

AR 15-6

FREQUENTLY ASKED QUESTIONS

1. Application of Current AR 15-6 to Previous Investigations

a. **Does the current regulation apply to ongoing investigations appointed under the previous AR 15-6?** To the extent possible, investigations should comply with the new AR 15-6, especially with respect to the due process rights of the subject of the investigation. The legal advisor and the legal reviewer should at least identify where the investigation is inconsistent with the new AR 15-6 so that an approval authority is aware of the differences when taking action. Err on the side of more due process rights for the subject (especially para 2-8c) and an unimpeachable legal review (see para 2-7).

b. **Do the reconsideration provisions in paragraph 2-9 of the new AR 15-6 apply to investigations completed under the previous AR 15-6?** Yes, these provisions apply to the extent possible.

c. **Do the provisions in paragraph 3-19 of the new AR 15-6 apply retroactively to completed AR 15-6 investigations?** Yes, the filing requirements apply to investigations currently on file – those records currently held must be held for not less than 5 or 10 years (depending on the type of case) from the completion date. However, the new regulation *does not* require that previously completed cases be synopsisized and submitted to OTJAG; that previously completed “high profile” cases be submitted through USARMDA to NARA or simultaneously to OTJAG and HRC; or that investigations conducted in and concerned with deployed operations be forwarded to the replacing unit prior to the conducting unit's departure. However, SJAs may determine that application of the latter rule is prudent regardless of whether it is required.

2. Service to the Soldier.

a. **Do paragraphs 2-8c(1) and 2-8c(2) discuss two separate types of referral actions? In other words, does paragraph 2-8c(1) require an IO who discovers adverse information regarding a field grade officer (FG) to refer that portion of the investigation regardless of whether a finding is made concerning that officer; and does paragraph 2-8c(2) separately require referral to a FG when an actual finding is made against that officer?** There is only one referral requirement and process. Paragraph 2-8c(1) simply establishes the existence of a referral policy. Paragraph 2-8c(2) establishes that the approval authority will provide due process before approving a finding that would constitute “adverse information.” Remember, according to the definition of “adverse information” there is no “adverse information” unless there is a “substantiated finding” (see paragraph 3 below). Therefore, there is nothing for the IO to refer prior to the approval authority's intention to approve a finding. An IO can discover information that may reflect poorly on a FG officer, but that information does not become “adverse information” for the purposes of AR 15-6 until the approval authority intends to approve that information as a finding.

b. **Should the notification to the Field Grade Officer include a warning that statements to the IO by an identified witness may be protected by the Military Whistleblower Protection Act as implemented by DoDD 7050.06 and AR 600-20?** Yes. The referral memorandum should include notification that the Army prohibits taking or threatening to take unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action for making a protected communication and that witness statements made by Service members in an AR 15-6 investigation may be protected communications under the Military Whistleblower Protection Act.

3. "Adverse Information"

a. **What is "Adverse Information"?** The definition can be found in the glossary:

Adverse information is any substantiated adverse finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence. To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual. The following types of information, even though credible, are not considered adverse: (1) motor vehicle violations that did not require a court appearance; (2) minor infractions without negative effect on an individual or the good order or discipline of the organization that: (a) were not identified because of substantiated findings or conclusions from an officially documented investigation; **and** (b) did not result in more than a nonpunitive rehabilitative counseling administered by a superior to a subordinate.

This definition is derived from DoDI 1320.04, implementing the 10 USC § 615 requirement that "any credible information of an adverse nature, including any substantiated adverse finding or conclusion from an officially documented investigation or inquiry" be presented to brigadier general and major general promotion selection boards.

b. **Does the information in my investigation meet the definition of "adverse"?**

This is determined by addressing each element presented in the definition, and then using the exclusions to eliminate specific types of derogatory or unfavorable information that is not "adverse" for this purpose:

(1) **Is the information found in a "substantiated adverse finding or conclusion documented investigation or inquiry"?** Obviously this prong is met if we are dealing with a finding in an AR 15-6 administrative investigation or board. Findings from a preliminary inquiry would not meet this requirement, but may be reduced to writing, documented, and further pursued by an additional administrative investigation or board.

(2) **Is the information "credible"?** Again, this prong is presumably met if the information is included as a "substantiated finding." All findings must be resolved and supported by a preponderance of the evidence. "Resolved" simply means that, if alternate conflicting explanations or interpretations of facts are supported by the evidence, the IO made a decision as to which is better supported by the preponderance of the evidence and explained how he reached this conclusion.

(3) **Is the information "adverse"?** The decision on whether information is "derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual" is largely within the discretion of the approval authority. There is no standard beyond the plain language of the definition provided in the regulation. However, it is important to remember that the purpose of this provision is to capture information that reflects on an officer's fitness for promotion to the grades of brigadier and major general. Such information does not have to be criminal or a violation of an administrative policy to meet the definition of "adverse." Inefficiency, incompetence, failures of leadership, and similar findings will also likely be "adverse."

(4) **If otherwise "adverse," is this type of information excluded from the definition?** The exclusions are fairly self-explanatory. However, please note that exclusion (2) is a three-part test: Is the conduct a "minor infraction without negative effect on an individual or organization?" If yes, then the information is still "adverse" unless the information is *also* not a "substantiated finding or conclusion from an officially documented investigation" *and* "did not result in more than a nonpunitive rehabilitative counseling administered by a superior to a subordinate." For example, MAJ A showing up late without

permission or notice to his supervisor may be a minor infraction without a negative impact, but if this information appears as a substantiated finding in an AR 15-6 it *is not automatically excluded*. The approving authority may decide it “reflects unacceptable conduct.” However, if the information simply comes up in a witness statement and is not a substantiated finding then it may be automatically excluded.

4. Appointing Serious Incident Investigations

a. **In paragraph 2-1c, what does “a general/flag officer assigned to a command billet with a servicing SJA” mean?** This language means exactly what it says. The term “servicing SJA” requires that the GO occupying a command billet have available a Staff Judge Advocate to provide legal advice on AR 15-6 investigations. “SJA” is deliberately used in opposition to the terms “JA,” “legal office,” or “legal advisor.”

b. **In paragraph 2-1c, what does the term “non-DOD personnel” mean?** This term is intended to mean United States personnel accompanying the DOD force, including the personnel of other agencies, contractors, and non-governmental organizations. The term would not include local civilians or foreign government personnel.

5. Redactions. In various provisions, the regulation requires that a field grade officer receive a redacted copy of an investigation that contains adverse information pertaining to that officer.

a. **What information from the investigation must be provided to the officer?** Under this regulation, copies of investigations are furnished to field grade officers for due process reasons in accordance with the provisions of AR 600-37 and not in response to a FOIA or Privacy Act request. Accordingly, FOIA and Privacy Act redactions do not apply. Rather, only that information that forms the underlying basis for the adverse action should be furnished to the officer.

b. How should the investigation be redacted?

(1) Portions and pages of the investigation that do not pertain to the adverse information concerning the field grade officer should be redacted.

(2) Pages containing both relevant and non-relevant information should be redacted to eliminate the non-relevant information.

(3) PII (social security numbers, home addresses, and phone numbers, etc.) should be redacted from the relevant portions of the investigations unless doing so would substantially impair the responding officer’s due process rights.

(4) The names of witnesses, accusers, and other relevant persons associated with the adverse information concerning the field grade officer should NOT be redacted.

6. Misc.

a. **Paragraph 2-7e states that “[w]henver possible, the legal advisor designated to support the investigation or board will not conduct the legal review.” What does “whenever possible” mean?** The language should be taken at its plain meaning—as a qualifier to the preference that a separate JA perform the legal review. The provision is simply meant to: 1) establish the preference, 2) recognize that there are situations where the preference is not feasible, and 3) provide room to deviate from the preference. There is no official definition or metric for deciding whether a particular set of facts constitute “possible.” The call is fact specific based on the situation. This provision is not meant to be a procedural requirement which by itself would raise any sort of legal error or create a basis for reconsideration or appeal.

b. Do the synopsis and reporting provisions in paragraph 3-19 apply to the National Guard?

Yes, in so far as the entirety of AR 15-6 applies to the National Guard. If the current operating status places the command under the governance of the regulation then the entire regulation applies.

Prepared by: CPT Brian D. Cox/703-693-0549
Approved by: COL Karen H. Carlisle/703-693-0369