



# Office of Command Counsel Newsletter

December 1997, Volume 97-6

## REDS Comes to AMC

### Pilot sites chosen to test ADR for Workplace Disputes

**A**MC has been a leader in designing dispute resolution processes for several substantive areas of practice to include the AMC-level Protest Program and Partnering.

We are pleased to announce that we are testing an ADR program for workplace disputes. Entitled **REDS** - Resolving Employment Disputes Swiftly, three pilot programs will run at Tank-automotive and Armaments Command (TACOM), Army Research Laboratory (ARL), and Anniston Army Depot (ANAD).

During the week of 3 November, three-person ADR Teams representing test-site EEO, CPO and Legal staffs met at HQ AMC to design program procedures and an information brochure.

A special thanks to **Jean Wiley Cozart**, AMC Director of Equal Opportunity for taking the initiative and organizing the effort.

**Cassandra Johnson**, DSN 767-8050, is the AMCCC POC. Counsel from the test sites who are members of their installation ADR Team are **Paul Vitrano** (TACOM), **Sam Shelton** (ARL) and **George Worman** (ANAD). **Steve Klatsky**, DSN 767-2304, is participating as ADR advisor.

Many of you volunteered your command to serve as a test site. As with all ADR initiatives, a basic tenet is to start small and test a program. That's what we're doing, so we hope you understand. As the test program progresses you will be provided information and be given an opportunity to comment.

In short, we believe that ADR offers several advantages over traditional dispute resolution processes in handling employment issues. In most situations, the traditional complaint and grievance procedures do not focus on the continuing employment relationship. Often, the formal, adversarial process

makes the employer-employee relationship worse. Additionally, ADR offers an expedited resolution, less costly in both time and money. ADR encourages the parties to communicate with each other, and to formulate a resolution they design; one that concentrates on healing the relationship and moving forward.

#### *In This Issue:*

<i>ADR for Workplace Disputes</i> .....	1
<i>Inherently Gov't Functions</i> .....	2
<i>ESC Acquisition Law Point Papers</i> .	3
<i>A-76 Cost Comparisons</i> .....	4
<i>Common Threads-AMC Business Initiatives</i> .....	5
<i>Employer Liability for Sexual Harassment</i> .....	6
<i>Environmental Executive Orders</i> ...	9
<i>AMC Environmental Council looks to the future</i> .....	10
<i>Contractors in the Workplace</i> .....	11
<i>Teaming Training at the Office of Command Counsel</i> .....	15
<i>Faces in the Firm</i> .....	16

# What Are Government Functions? — An Inherently Difficult Call to Make

As we go to press, MSC's are actively engaged in responding to a data call concerning the identification of missions and functions that are inherently governmental.

Inherently governmental functions are those functions that are intimately related to the public interest and require either the exercise of discretion in applying government authority, or the making of value judgments in government decision making.

Inherently government functions normally fall into two categories: the act of governing (i.e., the discretionary exercise of government authority) and monetary transactions and entitlements.

Inherently government functions determinations are a matter of policy not law. The HQ, AMC functional directors

are responsible for ensuring consistent analysis within their functional areas. Conclusions must be made on a case by case basis considering the totality of the circumstances, such as whether the function involves discretionary activities or value judgments that commit the government to a course of action in a way that significantly affects the public interest.

Importantly, inherently governmental functions cannot be contracted out and must be performed by government employees.

Deputy Command Counsel **Nick Femino**, DSN 767-8032, is the leader of the team addressing this issue. **Diane Travers**, DSN 767-7571, prepared a Point Paper on the subject for the ESC (Encl 1).<sup>c</sup>

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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

## ESC Discussions on Acquisition Law

### Contracting Out, A-76, Proprietary Data, Authorization Bill & more...

**A**t the quarterly Executive Steering Committee meeting — Commander's Conference, the Office of Command Counsel distributes point papers on several important topics that warrant highlighting.

During the week of 17 November, the ESC was held at White Sands Missile Range. Point papers were distributed on the following subjects:

Protecting Contractor Proprietary Data, highlighting proprietary data protection and use considerations, POC **Ed Stolarun**, DSN 767-8051 (Encl 2).

A-76 Cost Studies, providing information about when cost studies are required under OMB Circular A-76, POC **Dave Harrington**, DSN 767-7570 (Encl 3 ).

Common Threads to AMC Business Process Re-engineering Initiatives, address-

ing systemic issues involved in several important initiatives, POC **Elizabeth Buchanan**, DSN 767-7572 (Encl 4).

Official Representation Funds, providing needed guidance on proper use of these funds as well as a list of prohibitions, POC **LTC Paul Hoburg**, DSN 767-2552 (Encl 5 ).

FY 98 DOD Authorization Bill, summarizing highlights in HR 1119 as presented to the President on 6 Nov 97, POC **Diane Travers**, DSN 767-7571 (Encl 6 ).

An additional ESC Point Paper will be found in the Ethics Focus.

A special thanks to **LTC Paul Hoburg** who has the task of orchestrating and administering the effort, one that the MSC Commanders truly appreciate, as they often comment that these materials are very useful. ©

## List of Enclosures

1. *Inherently Governmental Functions*
2. *Protecting Contractor Proprietary Data*
3. *A-76 Cost Studies*
4. *Common Threads in AMC Business Initiatives*
5. *Official Representation Funds*
6. *FY 98 Authorization Bill*
7. *GAO and Non-procurement Instruments*
8. *Fun with FACA*
9. *Beware of Alert Copyright Owners*
10. *EPA Inspections re EPCRA Compliance*
11. *Environmentally Related Executive Orders*
12. *ELD Bulletin Oct 97*
13. *ELD Bulletin Nov 97*
14. *Environmental Management Review*
15. *Environmental Leadership Program*
16. *Energy Policy and Conservation Act (EO 12902)*
17. *Contractors in the Workplace*
18. *Anti-Lobbying Act*
19. *Fundraising Activities*

## OOPS!

In Newsletter 97-5 TACOM counsel **Kuhn** was renamed without his permission. Of course, he is still known as **David**. Sorry for the error.

# Acquisition Law Focus

## Fun with FACA

CBDCOM's **Lisa Simon**, DSN 584-1298, provides an article on a proposed amendment to the Federal Advisory Committee Act (FACA) which would exempt the National Academy of Sciences ("NAS") and its subordinate committees from coverage under FACA. However, even though the NAS may now be exempt, a review of the proposal indicates the NAS may be required to make committee proceedings more open to the public. The proposed amendment is currently awaiting the President's signature. If enacted, the law's requirements will apply retroactively to all NAS committees formed after 1972.

We foresee two potential impacts on AMC. First, it removes the specter of FACA litigation from NAS committees. This would end a hotly contested issue that has been debated in the courts. Second, consulting agencies may be precluded from relying on NAS advice if the NAS does not comply with the amendment's requirements. This legislation is in response to: Animal Legal Defense Fund v. Shalala, 104 F.3d 424 (D.C. Cir.1997), writ of certiorari denied November 4, 1997 (Encl 8) ©

## A-76 Cost Comparisons & Contracting Out

HQ, AMC Counsel **Dave Harrington**, DSN 767-7570, provides an overview addressing when cost studies are required under OMB Circular A-76 rules concerning Contracting Out (Encl 3).

A commercial activity is an activity that can be obtained from a commercial source. Inherently Government functions, which involve the exercise of discretion in applying Government authority or use of value judgment in making decisions for the Government, are not commercial activities, and are thus not subject to OMB Circular A-76 or its supplemental handbook.

Under current rules contained in A-76 and its Revised Supplemental Handbook, several functions may be converted to contract without performance of a cost comparison:

- o Activities with 11 or more full time equivalent employees (FTEs) if fair and reasonable prices can be obtained through competitive award, and all directly affected employees serving on permanent appointments are reassigned to other compa-

rable positions for which they are qualified.

- o Activities performed by uniformed military personnel if the contracting officer determines that fair and reasonable prices can be obtained from commercial sources.

Other cost comparison exemptions exist when converting the activity to or from in house such as:

- o National defense and national intelligence security.

- o Activities where there is no satisfactory commercial source. All reasonable efforts (in compliance with FAR) must be made to identify available sources.

- o Activities performed by 10 or fewer full time equivalent employees (FTEs). If the contracting officer determines that offerors will provide required levels of service at fair and reasonable prices.

- o Activities for which a waiver of cost comparison requirements is approved by the ASA(IL&E). The waiver must be based on a determination that conversion will result in a significant financial or service quality improvement without reducing significantly the level or quality of future competition.

- o Functions at installations scheduled for closure on a date certain (BRAC). ©

# Acquisition Law Focus

## COMMON THREADS IN AMC BUSINESS PRACTICE PROGRAMS & INITIATIVES

HQ, AMC's **Elizabeth Buchanan**, DSN 767-7572, provides information on systemic issues common to AMC's business process re-engineering initiatives.

AMC has several such ongoing programs and projects including the Apache Life Cycle Management Pilot, the M109 Family of Vehicles Life Cycle Management Pilot, and CECOM's Logistics Automation Privatization Pilot.

These initiatives are still in early stages, but some common threads are appearing, including:

- o OMB Circular A-76 cost comparison requirements apply unless there is an applicable exemption, waiver, or the program meets the requirements of privatization. Privatization requires that the government convert a public function to private control and ownership. Examples include utilities and housing.

- o Competition in Contracting Act (CICA) requirements apply unless a sole source justification, such as proprietary information, exists. In addition, to the extent that requirements which have been accomplished by small businesses are "bundled together" for efficiency, we must be prepared to document the government need for the efficiency and protect small business participation through incentives and evaluation criteria.

- o Restrictions on contracting out depot maintenance apply to those initiatives which impact depot maintenance. Partnering arrangements with our depots and industry will assist in achieving objectives.

- o The larger initiatives generate significant political interest. Extra time must be built into initiative schedules to provide for the required briefings.

- o All of the larger initiatives have significant potential impact on readiness and on Army financial management. To allow for exploration and resolution of these issues, formalized General Officer Steering Committees with subordinate Integrated Process Teams have been formed. This process has been very successful in raising and resolving very complex issues impacting Army-wide processes (Encl 4). ©

## GAO & Non-Procurement Instruments

TACOM-ARDEC's **Denise Scott**, DSN 880-6585, provides an excellent paper addressing GAO treatment of protests regarding award of cooperative agreements such as grants, other transactions and cooperative research and development agreements (Encl 7).

The general rule is that GAO will not review protests regarding nonprocurement instruments, primarily because they do not involve award of a "contract."

The GAO will consider a protest that alleges an agency improperly used a nonprocurement instrument where a "procurement contract" is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. See, Renewable Energy, Inc., B-203149, June 5, 1981, 81-1 CPD 451.

Finally, although the GAO will explore whether or not an agency properly used a nonprocurement instrument as opposed to a contract, it has refused to consider the pure issue of whether or not the correct nonprocurement instrument was used, Energy Conversion Devices, Inc., B-260514, June 16, 1995. ©

# Employment Law Focus

## HIGH COURT TO RULE ON EMPLOYER LIABILITY

### Ruling in Sexual Harassment Case to Clarify the Law

The Supreme Court has agreed to decide when an employer can be held liable for a supervisor's sexual harassment of a lower-level employee.

Under the 1986 Supreme Court decision of Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986), an employer can not automatically be held accountable regardless of the circumstances. In the absence of guidance, lower courts have focused on a variety of factors such as whether senior management knew or should have known about the hostile behavior

and whether the supervisor was in position to exploit authority.

In Faragher v. Boca Raton, No. 97-282, a federal district court in Miami found the city liable for the unwanted touching of a female lifeguard by two supervisors, deciding that the city "should have known" about the behavior by conducting a proper investigation. On appeal, the 11th Circuit Court of Appeals overruled the lower court, holding that the city should not be held liable for the unauthorized misdeeds of supervisory employees, <sup>c</sup>

## Man Sexually Harassed by Female Co-Worker

A common question raised during sexual harassment training is whether there are examples of a woman sexually harassing a man. In Cerullo v. Cohen, DC EVA, No. 97-69-A, Oct 8, 1997, a federal jury

awarded \$850,000 to a Defense Intelligence Agency security officer who claimed that he was sexually harassed by a female secretary who routinely used vulgar, sexually explicit language, and then retaliated against him for complaining. <sup>c</sup>

## Health Problems May Not Justify Long Absence

Prolonged absence with no foreseeable end can provide just cause for an employee's removal even when the absence is excused for poor health, if the absence constitutes "a burden which no employer can efficiently endure," so says the MSPB in Allen v. Department of Army, No. SF-0752-96-0050-I2 (Oct 3, 1997).

The criteria for taking an action based on excessive absence were met: (1) he was absent for compelling reasons beyond his control so that agency approval was immaterial; (2) he was absent for almost seven months, and the agency warned him that failure to report for duty could result in disciplinary action; and (3) the agency needed an employee to fill the appellant's position.

The factors used by the Board originally were raised in Rhodes v. Department of Interior, 21 MSPR 193 (1984), 770 F.2d 182 (Fed Cir. 1985).

# Reprimand *NOT* Removal For False 171

In Perez v. USPS, 97 FMSR 5314, Sept 9, 1987 the agency removed the appellant, charging that he falsified his employment application when he failed to report that he had been convicted of "conspiracy to burglarize." The AJ found that the agency proved its charge and that removal was a reasonable penalty. On review, the Board found that the penalty of removal exceeded the bounds of reasonableness. The Board acknowledged that, in most cases involving falsification of employment documents, the Board has expressly declined to consider mitigating factors, but the Board rejected a per se rule that removal is always warranted where an employee has falsified his or her employment application. The Board noted that the appellant in this case had 15 years of federal service, 11 years of which were with the agency, and the

agency had not shown or claimed he committed any offense during his employment. Further, while the agency initially charged that the appellant falsified his employment application when he failed to report that he had been convicted of "conspiracy to burglarize," it was later discovered that the underlying criminal charge was actually "willful failure to appear." Since the appellant had falsified his employment application, however, the Board found that his employment records should reflect the misconduct, but the Board concluded that the removal should be mitigated to a written reprimand. In view of the mitigating factors, particularly the length of time that had elapsed with no further misconduct, a suspension or demotion would have been punitive rather than rehabilitative. ©

## No Union Rep in this Interview

In FLRA v. US DOJ, 97 FLRR 1-8009, Sept 25, 1997, the Second Circuit overturned a FLRA decision, holding that under the circumstances in the case, six bargaining unit employees were not entitled to union representation during their investigative interviews. In the opinion of the Court, the critical inquiry is whether the investigation concerned matters within the scope of collective bargaining.

In the instant case, the focus of the investigation of some of the employees was whether the employees had accepted bribes. The court considered this to be outside the scope of collective bargaining. Several other employees were questioned about violations of the agency's policy prohibiting the purchase or possession of personal firearms. None of the parties to the case had suggested that the issue was within the scope of collective bargaining. Therefore, none of the employees were entitled to union representation during their examination. ©

## Leak Violates Confidentiality

Confidentiality provisions in settlement agreements are difficult to enforce. Counsel often tries to avoid these provisions because of the possibility that a violation will re-open a case.

In Thomas v. HUD, 97 FMSR 7023 (Sept 8, 1997), the Federal Circuit concluded that the agency materially breached the confidentiality provisions of the settlement agreement. The agency demoted the petitioner based on charges of mismanagement and abuse of supervisory authority. The petitioner appealed, and the parties entered into a settlement agreement, which included a Memorandum of Understanding (MOU) outlining the petitioner's requirements regarding confidentiality. Subsequently, when the agency was contacted with an inquiry by a potential employer, an agency employee stated that there had been some problems and that the petitioner had been the subject of an Inspector General matter. The petitioner contended that the agency breached the agreement, and he sought to withdraw his resignation and to rescind both the settle-

ment agreement and the MOU. The AJ found that the agency did not materially breach the MOU and the MSPB affirmed. On appeal, the Court held that the agency clearly breached the confidentiality provisions of the MOU and further held that the agency's breach was a material one, a matter of vital importance that went to the essence of the contract. The Court stated that, when the leak comes from a responsible official inside the agency in response to an inevitable inquiry from a potential employer, the agency that willingly entered into such an arrangement must be held responsible. The Court concluded that, because the agency breached the agreement, the petitioner was discharged from his contractual duty to resign. Because the agency denied his attempt to withdraw his resignation, the resignation became an involuntary one and the agency's action constituted a removal. Since the Board had dismissed the appeal on the grounds of a voluntary resignation, the Court remanded the matter to the Board for further action. ©

## BEWARE of Alert Copyright Owners

**Bill Medsger**, DSN 767-2556, Chief, Intellectual Property Division, provided the ESC with guidance on preventing copyright infringement (Encl 9).

Army policy is to respect the rights of private copyright owners. Army Regulation 27-60 states that copyrighted works will not be reproduced, distributed, or publicly performed without the permission of the copyright owner. Exceptions to this policy are allowed only if use is permitted under the copyright laws or the use is required to meet an immediate mission-essential need for which nonconforming alternatives are unavailable or unsatisfactory.

Caution must be exercised to ensure that AMC brochures, posters, videos, software and Internet homepages do not include copyrighted material unless advanced permission has been obtained from the copyright owner. Identifying copyrighted material is not always easy - a work may be copyrighted even though it does not contain a copyright notice. Accordingly, it is imperative to know the source of all materials before they are used.

# Environmental Law Focus

## EPA Is Coming to Inspect Compliance with EPCRA

The Environmental Protection Agency (EPA) Federal Facilities Enforcement Office tasked EPA regional personnel to conduct Emergency Planning and Community Right-To-Know Act (EPCRA) inspections of federal facilities. Executive Order 12856 authorizes EPA to conduct reviews and inspections of federal facilities to ascertain compliance with EPCRA and Pollution Prevention Act requirements. EPA cannot take enforcement actions (fines, civil or criminal penalties) as provided in EPCRA against federal agencies that fail to comply with applicable EPCRA sections. However, EPA has outlined procedures to be followed if a facility is found to be out of compliance with EPCRA. DOD has issued guidance on complying with these EPA inspection procedures (Encl 10). This guidance document can also be obtained from DENIX. ©

## Get the Lead Out -- Well, Maybe

The issue of whether and to what extent lead-based paint contamination should be remediated at DoD BRAC sites continues to be a highly controversial issue, which has arisen at several of our BRAC installations. DoD and EPA continue to hold discussions to arrive at a consensus approach. A good article on the subject, Does CERCLA Regulate DOD Residential

Lead-Based Paint? by an Air Force environmental attorney, Thomas F. Zimmerman, appears in the Autumn 1997 issue of the *Federal Facilities Environmental Journal*. Any lead based paint issues at AMC BRAC installations should be discussed with **MAJ Mike Stump**, DSN 767-8049 and with **Colleen A. Rathbun**, Army Environmental Center (AEC), (410) 671-1551. ©

## The President Speaks: Environmental Executive Orders

More and more our environmental obligations, goals, and requirements are established by Executive Orders, issued by the President, rather than Congressional mandates. An inquiry from one of our installation attorneys prompted us to compile a list of some of the more recent or well known environmental Executive Orders, (Encl 11) POC **Bob Lingo**, ©

## Latest ELD Bulletins

ELD Bulletins for October and November 97 are provided (Encl 12,13 ) for those who have not yet signed up for or do not have access to the LAAWS Environmental Forum or have not received an electronic version.

## AMC Environmental Council Looks to the Future!

On 2 December 1997, the AMC Environmental and Legal Offices conducted their second AMC Environmental Council conference call. During the conference call, HQ AMC and MSC environmental and legal personnel discussed a broad variety of issues. As part of the AMC Environmental Council, the following initiatives are being developed: (1) environmental update video conferences, (2) an Environmental Quality Control Committee training video, (3) an installation self-audit pilot program, and (4) a guide on the preparation of real estate environmental assessments. In the future, the AMC Environmental Council will explore having AMC installations participate in the EPA Environmental Management Review (EMR) program and Environmental Leadership Program (ELP). Excerpts of EPA fact sheets relating to the EMR and ELP programs are provided as Encls 14 and 15. ©

December 1997

## Storing Non-DoD Hazardous Material

Section 343 of the new FY 98 National Defense Authorization Act, PL 105-85, amended 10 U.S.C. Section 2692 to clarify or add new exceptions to the prohibition against DOD storage or disposal of toxic or hazardous material that is not owned by the Department.

The Committee report indicates that the provisions were enacted to ensure that the DOD has appropriate authority to control munitions stored or disposed of in connection with; (1) storage of explosive material in conjunction with space launch programs; (2) storage of member personal property, such as guns, ammunition, and related material; (3) storage of allied/foreign munitions during joint testing, exercises or coalition warfare; (4) storage of explosives and hazardous materials in support of other U.S. government agencies, to include State and local law enforcement agencies; (5) storage of contractor owned explosive materials when performing a service for the benefit of the U.S. Government; and (6) storage of commercial explo-

sives on DoD installations participating in full or partial privatization. The amendment may be particularly important with relation to BRAC and other commercial leases or facility contracts. For further information, contact **Bob Lingo**, DSN 767-8082. ©

## EO Sets DA Energy and H<sub>2</sub>O Goals

The Energy Policy and Conservation Act and Executive Order 12902 set goals for reduction of federal energy and water consumption. For example, the latter sets a goal of reducing energy consumption by 30 percent by the year 2005 and mandates "cost effective" water conservation projects. What contracting and engineering resources are available for your installation to meet these goals? Included is a paper by **Donna K. Harvey**, an OTJAG DAC written as a JAG Graduate Course student: Water Conservation Measures at Army Installations (Encl 16). ©

CC Newsletter

## Side by Side: Contractor & Civilian

Mike Wentink, DSN 767-8003, supplied a Point Paper for the ESC on the sensitive issues related to contractor employees being in the workplace, working with government workers (Encl 17).

Contractor employees are indeed different from Federal employees, even those contractor employees who work on a daily basis in and around the Federal workplace. One major difference is that the conflicts of interest criminal laws do not apply to contractor employees (except for the bribery statute), nor do the *Standards of Ethical Conduct for Employees of the Executive Branch* or the DoD *Joint Ethics Regulation* apply to them.

Contractor employees and their workspace should be clearly identified to ensure that Federal employees and the public know that they are not Federal employees to avoid inadvertent unethical conduct in addition to other issues, such as illegal personal services, claims for services provided beyond that required by the contract, and misunderstandings about fiduciary responsibilities.

There are many important issues to keep in mind,

some of which include gifts, protecting information and employment overtures.

### GIFTS

Concerning the issue of gifts, remember that contractors and their employees are "outside sources." They should not be solicited for contributions to gifts to departing or retiring Army employees. The rules governing gifts between Army employees and those offered by a contractor or its employees to an Army employee are very different. In an appropriate case, an Army employee may accept a \$300 framed print from the employees in his or her organization, but could never accept that gift from the contractor employees who support his or her organization.

### INFORMATION EXCHANGE

Exchange of information between government and contractor employees are regulated by a host of rules, depending on the specific type of information.

Numerous statutes protect the release of procure-

ment information, trade secrets, other confidential information and classified information. In addition, the *Standards of Ethical Conduct* prohibit using or allowing the use of, nonpublic information for private interests. As Army employees, we must be very circumspect as to whom we release nonpublic information (i.e., need to know). But, we must be particularly vigilant when we are discussing sensitive matters with and around contractor employees.

### FUTURE EMPLOYMENT

Any discussion about future employment between an Army employee and a contractor employee, whoever initiates it, might require special reports depending on the situation. For sure, if the Army employee initiates the inquiry or wishes to pursue it, the Army employee is automatically disqualified from participating in official matters affecting the contractor and must issue a written notice of this disqualification.

As AMC reshapes, this issue will be a growing challenge to AMC Ethics Counsel.<sup>c</sup>

## Ethics and MSPB: Law, Literature and History

AMC Counsel **Mike Wentink**, DSN 767-8003, offers an interesting quote on MSPB case law treatment of ethics issues. The paper was prepared by **Stuart Rick**, Deputy General Counsel, Office of Government Ethics.

It is always rare to find examples of the relationship between law, literature and history. How about this one from the pre-Civil Service Reform Act case of Heffron v. U.S., 405 F.2d 1307, 1312-13 (Ct.Cl. 1969):

“In the days of **Rameses I**, we suppose, the one-way flow of gifts to those deputized to administer government affairs, from those obliged to do business with them, already was an ancient institution. Of course, the impartiality of the donees was in theory not impaired. That would be bribery, of which perish the thought. In many cultures the esteem and love of the citizen for the official was expected to be so large and dependable, it was relied on for the latter’s subsistence, no salary or a nominal one only being provided. Sometimes incumbents even had to purchase their offices.

That is, perhaps, the normal way to do things. Here in the United States we undertake to maintain an exception. The Congress appropriates funds to provide what it deems adequate salaries, frequently adjusted, for those who execute its laws, and on the other hand, the effort is made to restrict the citizenry to expressing its good will towards them in tokens other than money and articles of value. It may well be anticipated, however, that the smallest leak in the dike will swiftly widen, and the old river of gratuities will again flow in the old way. Human nature will reassert itself. It may not be unreasonable, therefore, to believe that what is required is a combination of emphatic warnings and drastic penalties. If at times, as here, this results in tragically wrecking an honorable career for an infraction apparently not of the gravest, this is part of the price that must be paid to maintain the respect and the self-respect of our Government.”

Can you think of a better statement about the relationship between ethics and behavior of public officials?<sup>©</sup>

## Personnel Changes Proposed for DOD

### *Reform Initiatives will Free \$\$\$\$ for Weapons Modernization*

On November 10 Defense Secretary **William Cohen** announced plans to reduce significantly the Department of Defense’s headquarters workforce and to open substantial numbers of commercial activities currently performed by DOD in public-private competition under Office of Management and Budget Circular A-76.

These changes are part of the plan developed by the Defense Reform Task Force to help DOD find ways to overhaul its organization and business practices, to free money to fund long-deferred weapons modernization. *Defense Reform Initiative: The Business Strategy for Defense in the 21st Century* is a 78-page plan outlining reform in consolidating organizations, reducing staff, increasing public-private competition, eliminating excess infrastructure, and reengineering defense support activities. ©

# Don't be Misled by Lack of Anti-Lobbying Act Prosecutions

The Anti-Lobbying Act, 18 U.S.C. 1913, prohibits officers and employees of the executive branch from engaging in certain forms of lobbying. If applied according to its literal terms, section 1913 would have extraordinary breadth, and it has long been recognized that the statute, if so applied, might be unconstitutional. The Office of Legal Counsel has interpreted the statute in light of its underlying purpose "to restrict the use of appropriated funds for large-scale, high-expenditure campaigns specifically

urging private recipients to contact Members of Congress about pending legislative matters on behalf of an Administration position." Memorandum for **Dick Thornburgh**, Attorney General, from **William P. Barr**, Assistant Attorney General, Office of Legal Counsel, "Constraints Imposed by 18 U.S.C. ' 1913 on Lobbying Efforts," 13 Op. O.L.C. 361, 365 (1989) (prelim. print)(citation and footnote omitted)("1989 Barr Opinion"). Although there has never been a criminal prosecution under the Act

since its adoption in 1919, the Criminal Division and its Public Integrity Section have frequently construed the Act in the context of particular referrals. The principles that the Criminal Division has developed over time provide guidance to the meaning of the statute that is necessary in order for the Act to provide reasonably ascertainable guidance to those to whom it applies.

Enclosure 18 contains additional information including a list of permissible and prohibited lobbying activities. ©

## Before You Participate - Fundraising Activity Rules

DoD Officials often receive invitations from various organizations requesting their participation in certain events, such as serving as chairs, attending, or making speeches. These invitations are further complicated when the events are designed to raise funds on behalf of the organization or to benefit a charitable entity. The DoD General Counsel provides guidance on analyzing those invitations under OGE and

JER requirements. The paper discusses the rules governing the acceptance of free attendance at events for which there are normally charges.

Unless authorized, DOD officials may not "participate in fundraising in an official capacity." Fundraising includes "active and visible participation in the promotion, production, or presentation of" an event at which any portion of the cost may be taken as a charitable tax deduction.

Participation includes serving as an honorary chairperson, sitting at a head table, or standing in a reception line. In accordance with the JER, a DoD official may not "officially endorse or appear to endorse" fundraising for any non-Federal organization, with certain specified exceptions.

Enclosure 19 highlights additional important provisions. ©

# TEAMING FOR SUCCESS

## AT THE OFFICE OF COMMAND COUNSEL

As part of the Continuing Legal Education Program theme for 1997, "Teaming for Success", the Office of Command Counsel took two days off from regular operations to participate in a two-day training session on Teaming.

Dr. Norma Barr, Barr & Barr Communication Consultants, the leader of the group, focused our attention on the different communication styles as revealed by the Myers-Briggs Type Indicator, the elements of Teamwork, Leadership and Power strategies. The group candidly discussed relationships, a critical element of Teaming, and discussed obstacles to Teaming, and made recommendations to improve Teaming.

Teamwork and Teaming become even more important as we face the reality of downsizing and the challenges that are inherent in new legal missions.

Dr. Barr defines Teamwork as action by a group of mutually trusting people working together to achieve shared goals in coordinated and cooperative effort while interacting responsibly with open communication.

Dr. Barr believes that

Teamwork requires four attitudes from team members that are reflected in the way behavior is exhibited. Additionally, four skills and processes are essential to keep relationships in focus, with potential problems openly considered and explored.

### Attitudes

**Trust:** A firm belief and confident expectation in the honesty, reliability and trustworthy intention of the other person.

**Candor:** Frank expression, straightforwardness about thoughts, feelings, and intentions.

**Participation:** Active sharing and taking part, both verbally and nonverbally.

**Shared Values:** Mutually shared values of worthwhile principles ... agreement about what is important, top priority, and essential.

### Skills

**Accurate Listening:** Listening on all five levels: words and facts, logical consequences, pattern and intent, feelings and values, and response to the messages.

**Shared Reasoning:** Ver-

balizing the reasoning, clearly stating premises, assumptions, and conclusions for others to consider, interpret and question.

**Conflict Resolution:** Responsibly identify the issue, gather the different standpoints, identify the differences and work toward an agreement, identify criteria for effective resolution and demonstrate giving and receiving feedback.

**Stakeholder Input to Decisionmaking:** Stakeholders are those who are affected by the decision and thereby see themselves as having a stake in the decision. Getting their information into the decision process is important for fair consideration of Stakeholder standpoints.

The objectives of the Teaming project were to take a close look at how we interact, who we are, and what communication styles and types comprise the office. It is hoped that we each learn to accept these individual differences and to interact with each other so that we best use the gift that each of us has.

POC is **Steve Klatsky**,  
DSN 767-2304. ©

# Faces In The Firm

## Arrivals

### Yuma Proving Ground

Mr. **Ronald F. Greek** came on board Monday, 1 December, as the Chief, Client Services. Ron will be responsible for legal assistance, claims, and other legal duties. Ron comes to us from private practice in Seattle, Washington. He is joined by his wife, Julita, and daughter Nicolette, 4. Ron is a Lieutenant in the Coast Guard Reserve. He is a valuable asset to the YPG SJA team. Welcome Ron, Julita, and Nicolette.

### Pine Bluff Arsenal

Mr. **Garth Terry** joined the legal office as the Deputy Command Judge Advocate. Mr. Terry was previously in the United States Air Force, worked at the Little Rock Air Force Base, and was in private practice in Utah before joining our legal community. Garth and his wife, Sheri, have three sons and a daughter. Welcome aboard Garth.

### Letterkenny Army Depot

**Everett W. Bennett II** joined the office coming from private practice in West Virginia. Mr. Bennett is married and has two children. Welcome to Pennsy.

### Red River Army Depot

**Lessa N. Whatmough** has returned to the Red River Army Depot. The former Captain Whatmough left Red River and worked for the Veterans Administration as a civilian upon leaving the United States Army. She returned to the legal office as a civilian. Glad to have you back, Lessa!

### Industrial Operations Command

The IOC Office of Counsel is expecting **Captain Eugene Baime** to arrive in January 1998. Captain Baime joins the IOC from the U.S. Army Legal Services, Falls Church, Virginia. Captain Baime will be specializing in the environmental law field. Looking forward to the Captain's arrival.

**Brian Klinkenberg** is at the IOC Office of Counsel focusing on office automation. Brian is a senior at North High School in Davenport, and is part of a cooperative agreement between the legal office and the Davenport School Board.

## Promotions

Congratulations **Cathy Collins**, Corpus Christi. Cathy was promoted to a Paralegal Specialist, which includes a raise and two-grade increase. Well deserved, Cathy!

Congratulations **Captain Scott W. Hickey** on your promotion to the present grade of Captain. Captain Hickey has been at Red River Army Depot since early this year.

## Births

Congratulations to **Gramma Gail** (paralegal specialist in the IOC Office of Counsel). Gail and Dick Fisher's son and daughter-in-law, Jeff and Cindy, recently celebrated the birth of their third child, Jenna Elizabeth. The beautiful little girl was welcomed home by her big brother and sister, Tyler and Casey.

# Faces In The Firm

## Awards and Recognition

**Mike Wentink**, Associate Counsel and Team Chief for Ethics, Office of Command Counsel, trained OGE attorneys and program personnel on 20 November 1997 concerning the Procurement Integrity law. OGE invited Mr. Wentink to provide this training because he is known as (and was introduced as) Mr. Procurement Integrity throughout the Executive Branch. He has presented this training throughout DOD and for other Executive Departments (Health and Human Services and Treasury), and for Executive Department ethics officials at the OGE Annual Conferences where it is always one of the most demanded and highly praised courses. OGE requested a copy of the training materials for its library, and asked Mike's permission to refer other agency ethics officials to him when OGE is not able to help them.

### FAREWELL

HQ AMC IP Counsel **Chuck Harris** is departing AMC to assume a position with the Army Medical Command at Fort Detrick, Maryland - Maybe the Terps will do better with you working in Maryland.,.....

**Steve Klatsky**, Assistant Command Counsel, concentrating in the area of ADR, was the kick-off speaker for a program on ADR sponsored by the Defense Equal Opportunity Management Institute, Patrick AFB, Florida. Steve made a 2-hour speech on ADR History, statutory and regulatory provisions, and chaired a discussion on the benefits and characteristics of ADR. ©

## Bye-Bye Bosses

The executive branch of government has lost about 25% of its supervisors since 1992, according to a survey by the Merit Systems Protection Board. Here is a selected list of agencies and percentage change in the number of supervisors:

DOD	-16%
Air Force	-13%
Army	-14%
Navy	-19%
Energy	-53%
OPM	-53%
EPA	-38%
Labor	-19%
SBA	-28%
SSA	-25%
VA	-28%

## WATCHING FOR STRESS!!!

According to the third edition of Jobs Rated Almanac, put out by National Business Employment Weekly, the 10 most stressful jobs are: US president, firefighter, senior corporate executive, Indy-class race car driver, taxi driver, surgeon, astronaut, police officer, NFL football player, air traffic controller.

HOPE Publications lists 35 stress reducers that include:

-Get up on time so you can start the day unrushed.

-Say no to projects that won't fit your schedule.

-Delegate tasks to capable colleagues.

-Allow extra time to do things and get to places.

-Make friends with happy, nonstressed people.

-Listen to relaxing tapes while driving to and from work.

-Laugh.

-Take your work seriously, but yourself not at all.

-Talk less, listen more.

-Sit on your ego.

**Knight-Ridder**