unit employees; the CBA requires 10 working days for bargaining unit employees.

level than the proposing official) specifying reasons for the decision and considering the employee's response.

Removals, reductions in grade or pay, and suspensions for more than 14 days require, in addition to the above requirements, 30 calendar days' advance written notice with specific reasons for the action,⁵ and a reasonable time, but not less than 7 days, to respond to the proposal.

Upon written request, an employee may receive up to 4 hours of official time (up to 8 hours in exceptional circumstances) for preparation of a reply.

If the proposed action is sustained by the deciding official, the action can be effected no sooner than 30 calendar days after the employee's receipt of the written proposal.⁶

Substantive Requirements

Proposing and deciding officials must address three substantive areas in their notifications to an employee. In addition, the deciding official must consider and respond to any arguments or documentary evidence that the employee has provided in response to the proposal.

Establishment of Charged Misconduct

First, the officials must determine, through an appropriate investigation into the allegations at issue,⁷ that misconduct has in fact occurred based on detailed and specific information. Such information may include, as appropriate, the employee's duties; the offense committed, and where, when, and how it occurred; what law, rule, regulation, policy, or standard of conduct was violated; whether the matter was discussed with the employee and, if so, what the employee's explanation was; whether there were any witnesses to the incident.

Where the employee's behavior appears to involve violation(s) of criminal law, the supervisor should refer the matter to the Office of the Inspector General (OIG) for consideration of an investigation.⁸

⁵ Less than 30 days' notice can be given if the Department has reason to believe that the employee has committed a crime for which imprisonment may be imposed.

⁶ If the employee is a bargaining unit employee, the action cannot be effected until the 6th work day after the final decision is issued; if the employee files a grievance, the effective date is stayed until a grievance decision is issued.

⁷ It is important to note that the Privacy Act requires federal agencies, when gathering information that may lead to an adverse determination about an individual, to obtain that information directly from the individual to the greatest extent practicable. See Dong v. Smithsonian, 125 F.3d 877 (D.C. Cir.)

⁸ The OIG may decline to investigate. If the OIG investigates and finds violations of criminal law, it may refer the matter to the U.S. Attorney's Office, which may decide to prosecute or to decline prosecution in lieu of administrative action by the Department.

The facts should be documented, as appropriate, through affidavits, witness statements, investigative reports, police reports, indictments, official records, relevant statutes, regulations, policy statements, and/or handbooks.

Specific reasons for the action should be characterized in terms of (1) a charge, that is a name, label or designation that generally characterizes the misconduct; and (2) a narrative description setting forth the details of the charged misconduct. While it is not mandatory that misconduct be labeled with a charge, the general practice at the Department is that a charge is articulated. The Department must be prepared to prove all of the elements that constitute a charge. There may be several instances or specifications of similar misconduct under a specific charge.

Establishment of Nexus

Second, the proposing official must determine whether there is a nexus between the employee's misconduct and the efficiency of the service. Generally, if the misconduct occurred while the employee was on duty, nexus is presumed. If the misconduct occurred off-duty, nexus must be established.

Determination of Penalty

Finally, the proposing official must determine the appropriate reasonable penalty, applying the 12 factors enumerated in Douglas v. Veterans Administration, 5 M.S.P.B. 313 (1981).⁹

The disciplinary framework for federal employees is based on the concept of progressive discipline, on the rationale that, except in the most egregious cases, adverse actions are intended to be corrective rather than punitive. Thus,

⁹ The 12 "Douglas factors" include: 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with an applicable table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

a supervisor should generally take only the minimum action necessary to correct the behavior. If the behavior does not improve, then actions should increase in severity.

Appeal Rights

All employees may appeal adverse actions alleged to be discriminatory through the EEO complaint procedures.¹⁰ Bargaining unit employees may appeal such matters through the negotiated grievance procedure.¹¹

Competitive service or preference eligible employees in the excepted service, and certain nonpreference eligible employees in the excepted service, may appeal severe actions such as suspensions exceeding 14 days, removals, or reductions in grade to the Merit Systems Protection Board (MSPB).¹² At the MSPB, the Department must establish by a preponderance of the evidence that the employee engaged in the misconduct of which he/she is accused, that action is warranted for the efficiency of the service, and that the penalty chosen is reasonable. The MSPB has the right to review whether an imposed penalty is the maximum reasonable penalty for a proven offense and is not an abuse of discretion.

General Information

If there is any reason to suspect a physical, mental, or emotional basis for the conduct problem, the supervisor must give the employee the opportunity to raise a medical basis for the problem, refer the employee to the Employee Assistance Program (EAP), rule on requests for reasonable accommodation, if any, and document all of the above.¹³ However, a supervisor should not tell the

¹⁰ The Department has established an Informal Dispute Resolution (IDR) Center as the first step for employee workplace disputes, disagreements, or complaints. The EEO process begins here as well. To initiate the EEO process, an employee must contact the IDR Center within 45 calendar days of the allegedly discriminatory agency action. The IDR Center is located at 490 L'Enfant Plaza, S.W., Suite 2100A, Washington, D.C. 20024; phone: (202) 619-9700; TTY: (202) 619-9731. If informal counseling does not resolve the matter, the employee receives a Notice of Right to File a formal EEO complaint. Complaints are filed with the Equal Employment Opportunity Group (EEOG) within 15 calendar days of receipt of a Notice of Right to File. EEOG is located at 400 Maryland Avenue, S.W., Room 2W240, Washington, D.C. 20202; phone: (202) 401-3560. If an employee files an EEO complaint, investigators under contract with the Department investigate the complaint and prepare a Report of Investigation. After receipt of the Report, an employee has the right to request a hearing before an Equal Employment Opportunity Commission (EEOC) Administrative Judge, or a Final Agency Decision from the Department. If the employee requests a hearing, the EEOC Administrative Judge issues a decision on the merits after the hearing.

¹¹ See Footnote 6, supra.

¹² To determine whether an employee is entitled to appeal rights to the MSPB, a supervisor should consult with the Employee Relations Team to determine the employee's status.

¹³ The EAP is a free and voluntary professional counseling and referral service designed to help employees with problems on and off the job. Before referring an employee to EAP, a supervisor should consult with the Employees Relations Team (ERT) regarding procedures. The EAP's 24-hour phone numbers are: 1-800-222-0364 and 1-888-262-7847 (TTY).

employee that he/she believes that the employee has a given medical condition; a supervisor is not qualified to make such a diagnosis.

Even if an employee has a medical condition that is the cause of the misconduct, the employee may still be disciplined as long as employees who do not have medical conditions would be disciplined in a similar manner for a similar offense.

Pending a decision on a proposal to discipline, the Department cannot send the employee home on enforced leave.¹⁴ The employee can be sent home on paid administrative leave in appropriate circumstances.

In taking actions under Chapter 75, supervisors are to abide by the merit system principles enumerated in 5 USC 2301(b),¹⁵ and refrain from committing any prohibited personnel practices, as outlined in 5 USC 2302(b).¹⁶

Supervisors are encouraged to consult with the Employee Relations Team, Human Resources Group, for technical assistance with conduct problems; and with the Division of Business and Administrative Law, Office of the General Counsel, for advice on legal questions.

¹⁴ There are some specific situations when an employee can be placed on indefinite suspension pending a final decision if criminal misconduct is involved. The supervisor should consult the Employee Relations Team before taking any such action.

¹⁵ The merit system principles state, *inter alia*, that federal employees should be selected through fair and open competition based on ability, knowledge, and skills; receive fair and equitable treatment without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition; receive equal pay for equal work; be retained on the basis of the adequacy of their performance and separated if they cannot or will not improve their performance to meet required standards; be protected against arbitrary action, personal favoritism, coercion for partisan political purposes, and reprisal.

¹⁶ Prohibited personnel practices include, but are not limited to, discriminating for or against any employee or applicant based on race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation; coercing the political activity of any person or taking any action as reprisal for the person's refusal to engage in such political activity; discouraging or obstructing a person from competition for employment; granting a preference or advantage not authorized by law; taking or failing to take action against an employee because the employee has engaged in whistleblowing activity.

AUTOMATION TOOLS

CALCULATORS

Severance Pay Calculator (access through the ACC/DP web page. Click on Civilian Issues, then click on Severance Pay Calculator)

<https://wwwmil.acc.af.mil/dp/>

Federal Employees Retirement Calculator (both CSRS & FERS)

<http://www.seniors.gov/fedcalc.html>

Social Security Benefit Calculators

<http://www.ssa.gov/planners/calculators.htm>

Calculator (Projecting TSP Account Balance, Annuity Calculator & Retirement Planner)

<http://www.tsp.gov/calc/index.html>

Life Insurance Calculator

<http://www.opm.gov/calculator/index.htm>

CSRS Retirement Calculator

<http://www.finance.gsa.gov/csrs/>

Military Deposit Calculator

<http://www.opm.gov/asd/htm/mildep.htm>

NAF Portability Calculator

<http://www.opm.gov/asd/naf/naf-1.htm>

EMPLOYEE/APPLICANT TOOLS

Determine your Military Spouse Preference Eligibility

<http://www.chrma.hqusareur.army.mil/staffing/asp/wizards/msp/default.asp>

Determine Your Veterans' Preference

<http://www.dol.gov/dol/vets/public/programs/programs/preference/mSERVICE.htm>

See if you are a VRA Eligible

<http://www.chrma.hqusareur.army.mil/staffing/asp/wizards/vra/VRAWizard.asp>

EMPLOYEE TOOLS

How to read an SF-50

<http://www.hrsc.osd.mil/sf50/sf50b.htm>

DFAS Employee/Member Service System (E/MSS)- E/MSS allows you, as a Department of Defense Military Member, Civilian Employee, Military Retiree or Annuitant to make certain changes to your pay information.

<https://emss.dfas.mil/emss.htm>

The Work Number (automated employment and income verification service)

<http://www.theworknumber.com>

Thrift Savings Plan

<http://www.tsp.gov/>

EEOC's Quick Start for Employees

<http://www.eeoc.gov/qs-employees.html>

TSP Account Access

<http://www.tsp.gov/account/index.html>

Social Security Retirement Planner

<http://www.ssa.gov/retire/>

DFAS Employee/Member Service System (E/MSS): make payroll changes on-line

<http://www.dfas.mil/emss/>

TRAVEL INFORMATION

Defense Table of Official Distance - automated capability used by the Department of Defense as its source of worldwide distance information (in miles and kilometers) for all household goods, freight, and travel needs.

<http://DTOD-mtmc.belvoir.army.mil/>

DoD Per Diem, Travel and Transportation

<http://www.dtic.mil/perdiem/>

Per Diem Rates

<http://www.dtic.mil/perdiem/pdrates.html>

Mileage Rate FAQs - PCS or MALT Mileage Rates vs TDY Mileage Rates

<http://www.dtic.mil/perdiem/faqmilea.html>

Defense Travel System

<http://www.dtic.mil/travelink/>

DLA'S Travel Webpage

<http://www.supply.dla.mil/travelpage/>

State Tax Exemption Table

<http://policyworks.gov/org/main/mt/homepage/mtt/PERDIEM/StTaxexemp.shtml>

Overseas Cost of Living Allowance Query

<http://www.dtic.mil/perdiem/ocform.html>

Military-Civilian Relocation Resources

<http://www.afcrossroads.com/>

Domestic Maximum Per Diem Rates

<http://policyworks.gov/org/main/mt/homepage/mtt/perdiem/perd01d.html>

Foreign Per Diem Rates

<http://www.state.gov/m/a/als/prdm/>

Premier Lodging Program (PLP) - Under this program, the government contracts with lodging properties in specific geographical areas, which guarantee rooms at a set rate within the established per diem.

<http://policyworks.gov/org/main/mt/homepage/mtt/perdiem/plp/plphp.html>

OTHER TOOLS

Questions and Answers Pertaining to the Veterans Employment Opportunities Act of 1998 as Amended

<http://www.opm.gov/veterans/html/veoq&a.HTM>

Extension of Veterans' Preference Questions and Answers

<http://www.opm.gov/veterans/html/VETQ&A.HTM>

Virtual Interactive Personnel (VIP) - DoD

<http://www.cpms.osd.mil/kbs/kbs.htm>

Expert Systems Employee Status, Negotiability, Leave & Absence, PCS, SCD Computation, Union Rep in Meetings, Setting Rates of Pay and Scale of Awards (last two geared to personnelists and management officials)

http://exsys.cpms.osd.mil:8080/kbs/p_expsys.htm

Selective Service – Verification

<http://www.sss.gov/regver/verification1.asp>

Addressing and Resolving Poor Performance – an OPM module developed for management officials

<http://www.opm.gov/er/poor/index.htm>

DoD Virtual Interactive Personnel System (VIP): general personnel information geared to managers and employees

<http://www.cpms.osd.mil/kbs/kbs.htm>

Field Advisory Services – FAS -Staffing & Development Branch Staffing Unit Documents

http://www.cpms.osd.mil/fas/staffing/staff_doc.htm

DoD Incentives & Recognition - awards & rewards to recognize individual and group performance

http://web1.deskbook.osd.mil/htmlfiles/dby_awards.asp

CAP : Requests (Computer/Electronic Accommodations Program)

<http://www.tricare.osd.mil/cap/requests/requests.htm>

The Injury and Unemployment Tracking System

<http://www.cpms.osd.mil/icuc/icuc.htm>

Air Force Pipeline Reemployment Program – Includes overview, procedures and sample request letter

<http://www.cpms.osd.mil/icuc/pipeline.htm>

INJURY COMPENSATION TUTORIALS

<http://www.cpms.osd.mil/icuc/tutor.htm>

Effects of Nonpay Status on Service Dates

<http://www.ita.doc.gov/hrm/nopayscd.html>

GUIDE TO ADDRESSING EMPLOYEE PERFORMANCE PROBLEMS

Introduction

The Civil Service Reform Act, at 5 USC Chapter 43,¹ provides the legal framework for monitoring and evaluating employee performance, and for taking corrective action if an employee's performance is unacceptable.²

If an employee's performance is unacceptable, the Department may remove or reduce in grade the employee, following appropriate procedures.³

This short Guide is not intended to be all-inclusive. Applicable laws, rules and regulations may change, and case law further defines the requirements.

General Performance Appraisal System

The Department's OPM-approved General Performance Appraisal System (GPAS) forms the basis for taking action against an employee for unacceptable performance. The GPAS provides the means for a supervisor to monitor and evaluate an employee's work.

The basis of the GPAS system is the performance agreement. At the beginning of the rating period,⁴ or soon after an employee enters on board, a supervisor must establish a performance agreement in consultation with the employee.

A performance agreement is a written document that includes critical and non-critical performance elements (a description of the employee's duties) and performance standards for each element (how well, how quickly, and how much the employee is expected to do).

Under the Department's GPAS system, an employee's supervisor, designated customers and co-workers, and the employee him/herself have an opportunity to provide comments on the employee's performance and rate him/her numerically from 1-10 (10 being the highest). The purpose of the feedback and rating is for developmental purposes only. The employee's supervisor

¹ OPM has established government-wide standards implementing the provisions of Chapter 43. These are found at 5 CFR Part 430. The Department also has issued related Personnel Manual Instructions (PMIs). These are PMI 430-2, General Performance Appraisal System; and PMI 432-1, Reduction in Grade or Removal Based on Unacceptable Performance.

² While unacceptable performance is generally best dealt with under Chapter 43, in certain circumstances, it may be advisable to take action under 5 USC Chapter 75, the provision relating to employee misconduct.

³ The procedures described in this document do not apply to employees still in a probationary or trial period. A supervisor should contact the Employee Relations Team for information on removal of probationary or trial period employees.

⁴ The Department has three rating cycles: May 1-April 30 for non-rating officials; June 1-May 31 for rating officials; and July 1-June 30 for SES employees.

ultimately retains the discretion to establish the Rating of Record, which constitutes either a Pass or a Fail rating. An approving official reviews the Rating of Record.

An employee's performance is unacceptable when he/she fails to meet the performance standards of at least one critical element of his/her performance agreement.

During the rating period, a supervisor is expected to monitor the employee's work in light of the elements and standards, and to hold at least one oral progress review in the middle of the appraisal period.⁵

At the end of the rating period, the supervisor gives the employee his/her annual Rating of Record and discusses performance.

If the employee's performance falls to the "Fail" level at any time during, or at the end of, the rating period, the supervisor should notify the employee that his/her performance has fallen to the "Fail" level and commence further action as discussed below.

Notice of Opportunity to Improve Period

At this point, the supervisor may take informal steps to improve the employee's performance deficiencies and/or prepare a written Notice of Opportunity to Improve. This notice must include the specific critical elements rated Fail; specific examples of the employee's Fail performance; the length of the opportunity to improve period; guidance on how to improve performance; specifics on what constitutes Pass performance; and consequences of failure to improve.⁶

During the opportunity period, the supervisor should provide assistance to the employee, document feedback and assistance provided, and document results (i.e., examples of employee's performance).

If there is any reason to suspect a physical, mental, or emotional basis for the performance problem, the supervisor must give the employee the opportunity to raise a medical basis for the problem, refer the employee to the Employee

⁵ If an employee is a bargaining unit employee, the supervisor should also consult the Collective Bargaining Agreement (CBA) because in certain situations, bargaining unit employees have additional rights. For example, if a bargaining unit employee's work has fallen below the acceptable level, he/she is entitled to quarterly progress reviews.

⁶ There is no set time period for an opportunity period. The Department's policy is that a minimum of 30 calendar days will be given. However, for most positions, a longer opportunity period would likely be more appropriate.

Assistance Program (EAP),⁷ rule on requests for reasonable accommodation, if any, and document all of the above.

If, as the result of the opportunity period, the employee's performance rises to the Pass level, the employee should be so notified. An employee must sustain performance at the Pass level for one year from the beginning of the opportunity period. Otherwise, action to remove or reduce in grade may be commenced.

Removal or Reduction In Grade

If the employee's performance remains at the Fail level at the end of the opportunity period, the supervisor may issue a notice of proposal to remove or to reduce in grade.

Written documentation of the employee's unacceptable performance and the supervisor's assistance to the employee is crucial to support an action based on unacceptable performance.

A Notice of Proposal to Remove or Demote must provide the employee 30 calendar days' written notice before an action is actually taken; specify instances of Fail performance occurring in the past year and critical elements involved; and grant the employee an opportunity to respond orally and/or in writing to the deciding official, who must be at least one level higher than the proposing official.

The deciding official must review the notice of proposal to remove or reduce in grade and supporting documentation, and consider the employee's response(s), if any, before issuing a written decision as soon as possible, but no later than 30 days, after the date of expiration of the notice period.⁸

The written decision should include reasons for the action, including instances of unacceptable performance; the supervisor's attempts to assist the employee; a discussion of the employee's response, if any; the effective date of the action; and appeal rights.

Appeal Rights

An employee has a choice of appeal venues, depending on his/her status. However, an employee may select only one venue.

⁷ The EAP is a free and voluntary professional counseling and referral service designed to help employees with problems on and off the job. Before referring an employee to EAP, a supervisor should consult with the Employee Relations Team (ERT) regarding procedures. The EAP's 24-hour phone numbers are: 1-800-222-0364 and 1-888-262-7848 (TTY).

⁸ The notice period may be extended an additional 30 days under regulations prescribed by the head of the agency. Any longer extensions can be made only in accordance with OPM regulations.

All employees have the right to avail themselves of the Equal Employment Opportunity (EEO) process, where it is alleged that a decision to remove or reduce in grade was based on illegal discrimination.⁹ However, the EEO process is limited to determining whether an employee has been discriminated against, and does not *per se* review the appropriateness of the procedures or substance of the removal.

Bargaining unit employees have the right to avail themselves of the negotiated grievance procedure under the Collective Bargaining Agreement (CBA). The union may take the grievance to arbitration. Arbitration is a type of quasi-adjudication in which the Department and the employee, represented by the Union, argue their respective cases before an impartial arbitrator, who issues a binding decision. Arbitration procedures are set forth in Article 43 of the CBA.

Competitive service or preference eligible employees in the excepted service, and certain nonpreference eligible employees in the excepted service, may appeal performance-based actions to the Merit Systems Protection Board (MSPB).¹⁰

If an employee elects to appeal to the MSPB, the Department must prove, by substantial evidence, that it complied with the procedural requirements of 5 USC Chapter 43 and that the employee failed to meet the standards of at least one critical performance element. The MSPB will not review or mitigate the deciding official's choice of penalty. The employee may assert affirmative defenses, including allegations of discrimination, in an MSPB appeal.

⁹ The Department has established an Informal Dispute Resolution (IDR) Center as the first step for employee workplace disputes, disagreements, or complaints. The EEO process begins here as well. To initiate the EEO process, an employee must contact the IDR Center within 45 calendar days of the allegedly discriminatory agency action. The IDR Center is located at 490 L'Enfant Plaza, S.W., Suite 2100A, Washington, D.C. 20024; phone: (202) 619-9700; TTY: (202) 619-9731. If informal counseling does not resolve the matter, the employee receives a Notice of Right to File a formal EEO complaint. Complaints are filed with the Equal Employment Opportunity Group (EEOG) within 15 calendar days of receipt of a Notice of Right to File. EEOG is located at 400 Maryland Avenue, S.W., Room 2W240, Washington, D.C. 20202; phone: (202) 401-3560. If an employee files an EEO complaint, investigators under contract with the Department investigate the complaint and prepare a Report of Investigation. After receipt of the Report, an employee has the right to request a hearing before an Equal Employment Opportunity Commission (EEOC) Administrative Judge, or a Final Agency Decision from the Department. If the employee requests a hearing, the EEOC Administrative Judge issues a decision on the matter after the hearing.

¹⁰To determine whether an employee is entitled to appeal rights to the MSPB, a supervisor should consult with the Employee Relations Team to determine the employee's status.

General Information

In taking actions under Chapter 43, supervisors should adhere to the merit system principles enumerated in 5 USC 2301(b).¹¹ Supervisors should also be aware of and avoid committing any prohibited personnel practices, as outlined in 5 USC 2302(b).¹²

Supervisors are encouraged to consult with the Employee Relations Team, Human Resources Group, for technical assistance with performance problems; and with the Division of Business and Administrative Law, Office of the General Counsel, for legal advice.

¹¹ The merit system principles state, *inter alia*, that federal employees should be selected through fair and open competition based on ability, knowledge, and skills; receive fair and equitable treatment without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition; receive equal pay for equal work; be retained on the basis of the adequacy of their performance and separated if they cannot or will not improve their performance to meet required standards; be protected against arbitrary action, personal favoritism, coercion for partisan political purposes, and reprisal.

¹² Prohibited personnel practices include, but are not limited to; discriminating for or against any employee or applicant based on race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation; coercing the political activity of any person or taking any action as reprisal for the person's refusal to engage in such political activity; discouraging or obstructing a person from competition for employment; granting a preference or advantage not authorized by law; taking or failing to take action against an employee because the employee has engaged in whistleblowing activity.

Computer Crimes in the Federal Workplace

The number of computers and technology-related devices has increased exponentially in the Federal workplace and these devices have become an indispensable part of our daily work routine. Less than twenty years ago, a personal computer (PC) was a luxury reserved for high-ranking officers and civilians. Now, virtually every employee has a PC on his or her desk, or has access to one. Moreover, the advent of communications technologies such as pagers, cell phones, e-mail and the Internet have provided us with the unprecedented ability to communicate instantaneously and efficiently with people over vast distances.

While communications technology and computer usage has expanded the way in which business is done, at the same time the explosive growth in computer usage has brought along with it a wide range of problems and concerns. The unique nature of the computer and more particularly the Internet, is such that the ability to commit certain crimes has actually increased. The ability of an individual to use the Internet to maintain anonymity has increasingly made it the medium of choice for those seeking to commit crimes, or use this technological marvel for other unauthorized purposes. The use of the computer and the Internet for illegal purposes can be generally grouped into a category of crimes known as computer or cyber crimes. This type of crime involves the use of technologies, including but not limited to, the computer and the Internet to target other computers, persons, and property. Many of these cyber crimes are simply new variations on old crimes.

Federal computer crimes are covered by Section 1030 of Title 18 of the United States Code (18 U.S.C. §1030). This statute first became law in 1984. While other Federal laws relate to the criminal use of computers and technology, this law is designed specifically to address the unauthorized use of computers as well as the information that they contain. Some examples of computer crimes that Federal employees should be aware of are the following:

Transmission of Classified and/or Sensitive Information

Only individuals with proper authorization may access information stored on Federal Government computers. Often this information contains personal data protected by the Privacy Act or material that is vital to national security. Federal law (18 U.S.C. §1030(a)(3)) makes it a crime for anyone to intentionally “access” a Federal Government computer without proper authority. All unauthorized use of Federal computers or information systems is a crime punishable by a fine of up to \$250,000 or a term of imprisonment of ten years. Accessing or providing someone with unauthorized access to a Government computer system is a serious crime regardless of the individual’s motives. Moreover, it is not a defense that a person did not know that the information was classified or that they were just “looking” around.

Tampering

Unlawful alteration of data on a computer system is also a crime. The person committing the act need not trespass on that particular system. For example, this situation often occurs when an employee

is authorized to access a computer system for a valid purpose but goes beyond the scope of that authorization and alters information by adding or deleting data.

Using a Government computer to operate a business or pyramid scheme

Using a Government computer to run a business or engage in a profit-making enterprise is a violation of Federal regulations and an abuse of Government resources. Such violations can be as simple as the employee who moonlights during work hours as a day trader or the employee who “borrows” web space on the Government-owned Local Area Network (LAN) to host his or her own personal real estate sales website. Likewise, solicitation of money, as part of a scheme whereby a recruit solicits money from others, who in turn solicit money from other recruits, is prohibited. These practices, known as pyramid schemes, can constitute fraud and could subject an employee to Federal wire fraud charges. Using a Government computer with intent to commit fraud is punishable by a fine of up to \$250,000 and five years in prison. In the case of a repeat offender, the maximum punishment increases to up to ten years.

Utilization of a computer in order to annoy, harass, or alarm another person

As stated earlier, oftentimes certain individuals misuse the anonymity of computers and particularly e-mail and the Internet, to infringe upon the privacy rights of others by annoying, harassing and, in the most serious cases, “cyber stalking” another person. Cyber stalking is similar to traditional stalking and occurs when an individual repeatedly harasses or threatens another, through e-mails and/or other electronic contact. It is often a serious problem in the workplace because unlike private e-mail users, Federal employees do not have the ability to readily change their e-mail addresses without significant difficulty and expense. Cyber stalking laws, prohibiting such harassing contact, are in effect in several states. At last count, 39 states, including New Jersey, have laws on their books expressly criminalizing this conduct. Federal employees should be aware of this type of activity and report it immediately. Most Government computers are monitored and often the offending conduct can be traced back to the user identification of the sender.

Viewing, access and possession of pornography

Federal employees must protect and conserve Government property and use it (or allow its use) only for authorized purposes. 5 C.F.R. § 2635.704(A). It is a violation of both Federal law and the Joint Ethics Regulation (DoDD 5500.7-R) to use a Government computer for unauthorized purposes such as accessing any type of pornography over the Internet. Pornography is generally broken down into the categories of adult and child pornography. While it is not against the law to possess or own adult pornography, it is a violation of Federal regulations to access it from a Government computer. There may be times when pop-up advertising to adult content websites appears on the screen during valid Internet surfing. However, should an employee inadvertently click on a link or view such a site, the employee should immediately notify his or her supervisor. Remember that most Government networks have software that will randomly check to see if these types of sites have been accessed. It is always best to be safe and let a supervisor know rather than take your chances that no one will find out.

Child pornography has been defined under Federal statute (18 U.S.C. § 2252) as a visual depiction of a minor (child younger than 18) engaged in sexually explicit conduct. The FBI actively

investigates matters involving the transmission, production and distribution of child pornography. Transmitting, or simply possessing, child pornography is illegal. The depiction of any child engaged in a sexual act, or an image that is obviously not “artistic” or serving any educational purpose, qualifies as pornography. This category includes images which are “morphed” or constructed of various body parts and do not represent living individuals. Computer telecommunications have become one of the most prevalent mediums used by pedophiles to share illegal photographic images of minors and to lure children into illicit sexual encounters. The Internet has dramatically increased sex offenders’ ability to access the population they seek to victimize. It is the responsibility and obligation of every Federal employee to report any information regarding instances of child pornography. It is a crime for anyone to possess even one child pornographic image whether electronic or otherwise. This is true even if the image is stored or viewed on a home computer. The penalty for possession of a single child pornography image includes a fine up to \$100,000 and imprisonment for a maximum of five years.

In addition to criminal penalties, civilian employees who misuse Government computers are subject to severe administrative penalties such as letters of reprimand, suspension and even termination. Military members may be punished under the Uniform Code of Military Justice (UCMJ) for failure to obey an order or regulation prohibiting the improper use of Government resources. Military members can face punishment ranging from reprimand or Article 15 all the way up to a General Court-Martial.

Internet-related crime, like other crimes, should be reported to appropriate law enforcement investigative authorities at the local, state, and Federal level. Several Federal law enforcement agencies investigate domestic Internet crime such as the FBI, United States Secret Service, United States Customs Service, United States Postal Inspection Service, and Bureau of Alcohol, Tobacco and Firearms (ATF). Each of these agencies has offices conveniently located in every state to which crimes may be reported. Contact information regarding these local offices may be found in local telephone directories. Employees who are aware of Federal computer crimes should report them to their immediate supervisors, the Army Criminal Investigation Division and local or Federal law enforcement agencies.

The Point of Contact for this subject in the CECOM Legal Office is CPT Michael Stephens (732) 532- 9813; DSN 992-9813.

KATHRYN T. H. SZYMANSKI
Chief Counsel

It is official now. Section 1116 of the National Defense Authorization Act for Fiscal Year 2002, signed into law on December 28, provides for employees (among others) to retain promotional items (such as frequent flyer miles) received as a result of government travel. These changes have been reflected in the Joint Travel Regulations as noted in the attached Word file. If you cannot access the Word file, please note the changes at the following web link at: <http://141.116.74.201/regchgs.htm#JFTR>
<<U01065-C01055 CLEAN.doc>>

The text of Section 1116 is below.

SEC. 1116. RETENTION OF TRAVEL PROMOTIONAL ITEMS.

(a) **DEFINITION-** In this section, the term 'agency' has the meaning given that term under section 5701 of title 5, United States Code.

(b) **RETENTION OF TRAVEL PROMOTIONAL ITEMS-** To the extent provided under

subsection (c), a Federal employee, member of the Foreign Service, member of a uniformed service, any family member or dependent of such an employee or member, or other individual who receives a promotional item (including frequent flyer miles, upgrade, or access to carrier clubs or facilities) as a result of using travel or transportation services obtained at Federal Government expense or accepted under section 1353 of title 31, United States Code, may retain the promotional item for personal use if the promotional item is obtained under the same terms as those offered to the general public and at no additional cost to the Federal Government.

(c) **LIMITATION-** Subsection (b)--

(1) applies only to travel that--

(A) is at the expense of an agency; or

(B) is accepted by an agency under section 1353 of title 31, United States Code; and

(2) does not apply to travel by any officer, employee, or other official of the Government who is not in or under any agency.

(d) **REGULATORY AUTHORITY-** Any agency with authority to prescribe regulations governing the acquisition, acceptance, use, or disposal of any travel or transportation services obtained at Government expense or accepted under section 1353 of title 31, United States Code, may prescribe regulations to carry out subsection (b) with respect to those travel or transportation services.

(e) **REPEAL OF SUPERSEDED LAW-** Section 6008 of the Federal Acquisition Streamlining Act of 1994 (5 U.S.C. 5702 note; Public Law 103-355) is repealed.

(f) **APPLICABILITY-** This section shall apply with respect to promotional items received before, on, or after the date of enactment of this Act.



**PER DIEM, TRAVEL AND TRANSPORTATION ALLOWANCE
COMMITTEE**

**HOFFMAN BUILDING 1, ROOM 836
2461 EISENHOWER AVENUE, ALEXANDRIA, VA 22331-1300**

CORRECTED EDITION

PDTATAC/tlw

31 December 2001

MEMORANDUM FOR PDTATAC EDITOR

SUBJECT: Frequent Traveler Benefits and Retaining Promotional Items
Military Editorial U01065
Civilian Editorial C01055

1. *Revisions in this editorial are based on Section 1116 of the FY02 NDAA. These revisions are effective this date and are scheduled to appear in printed change number 183 of the JFTR, and 437 of the JTR.*

2. It is requested that the JFTR be revised as follows:

CHAPTER 1

PART A: APPLICABILITY AND GENERAL INFORMATION

NOTE TO EDITOR: No further changes to "Applicability and General Information"

**PART B: GIFTS, GRATUITIES AND OTHER BENEFITS RECEIVED FROM COMMERCIAL
SOURCES**

U1200 RETAINING PROMOTIONAL ITEMS

A. General

1. A traveler on official business traveling at Government expense on the funds of an agency (See definition in Appendix A) may keep promotional material (including frequent traveler benefits such as points or miles, upgrades, or access to carrier clubs or facilities) for personal use. This applies to promotional items received before, on, or after 31 December 2001.
2. The promotional material must be obtained under the same terms as those offered to the general public and must be at no additional Government cost.
3. Promotional items received for travel using funds other than those of an agency are not covered by this rule. Travelers should seek guidance from those funding authorities.)

B. Seat Relinquishing

1. Voluntary. A traveler may keep payments from a carrier for voluntarily vacating a transportation seat. However, no additional expenses (per diem or miscellaneous reimbursable) may be paid as a result of the traveler's delay. *Additional travel expenses incurred as a result of voluntarily giving up a seat are the traveler's financial responsibility.*
2. Involuntarily. If a traveler is involuntarily denied boarding on flight, compensation for the denied seat belongs to the Government (59 Comp. Gen. 203 (1980)).

C. Lost or Delayed Accompanied Baggage. A traveler may keep payments from a commercial carrier for accompanied baggage that has been lost or delayed by the carrier. If the traveler intends to make a claim against the Government, the traveler should see the Claims Office prior to accepting a carrier's compensation. By accepting the carrier's compensation, the traveler may be accepting that amount as payment in full.

U1205 STANDARDS OF CONDUCT AND PAYMENT ACCEPTANCE FROM NON-FEDERAL SOURCES FOR TRAVEL AND TRANSPORTATION EXPENSES

See the Joint Ethics Regulation (JER), DoD 5500.7-R, at http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/index.html (or appropriate Service regulations for Non-DoD Services) regarding Standards of Conduct and how to accommodate non-Federal sources for travel and transportation expenses.

NOTE TO EDITOR: Par. U2010 is aligned with the wording in C1058 in MAP 42-01/CAP 36-01 (Ted's item).

U2010 OBLIGATION TO EXERCISE PRUDENCE

A traveler must:

1. exercise the same care and regard for incurring expenses as a prudent person traveling at personal expense, and
2. maintain records to validate individual expenses of \$75 or more and all lodging costs (All receipts should be maintained until the travel claim is paid and possibly longer if required by financial regulations).

Excess costs, circuitous routes, delays or luxury accommodations that are unnecessary or unjustified are the traveler's financial responsibility.

NOTE TO EDITOR: PARS. U2010-B & C are deleted and the info moved to the new par. U1200.

U3125 COMMERCIAL AIR TRANSPORTATION

A. *****

B. Class of Service

4. Premium-Class Other Than First-Class Use.
 - a. *****
 - g. obtained as an accommodations upgrade through the redemption of frequent traveler benefits.
 - h. *****

APPENDIX A: DEFINITIONS

AGENCY.

A. Includes:

1. An Executive agency, as defined in 5 U.S.C. §101;
2. A military department;
3. An office, agency or other establishment in the legislative branch;
4. An office, agency or other establishment in the judicial branch; and

5. The Government of the District of Columbia.

B. Does NOT include :

1. A Government-controlled corporation;
2. A member of Congress; or
3. An office or committee of either House of Congress or of the two Houses.

APPENDIX O

T4020 TDY TRAVEL POLICY

A. *****

B. Traveler Rights and Responsibilities

1. *****

9. Retaining Promotional Items

a. A traveler on official business traveling at Government expense on the funds of an agency (See definition in Appendix A) may keep promotional material (including frequent traveler benefits such as points or miles, upgrades, or access to carrier clubs or facilities) for personal use. This applies to promotional items received before, on, or after 31 December 2001.

b. The promotional material must be obtained under the same terms as those offered to the general public and must be at no additional Government cost.

c. Promotional items received for travel using funds other than those of an agency are not covered by this rule. Travelers should seek guidance from those funding authorities.

10. *****

3. It is requested that the JTR be revised as follows:

CHAPTER 1 - DEPARTMENT OF DEFENSE (DoD) EMPLOYEE TRAVEL ADMINISTRATION

PART D: GIFTS, GRATUITIES AND OTHER BENEFITS RECEIVED FROM COMMERCIAL SOURCES

NOTE TO EDITOR: par. C1200 is completely rewritten

C1200 RETAINING PROMOTIONAL ITEMS

A. General

1. A traveler on official business traveling at Government expense on the funds of an agency (see definition in Appendix A) may keep promotional material (including frequent traveler benefits such as points or miles, upgrades, or access to carrier clubs or facilities) for personal use. This applies to promotional items received before, on, or after 31 December 2001.

2. The promotional material must be obtained under the same terms as those offered to the general public and must be at no additional Government cost.

3. Promotional items received for travel using funds other than those of an agency are not covered by this rule.

Travelers should seek guidance from those funding authorities.)

B. Seat Relinquishing

1. Voluntary. A traveler may keep payments from a carrier for voluntarily vacating a transportation seat. However, no additional expenses (per diem or miscellaneous reimbursable) may be paid as a result of the traveler's delay. ***Additional travel expenses incurred as a result of voluntarily giving up a seat are the traveler's financial responsibility.***

2. Involuntarily. If a traveler is involuntarily denied boarding on flight, compensation for the denied seat belongs to the Government (59 Comp. Gen. 203 (1980)).

C. Lost or Delayed Accompanied Baggage. A traveler may keep payments from a commercial carrier for accompanied baggage that has been lost or delayed by the carrier. If the traveler intends to make a claim against the Government, the traveler should see the Claims Office prior to accepting a carrier's compensation. By accepting the carrier's compensation, the traveler may be accepting that amount as payment in full.

NOTE TO EDITOR: No changes to par. C1201

C1205 STANDARDS OF CONDUCT AND PAYMENT ACCEPTANCE FROM NON-FEDERAL SOURCES FOR TRAVEL AND TRANSPORTATION EXPENSES

See the Joint Ethics Regulation (JER), DoD 5500.7-R, at http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/index.html regarding Standards of Conduct and how to accommodate non-Federal sources for travel and transportation expenses.

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1. A Government-controlled corporation;
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3. An office or committee of either House of Congress or of the two Houses.

APPENDIX O

T4020 TDY TRAVEL POLICY

A. *****

B. Traveler Rights and Responsibilities

1. *****

9. Retaining Promotional Items

a. A traveler on official business traveling at Government expense on the funds of an agency (See definition in Appendix A) may keep promotional material (including frequent traveler benefits such as points or miles, upgrades, or access to carrier clubs or facilities) for personal use. This applies to promotional items received before, on, or after 31 December 2001.

b. The promotional material must be obtained under the same terms as those offered to the general public and must be at no additional Government cost.

c. Promotional items received for travel using funds other than those of an agency are not covered by this rule. Travelers should seek guidance from those funding authorities.

10. *****

//signed//

S. W. Westbrook
Director

cc:
Director
MAP Members
CAP Members

Lynn Wawrzyniak **TLW**

SYNOPSIS: This editorial implements FY 2002 DoD Authorization Bill, Section 1116, which allows employees, members, and those traveling on invitational travel orders to keep promotional items, including frequent flyer miles, received while traveling on official business paid for by an agency. This applies to promotional items currently held or received in the future. The attached proposed change implements this legislative change and conforms the JFTR/JTR definition of AGENCY with 5 USC §5701. Additionally, this editorial rewrites Chapter 1, Part D, JTR, par. C1200 and also adds a new Part B to Chapter 1 of the JFTR, par. U1200, to align the two volumes.

Frequent Flyer Info from DA SOCO

Implementing Regulations

The statute has been implemented by the following applicable regulations. For DoD military and civilian personnel, the Joint Federal Travel Regulation and Joint Travel Regulation, respectively, have been revised and can be found at <http://141.116.74.201/regchgs.htm>.

The Joint Ethics Regulation, DoD 5500.7-R, has been changed as of January 10, 2002, to be consistent with the Act. The change will be posted shortly on the SOCO web site under the Joint Ethics Regulation and is also attached below.

Application to 31 U.S.C. 1353

P.L. 107-107 states that promotional benefits that result from travel accepted pursuant to 31 U.S.C. 1353 (official travel paid by a non-Federal entity) may be retained by the employee. The Joint Travel Regulation and Joint Federal Travel Regulation no longer address this issue, and the Joint Ethics Regulation does not offer additional guidance. Thus, provided that the entity that paid for the travel does not object, Federal military and civilian personnel may retain frequent flyer miles that are derived from such travel.

Taxability of the Benefit

GSA has advised that it has asked the IRS for information about the taxability of frequent flyer miles. It is possible that such benefits may be considered to be additional compensation, and taxed accordingly. Until a ruling is received, it is recommended that personnel who redeem frequent flyer miles or other promotional benefits keep a record of such redemptions.

Supervisory Challenges

Under the new rules, it is not unforeseeable that some personnel may attempt to schedule travel in order to acquire frequent flyer miles or other promotional items. For example, travel may be increased by scheduling travel that is not necessary, scheduling meetings in more distant locations, or scheduling travel that involves multiple legs. Personnel who have frequent flyer accounts for one carrier may attempt to avoid use of the contract (city-pairs) carrier when they do not have a frequent flyer account for the contract carrier. Such attempts, to the extent that they increase the costs of travel to the Government, violate the Joint Ethics Regulation, and, in some cases, may violate criminal conflicts of interest statutes.

Upgrade to First Class

Personnel on official travel may now use frequent flyer miles, because they belong to the individual, to upgrade to first class. However, each Military Department has issued guidance regarding the wearing of uniforms while traveling in first class accommodations.

Transitional Compensation

Military and civilian families alike can face the issues of spousal or dependent abuse. No one likes to be faced with that situation, talk about it, admit it, or deal with its consequences. Sometimes, the loss of financial and medical benefits to the military family is a disincentive for that family to report the abuse. The family members sometimes choose to suffer with the abuse; they avoid seeking medical treatment and never report the situation to avoid financial “penalty” associated with the service member’s potential discipline or discharge. Fortunately, Congress has provided some relief to military families that are confronted with this difficult and often debilitating circumstance.

Congress established the Transitional Compensation (TC) program for abused dependents of military personnel in order to counter economic barriers and increase the likelihood that family members will report the abuse. The legislation authorized temporary payments, at the rate specified for Dependency and Indemnity Compensation (DIC), for families in which the service member has been (1) discharged administratively or by court-martial for a dependent-abuse offense or (2) been sentenced to a forfeiture of all pay and allowances by a court-martial for a dependent-abuse offense after November 29, 1993. Dependent abuse offenses include, but are not limited to, sexual assault, rape, sodomy, assault, battery, murder and manslaughter.

Benefit entitlement begins on the date the administrative separation is initiated or the court-martial sentence is approved. Payments are for a minimum of 12 months or until the soldier’s ETS date, whichever is longer, but may not exceed a maximum of 36 months. The current monthly DIC rate is \$911 for a dependent spouse and \$229 for each dependent child in the care of the spouse. Other benefits include retention of the family member ID card, access to exchanges and commissaries, and medical, dental and TRICARE enrollment (for the purposes of abuse-related care only) for one year following the service member’s discharge.

If the service member was retirement-eligible, the medical benefits are the same as if the member had simply retired with full benefits. Further, the spouse can apply to a court of competent jurisdiction to obtain a court-order for her/his portion of any disposable retired pay that the service member lost by virtue of the member’s discharge as a result of dependent abuse.

These benefits can be forfeited. In the case where a dependent child is the victim, spousal benefits are forfeited if the spouse is found by a competent authority to have been an active participant in an abusive offense against the minor child. Also, if the spouse resides in the same household with the convicted service member, the spousal benefits cease and, by Department of Defense Instruction, cannot be resumed on subsequent physical separation. In addition, the spouse loses the spousal benefits (but not the dependent child’s benefit) upon remarriage, but they can be reinstated if the new spouse dies or there is a divorce or annulment of the second marriage. The dependent child’s benefit is forfeited if the service member’s spouse loses custody of the minor child or children. Both spousal and child benefits cease if the court-martial sentence is later remitted, set aside or mitigated to a lesser punishment that does not include the

dependent-abuse offense. In the case of an administrative separation, both spousal and child benefits cease if the convening authority disapproves the board's recommendation for separation on the dependent-abuse offense.

At Fort Monmouth, the Legal Services Branch of the Staff Judge Advocate Division and Army Community Service Family Advocacy Program staffs work together to provide information on eligibility and assistance to victims of dependent abuse. Applications and documentation required in accordance with AR 608-1 are submitted to the U.S. Army Community and Family Support Center to determine legal sufficiency of the application packet and approval of benefits. Due to program administrative revisions and automation upgrades in FY00, the time required for approval of benefits and issuance of a fund cite has been reduced to an average of five working days.

The Point of Contact for this subject in the CECOM Legal Office is Ms. Pamela McArthur, (732) 532-4760; DSN 992-4760.

KATHRYN T. H. SZYMANSKI
Chief Counsel

FREQUENTLY ASKED QUESTIONS ABOUT WILLS AND ESTATES

The passing of a loved one is an emotionally difficult time under the very best of circumstances. The prospect of going through the probate or administration process only aggravates an already overwhelming situation. First and foremost, “probate” is not a dirty word. It is simply the proving of the validity of a will. Second, by planning ahead, having a will and other documents in order, and understanding the basics of the process, you can ease some of your fears and your fears for your beneficiaries and loved ones.

To that end, here are some Frequently Asked Questions about wills, estates and the local probate process.

Q. What is a will?

When properly prepared, a will is a legal document that tells what you want done with your property when you die. It can tell how you want your property divided and who is to receive any money, property, or personal possessions. Your heirs will know exactly what you want done. Death is a trying and stressful time for those who survive. A will can be a comfort: if you have stated exactly what you want, your intentions will be known.

Q. What is a self-proving will?

If the will is properly signed and witnessed before a notary public or an attorney, it becomes a self-proving will in New Jersey. However, if a notary public or an attorney did not witness the signing, a witness proof will be required to verify the signature of the decedent before the probate process can begin. This can involve the need to actually locate the witnesses and obtain affidavits from them, an often time-consuming and cumbersome process. Therefore, your will should contain self-proving language.

Q. Where should you keep your will?

Your will should be kept in a safe place that is easily accessible in the event of your death and where the executor can find it. Tell the executor where it is located or give him or her a copy to keep. If a will is kept in a safe deposit box it might not be accessible on a weekend, late at night or without a joint holder of the box. Remember: if the decedent’s name is the only name on a safe deposit box, beneficiaries may need court intervention to gain access to the will.

Q. Upon the passing of the decedent, what does the survivor/executor do first?

First, if the decedent was a veteran, you should visit the Casualty Assistance Office for information and assistance on services available to you as the surviving relative. Casualty Assistance can obtain the paperwork for surviving spouses to obtain their survivor’s pay and

report the death to the Veterans' Administration. They are located at Bldg 918, on Murphy Drive, telephone (732) 532-2040. Your personal funeral director can arrange for burial in a veterans' cemetery and military honors, if appropriate. The executor should also go to the Monmouth County Surrogate's Office to begin the probate proceeding. The Surrogate's Office is located at the Hall of Records (second floor), Main and Court Street, Freehold, New Jersey 07728; Phone 732-431-7330; Fax 732-303-7656; Office Hours: Mon.-Fri. 8:30-4:30. They have two satellite offices at Wall Township Public Library, Allaire and Baileys Corner Road, Wall Township; Hours: Wednesday 9:00-4:30 and Monmouth County Public Library, 1001 Broad St. (Route 35), Shrewsbury Borough; Hours: Thursday 9:00-4:30.

The Surrogate's Office can then issue Letters Testamentary and/or Surrogate's Certificates. These documents identify a person as the duly appointed executor and facilitate the conducting of the business of the decedent's estate.

Q. What should the executor bring to the Surrogate's Office?

The executor should bring the original will, death certificate with raised seal, and a completed information sheet. This sheet includes the names and addresses of closest next of kin, including any children of the decedent's deceased children. In circumstances where the decedent had no surviving spouse, children or grandchildren, the names of children of the decedent's deceased brothers or sisters (if any) may also be necessary. The executor may obtain a copy of the form at the Surrogate's Office or at the Legal Services Branch, Bldg 677 on Wilson Avenue.

Q. How many Surrogate's Certificates will I need?

Creating a list of all of the assets of the estate will help determine the number of certificates you will need to have issued by the probate clerk. These certificates are documents the executor delivers to various persons and agencies to conduct the business of the estate. An example would be: an executor delivering a Surrogate's Certificate to the Department of Motor Vehicles to change the title of an automobile.

Q. Am I entitled to compensation as an executor/administrator?

Yes! The executor/administrator is entitled to a corpus commission of 5% of the first \$200,000 of estate assets subject to administration, 3 _ % on the balance of this amount up to \$1,000,000 and 2% for amounts exceeding \$1,000,000.

Q. How do I contest a will or dispersal of the estate?

A caveat must be filed with the Surrogate to temporarily prevent the probating of a will or granting of administration. Generally, you will need an attorney to represent you in this adversarial process.

Q. What are the tax laws in New Jersey?

The revised New Jersey Transfer Inheritance Tax Act of 1985 provides for four classifications of beneficiaries.

Class A: includes spouses and children and provides that they do not pay any state inheritance tax. Also exempt under Class A are fathers, mothers, grandparents, an adopted child or children, any issue of any child or legally adopted child of a decedent, or a mutually acknowledged child or stepchild.

Class C: Brothers, sisters, daughters-in-law and sons-in-law are exempt for the first \$25,000. If the bequest is in excess of \$25,000 and up to \$1,100,000 there is an 11% tax. Then, up to \$1,400,000, the tax is 13%, and up to \$1,700,000, the tax is 14%. There is a 16% tax on any amount over \$1,700,000.

Class D: all others are exempt from taxation if the total amount is no more than \$499. There is a 15% tax on any amount up to \$700,000 and 16% for any amount beyond that.

Class E: includes bequests for charitable or public purposes to the State of New Jersey, an educational institution, church, hospital, orphans' asylum, public library, and certain other non-profit agencies. These are also exempt from inheritance taxes.

Again, these rates are subject to legislative change. To check from time to time, you may call the [New Jersey Inheritance Tax Office](#) at 609-292-5033.

Q. How soon must state inheritance taxes be paid?

State inheritance taxes must be filed and the tax paid within eight (8) months after the decedent's death to avoid interest.

Q. Does the federal government tax an estate?

Yes, the federal government does tax an estate. There is no tax due on any amount passed to your spouse. As of 2000-2001, the first \$675,000 of the estate that is passed to others is exempt from taxation and no tax form needs to be filed. When the estate exceeds \$675,000, it is recommended that an accountant or tax lawyer be consulted to help compute the correct tax owed. The applicable credit amount is scheduled to increase yearly, but that is subject to any legislative modification.

Q. What happens when two people's names are on one piece of property? How does the will handle that situation?

When a husband and wife own a piece of real property equally together, they have a form of joint ownership, often called a tenancy by the entireties. Upon the death of one member of the marriage, the other automatically becomes the sole owner. Therefore, this item will not be distributed under the terms of the will (but it is included in the estate for tax computation!). Personal property may also be held under the special joint ownership of husband and wife, including items such as furniture, checking accounts, savings accounts or stocks and bonds.

Two or more people who are not married can generally hold property in one of two ways: as tenants in common or as joint tenants with the right of survivorship. When two people who are not married hold a piece of real or personal property jointly with the right of survivorship, this item becomes the property of the survivor on the death of the other title holder (outside the terms of the will). Once a piece of property (real or personal) is held by one person alone, then that person's will controls its disposition upon the death of the sole owner.

If the people hold the property as tenants in common, when one of the holders passes away, that person's "portion" goes to their heirs under the terms of the will.

Q. Can one spouse disinherit the other spouse completely?

No. As a general rule, if a married person dies domiciled in New Jersey, the surviving spouse has a right of "election", that is, to take an elective share of one-third of the estate, provided that (1) at the time of death the decedent and the surviving spouse had not been living separate and apart in different habitations or (2) had not ceased to cohabit as man and wife.

Q. Can you disinherit your children completely?

Yes.

Q. What are the Surrogate fees the executor pays from the estate?

The Probate fee is \$50.00. That is a base fee that includes: a will (2 pages), application, qualification of the executor, authorization, witness proof, judgment, letters and certificates. Additional pages of the will or additional documents are charged at the rate of \$3.00 per page. There are similar fees for the administration of a will. Clerks will determine the full fee amount at the time of application.

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KATHRYN T. H. SZYMANSKI
Chief Counsel