



Office of Command Counsel Newsletter

June 1998, Volume 98-3

DA EEO Team Building Workshop---EEO, CPO and Legal Cooperation Encouraged!

Many thanks to **Luther L. Santiful**, Deputy for Equal Opportunity Policy, for chairing a very successful DA EEO Team Building Workshop, 19-24 April, in Pittsburgh, Pa. Mr. Santiful focused attention on the aspect of Teamwork by including members of the legal and civilian personnel communities in the planning and execution of the program.

Teamwork Defined

In his welcoming letter to the some 300 attendees, Mr. Santiful stated that "Teamwork is defined as the 'work done by a number of associates with each doing a clearly defined portion but all subordinating personal prominence to the efficiency of the whole'. Our three communities—EEO, Legal and Civilian Personnel, indeed to have separate and distinct responsibilities; however, our collective goal is the same. Together, we must strive to provide a work environment that is free of discrimination with equal opportunities for all employees. Hopefully, this week will provide you with the tools to meet those challenges successfully."

AMC Attorney Presence & Presentations

Highlights included plenary sessions on many important policy developments from the three communities and break out sessions focusing attention on significant issues. AMC attorneys actively participating as attendees included **Kathi Szymanski** and **Paula Pennypacker** from CECOM; **Mike Lassman**, STRICOM; **Sam Shelton**, ARL; **Jack Skeen**, Dugway Proving Ground; and **Jim Gilliam**, Rocky Mountain Arsenal.

AMC attorneys who made presentation were **Cassandra Johnson** on Developing Settlement Agreements and **Steve Klatsky** on Alternative Dispute Resolution.

More information on this important session is contained elsewhere in this Newsletter. ©

The DA Equal Employment Opportunity Vision:

The model employer with a diverse and effective workforce founded upon the principle of equality of opportunity for all.

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President Clinton on ADR:

MEMORANDUM FOR
HEADS OF EXECUTIVE DE-
PARTMENTS AND AGENCIES

SUBJECT: Designation
of Interagency Committees to
Facilitate and Encourage
Agency Use of Alternate
Means of Dispute Resolution
and Negotiated Rulemaking

"As part of an effort to
make the Federal Govern-
ment operate in a more effi-
cient and effective manner,
and to encourage, where pos-
sible, consensual resolution
of disputes and issues in con-
troversy involving the United
States, including the preven-
tion and avoidance of dis-
putes, I have determined that
each Federal agency must
take steps to:

(1) promote greater use of
mediation, arbitration, early
neutral evaluation, agency
ombuds, and other alternative
dispute resolution tech-
niques, and (2) promote
greater use of negotiated
rulemaking."

With these words Presi-
dent Clinton called for an
ADR Working Group com-
prised of the Cabinet Depart-
ments, and other agencies
with a significant interest in
dispute resolution, to facili-
tate and encourage agency
use of alternative means of
dispute resolution.

Specifically mentioned by
the Presidential order are dis-
putes involving personnel,
procurement, and claims.

The Working Group
shall facilitate, encourage,
and provide coordination for
agencies in such areas as: (1)
development of programs that
employ alternative means of
dispute resolution, (2) train-
ing of agency personnel to
recognize when and how to
use alternative means of dis-
pute resolution, (3) develop-
ment of procedures that per-
mit agencies to obtain the
services of neutrals on an ex-
pedited basis, and (4)
recordkeeping to ascertain
the benefits of alternative
means of dispute resolution.

...and ADR on Law Day:

In celebration of Law Day.
Attorney General Janet Reno
sent a letter to all governors
and state attorneys general,
saying: "I believe we have an
obligation to those we repre-
sent and to society as a whole
to serve as peacemakers and
problemsolvers. It is our job
to help resolve disputes in
ways that promote civility,
preserve relationships, and
minimize the burdens on our
court systems. Many ADR
programs serve these pur-
poses admirably".

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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.

Incidental Material: Buying Commercial On A Cost Reimbursable Basis

AMCOM's **Wil Rathbun**, DSN 788-0544, provides an article on incidental material, highlighting the definition, and outlining the AMCOM position supporting the view that commercial material may be purchased on a cost reimbursable basis(Encl 1)

AMCOM support contracts are services contracts not supply contracts. These service contracts can not be used to satisfy all service and supply requirements. Satisfying all requirements for material under support services contract would violate the stringent competition requirement imposed on the Government by the Competition in Contracting Act (CICA), 10 U.S.C. 2304. No list of material is provided under this type of contract for the offerors to bid on. Under CICA, a contracting agency must specify its needs in a manner designed to achieve full and open competition.

Many of the required material items are available in the commercial marketplace. FAR 12.207 requires that

agencies use fixed price contracts to acquire commercial items. AMCOM support service contracts are cost type contracts.

Merely Incidental

The AMCOM rationale supporting the purchase of some commercial material on a cost reimbursable basis is that it is merely incidental to the performance of cost reimbursable services. Therefore, Part 12 of the FAR does not apply. The purchase of commercial items beyond what is considered incidental under support service contracts would violate Title VII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) which Part 12 of the FAR implements.

In order to be considered incidental the material must be secondary or minor in comparison to the services being purchased. The fact that the material is required for the contractor to perform services under the contract does not necessarily make it incidental. If the cost of the material is significant (over 20%) you will need to justify the purchase in writing. ©

List of Enclosures

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5. Overarching Partnering Agreements—CECOM-EDS
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Acquisition Law Focus

Other Transaction Training Summarized

Thanks to SSCOM Intellectual property Counsel **Vin Ranucci**, DSN 256-4510, for providing a summary of training received on the use of Other Transactions (Encl 2). The course was called Cooperative Agreements and Other Transactions, sponsored by the National Contract Management Association (NCMA).

Contracting Based On Agreement

Instead of contracting based on "regulation", we should consider contracting based on "agreement". This is most important if we want to contract with commercial firms which don't deal with the Government very often. Many defense firms are satisfied with our usual "modus operandi" because those

firms are set up to handle our regulations conveniently. However, current emphasis is on dealing with commercial firms because (1) civilian technology is more advanced than military technology; (2) innovative civilian products are introduced rapidly; (3) civilian firms with big R&D budgets don't do business with DoD; and (4) there is a shrinking defense and industrial base. Bottom line: if appropriate, we must contract with these civilian firms with different provisions and conditions than those in our standard FAR/DFARS.

OT's are authorized under 10 U.S.C. 2371 for carrying out basic, applied, and advanced research projects. The paper addresses "things to consider for several different aspects of this important area. ©

Personal Liability for Y2K Certification?

As the millenium gets closer, or at least 1 January 2000, the issue of what happens to computers on that magic date is becoming critical.

One of the first legal issues faced on the Y2K problem concerns personal liability for those General Officers and Senior Executive Service personnel required to certify a computer system as Y2K compliant. **Steve Klatsky**, HQ AMC, DSN 767-2304, has opined that the qualified immunity doctrine should protect those officials who are "acting within the scope" of their government duties.

A GO or SES must certify a computer system as compliant. If the certification is made, but the system goes "haywire"--not the technical term, on 1 Jan 2000, those harmed may bring suit. In this case, we believe that the US will be substituted as the proper party if an individual is a named defendant.

Of course, if there is any doubt as to whether a specific computer system is compliant, no certification should be made, and, we should never coerce an official into certification. ©

**The New AMC
Web Site URL is...
www.amc.army.mil**

Acquisition Law Focus

GAO Rules on three \$\$\$\$ Issue Cases

Lisa Simon, HQ AMC, DSN 767-3117, provides a summary of three recent General Accounting Office decisions on appropriations law issues (Encl 3).

Economy Act

The first decision concerns interpretation of the Economy Act provision on overhead rate billing policies. The Treasury Department's method for computing hourly rates was deemed reasonable and consistent with the statute. The GAO found that agencies "possess some flexibility" in applying these standards.

Equip, Operate & Maintain a Golf Course

The second indirectly relates to the sport of golf, and whether appropriated funds can be used to install a

water pipeline in the face of 10 USC Sec 2246(a) restrictions. GAO ruled that Fort Sam could not, stating that the above statute took precedence over the more general language contained in 10 USC Sec 2866.

The Judgement Fund

The third relates to the use of the Judgement Fund, 31 USC Sec 1304, and whether that fund could be used to pay for the supervision of the court-ordered Teamsters election rerun. In this case, the GAO held that unless the government is directly ordered to pay a sum of money to an identified adverse party, the costs of complying with a court order are not considered payable from the Judgement Fund.

Visit the GAO web site: <http://www.gao.gov>, for these cases and lots more information about the agency. ©

Federal Employees Feel the Change in their Workplace

Federal employees have mixed feelings about changes in the workplace brought about by downsizing and reinvention. Budget cuts and reduced staffing have a negative impact on employee morale and mission accomplishment.

The Merit Systems Protection Board recently published a report revealing that employees think their agency employer has improved productivity as a result of giving employees more flexibility in performing their jobs.

Importantly, those employees working in agencies that have made National Performance Review goals a priority report increased productivity as against those agencies who have not made NPR a priority.

Since a similar study in 1992, employees overall job satisfaction remains at a solid 70%.

Check out the report: *The Changing Federal Workforce: Employee Perspectives*, at www.mspb.gov. ©

**Full AMC Command Counsel
CLE Report in August Issue**

Partnering Workshops at Roadshow VII

Roadshow VII is off to a great start. As this is being written we are in our third whistlestop tour--AMCOM, after successful ventures at STRICOM and TACOM-ARDEC in April.

One of the highlights of the Roadshow are two Partnering Workshops being conducted to expand the use of Partnering throughout AMC.

Contracts Identified

Each AMC major subordinate command has identified two contracts for which they wish to use Partnering. During the Roadshow, AMC has funded the use of a facilitator trained in Partnering and the AMC Partnering Model, to assist the contracting parties to use this excellent tool.

Thus far, we can report great success. The parties attending the Partnering Workshops report that they have benefited by the focus on open and honest communication to create a mission statement, Partnering Charter, identifying goals and objectives, and designing conflict escalation and resolution tools.

Participants report that Partnering builds on existing integrated process team approaches, by the wide variety of tools that characterize the Partnering Workshop.

Lessons Learned

Among the important lessons learned so far is that it is important to extend an invitation to the user community. Participant evaluations indicate that these Partnering Workshops have created a momentum to continue to view enhanced communications as a key to success.

We thank **Harlan Gottlieb**, of STRICOM and **Jerry Williams**, TACOM-ARDEC for the excellent work they did to prepare for the Partnering Workshops.

Ed Korte, introduces Partnering during the first morning executive session, showing the AMC Partnering Videotape, making the AMC Partnering Guide available to attendees, and reviewing the benefits and characteristics of Partnering.

On the last morning, there are report outs on each Partnering Workshop. ©

Education Partnership at AMCOM

As a result of a visit from AMC Commanding General **Johnnie E. Wilson**, AMC has entered into an Education Partnership agreement with Oakwood College. The agreement was entered into under the authority of Public Law 101-510, November 5, 1990, Section 2194 of Title 10, United States Code, as added by Section 247 of the National Defense Authorization Act for Fiscal Year 1991. The purpose of the agreement is to encourage and enhance study in scientific disciplines.

Under this agreement AMCOM is allowed to loan or transfer surplus equipment. Laboratory personnel may also be made available to teach science courses or to assist in the development of science courses and materials for the institution.

As a historically Black college, Oakwood College will receive assistance on a priority basis in accordance with Sections 2194(c) and(d) of Title 10 U.S.C.

Thanks to AMCOM's **Wil Rathbun** for this report. ©

CECOM A Leader In Executing Overarching Partnering Agreements With Industry---A Proven Method for Expanding Partnering

Industry Very Receptive to Future Commitment to Partner

CECOM is in the forefront of a vital means of expanding the use of Partnering throughout AMC—the execution of Overarching Partnering Agreements (OPAs). Appendix C of the AMC Partnering for Success Guide contains an early CECOM OPA, signed with Hughes Aircraft.

CECOM Lead Partnering Champion **Larry Asch** has provided the AMC ADR Manager, **Steve Klatsky**, with other examples of OPAs. We have included the OPA between CECOM and GTE (Encl 4) and CECOM-Electronic Data System Corporation (EDS) at Enclosure 5.

Preamble

The opening preamble to an OPA contains a mutual commitment on the part of the contracting parties: “We, the senior leadership of Team C4IEW&S and (contractor), are firmly committed to the utilization of the Partnering process in the performance and administra-

tion of each of our future contractual endeavors.”

Relationship Goal

Thereafter, the parties recite their underlying relationship goal. “We will serve as the champions for the establishment of positive and proactive relationships between our organizations based upon mutual trust and respect and the replacement of the “us vs. them” mentality of the past with a “win-win” philosophy and partnership for the future and dedicated to the accomplishment of mutually beneficial goals and objectives (i.e., the delivery of the highest quality products/services, on or ahead of schedule, at a reasonable price/profit).”

OPA Objective

The parties then shift to their overriding objective. “Our overriding objective shall always be providing America’s warfighters with the most technologically advanced and highest quality supplies and services in a timely manner in order to pro-

mote the swift, safe and successful accomplishment of their missions.”

Future Focus

The focus of the OPA is on the future as evidenced by this paragraph: “All contracts between Team C4IEWS and (contractor) awarded subsequent to the execution of this Agreement will include an individually designed and tailored Partnering Agreement based upon open, effective and continuous communication and dedicated to successful contract performance, the establishment of a true team spirit, the timely resolution/avoidance of problems, and continuous product and process improvement.”

The parties also commit to resolving issues at the lowest level, designing specific dispute escalation and resolution processes to prevent surprises and program delays.

For more information on OPAs contact **Steve Klatsky**, DSN 767-2304. ©

Labor Organization's Rights & Claims During Privatization

CECOM's **Lea Duerinck**, DSN 992-3188, has provided an outstanding memorandum discussing the possible rights or claims that a labor organization may assert when a determination has been made to privatize a governmental activity (Encl 6).

Specifically, it underscores a labor organization's rights or claims regarding the contracting out determination, impact and implementation rights, and the negotiability of a labor organization's contracting out proposals.

Federal Labor Law

The Federal Service-Management Relations Act, 5 U.S.C. § 7106 *et. seq.* (1998) specifies management rights concerning contracting out determinations. Specifically, it states that "nothing in this chapter [5 U.S.C. § 1701 *et. seq.*] shall affect the authority of any management official of any agency...to make determinations with respect to contracting out." However, this same section also establishes a labor organization's right to negotiate implementation of procedures and appropriate arrangements for employees who are affected

by management's exercise of statutory authority.

A-76 Case Law

In National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989), *cert.denied*, 496 US 936 (1990), the court held that a labor organization lacked standing to bring suit under Circular A-76, and the National Defense Authorization Act. The court held that determinations to contract out work are administrative and not reviewable under APA. The court concluded that nothing in Circular A-76's legislative history seemed to provide any basis to bring a suit to challenge a contracting out determination to protect an employee's job. Accordingly, the court held that the employees did not have standing under APA. Finally, the court rejected the union's claim that it had standing based on its rejected bidder's status (since neither the union nor its members bid on the privatization contract). *Id.* at 1052.

Wrongful Privatization

However, since Cheney, the sixth circuit has held

that the courts may review wrongful privatization cases under APA. Diebold v. U.S., 947 F.2d 787 (6th Cir. 1991), *rehearing denied*, 961 F.2d 97 (1992). In this case the union alleged that the government had wrongfully calculated the cost comparison data in its contracting out determination. The court held that failure to comply with requirements of a cost comparison "could support a claim that the agency was not complying with statutory directives to pursue economy and efficiency and to contract out commercial activities if contracting out will cost less than in house production - the law to be applied." *Id.* at 801-2.

Standing Found

The standing issue has been more recently addressed in National Air Traffic Controllers Association v. Federico Pena, et.al., 944 F. Supp. 1337, (N.D. OH 1996), where the court ruled that the association had standing under Article III of the Constitution to bring the suit, continuing by outlining what an individual has to demonstrate to show standing. ©

Employment Law Focus

Civilian Personnel Litigation Trends & Lessons Learned

At the DA EEO Team Building Workshop, **Mike Meisel**, Chief, Civilian Personnel Litigation, OTJAG, made an outstanding presentation on several important lessons learned in recent civilian personnel litigation. Among the more significant trends included in the presentation were:

- New lawsuits have doubled since the Civil Rights Act (CRA) of 1991.

- An EEO case takes 3 times longer to resolve if it goes to a jury trial.

- The Army has had 27 jury trials under the CRA of 1991.

- DA is receiving increased pressure to settle from U.S. Attorneys.

- Emphasize the facts more than the law—an unsympathetic manager versus a sympathetic plaintiff can be a costly experience.

- NAF cases are especially scary as they cannot be settled using the judgement fund. ©

The FLRA, Financial Disclosure Statements OGE and Negotiability

The Federal Labor Relations Authority issued an important decision in HUD, 53 FLRA No. 115 concerning an arbitrator's authority in reviewing agency decisions as to whether individual positions are required to file financial disclosure documents. The Authority found that it was subject to the negotiated grievance procedure and arbitration.

The Office of Government Ethics issued a final rule clarifying that the agency review of confidential financial disclosure filing determinations provided at 5 CFR 2634.906 is intended to preclude all further review, including grievance procedures and arbitration. It was effective 6 April.

So, it appears that Authority decision should no longer be followed. ©

MSPB AJ's Testing Bench Decisions

The Merit Systems Protection Board, in still another attempt to streamline operations, has initiated a pilot project that will allow MSPB Administrative Judges to issue bench decisions—oral decisions delivered at the conclusion of a hearing,

In the first such case the AJ called a 15 minute recess after the hearing to collect thoughts and make notes.

Under the Board's proce-

dures, an AJ may issue a bench decision if he or she believes that the issues have been clearly delineated and addressed and is confident that he or she can decide without further review of the record. Additionally, a party may request a bench decision,

The pilot is in effective throughout all Board regional offices and will be in effect through January 1999. ©

Can EEOC Order Agencies to Pay Comp Damages?

The US Court of Appeals for the Seventh Circuit rules that the EEOC lacks authority to award compensatory damages at the administrative stage of EEO complaint processing. The case, Gibson v. Brown, CA7, No.96-3776, March 3, 1998, is at odds with an earlier decision of the Fifth Circuit, Fitzgerald v. Veteran's Affairs, in which the Court stated that administrative agencies, such as EEOC, may award compensatory damages for emotional injury. The Court in Gibson believes that the Civil Rights Act (CRA) of 1991 envisions that once a complaining party seeks compensatory damages, then either party, including the agency-defendant, can demand a jury trial on the issue.

FLRA Forms & Information On the Net

Forms needed to file unfair labor practice charges and representation petitions are now available electronically from the Federal Labor Relations Authority Web Site: www.flra.gov. The site also

The Court concludes by stating that the CRA contains no provision permitting EEOC to order a government agency to pay compensatory damages. Another reason behind the decision is the issue of sovereign immunity. Waiver of sovereign immunity must be explicit, with a waiver defined narrowly. The CRA contains no such waiver as to the awarding of compensatory damages against an agency without a jury trial.

The Gibson decision may be short lived in that there is legislation already introduced to overturn the decision.

The official HQ DA position is that we should follow the EEOC ruling permitting compensatory damage awards at the administrative stage.

contains checklists developed for use in negotiability and arbitration appeals, and provides information concerning all areas of FLRA practice.

Removal for Drug Use Upheld Despite 35 Year Unblemished Record

Illegal drug use can justify a removal action under a recent Merit Systems Protection Board decision, Patterson v. Air Force, 98 FMSR 5071, Feb 25, 1998. The employee held a drug testing designated position and, as an aircraft mechanic, one in which safety is a critical issue. The fact that he had 35 years of unblemished service did not change the penalty analysis under Douglas. The Board found that deference to the agency's primary discretion in managing its workforce was warranted. Thus, the Board supported the agency contention that a lesser penalty would cause an undue disruption.

DA EEO Goals

A work environment free of unlawful discrimination

A work force reflective of our nation's diversity
EEO institutionalized as an integral part of the Army mission

Army EEO professionals who are experts in their field.

Employment Law Focus

Why Teamwork?

During the DA EEO Team Building Workshop there were several presentations highlighting the benefits and essentiality of Teamwork in the labor and employment world. **Mike McClure**, DA Chief of Employee Relations and **Dave Helmer**, DA Chief of Labor Relations made some of the best arguments for Teamwork—with a logical and common sense set of benefits:

○ Teamwork helps the program

○ Lack of Teamwork can hurt a case

○ Teamwork reduces forum shopping

○ Teamwork leads to an improved work product

○ Teamwork maximizes ability to exercise newly delegated authority to create policy

○ If it impacts employees, everybody—Civilian Personnel, EEO and Legal are impacted

○ Commander's want consistency—lack of consistency threatens credibility of all three offices

Take a look at your practice, and your relations with the EEO and CPO offices. Are you a Team? ©

DA Values Highlighted in DA EEO Team Building Workshop

Loyalty: Bear true faith and allegiance to the U.S. Constitution, the Army and other soldiers

Duty: Fulfill your obligations

Respect: Treat people as they should be treated

Selfless Service: Put the welfare of the nation, the Army, and your subordinates, before your own

Honor: Live up to all the Army values

Integrity: Do what's right, legally and morally

Personal Courage: Face fear, danger, or adversity—physical and moral ©

The Cost of Reasonable Accommodation

At the DA EEO Team Building Workshop, Ms. **Dinah B. Cohen**, Director, Computer/Electronic Accommodations Program, TRICARE Management Activity, OSD gave an outstanding presentation on reasonable accommodation. Attorneys commonly hear presentations on this subject concerning legal developments. This presentation underscored the trends in accommodation, including the use of developing technology. Of particular interest is a section on the cost of accommodation:

Cost to Employer

No cost to employer...	31%
Between \$1 and \$500...	38%
Between \$500 and \$1,000...	19%
Between \$1,000 and \$5,000...	11%
More than \$5,000...	1%

A thought-provoking end to the presentation was this memorable statement: "Access the Possibilities: For American's without disabilities, technology makes things easier. For American's with disabilities, technology makes things possible." ©

Environmental Law Focus

Lingo Speaks...to AMC Ammunition Plant Commanders Preventive Law Philosophy Highlighted

Bob Lingo, AMC Environmental Counsel, periodically speaks to new AMC Ammunition Plant Commanders, to brief them on what are likely to be new areas of responsibility for them. Applicable laws, regulations and DA and AMC policies are thoroughly discussed. More importantly, it expresses to these new commanders that the AMC legal community takes a preventive law approach and that we are available as a resource to assist them to be successful.

In April, Bob spoke to the newly named commanders of Hawthorne, Milan and Radford AAPs. ©

Cleaning Up the Old Range

Comprehensive Safety Policy Adopted

The Department of Defense has developed a proposed Range Rule that identifies a process for evaluating and conducting response actions on closed, transferred, and transferring military ranges. It sets forth a comprehensive process for identifying, evaluating, and addressing military munitions and constituents on these ranges which ensures not only public safety, but also the safety of response personnel. Encl 7 is a summary.

Military Munitions Not Addressed

The proposed Rule does not address the management of military munitions on Active or Inactive Ranges. This will be addressed in a separate policy to be issued by the DoD Explosive Safety Board.

Doing Well by Doing Good... Supplemental Environmental Projects

The EPA has issued a revised, final EPA Supplemental Environmental Projects Policy, published in the May 5, 1998 Federal Register at pages 24796 - 24804. EPA has refined and clarified its interim policy to better assist it in exercising its enforcement discretion to establish appropriate settlement penalties and supplemental environmental projects (SEPs) that secure significant environmental and public health improvements. The final policy is effective 1 May 1998. SEPs are, in many cases, a good way for the Army to reduce monetary penalties, and at the same time conduct beneficial environmental projects. Copies of the policy can be accessed through the Internet at: <http://www.epa.gov/oeca/sep/sepfinal.html>. Environmental attorneys should obtain and retain a copy of this policy. ©

FOSETs: A New Term & Document for Early Transfers

The Department of Defense has recently issued guidance for obtaining the approval of a Governor of a State to transfer DoD real property not on the National Priorities List (NPL) using the new Early Transfer Authority of CERCLA, which allows transfer prior to completion of all necessary remedial action (Encl 8). The process centers on the review and signing of a Finding of Suitability for Early Transfer (FOSET), a new term

and environmental review process for us. The Army will be responsible for preparing the FOSET, even in those cases involving non-BRAC property where the General Services Administration (GSA) is the property disposal agency. Separate guidance is being developed by the U.S. Environmental Protection Agency (EPA) for use of the ETA for property on the NPL. It will require a similar FOSET for NPL properties..^c

What Is In that Cloud of **Smoke?**

Reporting on Waste Munitions Activities--DOD Issues new Guidance

The Department of Defense has issued new Guidance requiring reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA) on munitions activities, including open burning and open detonation. Newlster 98-2 highlighted this issue.

A technical paper prepared by personnel from our own AMC Environmental Quality Division and the Army Environmental Center attempts to explain the complex rules on what is reported, and how (Encl 10).^c

Learning About Things that Glow In the Dark

Our installations and legal offices are becoming increasingly involved with issues concerning radiological materials and waste. The Nuclear Regulatory Commission has increased its oversight of the Army's NRC licensed commodity items, and

has imposed penalties against the license holder for improper management. It's time to learn more about radiological material, its effects, proper disposal, and the law and regulatory program. A list of available, relevant Web sites, compiled by **Robert Lingo** is at Encl 9. .^c

Raising Funds Raises Fundraising Issues

AMC Ethics Counsel **Mike Wentink**, DSN 767-8003, prepared an Ethics Advisory for the HQ AMC workforce, addressing various fundraising issues (Encl 11). The general rule is that we do not engage in fundraising in the Federal workplace, and we do not use our Federal office or position to raise funds whether on- or off-duty. Of course, there are exceptions. The primary ones are: The Combined Federal Campaign (CFC) and Army Emergency Relief (AER). Another exception are *ad hoc* type situations where a group of employees raises money among themselves for their own benefit, when authorized by the head of the organization in consultation with the ethics official (*e.g.*, the fundraisers to support

our annual organization day picnic).

Unless an exception applies, we may not solicit our fellow employees in the workplace for donations to support local schools, scouting activities, other youth programs, church activities, and other good causes. This means that, in the workplace, we may not sell candy, popcorn, cookies, raffle tickets, magazine subscriptions, *etc.* sponsored by these various organizations in an effort to raise money.

Also highlighted in the paper is fundraising outside the workplace—be careful regarding subordinates, and the DOD General Counsel policy regarding gifts to charities rather than specific individuals for special occasion circumstances. ©

Disclosing Nonpublic Information

The nature of the AMC mission often raises the issue of the rules concerning treatment and disclosure of nonpublic information. With the increase of contractor personnel in the Federal workplace it is important to remember that when we discuss it with, or give it to, a contractor employee, we have released it outside the government. HQ AMC Ethics Team Chief **Mike Wentink**, DSN 767-8003, has prepared an Ethics Advisory on this subject (Encl 12).

Statutes

The basic restrictions contained in the Procurement Integrity Act, the Trade Secrets Act and the Standards of Ethical Conduct for Employees in the Executive Branch are defined and outlined. Of growing importance are the rules concerning computer software and the purchase of technical data.

The risk of an improper disclosure includes barring a potential source from competing, having to fix a procurement or starting all over again. ©

Keeping Track of OTJAG Movement During Renovations in the Pentagon

Renovations in the Pentagon have caused many of those we routinely interact with to have their offices change--and their telephone numbers. Thanks to AMC Deputy Command Counsel/ Staff Judge Advocate, **COL**

Bill Adams for passing on a new roster containing current information on each Division with whom AMC attorneys routinely speak; this will keep the lines of communication open (Encl 16). ©

Certificate of Non-Disclosure: Ensuring Knowledge of Rules & Recipient Compliance

Once we decide that it is permissible to release nonpublic information we should not do so without some sort of promise by the contractor and its employee that they will not use or exploit the information in any way other than in furtherance of the contract.

Contract May Include

The contract might already provide for such a promise. If not, you should consider having the contractor employee sign a non-disclosure certification.

Mike Wentink also provides a copy of a sample Certificate of Non-Disclosure (Encl 13) for your consideration and use. The sample has an excellent definition of nonpublic information: includes such information as proprietary information (*e.g.*, information submitted by a contractor marked as proprietary), advanced procurement information (*e.g.*, future requirements, statements of work, and acquisition strat-

egies), source selection information (*e.g.*, bids before made public, source selection plans, and rankings of proposals), trade secrets and other confidential business information (*e.g.*, confidential business information submitted by a contractor).

Informing the Recipient

The recipient is advised as to certain restrictions and promises to abide by these as a condition of receipt. For example, the recipient agrees:

--shall not seek access to nonpublic information beyond what is required for the performance of the support services contract;

--will ensure that his or her status as a contractor employee is known when seeking access to and receiving such nonpublic information from Government employees;

--shall not use or disclose such information for any pur-

pose other than providing the contract support services, and will not use or disclose the information for any personal or other commercial purpose; and

--if recipient becomes aware of any improper release or disclosure of such nonpublic information, he or she will advise the contracting officer in writing as soon as possible.

--the recipient agrees to return any nonpublic information given to him or her pursuant to this agreement, including any transcriptions he or she made of nonpublic information to which recipient was given access, if not already destroyed, upon leaving the contract.

--any unauthorized use, release or disclosure of nonpublic information in violation of this agreement will subject the recipient to administrative, civil or criminal remedies as may be authorized by law. ©

Conflicts of Interest: A Back to Basics Advisory

We use the term "Conflict of Interest" in so many different circumstances that at times it seems that we do not really recall the basics. Simply put, a "conflict of interest" is a situation where an Army employee has a financial stake in the outcome of an official Army matter. But, it can be a daunting task to know and recognize when such a financial stake exists. **Mike Wentink**, DSN 767-8003, and **Alex Bailey**, DSN 767-8004, from the AMC Ethics Team have put together a paper for all HQ AMC employees that they share with you (Encl 14).

The paper addresses stock ownership, mutual funds, financial interests and professional affiliations, spouse and minor children rules, financial disclosure reports and job-hunting.

This excellent overview reminds employees to ask questions and get advice before you act, and that your Ethics Counselor is the best source for protecting yourself. ©

DAIG Concerned About Private Association Relationships

The DA Office of Inspector General recently expressed concerns about the Army's relationships with private associations. **Mike Wentink**, HQ AMC, DSN 767-8003, has shared these findings with the AMC Ethics Counselor community (Encl 15).

Among the important findings:

--Official settings are used frequently to promote PO membership and products.

--There still are cases where leaders serve as PO officers, directors and advisors because they inherited the responsibility from their predecessor in their official position (e.g., all commanders of X Brigade are appointed as President of the ABC Association, and each of the Battalion Commanders have specific jobs with the PO). As a result, they perform their new PO position as part of their official duties. (Note that JER 3-301 prohibits employees from accepting positions with a PO that are based on their official position.)

--Related to the above, Army personnel routinely perform PO business as part of their official duties (e.g., administer, set-up, coordinate, various PO events such as dinners, golf tournaments, bazaars, sporting events, displays, trade shows; tasked to sell souvenirs, raffle tickets, and other items) ... way beyond JER 3-211 support.

--Some installations have full-time AUSA offices operated by active duty personnel on Government time and report to the commander and staff.

--Co-sponsorship guidelines are not followed. Co-sponsorship is abused. More often than not, the Army gets little benefit, and the major benefit is to the PO.

--AUSA receives preferential treatment

--Many installations have established full-time AUSA offices to administer and promote AUSA activities, and these offices report to the commanders and staff.

All MSCs are supposed to be in receipt of the complete DAIG report. ©

Faces In The Firm

Hail and Farewell Goodbye and Best of Luck

HQAMC

The AMC Legal Community lost an outstanding counsel when **Dick Couch** retired in early May. After serving as an enlisted man in the Army, and contract specialist with TACOM, he worked as a procurement attorney at TACOM for several years. Dick then transferred to HQ AMC, later being named Chief, Protest Litigation Group.

For 10 years the group compiled one of the best records defending protests before the General Accounting Office. He was an outstanding representative of AMC, often called to speak on the AMC-Level Protest Program and other related topics.

Litigation is a demanding area and Dick provided exceptional leadership during the era of increasing challenges to contract decisions.

Because of **Dick Couch**, the AMC Protest Litigation Group has an outstanding reputation at HQDA legal and SARDA, and with the GAO.

Dick and his wife Janet have purchased a 100 year old home in the Upper Peninsula of Michigan.

LTC Paul Hoburg has ended his second AMC tour (ATCOM, HQ AMC) and has assumed a position as environmental counsel for US Army Ballistic Missile Defense Organization.

ARL

William E. Eshelman, Patent Attorney, Intellectual Property Law Branch, Office of Chief Counsel, Army Research Laboratory, left Government service to pursue career opportunities in the private industry.

Greetings

ARL

U. John Biffoni is working for the Intellectual Property Law Branch, Office of Chief Counsel, after departing CBDCOM.

AMCOM

Welcome to **ILT Andrew Sinn**, Office of SJA and **ILT Jeffrey Neurauter**, Acquisition Law Division, both arriving in May from the JAG School.

CECOM

Welcome to **1LT Walter Parker** assigned to the Legal Services Branch out of the JAG School.

Awards and Recognition

HQAMC

At the quarterly Office of Command Counsel Town Hall meeting the following special awards and recognition were observed:

Linda Mills: Meritorious Civilian Service Award, for a sensitive civilian personnel case. The nomination was from the DSC for Personnel.

Nick Femino: 25 years of Federal service.

Steve Klatsky: 25 years of Federal service

Cassandra Johnson: 20 years of Federal service.

Promotions

HQ AMC

Bill Medsger has been selected Chief, Business Operations Law Division, which consists of Acquisition Policy and Protest Litigation Branches.

Vera Meza has been chosen as Team Leader of the Protest Litigation Group.

CECOM

Congratulations to **CPT Sandy Bagett**, promoted in April.