



Office of Command Counsel Newsletter

October 2002, Volume 02-05

Nick Femino Announces His Retirement

Dominic A. Femino, Jr., the Deputy Command Counsel since March 1997 announced his retirement after more than 30 years of Federal service. His last day of work was October 18. Nick was both a respected and liked by all who had the pleasure of serving with him during his long career.

He received a Bachelor of Arts degree from Bowdoin College in 1969 and a Juris Doctor degree from Boston University School of Law in 1972. He also was a Distinguished Military Graduate of the ROTC Program at Boston University.

Mr. Femino was sworn into the Massachusetts State Bar in December 1972 and joined the U.S. Army as a Captain in The Judge Advocate General's Corps on January 1, 1973.

After discharge from military service in 1976, Mr. Femino became a civilian procurement attorney for AMC's Aviation Command at Fort

Eustis. In 1979 he served as a procurement law attorney for the U.S. Army Signals Warfare Laboratory at Vint Hill Farm Station. Prior to his selection to the SES and as Deputy Command Counsel Nick was the long time Chief Counsel for Vint Hill Farms Station. Nick was selected AMC Attorney of the Year in 1989.

Nick was considering postponing retirement until: he signed a recording contract highlighting his harmonica playing, read all the letters and works of Nathaniel Hawthorne, collected all the old postcards from his home town of Salem, Massachusetts, and panned for gold throughout the Blue Ridge mountains.

Although these were all doable, a pledge he could not make was waiting till the Boston Red Sox won the World Series.

Nick is an expert in the field of acquisition law. But, as important he never lost

sight of the fact that people are important and critical to the success of a legal community and an organization's success.

Nick will devote full time to his farm in Nokesville, Virginia and to be with his wife Beverly and sons Anthony and Tom.

Best wishes and good luck.

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Commanders' Conference Point Papers from the Command Counsel

1. Permissible Political Activities—**Bob Garfield**

2. FY2002 Significant Ethics Issues—**Bob Garfield**

3. Nepotism—**Mike Lassman**

4. NO FEAR Act—**Linda Mills**

5. Proposed Legislation in the FMS Arena—**Craig Hodge**

6. Public-Private Partnerships—**Dave Harrington**

7. Center for Patent Prosecution Excellence—**Bill Adams**

8. Contractors on the Battlefield—**Art Lees**

9. ADR Update—**Steve Klatsky**

10. Foreign Disclosure—**Louis Rothberg**

These point papers are referenced in the various focus areas and are included as enclosures.

At each Commanders' Conference **Ed Korte** presents the group with a series of 10 timely point papers.

Thanks to **Vera Meza** who manages the compilation each quarter.

Coming Soon:

A report on the Command Legal Program for 2001-2002 and the CLP for 2003-2004

Newsletter Details

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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

Proposed FMS Legislation benefits the Army

AMC currently has some stocks in long supply: when you have more than enough of an item, but not yet so many that you have an excess.

Currently, items which are in long supply and not expected to be replaced may be sold at "actual value" and the funds deposited in the miscellaneous receipts account of the US Treasury. The U.S. Army gets little benefit from the transfer.

Proposed legislation would permit items to be sold for "actual value" whether they are intended to be replaced or not.

The funds may be placed into the account from which the item may be replaced. Or, the funds may be used to buy any authorized item with a similar function or used to upgrade current stock.

In either case the Army can capture and use these funds. The proposed legislation is 22 U.S.C Sec 2761(a).

POC is **Craig Hodge**, DSN 767-8940.

Enclosure 1

Public-Private Partnerships

Public-private partnerships are agreements between organic Government-owned, Government operated depots or arsenals and one or more private industry or other entities to perform work or utilize facilities and equipment.

Dave Harrington DSN 767-7570, drafted a point paper describing the various statutes and regulations governing this area.

Congress has endorsed these arrangements to increase facility utilization and readiness and to lower costs.

10 USC 2474 allows performance of work by depot-level activities that have been designated as Centers of Industrial and Technical Excellence (CITES) in their core competencies and allows use of CITE facilities by contractors.

All five AMC maintenance depots have been designated as CITEs in their core competencies. ASPI is being implemented at Rock Island, Watervliet and Pine Bluff Arsenals. Public-private arrangements are in effect or are being pursued at all locations.

Enclosure 2.

List of Enclosures

1. Proposed FMS Legislation
2. Public-Private Partnerships
3. Foreign Disclosure of AMC Technical Data
4. ADR Update
5. Center for Patent Prosecution Excellence
6. Accounting for Personnel Accomp'g Military Forces
7. Nepotism
8. Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002
9. Whistleblower case--easier test for merits hearing
10. Significant Ethics Issues for 2002
11. Hatch Act
12. Anti-Lobbying Law and Guidance
13. Lexis/Nexis Corner

Acquisition Law Focus

SSAs do not see A-76 in-house cost estimates

Source Selection Authorities wanting to leave no piece of paper unturned to ensure that their source selection decisions withstand assault may have an issue with the A-76 rules that prohibit them from reviewing in-house cost estimates before they are opened for public inspection.

A-76 policies, to include the Supplemental Handbook, state that the SSA reviews all private sector offers and the in-house Management Plan to ensure that they provide the same level of effort. However, the Supplement specifically states that the SSA does not review the in-house cost estimate.

An Independent Review Officer (IRO) reviews the in-house cost estimate to ensure that it is consistent with the Performance Work Statement (PWS). Once the SSA has confirmed that both the in-house and private sector proposals are offering the same level of effort and the IRO has approved the in-house cost estimate, the Contracting Officer opens the in-house cost estimate, prepares a Cost Comparison Form, and announces a tentative deci-

sion. This begins the appeals process.

The Commercial Activity (CA) Study Team prepares the in-house cost estimate and CA manager works with the IRO to resolve any problems prior to the IRO's approval of the in-house cost estimate. This process can be elevated if necessary.

Department of Defense Instruction (DODI) 4100.33 further provides that the Head of the DoD Component or its designee shall certify prior to opening or closing that the in-house cost estimate is based on the most efficient and cost-effective operation practicable.

The A-76 Circular, the Supplemental Circular, and the volumes of DOD and Army policies offer no further safeguards relative to getting the in-house cost estimate right.

Why they exclude Source Selection Authorities from reviewing in-house cost estimates when they have a vested interest in them is unclear, but attorneys may be hard-pressed to inform them that it is to protect the integrity of the process.

POC is TACOM-RIA's **Joe Picchiotti**, DSN 793-8435.

Foreign Disclosure of AMC Technical Data

During the Spring, 2002, AMCIG conducted an audit of AMC compliance with applicable foreign disclosure regulations. The IG presented its finding July 2002

During the audit, the Director of International Cooperative Programs Activity requested IG assistance in obtaining HQDA and DOD clarification of legal requirements and guidance on technology transfers to ensure compliance with U.S. export control laws.

The IG accepted this request, and the recommendation made to the CG was adopted. HQ DA assistance is pending.

POC is **Louis Rothberg**, DSN 767-8147 (Encl 3).

ADR Update

A point paper on three AMC ADR programs highlights two acquisition areas: Partnering and the AMC-Level Protest Program. Our Partnering Inventory is 85. ANd, the AMC-Level Protest Program has resolved 576 cases. POC is **Stephen Klatsky**, DSN 767-2304.

Enclosure 4

Acquisition Law Focus

Center for Patent Prosecution Excellence (CPPE)

The AMC Office of the Command Counsel recently established the AMC Center for Patent Prosecution Excellence. The CPPE is a comprehensive, integrated system for protecting, leveraging, and licensing AMC intellectual property.

The goals of the CPPE are threefold:

1. To protect valuable AMC intellectual property;
2. To bring in royalty and other income to AMC labs; and
3. To increase the military and commercial state-of-the-art

The CPPE will be run by a customer-focused team that facilitates the invention disclosure and patenting process for the inventor and the lab director. In addition, the CPPE will maximize technology transfer professionals' ability to license AMC technology and bring royalty and other income into the lab.

There are five on-going initiatives within the CPPE:

1. Invention Disclosure. The CPPE will encourage the protection of valuable intellectual property through inventor outreach, process improvement, and patent prioritization.

2. Patent Services Contract. This CPPE will team with several high quality intellectual property law firms during the patenting process, in order to improve the quality of patent applications and patent prosecution. AMC recently issued a solicitation and is currently in the proposal evaluation phase. 3. Docket Management. The CPPE will automate the reporting of all AMC inventions and patents, in order to add visibility to our intellectual property and to assist in meeting Congressional reporting requirements. The CPPE will use a web-based program ("IPMIS") which was

developed by the Navy and is available at minimal cost to us.

4. Technology Transfer. The CPPE will team with partnership intermediaries to identify potential commercial partners to license AMC technology. The laboratory may use its share of the royalties for R&D and other purposes called out in the law. The inventor also retains a portion of the royalties.

5. Attorney Recruitment and Retention. The CPPE will establish methods to recruit and retain highly skilled intellectual property lawyers. To do this, the CPPE will establish a "Lab to Lawyer" program which will incentivize interested, qualified AMC scientists and engineers to become patent agents or patent counsel.

POC is **Bill Adams**, DSN 767-2301.

Enclosure 5.

Employment Law Focus

Accounting for Personnel Accompanying Military Forces

The Civilian Tracking System (CIVTRACKS), which became operational at the beginning of June 2002, is designed to capture data on Department of the Army civilians to assist tactical commanders in identifying all personnel within their areas of operation. This capability includes data on contractors, Red Cross, AAFES and other DoD component personnel.

MAJ Art Lees, DSN 767-2556 authored a point paper that explains the various capabilities contained in the CIVTRACKS system (Encl 6),

Nepotism: Its a family affair

Mike Lassman, DSN 767-8040, offers a point paper on this recurring issue.

Nepotism is the term used to describe the granting of improper preference, assistance or advancement to an individual related by blood or marriage. It is prohibited under both 5 USC 2302(b)(7) and 5 USC 3110(b).

A public official may not appoint, employ, promote, advance, or **advocate** for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he **exercises jurisdiction or control** any individual who is a relative of the public official. 5 USC 3110 (b).Enclosure 7.

REVISED MSPB FORMS PACKAGE PUBLISHED

The Merit Systems Protection Board is seeking public comments on its proposed MSPB Appeal Forms Package, which is a comprehensive revision of the current MSPB Appeal Form.

As required by the Paperwork Reduction Act, on September 4, 2002 the MSPB published a notice in the Federal Register,

Comments are due to MSPB by November 4, 2002. Link to the MSPB Appeal Forms:<http://www.mspb.gov/whatsnew/applformpack/newformspage.html>

The revision would require all appellants to file Form 185-1; a second form would be filed depending on the nature of the particular appeal. The revision is also intended to prepare for a future system of electronic filing.

Removal for Refusal to be Vaccinated is Upheld

The US Court of Appeals for the Federal Circuit ruled that the Navy could fire two civilian seamen who refused to be vaccinated against anthrax. Mazares v. Department of the Navy, No.01-3337. The vaccination was ordered

when their vessel was docking in South Korea—considered a country at high risk. Removal for this form of insubordination was not excessive for the two employees, both of whom with more than 10 years of service.

Employment Law Focus

No Fear Legislation

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002--No FEAR Act, P.L. No: 107-174, was enacted 15 May 2002. The effective date is 1 October 2003 (beginning of FY 04).

The legislation grew out of a GAO report that the number of discrimination complaints filed by federal employees grew tremendously in the 1990's and a House investigation finding a "disturbing pattern of intolerance, harassment and discrimination at the EPA."

The Act emphasizes notification of employees, increases the accountability of agencies, and establishes reporting requirements:

Each Federal agency will be required to reimburse the Judgment Fund out of agency operating expenses for the payment of judgments, awards and settlements attributable to discrimination or reprisal for whistleblowing or for the exercise of appeal rights.

Linda Mills, DSN 767-8049, prepared a point paper on this very important piece of legislation.

Enclosure 8

CC Newsletter

Whistleblower Decision: Easier to get hearing on the merits

On 4 Sept 02, the MSPB issued a significant decision Rusin v. Department of Treasury, CH-1221-00-0028-W-1, Sept 4, 2002, that will make it easier for employees claiming whistleblower status to receive a hearing on the merits of an individual right of action (IRA) after exhausting the administrative procedures provided by the Office of Special Counsel.

In so doing, the Board overruled the jurisdictional requirements set forth in Geyer v DoJ.

POC is **Linda Mills**, DSN 767-8049. (Case summary is at Encl 9).

Report of First Advanced Labor and Employment Law Course in the December Issue

Arbitrator Power IS Limited!

In case you think that the FLRA's reluctance to consider "interlocutory appeals" in 57 FLRA No. 194 (see previous e-mail and <http://www.flra.gov/decisions/v57/57-194.html>) provides further evidence that arbitrators are unrestrained and can get away with anything, you might want to see <http://www.flra.gov/decisions/v57/57-193.html> for a reminder that the arbitrator's power is not unlimited. The case digest follows:

57 FLRA No. 193

U. S. Dept. of Veterans Affairs, Northern Arizona Veterans Administration Health Care System Prescott, Arizona and AFGE, Local 2401 (White, Arbitrator), 0-AR-3498 (Decided July 5, 2002).

The Authority explained that arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.

Environmental Law Focus

Installation Management Agency Legal Support to AMC: Role of AMC Environmental Team

On 6 October 2002, the Installation Management Agency (IMA) became operational.

The AMC Command Counsel recently issued a memorandum outlining the basic strategy for providing the environmental/real estate legal support in this new organizational environment.

At active installations, the local legal office or, if there is no local legal office, the MSC Legal Office should continue to be the first line of legal support for our installation commanders and staff.

At BRAC/excess installations, the attorneys who are supporting particular sites should continue to provide this support to the maximum extent possible until the responsibility for the site transitions to another U.S. Army legal office.

At the headquarters level, the AMC Environmental Law team **Stan Citron** and **John German** will continue to perform substantially the same responsibilities as in the

past. The AMC Environmental Law team will continue to be actively involved in reviewing:

- a. Environmental issues of command interest (e.g., issues that have the potential for generating public, media, regulatory, or congressional interest).
- b. Any potential disagreements between the installations and the various IMA organizations.
- c. Environmental fines and penalty cases.
- d. Environmental agreements, and
- e. Environmental litigation support coordination

In addition, the AMC Environmental Law team will continue to be available to provide advice and guidance to the field attorneys on day-to-day questions.

The AMC Environmental Law team will remain active in BRAC/Real Estate matters by supporting the National Capitol Region (NCR) BRAC Field Office.

Environmental Law Team : Sharing the Workload

A summary of the AMC Environmental Law team responsibilities is as follows:

Compliance

Stan Citron has the lead on RCRA/CAA/CWA/SDWA; Conventional and Chemical Weapons; Safety/Radiological issues.

John German has the lead on NEPA/Unexploded Ordnance and Pollution Prevention matters.

Restoration

John German has the lead.

Real Estate

Stan Citron has the lead.

Litigation Support

John German has the lead,

Ethics Focus

Significant Ethics Issues --A 2002 Status Report

There are several programmatic changes underway in the ethics arena. The goal is to make the rules consistent with Federal government needs and practices and to improve program efficiency.

Automated Financial Disclosure System

There is a DA effort underway to develop an automated system that identifies financial report filers (SF 278 and OGE Form 450) and notifies them of their filing requirement.

Criminal Code Review

OGE and the Department of Justice have initiated a comprehensive review of the ethics provisions in the criminal code and will propose a revised chapter of the United States Code.

The provisions to be reviewed include those on bribery, conflicts of interest, gifts and gratuities, representation by Federal employees, and post-employment conflicts of interest. Some of these provisions date back to the Civil War. Although they have been revised over the years, they

still reflect the activities of a Federal government different from today's government

DOD Rewriting the JER

DOD General Counsel is rewriting the JER. The JER supplements OGE's ethics regulations and incorporates them. In many places, the JER repeats itself and the OGE regulations. Besides making some substantive changes the rewriters will attempt to eliminate the repetition. The rewrite is expected sometime in 2003.

Travel Card

Congress and the Executive Branch are scrutinizing the travel and purchase card programs. Extensive abuse of both has been brought to light. Abusers are being disciplined and fixes are being sought to eliminate abuse and to attract credit card company interest in the programs.

POC is **Bob Garfield**,
DSN 767-8003

Enclosure 10

Hatch Act Point Paper

Just in time for election season. Additionally, an article on the Hatch Act is in the August Issue of the AMC Command Counsel Newsletter. POC is **Bob Garfield**, DSN 767-8003.

Enclosure 11

Foreign Gift-- Minimal Value Rule Changes

On September 4, 2002, the General Services Administration (GSA) published a notice in the Federal Register. The notice states that, for purposes of gifts from foreign governments to Federal employees, the definition of "minimal value" has been changed from \$260 to \$285. The notice states that the effective date of this change is January 1, 2002. GSA modifies the definition of "minimal value" every 3 years to reflect changes in the Consumer Price Index.

Anti-Lobbying Law and Guidance-- 18 USC 1913

TACOM-ARDEC's **John McCambridge**, DSN 880-6583, delivers a fine article on an important subject: the law and interpretive guidance pertaining to anti-lobbying under 18 U.S.C. Sec 1913.

Criminal Provisions

The criminal anti-lobbying law provides "no part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropria-

tion; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined under this title or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment".

To date, there are no known convictions under this law.

Section 8012 of the FY2002 DoD Appropriations Act provides:

None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional actions on any legislation or appropriation matters pending before the Congress.

Every recent DoD appropriations act has contained identical language.

The paper also addresses cases, Justice Department interpretations and examples of violations.

The article concludes by reciting the contacts of AMC policy contained in a December 10, 1999 memorandum, subject: Congressional Relations and Contacts.

Enclosure 12

Faces In The Firm

Hello

The Office of Command Counsel welcomes back **Larry Anderson**, a veteran AMC attorney, from DOD.

Larry, a retired JAG Officer who had assignments at both AMC Europe and HQ AMC, joined the AMC Business Operations Law Division.

Captain Phyllis Smith joined the General Law Division in August. Phyllis is working on legal assistance and military law matters.

Job Assignments

Ed Stolarun, a veteran of over 30 years with AMC, and an intellectual property attorney with a wide range of experience was named Team Leader of the Information Technology and Intellectual Property Law Branch, Business Operations Law Division

Milestone

As the Newsletter goes to press, **Steve Klatsky**, Assistant Command for Alternative Dispute Resolution, completed 30 years of government service.

Steve started his AMC career, entering the Army after law school as a Military Police Officer at Sierra Army Depot. After two years he transferred to the Judge Advocate General Corps. He spent two years as a Captain at HQ AMC, and stayed with AMC after leaving the service.

Steve was an original member of the Department of the Army Labor Counselor Program.

STRICOM

Effective 1 October 2002 STRICOM was organizational changed to a Program Executive Office reporting directly to DA ASALT. Although no longer a major subordinate command of AMC, matrix support arrangements are being considered as we go to press.

Thanks to **Harlan Gottlieb** and **Laura Cushler** for their outstanding service.

LexisNexis Corner

(Editors Note: the copy of the LexisNexis Corner article is difficult to reproduce for the body of the Newsletter. So, we will always have the complete version as an enclosure. The body of the Newsletter will highlight the contents of the entire document.)

The October issue of the LexisNexis Corner highlights new enhancements and time save search tips.

Enhancements

New features include Shepardizing MSPB decisions, use of the fast print button, the printer/download utility, source selection tabs, finding a source tab, and editing your last 20 sources.

Time-Saver Search Tips

Check out the practice area pages for helpful ideas. These cover many disciplines, such as public contracting, labor and employment, environmental, patent and litigation.

Also, find out how the history button saves all of your searches for the entire day.

Thanks to **Rachel Hankins** and **Corrin Gee-Alvardo**.

Enclosure 13