



REPLY TO
ATTENTION OF

ARMY NATIONAL GUARD TRIAL DEFENSE SERVICE
4133^d REGIONAL TRIAL DEFENSE TEAM, WEST REGION
OREGON ARMY NATIONAL GUARD
OFFICE OF THE REGIONAL DEFENSE COUNSEL
1776 Militia Way, P.O. Box 14350
Salem, Oregon 97309-5047



NGJA-OR-TDS

4 May 2011

MEMORANDUM FOR AGR Soldiers receiving separation notices

SUBJECT: General Information concerning Separation from the AGR program and preparation of rebuttal documents

1. References:

- a. NGR (AR) 600-5, The Active Guard/Reserve (AGR) Program, Paragraph 6-5.
- b. AR 135-18, The Active Guard/Reserve (AGR) Program.
- c. DOD FMR 7000.14-R, Military Pay, Policy, and Procedures for Active Duty and Reserve Pay, Volume 7A, Chapter 35 and specifically sections 3501 (page 3) & 3502 (page 10).
- d. AR 135-178, Separation of Enlisted Personnel, Chapters 1, 2, 6, and 7 (Only if being separated from both the ARNG and AGR program)
- e. AR 15-180, The Discharge Review Board 7 (Only if being separated from both the ARNG and AGR program).
- f. AR 15-185, The Army Board for Correction of Military Records (Only if being separated from both the ARNG and AGR program).
- g. AR 27-10 Military Justice
- h. ORARNGR 24-12 Complaints of Wrong (Article 138).
- i. ORARNGR 27-5 Military Justice.
- j. ORARNGR 600-5.

2. AR 135-18, the AGR program, in Chapter 5 states in part:

- a. 5-1. Separation policy

“a. Separation from the AGR Program, as prescribed by this regulation, is an all inclusive term which is applied to personnel actions resulting in REFRAD, discharge, retirement, dropped from the rolls (DFR), release from military control, death, or transfer/reassignment to the Individual Ready Reserve (IRR).

b. All separations, voluntary or involuntary, from the AGR program will be governed by the following regulations:

(1) ARNGUS soldiers, released from FTNGD, while serving in the AGR program under the provisions (UP) of 32 USC are subject to separation UP of AR 135-175 (officers) or AR 135-178 (enlisted), or as further provided UP NGR 600-5.

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(2) ARNGUS soldiers released from AD, while serving in the AGR program UP of 10 USC are subject to separation UP of AR 600–8–24 (officers) or AR 635–200 (enlisted), or as further provided UP NGR 600–10.

(3) USAR soldiers released from AD, while serving in the AGR program UP of 10 USC are subject to separation UP of AR 600–8–24 (officers) or AR 635–200 (enlisted), or as further provided UP AR 140–30.

c. ARNGUS AGR soldiers will be reported to the appropriate State Adjutant General on REFRAD from AGR status.”

b. This memorandum addresses ARNG AGR issues. For other than Oregon, references to ORARNG specific regulations must reviewed in light of specific state regulations though the AR’s and NGR’s should generally control most circumstances and will generally not affect the writing of a rebuttal statement. Your review of NGR (AR) 600-5 and AR 135-18 will be helpful in conjunction with this memorandum to understand the actions you should be considering in your defense.

c. A typical memorandum notice may look like this:

Sample Soldier Notification Memo

Unit LETTERHEAD

Unit Office Symbol Date

MEMORANDUM FOR Soldier name, SSN, and unit

SUBJECT: Separation for Cause from Full-Time National Guard Duty

1. I am recommending to The Adjutant General that you be separated for cause from full-time National Guard duty under the provisions of NGR 600-5, paragraph 6-5, for substandard duty performance. The reasons for this recommendation are:

a. (State specific factual detail which constitute the basis for this action. One reason for involuntary separation under NGR (AR) 600-5c includes “Substandard Duty Performance”)

b.

c.

2. You are hereby notified that you are given the opportunity, but are not required, to request voluntary release in lieu of involuntary separation.

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- 3. You are advised that since you are pending involuntary separation, you may be provided legal counsel by a Judge Advocate General (JAG) officer in preparing comments or a rebuttal. Your JAG officer is _____. He may be reached at _____ during normal work hours. You may also retain civilian legal counsel at your own expense.
- 4. Pending the outcome of this administrative action, you are to report daily to the ??? Armory for normal duty
- 5. You have 15 days, or until (Enter date), to rebut or to comment in writing on this recommendation to me. That rebuttal or comment will be included in the recommendation to The Adjutant General.
- 6. You are (are not) entitled to separation pay as you have (have not) accumulated 6 years of continuous active duty.
- 7. You are to acknowledge receipt of this memorandum by signing the enclosed endorsement and returning it to me.

Signature block

I acknowledge receipt of notification that I am being recommended for involuntary separation from full-time National Guard duty.

I have been advised of my rights.

I do ___ do not ___ desire to make written comment or rebuttal the recommendation.

I do ___ do not ___ desire to have JAG assistance in preparation of my comment or rebuttal.

Signature _____ Date _____

3. Synopsis of events in separation from the AGR program.

a. Soldier's can generally expect to be counseled, the counseling documented the counseling using DA Form 4856, and the Soldier asked to verify acknowledgement of the counseling session(s) IAW NGR (AR) 600-5 paragraph 6-5a(1). There is additional guidance in AR 135-178 para 1-11 and 12a, b. and para 1-14 for additional counseling guidelines. With the counseling and separation notice usually will be followed by a flagging action,¹ revocation of security clearance², or other

¹ a. The proper name for what is commonly called a "flagging action" is Suspension of Favorable Personnel Actions (Flags). Refer to AR 600-8-2. When it is imposed, no favorable personnel action may be taken regarding the Soldier. Refer to para 1-14, AR 600-8-2.

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actions. A Soldier may also request MOS reclassification to seek to avoid the separation if other positions are available³. Verifying the counseling is not agreeing with the counseling but just acknowledging the content of the counseling. If the content is not accurate then not signing may be appropriate, but the counselor will merely note 'refused to sign', after which a Soldier would be strongly recommended to write up a memorandum for record (MFR) of the counseling and the aspects of it that were not detailed in the counseling. For instance, if the counselor said that there was an AR 15-6 investigation, and that you were found liable under it, but are not allowed to see the supporting documents, that would be something that you should document for a possible rebuttal to the AGR separation notice especially if it asserts allegations that might be from the AR 15-6 investigation. Please note that if ordered to sign, that you should sign as otherwise given its an acknowledgement and required, not signing could be a violation of Article 92 for Violation of a lawful order.

b. Commanders, generally, when deciding whether to initiate involuntary separation, are supposed to consider all the factors listed in NGR (AR) 600-5 paragraph 6-5a(2-g). If this has not been done, then the failure should be noted with specifics in the rebuttal.

b. Reasons for the Action. The suspension will be imposed in such cases of (1) adverse actions including investigation, court-martial, non-judicial punishment, AWOL, administrative reduction, and letter of reprimand; (2) separation; (3) security violation; (4) referred OER when on a promotion or intermediate or senior service college list; (5) elimination or removal from promotion, command or school selection list; (6) failure to take or pass the Army Physical Fitness Test (APFT); and (7) entry into the Weight Control Program. The flag must be removed when the action is complete. Categories (1)-(5) are non-transferable flags, while categories (6) and (7) are transferable. Refer to paras 1-12 and 1-13, AR 600-8-2.

c. Form Required. A report form, DA Form 268, Suspension of Favorable Personnel Actions, is required for a flagging action. The suspension is carried on the SIDPERS data base, but is in coded format. Refer to Chapter 3, AR 600-8-2.

² General. If a security danger is thought to exist, the commander, DCSOPS Intel Div, or the unit security manager should immediately suspend access to classified information by the Soldier, and the clearance authority for the activity will also be immediately notified. Refer to para 8-102, AR 380-67.

b. Grounds for Revocation of Clearance. Activities which may lead to revocation of a security clearance include: (1) sabotage or espionage, (2) association with a spy or saboteur, (3) advocating use of force or violence against the U.S., (4) membership in a subversive organization, (5) serving other governments in preference to the U.S., (6) participation in subversive organizations, (7) participation in other groups infiltrated by subversives, (8) violation or disregard of security regulations, (9) unauthorized disclosure of classified information, (10) giving false material facts in a security investigation, (11) criminal conduct, (12) alcohol or drug abuse, (13) sex perversion, (14) acts of poor judgment, (15) unreliable behavior, (16) mental condition which may cause significant defect in judgment or reliability, (17) excessive indebtedness, (18) refusal to provide material facts regarding security. Refer to para 2-200, AR 380-67. These criteria may also be grounds for involuntary separation.

c. Notification to Soldier. If a decision is made to deny or revoke a security clearance, the commander will give the Soldier a statement in writing of the reason for the action and give the Soldier an opportunity to refute or explain any charges. Refer to para 8-201, AR 380-67.

³ General. In addition to an annual review of a Soldier's primary and secondary Military Occupational Specialty (MOS), a commander or advisor, or the individual Soldier may request that the MOS be changed. Refer to Chapter 2, AR 140-158.

(1) As a result of discipline or discipline related incidents, an MOS change may be required. Many MOS positions require security clearances. If a security clearance is changed the Soldier may have to be reassigned to another MOS.
(2) Some specialized areas such as Military Intelligence have additional MOS requirements. Refer to AR 135-382. In addition, CID criminal investigators have specialized requirements. Refer to AR 195-3.

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c. Commanders should also be reviewing whether counseling efforts have failed to change behavior and performance, and based on that then the full-time supervisor or commander will prepare a written recommendation for involuntary separation for cause IAW NGR (AR) 600-5 paragraph 6-5b(1). The information in paragraph 6-10, AR 135-178 generally will be in that memorandum. This is also an area that should be discussed in a rebuttal if this has not been done.

d. The Soldier's full-time supervisor or commander will inform the soldier giving the soldier (at least) 15 days to respond IAW NGR (AR) 600-5 paragraph 6-5b(2,3). When notified, IAW NGR (AR) 600-5, para 6-5b(4), the "Soldier may be given the opportunity, but will not be required, to request voluntary release in lieu of involuntary separation. He/she may also request assistance of a JAG officer IAW NGR (AR) 600-5 paragraph 6-5b(5). Since the time lines for rebuttal to the separation action may be short, you should consider immediately requesting a continuance to consult with JAG since JAG will not likely be available until the next actual drill dates for JAG, and that will ordinarily require at least a 45 day period for consultation and preparation or review of rebuttal documents. JAG's that provide assistance are either legal assistance attorneys from the Office of the State Judge Advocate or from the State Trial Defense Services (TDS) as described in paragraph 11. In the mean time, you should seek to draft your rebuttal documents. Do not delay, JAG will not write your rebuttal for you.

e. After receipt of the rebuttal documents, the full-time supervisor or commander will forward the recommendation for involuntary separation for cause with the soldier's response to the TAG through Command Channels.

f. If TAG recommends rehabilitation⁴ and even reassignment IAW NGR (AR) 600-5, paragraph 6-5a(g), this action will be necessary before proceeding with the involuntary separation for cause action. If soldier is being separated from the military as well as the AGR program IAW AR 135-178, paragraph 1-12c recommends reassignment at least once with a minimum of two months in each unit

g. If TAG approves the separation action,

(1) HRO-AGR will cut orders separating the soldier from the AGR program for substandard duty performance IAW NGR (AR) 600-5, paragraph 6-5c(4). The orders will state that the soldier is or is not authorized separation pay IAW NGR (AR) 600-5, paragraph 6-5b(6) and reference c above. The authority for separation for cause from the AGR program is NGR (AR) 600-5, paragraph 6-5.

(2) The HRO-AGR office will prepare a DD Form 214 for the soldier IAW NGR (AR) 600-5, paragraph 6-5b(7).

⁴ Intermediate Commander May Direct Rehabilitative Transfer in Lieu of Separation. If an enlisted Soldier is recommended for separation for unsatisfactory performance, or some other type of misconduct under AR 135-178, an intermediate commander may disapprove the recommendation and direct a rehabilitative transfer of the Soldier to another organization. Refer to para 3-8, AR 135-178.

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4. If requesting separation from military status (both the AGR program and ARNG).

a. AR 135-178 becomes the authority for discharge rather than NGR (AR) 600-5 and the rules change a bit.

b. The reasoning behind the priority to AR 135-178 is generally as follows:

1. If you are AGR (Active Guard Reserve) separation will cause you to be terminated from your full time employment. The system is not supposed to allow a paper separation from the AGR program, followed by a separation from the MDay Traditional Soldier side, so if the Government wants you out of both then they have to process the Board Separation rather than doing two separate processes. This also means that if the Government separates you from your AGR position and then later uses the SAME events to seek to separate you from your MDay position that such action is inherently wrong and may be a basis to defend against the MDay separation. Those facts, however, can be used in characterization of discharge.

2. Essentially, the paper board (rebuttal only) release from the AGR program is managed under NGR (AR) 600-5, para 6-5, and AR 135-18, but for efforts to release from the AGR and Separate from the Traditional Title 32 service, AR 135-18, the AGR program, in Chapter 5 states in part: 5-1. Separation policy.

“a. Separation from the AGR Program, as prescribed by this regulation, is an all inclusive term which is applied to personnel actions resulting in REFRAD, discharge, retirement, dropped from the rolls (DFR), release from military control, death, or transfer/reassignment to the Individual Ready Reserve (IRR).

b. All separations, voluntary or involuntary, from the AGR program will be governed by the following regulations:

(1) ARNGUS soldiers, released from FTNGD, while serving in the AGR program under the provisions (UP) of 32 USC are subject to separation UP of AR 135-175 (officers) or AR 135-178 (enlisted), or as further provided UP NGR 600-5.

3. Thus, AR 135-178 causes for separation take priority, and the alternative then is separation from the AGR program leaving you in the Traditional National Guard IAW NGR 600-5, para 6-5. Also, AR 135-178, para 1-1 (a) (4) states that a purpose of the regulation is to “Provide for the orderly administrative separation of enlisted soldiers in a variety of circumstances.” If separation takes place first under the AGR program and immediately then under the Separation process of AR 135-178, then that policy provision is defeated. Moreover, under AR 135-178, para 3-2 on ‘Guidance’, “When a soldier is processed on the basis of multiple reasons for separation the following guidelines apply to procedural requirements (including procedural limitations on characterization or description of service):

a. The basis for each reason must be clearly established.

b. If a reason for separation set forth in the notice of proposed action requires processing under the Administrative

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Board Procedure, the entire matter will be processed under section III, of this chapter.

c. When there is any other clear conflict between a specific requirement applicable to one reason and a general

requirement applicable to another reason, the specific requirement will be applied.

d. If a conflict in procedures cannot be resolved on the basis of the foregoing principles, the procedure most favorable to the soldier will be used.”

4. Therefore, if separation is merely for cause from the AGR program under NGR 600-5, that leaves the Soldier still in the Traditional National Guard, and if there is cause for separation and a desire to separate from the Traditional National Guard then AR 135-178, para 5-1 (b)(1), and the policy under para 1-1 (b) (4), and finally under para 3-2, with the process most favorable to the Soldier being the procedures under AR 135-178, an AGR Soldier must be processed under the procedures of AR 135-178 if the command wants to remove them from the Traditional National Guard and not in a bi-furcated process of first separating from the AGR program and then initiating action under AR 135-178.

c. The soldier may require a review by an administrative board if he has over 6 years military service. In other words, the command cannot separate you on the facts for the AGR separation and then later use those facts to again move for a separation from the ARNG. Instead, they must move at once using the board process. Separation from the AGR program alone leaves the Soldier still in the Traditional ARNG program. If the command attempts to use the same facts and separate the processes, first with the AGR dismissal by notice and then separation under AR 135-178, then options will likely include a motion to dismiss the MDay separation action, an IG complaint or an Article 138 complaint.

(1) You should be counseled on the purpose and authority of the Discharge Review Board (DRB)(AR 15-180) and the Army Board for Correction of Military Records (ABCMR) (AR 15-185) during separation processing. Even though you can ‘appeal’ with this route, there is absolutely no guarantee that anything will come of this appeal process. Applications must be timely and appropriately made IAW other regulations and this memorandum does not address those appellate routes aside from the fact that you would ordinarily start with the DRB and then after their response file with the ABCMR.

(2) Counseling will include advice that a discharge under other than honorable conditions is a conditional bar to benefits administered by the Veterans Administration (VA), notwithstanding any action by a Discharge Review Board. Such explanation may be furnished the soldier in written form. See AR 135-178, Para 1-13.

d. Summary of Rights and Matters at the Separation Board

(1) If you are subject to an Other Than Honorable Discharge (OTH) and you receive such, then you may encounter and should expect to encounter substantial adverse consequences in civilian life. Your original separation notice should tell you whether you may be subject to getting an OTH and in all likelihood you are, and will if you do not appear at the hearing. If you are facing

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a board action for substandard duty performance only⁵, then you should be subject only to receiving a general or honorable discharge, though you may have received notice for an OTH. If you have been given notice for an OTH you should still presume that you can get that characterization of discharge.

(2) If you waive your rights to a board and request a conditional waiver of the board and it is approved by The Adjutant General (TAG), then you will not appear to the board and will be separated based on that waiver. You should never assume that a submitted waiver has been approved and not appear at a scheduled board proceeding without express information from command, OSJA, or your JAG that the waiver has been approved and the board cancelled.

(3) If you are being separated for fraudulent entry then your enlistment may be voided.

(4) There are three types of separation in administrative processes, HONORABLE, HONORABLE UNDER GENERAL CONDITIONS, AND OTHER THAN HONORABLE. There is great stigma attached to the OTH, lesser in the General discharge, and none with an Honorable.

(5) If you receive a discharge less than honorable, there is no automatic upgrading or review of the discharge by any Government Agency.

(6) Upgrading of the character of discharge is only on application to the Army Discharge Review Board or the Army Board of Correction of Military Records. Once discharged, you would have no rights to military lawyers for assistance, and you would have to file with the ADRB or ABCMR yourself or hire a private attorney to assist you.

(7) Consideration by either the Army Discharge Review Board or the Army Board of Correction of Military Records does not guarantee upgrading of a discharge that is less than honorable.

(8) If the basis for the separation is a continuous unauthorized absence of 180 days or more, a discharge as an OTH is a conditional bar to benefits administered by DVA, regardless of any action by the Army Discharge Review Board, or the Army Board of Correction of Military Records.

⁵ **Enlisted Separation for Unsatisfactory Performance.** The grounds for such a discharge include the Soldier's inability to participate satisfactorily in future training, and actions by the Soldier having an adverse impact on military discipline, good order and morale. Refer to paras 2-2, and Chapter 6, AR 135-178.

(1) Counseling is required. Refer to para 2-2b, AR 135-178. The separation authority (see AR 135-178, para 1-25) may waive the requirement of a rehabilitative transfer. AR 135-178, para 2-4c, d.

(2) The commander will refer to para 1-8, AR 135-178, to determine if a medical evaluation is required prior to processing for separation.

(3) A Soldier with six (6) or more years of creditable military service is entitled to request an administrative separation board. AR 135-178, para 3-4a(7).

(4) An intermediate commander may disapprove the recommendation, and direct reassignment of the Soldier to another organization. Refer to para 3-14a, AR 135-178.

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(9) A JAG attorney for consultation cannot represent the soldier before an administrative separation board unless consulting counsel is appointed as counsel for the Soldier for representation and the soldier requests the representation.

(10) If you have over 18 years of good time in the service for the purposes of retirement, then any separation action must be approved by HQDA. Otherwise, at the board, the board will make a finding on the BASIS or cause for the action (ie whether you are guilty), and then decide whether the matter is justification for SEPARATION, and then whether you should be separated, and if so then whether any separation action should be SUSPENDED under terms of in effect PROBATION for up to one year, and the CHARACTERIZATION of discharge, if any to be given at separation. The Adjutant General (TAG) may approve the action, may approve RECOMMENDATIONS for suspended separation, and may disapprove and retain. However, the TAG ordinarily approves the action taken by the board of officers (usually COL, LTC, MAJ).

(11) If you are AGR, as you know, separation will cause you to be terminated from your full time employment.

(12) Soldiers at a board often face an OTHER THAN HONORABLE (OTH) discharge and to avoid the possibility that this OTH would be placed on you, you may submit a Conditional Waiver offering to accept a General Discharge (GD).

(13) **MEDICAL DISCHARGE AND RELATED MATTERS.** If you are facing a discharge and you have medical reasons which are the substantial cause behind the allegations, for instance AWOL because of medical or mental issues, and you wish to seek a **MEDICAL DISCHARGE**⁶ rather than a discharge under substandard performance (or possibly misconduct), then you must advise your JAG of this **IMMEDIATELY** and provide all supporting medical information. Generally you will submit a memorandum to command that states generally that you will submit to a physical and evaluation, request that the board process be held in abeyance while the physical and evaluation is ongoing, and requests that the TAG withhold military justice authority from your command while this is ongoing. The primary thing is that if you are AWOL then the command does not have to agree to this with a misconduct allegation. If you are AWOL and being separated for substandard duty performance, for instance, AWOL, then the command should cooperate **BUT** you must make yourself subject to military control **AT LEAST** for the physical and evaluation and must cooperate to every extent. Any failure to cooperate will eliminate the opportunity for the physical and evaluation, and without that you cannot receive a medical discharge, and you will be processed under the action pending. In either case, you often should still consider the conditional waiver and prepare to submit it or submit it conditionally upon the result of the medical board action. If, however, you have medical issues only, a good clean military history, and your duty performance would be characterized as good up to the point of departure due to medical issues, then the conditional waiver should be for an honorable discharge since under substandard duty

⁶ a. Under AR 635-40, characterization of medical discharge by reason of physical disability normally will be characterized as honorable, or general under honorable conditions where service is satisfactory but not sufficiently meritorious to warrant honorable characterization. AR 635-40, attachment E-12 (b).

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performance the Government should be able to only secure a Honorable or General Discharge, and not a Other Than Honorable Discharge. You should plan on submitting any documents, affidavits, statements, or at least names of witnesses who can provide statements, that your military bearing, character and duty performance up to the point of departure was good.

(14) In relationship to a Other Than Honorable (OTH) discharge, a General Discharge under Honorable Conditions (GD) would have some adverse effect on your military and veteran's rights, but nothing of the nature that an OTH will have. Generally a GD should not have an adverse effect on any already accrued military benefits from prior Federal or other State Service though this is subject to change. In any case a GD would have an adverse effect on any educational benefits that you may be looking for from this enlistment and you would have bar to reenlistment against you. In regards to any rights you may lose as a result of discharge characterized as GENERAL or OTHER THAN HONORABLE, you may wish to speak with J-1/G-1, Education Benefits AT THE MILITARY DEPARTMENT. If you speak with them then tell them your situation and ask generally whether the general discharge will have any effect on your military benefits. Any discharge will likely be accompanied by a bar to reenlistment and so your re-entry into the military is unlikely, though possible, after separation.

(15) At the board you would have an opportunity to submit any evidence to dispute the Government's evidence against you, though any admissions you may have made or any underlying Article 15's would be used against you and damage your ability to rebut the Government's evidence. After attacking the Government's evidence you would be allowed the opportunity to submit any evidence of good military character and bearing and that, generally, you should be retained in the military regardless of the underlying offenses. This usually works only if you can get your entire chain of command to testify for you, recommending retention or at least getting them to submit statements (preferably affidavits) on your behalf. You can testify yourself and either make a sworn or unsworn statement.

(16) Once the evidence is submitted the Board will make a recommendation of separation or retention and the characterization of discharge, if any. You will be subject to receiving an OTH and if you received an OTH then you would lose ALL of your military rights and benefits, all veterans rights and benefits and can expect to encounter substantial prejudice in your civilian life. This is especially true if you were to apply to any Government job or any job regulated closely by the Government. You should be aware that your discharge certificate will reflect the nature of the reason why you are discharged (eg misconduct), in addition to the actual characterization of discharge.

5. Separation Summary. Pursuant to ORARNG 600-5 separation may be commenced when the soldier's degree of efficiency, manner of performance of duty, military conduct or the commission of any derogatory act makes continuation in AGR status inappropriate. Recommendations for separation are then routed through command channels to SPMO for final determination by The Adjutant General. The notice shall specifically include the reasons for the recommendation, allow 15 days from "notification" to prepare a rebuttal and if requested will be provided assistance by a JAG officer. Upon receipt of the rebuttal, the commander will "comment" on the substance of the

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rebuttal, and intermediate commanders will recommend approval or disapproval and forward to the next higher headquarters. Thus, any letters in support of you from these commanders before processing to attach to a rebuttal would be very advantageous. Actual release from the AGR program will not happen until The Adjutant General has approved the final separation packet, and the Soldier shall have at least 30 days from the date of approval before being released from active duty. ORARNGR 600-5 says that a soldier can ask for a reassignment with the concurrence of the losing and gaining commanders.

6. Rebuttal. The following is a general advice for those AGR Soldiers pending separation from the program. First, you are MDAY and AGR. Separation from the AGR program does not separate the MDAY side and the command should NOT intend to try to separate MDAY after an AGR separation without further problems. Instead, if command wishes to separate from both AGR and the MDAY traditional soldier side then a regular separation action must take place, rather than the short form AGR dismissal process.

a. You must draft a rebuttal that is responsive to the letter. It should be in military memorandum format, and should address any prior requests for help, the lack thereof, any requests before for rehabilitative transfers⁷, and any request now. Complaining about the command or other unrelated matters is not helpful in your rebuttal. Each case is somewhat different so the guidance herein cannot be specific to your case. Ordinarily, an assigned JAG will try to review your draft rebuttal if you can get it to the JAG in time for a review. In any case, you may wish to request a 30-45 day extension for JAG consultation and review.

b. Separation is IAW ORARNG 600-5, Chapter 5, paragraph 5-3 (e).

c. Pursuant to ORARNG 600-5, paragraph 5-2 the commander/supervisor must exercise reasonable judgment in order to “ensure the procedure and penalty {for military discipline and adverse actions} selected are appropriate.” Prior to taking action, the Support Personnel Manning Office (SPMO) will be contacted to ensure that the proper procedures are followed and to advised the commander/supervisor of the historical actions for like offenses. The regulation then sets forth factors to consider in determining the appropriate action.

1. *Question:* What evidence exists that the command contacted SPMO before action was initiated in this matter; and if contact was made, what historical actions were given to the command as a decision making tool and guidance; and what evidence exists that the command considered the factors in paragraph 5-2 before determining what action to take?

⁷ **Rehabilitative Transfers.** For an enlisted Soldier, a rehabilitative transfer may be required under certain circumstances prior to initiation of involuntary separation proceedings under AR 135-178. Refer to AR 135-178, para 2-4 for rehabilitative transfer requirements. In situations involving entry level performance and conduct (Chapter 8, AR 135-178), unsatisfactory performance (Chapter 9, AR 135-178), minor disciplinary infractions and patterns of misconduct (para 12-1, AR 135-178), a rehabilitative transfer is required unless waived, para 2-4d. Refer to the specific regulation for guidance on waivers.

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2. Is it the Soldier's position that none of the requisite actions under paragraph 5-2 were taken prior to initiating separation?

d. Notice of problems that may amount to a cause for separation are contemplated in paragraph 5-3; to include oral, written, and letters of reprimand.

1. *Question:* To what extent did the command attempt to provide oral counselings, written counselings, or apply letters of reprimand before proceeding to the separation action?

2. Is it the Soldier's position that in absence of any significant attempt to counsel the Soldier – taking into account any medical difficulties or other matters – that the “clarity with which the soldier has been made aware of the rule(s) violated . . .” is questionable?

c. Moreover, has the separation action in this case previously considered whether there is the “possibility of reassigning the soldier” as required under (1) (6), and is this something which is something the Soldier has requested?

e. As previously stated, IAW to ORARNG 600-5 separation may be commenced when the soldier's degree of efficiency, manner of performance of duty, military conduct or the commission of any derogatory act makes continuation in AGR status inappropriate. Recommendations for separation are then routed through command channels to SPMO for final determination by The Adjutant General. The notice shall specifically include the reasons for the recommendation, allow 15 days from “notification” to prepare a rebuttal and if requested will be provided assistance by a JAG officer. Upon receipt of the rebuttal, the commander will “comment” on the substance of the rebuttal, and intermediate commanders will recommend approval or disapproval and forward to the next higher headquarters. Actual release from the AGR program will not happen until The Adjutant General has approved the final separation packet, and the Soldier shall have at least 30 days from the date of approval before being released from active duty.

1. The soldier must review the stated grounds for the separation action, and are often for misconduct and inefficiency. The Soldier should specifically and concisely address each allegation in the rebuttal with any supporting documents and references.

f. In the event that there are medical matters, a review of AR 40-501, is important, often para 7-3 (e) (1) and (2) which discuss in part that determination of individual assignment or duties to be performed are command/administrative matters. Limitations such as “no field duty”, “no overseas duty,” or “must have separate rations” are not proper medical recommendations, it probably would be more appropriate to have the Soldier's treating doctor reconsider and determine if recommending “convalescent leave” is in fact what the civilian doctor is really suggesting. The command should, in effect, take into account medical and mental issues.

1. *Question.* Is It the Soldier's position that his medical condition prohibits his performance of duty and his ability to travel for treatment? Is medical inability to perform something that might be considered a defense in a criminal action and should it be in this matter?

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g. The Soldier may request a compassionate reassignment. Whether the command makes a soldier aware of this or facilitates it may be a concern. Command should provide the Soldier information that a JAG is available for advice in this regard or at least by telling the Soldier that to do so requires use of AGO form 216 and a doctors statement providing a specific medical reason, diagnosis and prognosis of the illness, including date of onset, past and anticipated periods of hospitalization and period of convalescence, if applicable.

h. *Question.* Were the pre-requisite actions contemplated in ORARNG 600-5, paragraph 5-2 taken, and if not did such result in a prejudicial and unfounded action by the command in immediately moving forward to separate the Soldier from the AGR program without proper analysis, and without counseling or appropriate efforts to find a lesser form of discipline under paragraph 5-2? Moreover, did the immediate action take into account the mitigating factors for any alleged offenses as required in paragraph 5-2 (j).

i. Brief outline for a rebuttal memorandum:

1. I am in receipt of the notice of separation dated **.
2. I object to separation and desire to be retained in the AGR program.
3. I have previously requested rehabilitative transfer without response.
4. I request now rehabilitative transfer.
5. I would like to seek a MOS change.
6. The notice of separation alleges ***.
7. In response to the notice allegations I state that **
8. Address any action deficiencies reflected by the regulation (see para's above).
9. In support of my request to remain in the AGR program, I attach **statements** awards**, etc.
10. I respectfully request reassignment, and retention in the AGR program.

j. Include in the body of the memorandum references to any attachments, and include at the appropriate place at the bottom left of the signature references to the attachments and what they are. Keep copies of all your final documents.

k. Generally, the response should be directed to the initiating commander and copied (Cf) to the AGR program manager at Joint Forces Command (especially if rehabilitative transfer is requested).

7. Medical Issues. For Title 32 Soldiers, AR 135-178 does not require medical examinations for all actions under Chapter 12, but a medical examination may be administered if the soldier requests it in writing or the command believes such is warranted. AR 135-178, para 1-8a. Completion of the physical is not intended to allow or require delay of the separation. However, the soldier's general court-martial convening authority (TAG) may direct in writing that the Soldier be processed through the physical disability system, where the soldier's medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative elimination, or other circumstances of the individual case warrant disability processing instead of

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further processing for administrative separation. AR 635-40, para 4-3. Referral to such a proceeding will take precedence over the pending administrative separation action. AR 135-178, para 1-9. This may include referral to a Medical Evaluation Board (MEB) under AR 40-400, chapter 7, or a Physical Evaluation Board (PEB) under AR 635-40. AR 135-178, para 1-9. If you are an AGR facing a separation action but believe you have medical issues then you need to promptly examine that issue and submit the necessary documents for Line of Duty determinations, etc. The 4133 website contains information about the MEB process.

8. Appeals and other actions. In addition to submitting 'appeals' to DBR and ABCMR, a Soldier may have some recourse or should consider –

a. *Inspector General Complaints.* Depending upon the nature of the problem, a Soldier may decide to utilize the Inspector General action request system. The purpose of that system is to render assistance, correct injustices affecting individuals and eliminate conditions detrimental to the efficiency or reputation of the Army. Refer to para 7-3, AR 20-1. No reprisal action can be taken against a Soldier who consults with the IG.

b. *Article 138 Complaints.* Article 138 allows any Soldier who believes himself or herself wronged by a commander, who has first complained to that commander in writing and who gave the commander an opportunity to redress that wrong without success, to complain to any superior commissioned officer. The Article 138 process is described in Chapter 20, AR 27-10, and in Oregon in ORARNGR 24-12 Complaints of Wrong (for the Oregon specific process review that regulation or its current iteration). Each state will likely have its own regulation or code section that implements this type of right so the particular regulation must be reviewed and followed. It is strongly recommended that you seek counsel of a JAG before creating an Article 138 complaint due to its very nature and routing.

(1) Generally, the complaint must be forwarded to the GCMCA with jurisdiction over the officer against whom the complaint is lodged. The GCMCA for Article 138 purposes is the TAG in Oregon since the TAG has withdrawn Special Courts-Martial Authority. Refer to para 20-4, AR 27-10 and your state regulation. The complaint must be investigated. The GCMCA may refer the matter to a lower commander for corrective action instead of taking personal action. However, the authority must personally review the matter and for Title 10 matters forward the results of the investigation through channels to the Secretary of the Army or designee, that being The Judge Advocate General (TJAG), para 20-11, AR 27-10. For ARNG submission to higher authority would subject to state regulation unless National Guard Bureau adopts a regulation requiring notice to that level.

(2) The Title 10 Federal status process includes that after a request for redress is submitted to the commanding officer, the commanding officer will have 15 duty days before a complaint under Article 138 may be submitted. Refer to paras 20-6, 20-7, AR 27-10. Moreover, the complainant must deliver the complaint to the complainant's immediate superior commissioned officer within 90 days of the date of complainant's discovery of the wrong, excluding any period during which the request for redress was in the hands of the respondent. Refer to para 20-7b, AR 27-10. The request

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for redress and the complaint must be made while the complaining Soldier is in a duty status subject to the UCMJ. Refer to para 20-4a, AR 27-10. For State purposes this means while in a State Title 32 status, or potentially State Active Duty (SAD).

9. Attorney Client Privilege. Communications between you and consulting counsel regarding the merits of the separation action are privileged communications between you and the JAG attorney.

10. Caveat and Warnings. This memorandum is not intended to and cannot replace the advice of a Judge Advocate or other knowledgeable attorney. References herein are intended to be accurate and all effort has been made to insure accuracy but regulations change as do their interpretations. Strict reliance on the information herein without seeking current information and direct legal advice is not recommended.

11. ORARNG & JAG assignment. JAG assignment is either to a legal assistance attorney (LAA) of the Office of the State Judge Advocate (OSJA) or the State TDS. *Subject to other TDS mission requirements, TDS attorneys should ordinarily assist soldiers on military administrative actions that (a) Are initiated on the basis of alleged violations of the State Code of Military Justice (SCMJ); or (b) Are related to impending, pending or recently completed SCMJ proceedings.* AR 27-3 para 3-5 (g). Therefore, if the basis of the action is other than that you should contact the OSJA of your state for legal assistance. If it is based on a SCMJ action then contact your state TDS. The 4133 RDC, RSDC and 653d Oregon TDC can be emailed at NGOR.JAG.4133.TDS@ng.army.mil. The Oregon 653d Trial Defense Counsel message phone number is 503.269.5523. The unit Website is located at <http://www.oregon.gov/OMD/JAG>. If you are not a member of the Oregon Army National Guard contact your state TDS or we will try to refer you to your state TDS if you cannot locate that organization. If you are Active Duty or Army Reserve will also refer you to the unit affiliated with your organization but you should have that available in the notification you received. Ordinarily, the 4133d works with Western Regional Army Active Component TDS units, and Army Reserve TDS, so if you are not in the Western Region please see about contacting your supporting TDS directly.

12. POC for this memorandum is the current Regional Defense Counsel.

ORIGINAL SIGNED

DANIEL J. HILL
COL, JA
Regional Defense Counsel