



Office of Command Counsel Newsletter

August 2002, Volume 02-04

AMC Attorney Career Program Task Force to Look At Career Program Regulation...and More

The AMC Attorney Career Program Task Force announced during the CLE 2002 Program will kick off an initial meeting at HQ AMC on Thursday August 22. The Task force co-chairs are **Stephen Klatsky** and **Holly Saunders**. Members include **Susan Harbort**, CECOM, **Sharon Hill**, AMCOM, **Tom Jackson**, OSC, **K Krewer**, TACOM, **Les Mason**, ANAD and **Pat Sheldon**, SBCCOM.

The committee will work on creating a working draft revision to the primary regulation governing the AMC Attorney Career Program, AMCR 690-2, last revised in 1992.

The AMC legal community was canvassed for areas of inquiry. The following is an initial list:

Form 2693—revise, automate and require revisions when performance appraisals are issued.

Determine method for seeking additional information from applicants—resume or the like.

AMC Professional Responsibility Committee.

Revise Outside Practice/Employment Policy.

Define Placement Program.

Classification Authority.

“Member in good standing”—Automate certification process.

Training and Professional Development.

Recruitment and Placement.

Discipline process.

Conflict of Interests.

Once a working draft is designed it will be redistributed to each AMC legal office for review and comment. We thank those who took the time from their daily legal practice to prepare and forward comments on this important project.

In This Issue:

| | |
|---|----|
| <i>AMC Attorney Career Program</i> | 1 |
| <i>Newsletter Index Parts 1&2</i> | 2 |
| <i>FACA</i> | 3 |
| <i>Commercial Items</i> | 4 |
| <i>EEOC ALJ Handbook</i> | 6 |
| <i>SCt on Continuing Violations</i> | 7 |
| <i>OPM Director re Labor-Mgmt Rel</i> ... | 8 |
| <i>Hatch Act</i> | 9 |
| <i>Categorical Exclusions</i> | 10 |
| <i>LexisNexis Corner</i> | 11 |
| <i>Faces in the Firm</i> | 12 |

AMC Command Counsel Newsletter Attorney Index Updated

FAQs about Powers of Attorney

A revised and updated AMC Command Counsel Newsletter Index is included.

Part 1 is a Topic and Alphabetical Title of the Article (Encl 1).

Part 2 is Listed by Topic and Most Recent Article (Encl 2).

Thanks so much to **John Metcalf**, of the CECOM-Ft. Belvoir Branch and his staff. The service is an absolutely superb one benefiting all readers.

With the increased frequency and length of mobilization and TDY assignments civilian and military personnel often ask about and seek to execute a Power of Attorney.

The CECOM, Ft. Monmouth Legal Assistance Division has prepared a primer that addresses questions related to this important tool to manage ones financial and other matters.

The paper highlights an important common restriction: a marriage ceremony or will execution can not be accomplished by this document (at least in most states) (Encl 3)

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Check out the Newsletter on the Web at http://www.amc.army.mil/amc/command_counsel/

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

Acquisition Law Focus

A Primer on FACA

Many of our clients are not even aware that the Federal Advisory Committee Act (FACA) exists.

Those who are aware of FACA are never sure if the group they would like to assemble would run afoul of FACA.

In an effort to provide some general “user friendly” guidance in this area to our clients, **Denise Scott**, TACOM-ARDEC, DSN 880-6585, prepared a summary of FACA.

It is intended as a starting point so that the client has some guideposts when considering soliciting input from entities outside the Federal government.

If a plan is formulated with this guidance in mind the client is less likely to discover after much effort is already expended that the group they intend to use is subject to FACA.

What is the Federal Advisory Committee Act (FACA)? (see 5 U.S.C., App., and 41 CFR 102-3)

FACA governs the establishment, operation, and termination of advisory commit-

tees within the executive branch of the Federal Government. The Act and associated implementing regulations define what constitutes a Federal advisory committee and provide general procedures to follow for the operation of these advisory committees. In addition, the Act and regulations are designed to assure that the Congress and the public are kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees.

The paper addresses many important aspects of the law.

FACA Indicators

One key portion contains a list of FACA Indicators:

Is the Committee “established” or “utilized” by the agency?

Does the agency manage or control membership, composition, and define the agenda?

Does the agency fund the group?

Does the group provide advice and recommendations as a group? (Encl 4)

List of Enclosures

1. Newsletter Index Pt 1: Topic/Alphabetical
2. Newsletter Index Pt 2: Topic/Most Recent Article
3. FAQs re Powers of Attorney
4. Federal Advisory Committee Act
5. Commercial Items & Services
6. Reverse Auction Contracting Technique
7. EEOC Handbook for Administrative Law Judges
8. Inability to Maintain Regular Attendance
9. Supreme Court on Continuing Violations
10. OPM Director on Labor-Management Relations
11. OPM Guidance on Official Time & Reporting
12. Hatch Act
13. Categorical Exclusions--AR 200-2--“Environmental Effects of Army Actions
14. LexisNexis Corner

Commercial Items: Applying the Definition to Services

Since the Federal Acquisition Streamlining Act (FASA) of 1994 (Section 8104, paragraph 2377 of Public Law 103-355) established a preference for the acquisition of commercial items, the process of considering commercial goods and services to meet the Government's requirements has become familiar to most of us in the acquisition community.

Application of Commercial Item Definition to Services

More recently, we find ourselves looking closely at the application of the commercial item definition to services. At first glance, almost all of the services we procure would seem to be commercial in nature.

If we apply the "of a type test", that is, services of a type offered and sold in the marketplace, to services for installation, maintenance,

repair, training, and other commonly acquired services, we could consider almost all of the services we buy to be commercial.

The Comp Gen Rules

The Comptroller General upheld this interpretation in the Aalco Forwarding, Inc. decision that an agency properly determined that household moving services for military personnel are commercial services "of a type" offered and sold in the commercial marketplace.

The decision cites that the agency "reasonably concluded, based on its market research, including reviews of numerous commercial contracts, that the moving services it seeks in reengineering its current program qualify as a commercial item because they are the type of services offered and sold competitively by the moving industry in substan-

tial quantities to commercial shippers, particularly in the national account contract market.

In this regard, it is apparent that the services used for the movement of the household goods of military personnel, i.e., packing, loading, hauling, storage and other accessorial services, and delivery, are not services that are unique or provided only to the government, but are essentially the same moving services provided in the commercial market, in that movers use the same trucks, warehouses, ocean or air carriers, crews, packing materials, and other equipment to perform both DOD's and the commercial market's household goods moving requirements.

CECOM's **Marla Flack**, DSN 992-5057, has prepared a very complete article on this important subject. (Encl 5)

Reverse Auction Contracting Technique

For nearly two years, the CECOM Acquisition Center has been at the forefront of an innovative contracting technique – the use of an on-line auction to procure supplies. With the blessing of the Department of Defense (DOD), CECOM began conducting on-line auctions in the spring of 2000.

On-Line Auctions

The on-line auction is an event conducted over the Internet in which multiple suppliers of goods have an opportunity to simultaneously bid to meet a buying organization's specified requirements.

This technique permits bidders to submit multiple bids over time to reduce their prices to be more competitive with other bidders. Since the prices are moving downward, this form of auction is referred to as a **"Reverse Auction."**

The Reverse Auctioning tool is an award-winning electronic commerce application that represents a significant departure from the static and

inflexible process typically used to purchase supplies.

After conducting numerous reverse auctions for various agencies over the past two years, it has become evident that the two basic benefits are savings and efficiency.

The Process

The process begins with an announcement of the requirements to be procured through the Interagency Business Opportunities Page (IBOP).

A screen is completed by the Contracting Office which describes the items to be procured and sets forth the rules of the auction; i.e., start time, duration, minimum bid, etc.

The qualified bidders can access a screen that permits them to submit their bids, and see other competitors' bids during the course of the auction. The bidders' identities, although known by the Contracting Officer, are not publicly disclosed during the course of the auction.

The Contracting Officer can monitor the auction,

which will be ended automatically at the predetermined closing time (including any provision for automatic extensions).

Part 15 rewrite Changed All

Until the rewrite of Part 15 of the Federal Acquisition Regulation (FAR) in 1997, the FAR prohibited the use of auction techniques in negotiated procurements.

When FAR Part 15, which governs the conduct of negotiated procurements, was rewritten, it encouraged a more open dialogue between the Government and offerors, and no longer included the prohibition against the use of auction techniques. This change to the FAR, coupled with the proliferation of the Internet, especially the more common use of commercial auction sites, such as e-Bay, opened the door to the use of the on-line auction technique in Government acquisition.

POC is CECOM's **Bob Russo**, DSN 992-9840. (Encl 6)

EEOC Issues Handbook for Administrative Judges

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing statutes which prohibit discrimination in federal employment. § 201 *et seq.*

The Commission's regulations, set forth at 29 C.F.R. Part 1614, provide the basic framework for the processing of federal sector complaints of discrimination. Pursuant to these regulations, EEOC Administrative Judges are authorized to conduct hearings and issue decisions. 29 C.F.R. § 1614.109.

The purpose of this handbook is to provide guidance to Administrative Judges concerning the processing of hearing requests and the conduct of hearings on individual and class complaints of discrimination.

This handbook supplements the Commission's regulations and the EEOC Management Directive 110, November 9, 1999 (EEO MD-110).

The Handbook is a useful tool for the practitioner as well as it provides a supplement to the EEOC Management Directive 110.

The document contains two major sections.

First, it is divided into 10 chapters.

CHAPTERS:

1. Initial Processing
2. Official Documents Issued by an Administrative Judge
3. Settlement and Alternative Dispute Resolution
4. Discovery
5. Summary Judgment
6. Sanctions
7. Hearing Process
8. Decisions
9. Attorney's Fees and Compensatory Damages
10. Class Complaints

Second, are important appendices that highlight the proactice before the EEOC AJs.

APPENDICES:

- A. Order Directing Agency To Produce Complaint File
- B. Acknowledgment and Order
- C. Designation of Representative Form
- D. Consolidation Order
- E. Notice of Intent to Issue Decision Without A Hearing
- F. Order of Dismissal
- G. Order Entering Judgment
- H. Notice To The Parties
- I. Acknowledgment and Order for Class Certification (Encl 7)

Inability to Maintain Regular Attendance

One of the most difficult and frustrating type of case is where there is an employee who has legitimate medical problems and is absent from the work site on an intermittent basis; i.e. in one month, out the next, back in for several weeks, etc. This type of case involves both reasonable accommodation and adverse action principles.

The MSPB has held, most recently in Combs v. Social Security Administration, 102 FMSR 5142 (Feb. 26, 2002) that an employee who is frequently absent, on approved leave, can be the subject of an adverse action. The Board, citing Cook v. DA, 18 MSPR 610 (1984) held that certain criteria must be met.

TACOM-ARDEC's **Joel Friedman**, DSN880-6588, provides a practice note on the case law behind and the management burden in these cases. (Encl 8)

Hostile Workplace, Discrete Acts and Continuing Violations-- The Supreme Court Rules

The U.S. Supreme Court ruled unanimously June 10 that the continuing violation doctrine does not apply to claims for discrete acts of employment discrimination, but decided 5-4 that the doctrine can apply in hostile environment claims (*National R.R. Passenger Corp. v. Morgan*, U.S., No. 00-1614, 6/10/02).

Rejecting a portion of a U.S. Court of Appeals for the Ninth Circuit decision that allowed Abner Morgan to include several years of alleged discriminatory actions by the National Railroad Passenger Corp. (Amtrak) in his Title VII of the 1964 Civil Rights Act complaint, despite the untimeliness of many of the ac-

tions, the court found the statutory definition of "unlawful employment practice" relates to discrete acts, and therefore could not be linked together under a continuing violation doctrine. The court's opinion by Justice Clarence Thomas rejected Morgan's argument that "practice" connotes an ongoing violation that can occur or recur over a period of time. Finding that 42 U.S. Code Section 2000e-2 details numerous discrete actions as part of the explanation of "[u]nlawful employment practices," the court said there was "simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of a timely filing." (Encl 9)

Employment Law Focus

OPM Director on Labor Management Relations

Attached, for your info, is a memo from the Director of OPM regarding Labor-management Relations. **Kay Coles James Cole** states that in addition to the need for labor and management to ensure that official time is authorized and used appropriately, there is an equally important responsibility of labor and management to work together to deliver the best possible service to the American people.

Ms. Cole goes on to state that labor and management have a mutual stake in achieving President Bush's bold strategy for improving the performance of Government and delivering better results for the American people.

While agencies are no longer required to form partnerships with their unions, they are strongly encouraged to establish cooperative labor-management relations. (Encl 10)

OPM Guidance on Reporting the Use of Official Time

The Office of Personnel Management is issuing this guidance to help departments and agencies report on the number of hours of official time that employees used to perform representational functions in FY 2002. Agencies are asked to complete this report and submit it to OPM no later than October 31, 2002.

From the Document:

"We have asked for as little official time data as possible because we are fast approaching the end of the fiscal year and we recognize that agencies may not be able to collect and report more than total hours of official time for FY 2002.

To help us draw conclusions from the information reported this year, OPM will

examine the official time data and any explanation of unusually high or low usage and correlate that with data we have already collected showing the number and size of bargaining units at each Federal agency. We will work closely with agencies and unions to establish a more comprehensive reporting framework for future years.

Your report should cover all agencies except non-appropriated fund instrumentalities and only those representational activities related to labor relations, such as those provided for by 5 U.S.C. Chapter 71 and collective bargaining agreements.

Agencies should not report activities under non-labor relations laws or regulations (e.g., civil rights laws or agency administrative grievance procedures. (Encl 11)

Hatch Act--Civilian & Military Personnel Political Activities

Even though the year 2002 elections are 5 months away, we are already seeing campaign activity, not only in some Congressional races, but also at the state and local level.

A Federal statute, the **Hatch Act**, governs civilian employees' participation in the political process.

While it is DoD policy to encourage DoD employees and members of the Armed Forces to carry out the obligations of citizenship to the maximum extent possible, there are some limitations, which vary depending on the individual's employment status.

The limitations for members of the **Senior Executive Service**, other Federal employees, and members of the **Armed Forces** are different.

This Ethics Advisory summarizes permissible and prohibited activities and should be regarded as a general guide.

The Office of Special Counsel is charged with enforcing the Hatch Act. Civilian employees should contact

it with specific questions. It has a Hatch Act Hotline, 1-(800) 854-2824.

Permissible Activities

DoD civilian employees (except career members of the Senior Executive Service may not engage in activities 10, 11, 12 and 13), in their personal capacities may:

1. Be candidates for public office in nonpartisan elections;
2. Register and vote as they choose;
3. Assist in voter registration drives;
4. Express opinions about candidates and issues;
5. Contribute money to political organizations;
6. Attend political fundraising functions;
7. Join and be an active member of a political party or club;
8. Sign nominating petitions;
9. Campaign for or against referendum questions, constitutional amendments, or municipal ordinances;

10. Campaign for or against candidates in partisan elections;

11. Make campaign speeches for candidates in partisan elections;

12. Distribute campaign literature in partisan elections; and

13. Hold office in political clubs or parties.

Prohibited Activities

You will have to read the enclosure for a complete list of the restrictions--less than several years ago.

Civilian DoD employees (including career members of the Senior Executive Service) **may not:**

1. Use official authority or influence for the purpose of interfering with or affecting the result of an election;

2. Collect political contributions unless both the collector and the donor are members of the same Federal labor organization or employee organization and the donor is not a subordinate.

POC is **Bob Garfield**, DSN 767-8003. (Encl 12)

Air Force Legal Information Service WebFLITE

Looking for some assistance to help answer the environmental legal challenge du jour?

Then check out the following web site provided by the Air Force at no cost to registered DOD attorneys and other legal professionals. Registration is simple and requires only minutes of your time.

Once at the home page, click on the icon for environmental, which will take you the environmental law home page.

Once there you'll have access to a host of helpful links including, environmental Primers, Theses, and media/environmental legislation specific categories.

Air Force Legal Information Service WebFLITE has an auto-registration system to allow Army legal profession-

als to register for no-fee WebFLITE accounts.

User identities will be verified by e-mail message to their military e-mail addresses as well as a message to their supervisors.

Passwords will be reset every 90 days to ensure that individuals are removed from the system when they are no longer eligible for no-fee access.

Non-Air Force users will be excluded from AF-only applications such as AFCIMS, AMJAMS, LEXIS, controlled DocuShare folders and the JAG Roster, and files set off-limits (e.g., JAX materials).

This auto-registration system is currently the best method consistent with DoD charter (DoDD 5160.64). For free account registration go to <http://register.jag.af.mil> and follow the prompts.

Categorical Exceptions

An excellent article on the new Army Categorical Exclusions (CXs) in Appendix B of the recently promulgated Army NEPA regulations (32 CFR 651) was published in the most recent edition of the Army's Environmental Law Bulletin.

The article, written by **MAJ Jeanette Stone**, compares the new CXs to the old ones in Appendix A of AR 200-2.

Practitioners familiar with the old CXs will find the article particularly useful in determining which new CX to use when completing NEPA actions that do not require the production of an Environmental Assessment or an Environmental Impact Statement.

The new regulations were published in the Federal Register, Volume 67, No. 61, Part II, pages 15290-15332, March 29, 2002

A copy of Major Stone's article is attached as a word file. The referenced Environmental Law Bulletin can be accessed on the Environmental Forum of the Army's JAGCNET. (Encl 13)

The LexisNexis Corner

NEW ENHANCEMENTS

LexisNexis is pleased to announce exciting, customer-inspired enhancements to the **LexisNexis™ Research Service** at www.lexis.com.

Innovative new search tools ... enriched content ... and ease-of-use enhancements are only the beginning. Now more than ever LexisNexis provides a dynamic, one-stop destination for all your essential information needs.

Experience and explore the new time-saving, productivity-increasing enhancements for yourself. Visit us online at <http://www.lexisnexis.com/corpcounsel/demo/>. Better yet, please call Corrin Gee at 202.857.8236 or e-mail at corrin.gee-alvarado@lexisnexis.com to arrange a demonstration.

Monthly Search Tips:

Enhancements to Patents on LexisNexis™!

Some exciting new enhancements were recently made to the LexisNexis patents making LexisNexis even more comprehensive

NEW FULL SHEPARD'S COVERAGE OF MSPB DECISIONS!

Full coverage of Merit Systems Protection Board (MSPB) decisions is now available in **Shepard's** citations. You may now enter a MSPB citation and get a list of all citing references with the editorial analysis expertise of **Shepard's**. Use **Shepard's** citations to begin your research or to validate decisions! And don't forget, **Shepard's** on [lexis.com](http://www.lexis.com)® is even easier to use than ever before!

Looking for a needle in a haystack...

When searching on a name in the person locator files, it's best to use the w/n connector to link first name to last name. . Example: Edgar /3 Poe, will retrieve all records including: Edgar Allen Poe, Edgar A. Poe, Poe, Edgar, Edgar Poe or Edgar Al Poe. The w/n connector allows you to include, but not mandate, middle names, hyphenated married names, etc., without excluding anything. Also,

consider using name derivatives and initials where appropriate: Bill! Or Will! Or William or W. to retrieve documents identifying the name William.

One word can make all the difference!!

More than you can handle?

Did you know that if you need to locate more than 1,000 people, LexisNexis™ can offer you the ease and accuracy of a Batch search! Batch searches are run in the person or property locator sources and can be used to locate or confirm data on people, addresses, and phone numbers. All you need to do is provide your LexisNexis account manager with an electronic format of the data you have. If you have the names, addresses, partial Social Security Numbers, etc. we can find the missing corresponding data.

If you would like more information or would like to set up a training session, please contact: **Corrin Gee** at (202) 857-8236 or **Rachel Hankins** at (202) 857-8258. (See More...at Enclosure 14)

Faces In The Firm

HELLO

AMCOM

Polly H. Chatham has been assigned to Acquisition Law Division, Branch A. She comes to us from private practice.

Mary B. Richards has been assigned to Acquisition Law Division, Branch B., comes to us also from private practice.

CPT Dennis Lee has been assigned to Acquisition Law Division, Branch B., comes to us from Ft. Hook, Texas.

CECOM

LTC Chip Boucher is the new SJA. He was previously assigned at the Army Litigation Division, where he was awarded a Meritorious Service Medal for his three years as Chief, Tort Litigation Branch.

CECOM DIVISION C

CECOM Alexandria Branch - **Sara McWilliams** - Sarah brings a wealth of contract law experience, coming to CECOM from the US Army Military District of Washington. Previously she served as an Attorney-Advisor for the Armed Services Board of Contract Appeals.

Fort Belvoir Branch - **Patricia Boone-Proctor** arrives from the Defense Supply Center, Richmond, where she worked as an Employee Relations Specialist. Previously she served as a Trial Attorney, Office of Corporation Counsel, Washington, DC.

TACOM

CPT Gary Bilski has been assigned. Gary is currently attending the basic Procurement Law course at the JAG school.

GOODBYE

HQ AMC

Diane Travers, who worked in the Business Operations Law Division for nearly 8 years, and several years before that at Vint Hill Famrs Station, resigned her position to spend more time with her family

Linda Fluke, secretary to the Command Counsel and a long time HQ AMC employee, primarily in the product/quality assurance area retired.

Lisa Simon, Chief, Information Technology and Intellectual Property Law Branch has accepted a position with the DOD Office of General Counsel.

AMCOM

Karolyn Voigt, Chief, Acquisition Law Division, Team A. retired May 3rd.

Hal Dilworth, Attorney Advisor of the Adversary Proceeding Division, retired July 3rd. **CPT Anthony Adolph**, Attorney Advisor Acquisition Law Division, Team A will be departing for the 2nd Infantry Division in Korea on August 7th.

Glenda Elrod, Paralegal Specialist of the General Law Division retired July 3rd.

CECOM

SJA COL Donna Wright PCS'd in July after being awarded a Meritorious Service Medal and is now the military Trial Judge at Fort Carson.

TACOM

The Business Law Division said goodbye to **CPT Phil Mitchell** in July. Phil is being promoted to Major, and he is currently attending the JAG Advanced Course in Charlottesville.