



Office of Command Counsel Newsletter

August 1998, Volume 98-4

Command Counsel Continuing Legal Education Program--*Review & Highlights*

The annual AMC Command Counsel Continuing Legal Education (CLE) Program is a highlight of our law firm, an opportunity to learn, meet colleagues, share ideas, and become more closely knit. Each year we recognize how important it is to work together, to keep each other informed of developments and to share experiences.

This year's CLE was held 8-12 June, and was attended by nearly 150 AMC attorneys, counsel from other DA and DOD legal organizations and some key non-attorney personnel.

I want to thank **Steve Klatsky** for again chairing the committee that planned and administered the program. The committee included **COL Bill Adams, Bill Medsger, Dick Couch, Vera Meza, LTC Paul Hoburg** and **Tom Cavey**. Program administration was handled expertly by **Tom Cavey, Holly Saunders** and **Elaine Basile**.

The theme of this year's CLE theme—"AMC Attorneys: Supporting the Total Army"—highlights the im-

portance of the change in the nature of our relationships: to the military, to the civilian workforce and the business community. The Army force structure is very different than that of just a decade ago. And, with change come both challenges and new opportunities to contribute to the success of the AMC mission. As a law firm we welcome those challenges.

The program was designed to provide our attendees with a mixture of plenary sessions, electives and a total of four hours of legal focus sessions devoted to acquisition law, environmental law, intellectual property law, and employment law.

Much thanks to those who planned and chaired the important legal focus sessions: **Bob Lingo, Bill Medsger, LTC Paul Hoburg** and **Cassandra Johnson**. These sessions are always a vital component of the CLE—a rare opportunity for practitioners of these disciplines to meet in an informal setting to discuss current legal issues,

cases and controversies. A great deal of work goes into the planning of this session.

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CLE
Special Report
Pages 16-19

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Tom Cavey To Retire

Command Counsel Executive Officer for 15 Years--40 Years of Government Service

All of us who worked with **Tom Cavey** during his 15 years as Office of Command Counsel Executive Officer are sad to see Tom and his wife Iris retire from the Federal service. **Tom Cavey** spent 20 years in the Army as an enlisted man and officer attaining the rank of Major. He then spent 20 years with the Office of Personnel Management, Health and Human Services, Ft. Belvoir, and AMC, first as a classification specialist and then as our XO. When you meet Tom you feel as if you are his friend--his jovial personality and sense of humor make friendships happen, and keep them alive.

At the annual CLE we surprised Tom with a luncheon in his honor, presenting him with many expressions of our feelings and emotions as we wish him well. Tom managed the career program, and, as such, was often the first person with whom our attorneys spoke concerning personnel actions. Careers are important to each individual, and Tom always knew the impor-

tance of his role in making us comfortable that fairness and equity were ingredients of every action.

Probably most important was the kindness and decency expressed by Tom towards every member of our AMC legal community. Headquarters organizations are always viewed with mixed emotions by those on the receiving end of ideas and taskers (sometimes not so mixed emotions). On his many trips to AMC field offices, Tom always took the time to walk around, meet and speak with every individual in the office. His one concern was asking how things were going,—asking “what do you need from us?” I truly believe that all of us will remember Tom as a person who was very honest and open, and was unafraid to hear bad news. He actually worked best when aggressively fixing problems.

Tom and Iris have not solidified retirement plans. We know that Tom will be actively involved with his church, family, and community. You really will be missed Tom. ©

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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

Fiscal Policy Development: Severable Services

Don't forget about the new authority to enter into contracts for severable services for a period beginning in one fiscal year and ending in another, as long as the contract period does not exceed one year.

This is a departure from the previous rule stating that severable service contracts represented the *bona fide* need of the fiscal year in which the services were performed; accordingly, the theory went, the contracts could not legally "cross" fiscal years. Now, in essence, severable service contracts can legally "cross" fiscal years, provided that the *bona fide* need exists for the services when the contract is awarded and provided the contract does not exceed one year. See 10 USC 2410(a) for more details.

This is a particularly "good news story" for our clients requiring routine, recurring support services, as it should give them more flexibility than in the past. POC is **Lisa Simon**, DSN 767-2552.©

CC Newsletter

Fraud Indicators: TACOM- ACALA Preventive Law Note: Keeping the Client Informed of Fraud

TACOM-ACALA's **Sue Allison-Hiebert**, DSN 793-8445, provides an excellent preventive law note informing clients as to what facts or circumstances may indicate fraud (Encl 1). The paper includes a description of potential fraud indicators at four distinct contracting stages: presolicitation, solicitation, pre award and post award. If an employee believes an impropriety exists, they are encouraged to contact the TACOM-ACALA Fraud Advisor or the Criminal Investigative Command Special Agent. It is interesting to note that since TACOM-ACALA is located with HQ IOC, fraud advisors at the IOC are also identified: **Marina Yokas-Reese** and **Tom McGhee**.©

List of Enclosures

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OPTION EXERCISE PROTEST POTENTIAL: What Might GAO Do and Not Do

The GAO will usually decline to review an agency's decision not to exercise an option. The matter is usually considered contract administration since it does not involve the failure to conduct a required competition and under the usual Government contract option clause the option is exercisable at the sole discretion of the Government. The GAO recognizes that a contractor has no legal right whatsoever to compel the Government to exercise an option. See, C. G. Ashe Enterprises, B-188043, March 7, 1977, 77-1 CPD 166; Interstate Equipment Sales, B-222213, March 19, 1986, 86-1 CPD 274; Digital Systems Group, Inc., B-252080.2, March 12, 1993, 93-1 CPD 228.

However, if the agency conducts a competition to determine which of the incumbent contractors should have their option exercised the GAO will review the failure to exercise an option. Fjellestad, Barrett and Short, B-248391, August 21, 1992, 92-2 CPD 118; Walmac, Inc., B-244741, October 22, 1991, 91-2 CPD 358; Digital, supra.

One of AMCOM's customers has awarded parallel development contracts under a Broad Agency Announcement. These contracts include a small basic effort and larger options. The customer hopes to receive sufficient funding to award all the options but may be limited to funding only one of the incumbents. Neither the RFP nor the contract mention any downselect procedures. If the customer does not receive sufficient funding to exercise each incumbents option, the customer plans to advise the incumbents whose options are not being exercised that due to funding limitations an administrative determination was made not to exercise their option.

Legal has advised that if it conducts even a limited competition in order to determine which option to exercise the GAO will review the action. See, Mine Safety Appliances Co., B-238597.2, July 5 1990, 90-2 CPD 11; Honeywell, Inc., B-244555, October 29, 1991, 91-2 CPD 390.

If the customers do not receive sufficient funding to exercise all of the options in parallel development contracts they must be cautioned not to convene an evaluation panel and conduct a competition in order to determine which option to exercise. The program manager or other appropriate official should review the performance of the contractors and the terms of the option in order to make a recommendation to the contracting officer on which option should be exercised. This procedure should be viewed as a matter of contract administration outside the scope of the GAO's bid protest function.

POC is **Will Rathbun**, DSN 788-0544. ©

**Coming Soon:
Look for
Details on the
AMC A-76
Workshop**

Acquisition Law Focus

PARTNERING: It's Not Just Acquiring for Contractors Anymore Commercial Items

The AMC Partnering Program is quickly expanding, in part due to the excellent efforts of our cadre of AMC MSC Lead Partnering Champions (LPC). STRICOM LPC **Harlan Gottlieb**, DSN 970-3513, provides an excellent synopsis on a recent success story in using Partnering in a agency-agency Partnering Workshop (Encl 2).

The AMC Partnering for Success model was used successfully in a Partnering Workshop between the PM for Advanced Distributed

Simulation (ADS) and a TRADOC agency, the National Simulation Center (NCS), to define roles and responsibilities for each agency in the Warfighter's Simulation Program (WARSIM).

This is an example of the many potential uses of the Partnering process.

The paper walks you through the steps STRICOM took in reacting promptly when it identified a problem that could lead to failure: confusion over roles and responsibilities.[©]

CBDCOM's **Phil Hunter**, DSN 584-1299, provides an excellent treatise on acquiring commercial items (Encl 4). The paper underscores that commercial items is defined in eight different ways under the FAR, and provides an in-depth discussion of the term "of a type", and its importance to the acquisition of commercial items.

Several special commercial items acquisition requirements are highlighted, including the need to conduct market research before acquiring. Market research is an essential element of an effective acquisition strategy. establishing the foundation for the agency description of need.

The description of need is the vehicle by which the government agency provides sufficient information to the potential offerors. explaining how the agency intends to use the product, the performance requirement and essential physical characteristics.[©]

Potential Pitfalls for Product Center Personnel

TACOM-ACALA's Chief Counsel, **Kay Krewer**, DSN 793-8414, provides another great example of a preventive law note addressing several issues of import, cautioning against making unauthorized commitments, releasing proprietary information, and releasing information

without authorization (Encl 3).

For each item details are provided on applicable law and regulations, for example, the Procurement Integrity Act, and the Trade Secrets Act, with common sense comments and suggestions for the client.

Good work![©]

A-76 Steps & DOD CA Initiatives

Diane Travers, HQ AMC, DSN 767-, and **Cassandra Johnson**, HQ AMC, DSN 767-8050, report on a program they attended on OMB Circular A-76 (Encl 5).

A-76 Is...

A-76 provides a process for a cost comparison between the public and private sectors before converting from government performance of a function to contractor performance, or from contractor performance to government performance.

Functions that cannot be contracted for include inherently governmental functions, core functions (technical or scientific requirements for emergencies and mission), legally exempt functions (guards, firefighters, Crane and McAlester), and gray areas (non-exempt but that cannot be clearly separated from exempt functions.)

A-76 8 Basic Steps

The basic steps in the process are: (1) determining availability of commercial sources; (2) preparing comprehensive performance work statement; (3) developing cost estimate for government performance and most

efficient organization (MEO); (4) independent review of MEO (5) Issuing a solicitation, conducting an evaluating, and selecting the best commercial source; (6) conducting the cost comparison between the commercial winner and the MEO; (7) public review; (8) appeals.

DOD Initiatives

Representatives from the services discussed their CA initiatives. The Army is currently studying 12,000 FTE with an expected annual savings of \$120M, and plans to have completed studies on 44,000 FTE by FY 03, with a projected annual savings of \$440M. The Navy is planning to studies 80,000+ FTE over the next 5 years at an expected \$2.5B savings over POM with \$1.2B savings annually thereafter. Navy has awarded an IDIQ contract for consulting services to use for A-76 studies, and has completed streamlined A-76 studies in 12 months. The Air Force has reduced over 28,500 FTE as a result of A-76 studies, and on average 60% of competitions go contract while 40% stay in house (overall government average is 50/50). ©

The National Partnership for reinventing Government, chaired by **Vice-President Gore** issued a memorandum requiring government documents to use plain language.

The memorandum states that beginning 1 October 1998 all new documents and forms will be written in plain language. By 2002, all documents created before 1 October 1998 must undergo a rewrite. New regulations written after 1 January 1999 will have to be written in plain language.

Guidance as to what plain language is will be issued shortly. The active voice ("you") and brevity will be encouraged.

As an example OSHA currently has a 63 word narrative standard for "egress". In part it reads: "Ways of exit access and the doors to exits to which they lead shall be so designed and arranged as to be clearly recognizable as such."

The standard was converted to plain language: "An exit door must be free of signs or decorations that obscure its visibility." **Mr. Gore** suggests that the word "obscure" might confuse. So he suggests "Don't put up anything that makes it harder to see the exit door".

Understand? ©

The Lexicon of Revised FAR Part 15...and other provocative changes

CECOM's **Pat Drury**, DSN 992-, recently gave two presentations to about 80 CECOM Acquisition Center-Washington personnel. The presentation highlights the important revisions in the solicitation, evaluation and source selection sections of FAR Part 15.

Sixteen Charts

Included is information on best value, award without discussions, establishing the competitive range, deficiencies and weaknesses, exchanges after establishing the competitive range, oral presentations, past performance, and proposal revisions and modifications.

Several definitions are provided on important aspects of the FAR 15 process.

Many AMC acquisition attorneys are responsible for briefings and other types of FAR 15 training, so these slides may point you in the right direction.

Best Value Defined

The definition of best value under FAR 2.101 is provided: "The expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement."

Exchanges & Past Performance

With respect to exchanges leading to the establishment of a competitive range, the briefing underscores that they are required with offerors whose adverse past performance is determinative. Such "exchanges" are permitted with offerors whose inclusion in the competitive range is uncertain. These may address ambiguities, deficiencies, weaknesses, errors, omissions, mistakes, and the relevancy of past performance.

Call Pat for a copy of this briefing. ©

IRS: Burden Shift Still A Burden

On July 22, 1998 President Clinton signed into law the IRS Restructuring and Reform Act of 1998. This wide-ranging legislation includes many provisions aimed at making the IRS a more taxpayer-friendly operation and bolstering taxpayers' rights in disagreements with the IRS.

Among those provisions is a controversial section that shifts the burden of proof in court proceedings from the taxpayer to the government.

However, the taxpayer must still overcome some major hurdles before getting the protective shift of burden. Under the new law, the IRS bears the burden of proof only if the taxpayer: (1) introduces "credible evidence with respect to any factual issue relevant to ascertaining the taxpayer's income tax liability"; (2) complies with the laws' substantiation requirements; (3) maintains records as required by the law and regulations; and (4) cooperates with reasonable IRS requests for meetings, interviews, witnesses, information, and documents.

A nice preventive law paper from HQ AMC's **Alex Bailey**, Chief of Legal Assistance, DSN 767-8004 (Encl 6). ©

Employment Law Focus

MSPB Annual Report for 1997

Great Statistics!

Case receipts—8,721 new cases, down less than 2% from 96.

Cases decided—8,314 decided

Dispositions—Of the 7,223 initial appeals decided 46% were dismissed (715 for lack of jurisdiction, agency cancellation of action or withdrawal of the appeal)

Settlement Rate—Of the 3,879 not dismissed, 1957 were settled—overall settlement rate of 50%. The settlement rate for adverse actions—66%; performance cases, 64%; within-grade denials, 75%

Relief for Appellants—Considering the number of appeals settled (1,957) and those in which the agency action was reversed or mitigated (587), appellants received relief in 65% of the appeals not dismissed. Of the 1,922 appeals that were not dismissed or settled, 30% resulted in reversal or mitigation of the agency action.

Processing Time—The average processing time for initial appeals was 108 days, with 81% decided within 120 days.

Types of Actions Appealed—50% concerned agency adverse actions, 10% RIF appeals, 22% retirement cases, and 2% concerned performance-based actions.

Whistleblower Appeals—610 appeals and stay requests. 242 were individual right of action appeals, 276 were direct appeals to the Board that included allegations of reprisal for whistleblowing, and 93 were requests to stay an agency action allegedly based on whistleblowing.

Whistleblower Relief—Of the 518 whistleblower cases decided, 59% were dismissed. In the other 211 cases, appellants received relief—through settlement, reversal or mitigation—in 68% of the cases.

Mixed Cases—Allegations of discrimination were raised in 1,833 of the initial appeals decided. In 1,452 of those appeals, the discrimination issue was not decided because the case was dismissed (902) or settled (534) or the allegation was withdrawn (16). The remaining 381 resulted in a finding of no discrimination in 93% and discrimination in 6%.^c

Supreme Court Alignment for the 1997-8 Term

Justices **O'Connor** and **Kennedy** continue to be in the center, and speak for the Court on key close issues. Kennedy was most often the pivotal 5th vote. **Kennedy** was in the majority most—93%, with **O'Connor** second with 89%.

Aligned to the left are Justices **Souter**, **Breyer**, and **Ginsburg**, who voted together 62% of the time. Aligned to the right are **Kennedy**, **O'Connor**, and **Rehnquist** who voted together 64%.

Voting together in 82% of the cases are Justices **Scalia** and **Thomas**.

Alone again is Justice **Stevens**, dissenting in almost 50% of the cases.

15 cases were decided by a 5-4 vote. The 5 Justices most often making that alignment were **Rehnquist**, **Thomas**, **Scalia**, **Kennedy** and **O'Connor**.^c

Employment Law Focus

Sexual Harassment & Employer Liability

The U.S. Supreme Court issued two decisions in late June. The cases deal almost entirely with the issue of liability; i.e., when is an employer liable for the acts of a supervisor who creates a "hostile environment"? You may want to focus on the following quote from one of the cases, Burlington Industries v. Kimberly Ellerth, 1998 U.S. LEXIS 4217 (June 26, 1998):

"[T]he Court adopts, in this case and in Faragher v. Boca Raton, post, p. ___, the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff

employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While proof that an employer had promulgated an antiharassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.

And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action." POC is HQ AMC's **Linda B.R. Mills**, DSN 767-8049. ©

Workplace Violence is Rarely Reported...and the most dangerous jobs

The Department of Justice reports that it is rare for instances of workplace violence to be reported. Less than half of these offenses are reported.

More than 2,000,000 workers reported violent episodes for each year 1992-1996, although there is a 17% decrease when you compare 1992 with 1996.

The report also discloses that the most dangerous job is police officer, followed by private security personnel, taxi drivers, prison guards, bartenders, mental health professionals and gas station attendants. The most safe job is that of college or university teachers.

Other statistics:

-- 37% of the victims knew the offender.

-- More than 37% worked for the government, a high figure in that only 16% of the total workforce are public sector employees. ©

Employment Law Focus

Executive Order Prohibits Sexual Orientation Discrimination

On May 28, President Clinton signed an amendment to Executive Order 11478 providing a uniform policy for the federal government prohibiting discrimination based on sexual orientation in the federal workplace.

Sexual orientation is added to the "protected" list that includes race, color, religion, sex, national origin, disability and age. Although most federal agencies have a policy in place barring discrimination based on sexual orientation, a uniform policy is applicable government-wide.

The EO can not create any enforcement rights such as filing a complaint with the EEOC. Congress can only grant such rights as part of legislation that provides for enforcement methods and means.

August 1998

OPM

on Team Leaders...

The Office of Personnel Management (OPM) is seeking to establish order in what is becoming a fixture of the general schedule—the so-called "team leader" position. Agencies have been designating employees as pseudo-supervisors, who are not quite rank and file employees or full fledged supervisors, to try out the concept, and in some cases, to skirt limits on the number of supervisors.

OPM has issued a new classification guide that helps agencies define these "leaders." It says that they can help facilitate work but can not plan, assign, okay or reject work performed by a team. And supervisors, not team leaders, schedule training and approve funding, while leaders may only observe and ask for team training.

The guide also says that a team leader's grade generally should be a full grade higher than the work being performed by the team. Agencies should by now have received this guidance (Encl 7). POC is HQ AMC's **Linda B.R. Mills**, DSN 767-8049, ©

and on RIF

The OPM changes address four areas. They are: (1) the method for averaging actual ratings received if there are fewer than three during the four year look-back period; (2) the use of "modal" ratings for employees who have no ratings of record during the four year look-back period; (3) the use of performance evaluations given under appraisal systems not covered by 5 CFR Part 430, Subpart B; and (4) the system for assigning retention service credit when there are mixed rating patterns within the same competitive area.

As these changes affect bargaining unit employees' conditions of employment, there is an obligation to notify your union(s) of the changes and provide them an opportunity to request bargaining. As these changes stem from a government-wide regulation, they are generally outside the duty to bargain in accordance with 5 USC Sec 7117(a)(1).

DAPE's memorandum is provided (Encl 8).

POC is HQ AMC's **Linda B. R. Mills**, DSN 767-8049. ©

Environmental Law Focus

Thinking Green for Weapons Systems

The Department of Defense continues to stress that environmental considerations should be integrated into weapon systems development, maintenance, and fielding.

There now is a wealth of information from the Army and other services as to the environmental requirements as they pertain to the weapon system acquisition program.

A revised list of WWW sites for access to this information is provided by HQ AMC Environmental Law Team Chief **Robert S. Lingo**, DSN 767- 8082 (Encl 9).

Nineteen Web Sites are cited, including ones from DOD's Office of Under Secretary for Acquisition and Technology, the Army (Army Acquisition Pollution Prevention Support Office, Army Environmental Center), Air Force, Navy and the Environmental Protection Agency.©

Does CERCLA Analysis Equal NEPA?

Do you have to do a NEPA analysis in support of CERCLA environmental remediation projects? **Peggy Giesking**, CBDCOM Environmental Attorney, DSN 584-4659, has provided a thorough examination of why the CERCLA process is the functional equivalency of NEPA, as part of her pursuing a Masters of Law. This also reflects the official Army position set forth in AR 200-2.

A copy of this paper may be obtained from Ms. Giesking.©

ELD Bulletins for May & June

Environmental Law Division Bulletins for May and June 1998 are provided (Encl 10 and 11) for those who have not received an electronic version or who have a general interest in Environmental Law.

Giving It Away... While You're Cleaning It Up

Last year Congress provided the Early Transfer Authority, which allows Federal agencies to transfer land before all remediation is completed, with a reservation of the final deed covenant until cleanup is completed.

The Environmental Protection Agency (EPA) and the Defense Department have now provided guidance for application of this new authority at NPL sites, and non NPL sites.

The EPA guidance can be accessed at <http://www.epa.gov/swerffrr/doc/hkfin.htm>; the DoD guidance at <http://www.dtic.mil/envirodod/brac/publish.html>©

Supreme Court Clarifies Corporate Liability for Parent Corporations

CERCLA Decision Will Impact Liability Analysis

On June 8, 1998, the Supreme Court issued an opinion in the case of *U.S. v. Bestfoods, et al*, 1988 LEXIS 3733, which a unanimous Court provided guidance on the issue of parent corporation liability for the actions of its subsidiaries under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Court's decision in this case may affect the Third Circuit's analysis in *FMC Corp. v. U.S. Dept. of Commerce*, 29 F.3d 833 (3rd Cir.1994) which has been used to impose liability on federal agencies as an operator.

This opinion could have a substantial impact on federal agency CERCLA liability. First, the Court seems to have discarded the "actual control" test, which was used by the Third Circuit in *FMC Corp.*¹ to find the federal government liable as an operator. Of course, it is unclear how the Court's focus on the rela-

tionship between a parent corporation and a facility would apply in situations where federal agencies have been involved with a particular type of industrial operation.

Significantly, the Court sharpened the definition of "operator" to include only those activities specifically related to disposal of hazardous waste and environmental compliance. This definition presumes that many of the factors the Third Circuit found to be relevant to an agency's control — such as the government's ability to direct raw materials to the plant and the government's involvement in labor issues at the plant — would not play a role in any new analysis of a federal agency's operator status.

Although each future case will be decided on the basis of its unique facts, *Bestfoods* will certainly influence upcoming decisions concerning federal liability.^c

Review Before You Spray

Do lessees under Army agricultural leases need to get Army approval before conducting aerial pesticide spraying? And are other pesticide management activities of lessee subject to Army Pest Management Plan requirements.

In an example of joint legal efforts, **Geraldine Lowery**, DSN 793-5932, an IOC attorney, in cooperation with **Scott Farley**, AEC attorney, have prepared a thorough legal memorandum discussing the requirements for Army approval of aerial pesticide spraying (Encl 12).^c

Contacting Army Regional Environmental Offices

Regional environmental offices can be a great resource to determine if other DoD installations are facing the same issues as you are, or whether there is a DoD common policy. They are now easy to contact. Encl 13 is a list of names, telephones, and E-mail addresses, and of course the Army RECs can be accessed through the AEC website: <http://aec-www.apgea.army.mil:8080/>.

It's that time again--political activity and The Hatch Act

The Hatch Act and implementing OPM regulations (5 C.F.R. Parts 733 and 734) apply to civilian employees. The rules applicable to soldiers are more restrictive and are set out in DoD Directive 1344.10 and AR 600-20.

When the Hatch Act Reform Amendments went into effect on 3 Feb 94, greater latitude for participating in the political process was given to most Federal employees. With certain exceptions (career SES, for example), Federal employees may now participate in partisan politics. However, there are still limits. What follows are lists of what most Federal employees may or may not do.

Federal Employees May

- be candidates for public office in nonpartisan elections
- register and vote as they choose
- assist in voter registration drives
- express opinions about candidates and issues
- contribute money to political organizations
- attend political fundraising functions

-attend and be active at political rallies and meetings

-join and be an active member of a political party or club

-sign nominating petitions

-campaign for or against referendum questions, constitutional amendments, municipal ordinances

-campaign for or against candidates in partisan elections

-make campaign speeches for candidates in partisan elections

--distribute campaign literature in partisan elections

hold office in political clubs or parties

Federal employees may not

-use official authority or influence to interfere with an election

-solicit or discourage political activity of anyone with business before their agency

-solicit or receive political contributions (may be done in certain limited situations by federal labor or other employee organizations)

-be candidates for public office in partisan elections

-wear political buttons on duty

-engage in political activity while on duty. while in a government office. while wearing an official uniform, or when using a government vehicle.

Military Personnel

Active duty military personnel are under different and more restrictive rules than civilian employees. For example, they may not make campaign contributions to other members of the Armed Forces or Federal employees. They also may not run for elective office in the Federal government, or the government of a state, territory, the District of Columbia, or any political subdivision thereon. (10 U.S.C. Sec. 973).

AMC Ethics Team Chief **Mike Wentink**, DSN 767-8003, and ethics counselor **Alex Bailey**, DSN 767-8004, provide the complete Hatch Act story (Encl 14).

Only the Office of Special Counsel is authorized to render an advisory opinion on the Hatch Act. So, they invite you to the OSC webpage <http://www.access.gpo.gov/osc/>.

Gifts Between Employees: The general rule & the special occasion exception

A regular and recurring issue in the workplace is that of gifts between employees. HQ AMC Ethics Team Chief **Mike Wentink**, DSN 767-8003, provides a paper on this subject (Encl 15).

The basic rule is two-fold: **Employees may not:**

(1) directly or indirectly give a gift to, or make a contribution toward a gift for an official superior, or solicit a contribution from another employee for a gift to an official superior; or

(2) directly or indirectly accept gifts from employees who receive less pay than they do, unless there is no superior-subordinate relationship between them two, and there is a personal rela-

tionship that would otherwise justify the gift.

There are **exceptions** to this rule. The primary one for departures and retirements is the "special, infrequent occasion." For occasions that terminate the superior-subordinate relationship, such as retirement, resignation or transfer, we may solicit nominal amounts to give a gift appropriate to the occasion.

The JER says that the "nominal amount" solicited may not exceed \$10, and that the total value of the gift generally should not exceed \$300. Note that a "promotion" is not considered to be a "special, infrequent occasion" unless the employee is also being transferred out of the supervisory or command chain.^c

Fundraising and Informal Funds

CECOM Deputy SJA **MAJ Marvin Gibbs**, DSN 992-4445 recently provided the workforce with an excellent preventive law note highlighting the various restrictions and rules applicable to

fundraising, describing what must be contained in requests to raise monies on a military installation, and providing monetary limitation rules, and points of contact for further information (Encl 16).^c

You Can't Always Speak

The relationship between AMC, DA and private associations raises many standards of conduct and ethics issues. One such recurring issue is that of speaking at private association events.

In short, giving the presentation must be something that we really want to do because it serves the Army's interests, and what we get out of it justifies our expenditure of resources, *i.e.*, we get "bang for the buck!"

The DoD *Joint Ethics Regulation* (JER) deals specifically with this issue and sets out the criteria for such support. Seven factors must be analyzed and met in order for speaker support to a private organization. These include:

-Must be no interference with performance of official duties or readiness.

-Community relations or other Army interests must be served.

-It must be appropriate to associate the Army with the event.

-We must be willing to provide same support for similar events.

AMC Ethics Counsel **Mike Wentink** provides an ethics advisory on this important subject (Encl 17).^c

Ethics Focus

Ethics & Private Organizations...

Membership and participation in private organizations enhance our professionalism as soldiers and Army employees, and in our life's work. In addition, participation in these organizations brings us into contact with the civilian community and it is a learning and sharing experience where we all benefit.

However, there are parameters that constrain our relationship with and participation in POs.

No matter how good the work is that they do or how well their goals and ideals complement those of the Army and AMC, they and their activities may not be organized, planned, administered and operated by and as an extension of the Army and AMC. They are non-Federal entities and must be treated as such. Like most things in life, there are rules!

AMCCC Ethics Counsel **Mike Wentink**, DSN 767-8003 and **Alex Bailey**, DSN 767-8004, provide a paper that highlights 6 rules, focused on financial interests, relationship to official duties, personal and private participation, and endorsement (Encl 18).

Three of the rules are:

Rule No. 1: If you are an officer, director, trustee, or employee of a PO, the financial interests of the PO are imputed to you. This means that you must not participate in official Army matters that affect that PO because you have a conflict of interest.

Rule No. 2: If you are an active participant in a PO, you probably should not participate in official matters involving the PO because of the appearances (a reasonable person with knowledge of the relevant facts would likely question your impartiality — for example,

Rule No. 3: As an officer, director, trustee, advisor or other active participant for a PO, you act in your personal and private capacity. This is not part of your job description. You are not authorized to organize, plan and run membership drives, fundraising campaigns, and other business of the PO from your AMC office. In appropriate cases, the “agency designee” (your boss) may authorize limited use of Government resources (e.g., your computer) and even some “excused absence” for professional development.

...and Gifts from outside sources

The basic rule is that we **must not** accept gifts from prohibited sources or which are offered to us because we are a Federal employee.

This sounds simple, but what's a gift? What's a prohibited source? **Mike Wentink** recently provided HQ AMC employees with an ethics advisory that defines gifts (and what is not a gift) and “prohibited sources (Encl 19).

A **gift** is anything of value (e.g., discounts, entertainment, training, favor, discount, forbearance, hospitality). Simple enough. However, the Office of Government Ethics specifically excludes some items from this definition, to include the following: coffee, donuts, and similar refreshments offered during a meeting (the “donut rule”). This does not include a working lunch.

A **prohibited source** includes anyone doing business with the Army, trying to do business with the Army, seeking official action from the Army, or is affected by how the Army employee performs or does not perform his or her duties. This includes on-site contractors and their employees. ©

Harvey Reznick Named AMC Attorney of the Year

A highlight of each CLE Program is the Command Counsel's Award Program: A time to reflect on this year's important individual and team achievements, and to recognize those counsel whose professionalism, initiative and exceptional work products contributed significantly to the success of AMC.

During the annual CLE Awards Luncheon, **Harvey Reznick**, Chief Adversary Proceedings Division, was recognized as the AMC Attorney of the Year, presented with the Joyce I. Allen Award, in a ceremony presided over by **Ed Korte** and General Counsel of the Army **Bill Coleman**.

Mr. **Reznick**, an attorney with AMC since 1968, served in several important acquisition law positions at the St. Louis AMC legal office, which has moved to Huntsville, and designated the U.S. Army Aviation and Missile Command (AMCOM).

Harvey Reznick's significant work accomplishments include serving as systems attorney for the Advanced Attack Helicopter Program, which was then the largest

Army research and development program. During eight years as the Chief, Procurement Law and Chief Counsel, Aviation and Troop Command (ATCOM), the command lost only one bid protest, a remarkable achievement. He also made major contributions to the geographic merger of ATCOM into AMCOM, respecting the decisions of all ATCOM legal office employees, and actively assisting in placement and relocation efforts. The selection is particularly noteworthy in that **Harvey Reznick** served with **Joyce Allen** for many years. ©

Attorney of the Year Nominees

The other nominees for this year's prestigious award were **Thomas Carroll**, CECOM; **Timothy Connolly**, ARL; **Violet Kristoff**, TACOM; **Bernadine McGuire**, IOC; **Robert Parise**, ARDEC; **Jeanne Rapley**, TECOM; and, **John Seeck**, IOC. Congratulations to all of you, and thanks for your efforts and contributions to your commands, AMC and the Army. ©

CLE Handouts Disks & The AMC Website

Each organization represented at the CLE Program was provided disks with handout materials used during the week. It is important that you make these disks available to every member of your office. A list of the materials contained on each of the 3 disks is provided (Encl 20).

Additionally, AMCCC Web Master **Josh Kranzberg** has placed much of the handout material on the AMC Command Counsel Home Page. These can be accessed at www.amc.army.mil/amc/command_counsel/CLE/CLEinfo. The materials include acquisition, environmental, employment law documents, and QDR charts used by **Mike Sandusky** in his plenary session. ©

AMC Attorneys Honored

One of the highlights of the annual CLE Program is the recognition of AMC counsel who contributed significantly to their organization, AMC and the Army. This year, at the Awards Luncheon, it was a pleasure to have General Counsel **Bill Coleman** join **Ed Korte** in presiding over the awards presentation. We extend our congratulations to both nominees and recipients of these awards.

Achievement Award

The Command Counsel Achievement Award is presented to an AMC field counsel nominated by a member of the Office of Command Counsel, Headquarters, AMC.

Bernadine McGuire, from the IOC, is this year's recipient, recognized for her exceptional work on the contract for the construction, systemization, operation and closure of a chemical demilitarization facility at Pine Bluff Arsenal, and for her contribution to the successful defense of a related protest filed with the General Accounting Office.

The Pine Bluff contract was awarded as part of the effort under the Chemical Stockpile Disposal Program, by which the Defense Department is carrying out the destruction of the U.S. stockpile of lethal chemical weapons communities. The Pine Bluff Chemical Agent Disposal Facility is a _ billion dollar project that will lead to the destruction of 3,850 tons of nerve and mustard gas.

Team Project Award

Several Teams were nominated as representing significant achievements by a group of individuals, working together: **APG Military Justice Team, SSCOM Trademark Registration Team, AMC Partnering Team, ARL's REDS (ADR Employment) Team, TACOM's Scout Legal Team, TACOM's Colt License Dispute Defense Team, and AMCOM's BRAC Claims Team.**

The recipient of the Team Project Award is the **AMC Partnering Team**: Team Chief is **Mark Sagan**, Deputy Chief Counsel, CECOM. Other team members are **Dave**

DeFrieze, IOC; **Ken Bousquet**, TACOM Acquisition Center; and, **Steve Klatsky**, HQ AMC.

The AMC Partnering Team made vital contributions to the expansion of Partnering within AMC. They wrote the Partnering for Success Guide, designing the AMC Partnering Model; developed the syllabus for, and conducted the successful training of 80 AMC Partnering Training; originated the concept for including Partnering in Roadshow VII; and represented AMC in numerous important sessions that addressed Partnering.®

Managerial Excellence Award

The Management excellence Award is named for Francis J. Buckley, Jr., former Chief Counsel of the US Army Missile Command. This year the following were nominated for this important award: **Laura Haug**, TECOM; **Kay Krewer**, TACOM-ACALA; **John Metcalf**, CECOM-Belvoir Legal Branch; **Edward Scruggs**, AMCOM; and, **Peter Taucher**, TACOM.

This year's recipient is **Laura Haug**, TECOM, recognized for her superb work as the Deputy Chief Counsel, TECOM; her accomplishments in the Commercial Activity Study of Base Operations, at APG; the TECOM Legal Office Reorganization & Relocation Projects; as well as her office management during the Ordnance Center & School Investigations and Cases.

AMC Preventive Law Award "Leadership & Relationships: The Courage to Communicate"

The AMC Preventive Program Award recognizes that effort during the past year that best fulfills the Command Counsel's Preventive Law philosophy embodied in the Command Legal Program. That philosophy encourages each attorney to anticipate the needs of clients and commands, to identify areas of greatest vulnerability and to develop programs to address those needs. The Awards Committee identified the following nominees, in alphabetical order for this year's Preventive Law Program Award as deserving special recognition:

Nominees:

Kathleen Allen, IOC; AMCOM Personal Services Prevention Team (Francis Faraci, Bob Garfield, Tina Pixler, Diane Beam, Julia Cole, James McMurray, and Edward; Bob Chase, ARL; Dave DeFrieze, IOC; Margaret Gillen, CECOM; Ron Majka, TACOM; Tom McGhee, IOC; and, TACOM-ACALA Legal Group (Kay Krewer, Joseph Picchiotti,

Pamela Bailey, Susan Allison-Hiebert, Maria Bribriesco, Caridad Ramos, Carrie Schaffner).

TACOM's **Ron Majka** is the recipient of this year's award, recognized for his outstanding work in the FAR 15 Rewrite Training Program. In order to appropriately introduce the new procedures set forth in FAR 15, TACOM developed a training program for its workforce. The scope of the FAR 15 Rewrite changes was so broad that training had to be conducted throughout the acquisition community.

Ron served as the TACOM Business Law Division representative to the overall TACOM Acquisition Center effort to develop a successful training program. He prepared a script to accompany the charts that provided background information, details and other useful information to place in a proper perspective the specific changes in question. Each trainer used these charts and background information during the training sessions. More than 300 persons were trained in small group sessions of 20-25 employees, conducted over a 2-month period. ©

"Leadership & Relationships: The Courage to Communicate"

At the CLE we were treated to a presentation entitled "Leadership & Relationships: The Courage to Communicate", by **Dr. Norma Barr** of Barr & Barr Communication Consultants. The basic premise of this enrichment session is that balancing head and heart is critical to leadership.

The courage to communicate requires the balance of head and heart. **Dr. Barr** introduced us to the concept of emotional intelligence, also referred to as social or personal intelligence, but all converge to focus on the ability to act wisely in human relations. The important conclusion: Leaders build responsible relationships by communicating authentic presence through words, actions, and values. ©

Plenary Session Discussion Highlights

Notes from the Chief...and QDR Impact on AMC

AMC Chief of Staff **MG Jim Link** and Chief, Special Analysis Office **Mike Sandusky**, briefed us on the many significant events that will shape our future, including the Quadrennial Defense Review, budget developments, competitive sourcing, and the inherently government function exercise. ©

Competitive Sourcing Panel

Outsourcing and Privatization, a significant issue for all of AMC, was addressed in a plenary session conducted by **Elizabeth Buchanan**, **Cassandra Johnson** and **Diane Travers**. During this session, the DA perspective, AMC developments, and a discussion of process, policy and procedures were all covered in detail. ©

Contractors in the Workplace

An interesting session was Contractors in the Workplace, during which **Ed Korte**, **Nick Femino**, **Bill Medsger** and **Diane Travers** worked with AMCCC Ethics Team Chief **Mike Wentink**, in presenting real life fact situations concerning contractors and government personnel working together. This important issue is of growing importance, touching upon many different areas of our legal practice and work relations. ©

The JAGC Perspective

BG Mike Marchand, Assistant Judge Advocate General for Civil Law and Litigation, joined us and gave an interesting presentation focused on current developments and items of interest to the TJAG.

Additionally, this reminded us that we enjoy a very close working relationship with the JAG Corps. ©

DA Sexual Harassment Study & the DA Human Relations Climate

MG (Ret) Richard Siegfried, who chaired the Secretary of the Army's Senior Review Panel on Sexual Harassment, gave attendees an overview of the important work done in assessing the human relations climate in the Army. Relationships and how we treat each other are central to the unit and organizational cohesion necessary for mission success.

It is essential that the Army as an institution learn from the experiences of the Aberdeen Proving Ground Ordnance Center cases, to listen closely to what the troops are saying and feeling, and to be prepared to accept the challenge of the changing nature of the military workforce. ©

Faces In The Firm

Hello

HQ, AMC

MAJ Ed Beauchamp arrived in July and is working with the Business Operations Law Division.

HQ, TECOM

Mr. Michael K. Millard joined the office on 30 March 1998 as the Chief, Client Services Division. Mr. Millard is not new to the TECOM legal community, having worked in our office from 1990 through 1993 as the Deputy Staff Judge Advocate.

LT David M. Dalton arrived on 10 April 1998 from the JAG Officer Basic Course. He is a welcome addition to the Civil Law Division.

Mr. Billy Smith arrived in the Legal Office on 26 May 1998, under the JAGC Summer Intern Program. He will work for approximately 2 months and then return to law school. He is a 2nd year law student from Franklin Pierce Law School in New Hampshire.

Yuma Proving Ground

MAJ George A. Figurski, arrived on 15 July 1998 from the CID Command, Fort Belvoir, to become the the new Command Judge Advocate.

Mr. David Holbrook, arrived on 22 June 1998 from Fort Campbell, Kentucky. He's YPG's new environmental attorney. He and his wife, Mary reside in Yuma, Arizona.

White Sands Missile Range

The new SJA is **LTC Karl Ellcesser** who reported in June from The JAG School.

AMCOM

LTC Andy Hughes has joined the Acquisition Law Division as Chief, Branch E.

SSCOM

Welcome to **Ms. Srikanti Dixit** who worked as an SSCOM summer intern while attending Ohio Northern University. She will be primarily working in contract law. Additionally, Ms. Dixit is currently involved with the Indian Bar Association's endeavor to decrease domestic violence.

TACOM

CPT Karen Sue Weichmann is the new contract attorney intern. She is currently enrolled in the JAG School basic contract law program.

Promotions

HQ, TECOM

Ms. Barbara S. Owen, Claims Examiner, in the Client Services Division was recently promoted to GS-09. Congratulations, Barbara!

CPT Jeffrey M. Neurauter, Branch C, Acquisition Law Division, was promoted to his current rank on 1 July 1998. He hosted a fun promotion party for all Legal Office personnel.

WSMR

LTC John Long has been promoted to **Colonel**. Congratulations!

Awards

HQ, TECOM

On the departure of the APG Garrison Commander, **Colonel Roslyn M. Glentz** officially recognized several office members.

Ms. Laura Rothenberg Haug, Deputy Chief Counsel and **Ms. Janet R. Wise** both received Commander's Award.

Mrs. Katherine (Alene) Williams, **Ms. Jean Buckholtz** and **Mr. David H. Scott** received Certificates of Achievement.

MAJ Marie S.L. Chapa, Deputy SJA and **CPT Creighton Wilson**, Civil Law Attorney received Garrison coins.

Faces In The Firm

Goodbye & Best of Luck

TACOM-ARDEC

Marty Kane after 19 years with Picatinny was recently promoted to Business Manager for the Joint Light-weight 15.5mm Howitzer program, a Marine Corp weapon system being developed jointly with the Army at Picatinny. Marty's expertise in acquisition and international law is a great loss though he is still on post with the same e-mail and telephone number.

Francisco (Frank) Rodriguez recently accepted a promotion as the Labor attorney with EPA, in New York City. Frank will be missed by people from all over the arsenal because of his many activities, both professional and social.

Barry Dean retired after 30 years of service to Picatinny. Good luck as a private practitioner.

Tobyhanna Army Depot

Good luck and best wishes to **CPT James Butler** who recently departed the legal office.

HQ, TECOM

SPC Juan Cruz, Criminal Law Division, ETS'd 26 June 1998. He is residing in Havre de Grace, Maryland and is working as a medical malpractice paralegal.

SPC Stephen George, Criminal Law Division, ETS'd 1 July 1998. He is residing in Lebanon, Pennsylvania with his wife and family.

Yuma Proving Ground

A happy retirement for **MAJ Harry Longbottom**, now residing in Yuma with his family.

White Sands Missile Range

LTC John Long, Chief Counsel has been reassigned to the HQs, Defense Logistics Agency. He is also now COL John Long - congratulations!

TACOM

Kevin Story has accepted a position with the Corpus Christi Army Depot legal office.

CPT Armand Begun has departed the JAG for a position with the IRS in Detroit.

Births

AMCOM

Congratulations to Chief Counsel, **Bob Spazzarini**, who became a first-time grandfather on 14 July 1998 with the birth of Benjamin Joseph Aquila, son of Julia (Spazzarini) and Vince Aquila.

HQ AMC

Linda B.R.Mills is now the proud mother of Jennifer Amarilis Reisberg Mills. Jennie was born in Guatemala City on October 17, 1997 and was escorted to the US in February by her mom and her honorary aunt, Vera Meza-Dombkowski.

TACOM

CPT Armand Begun and his wife Tina are the proud parents of a baby Michael, born on June 26, 1998.

And...Another Award

HQ AMC's **Larry Anderson** received the Superior Civilian Service Award for his excellent work in the negotiation of a bilateral agreement between the US and Switzerland that required extensive coordination with the State, Commerce and industry.