



REPLY TO
ATTENTION OF

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4133^d REGIONAL TRIAL DEFENSE TEAM, WEST REGION
OREGON NATIONAL GUARD
OFFICE OF THE REGIONAL DEFENSE COUNSEL
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NGJA-OR-TDS

5 July 2010

MEMORANDUM FOR Soldiers

SUBJECT: Oregon Military Justice Code and Process Summary

1. References:

- a. ORARNGR 27-5 / ORANGI 51-201, Oregon Code of Military Justice, 01 Oct 08
- b. AR 15-6, Procedure for Investigation Officers and Boards of Officers, 02 Oct 06
- c. AR 27-10, Military Justice, 16 Nov 05
- d. AR 600-20, Army Command Policy, 18 Mar 08
- e. Memorandum, Under Secretary of Defense, 02 Apr 08, subject: Self-Reporting by Officers and Senior Enlisted Members of Criminal Convictions

2. Purpose. This memorandum is intended to provide Oregon Army National Guard Soldiers a summary of the Oregon Code of Military Justice (OCMJ) and suggests what Soldiers should see from Commanders as a common sense approach to Military Justice.

3. OCMJ Summary.

- a. The OCMJ applies to Servicemember's of the organized militia in any military status, except for Federal (Title 10), to include any Title 32 status (IDT, ADOS, AT, AGR) and State Active Duty status (organized and unorganized militia), regardless of location in the United States (extra-territorial applicability).
- b. The OCMJ eliminates Servicemembers rights to demand a court-martial at a company-grade Article 15 hearing. It also establishes Servicemember right to a de novo review of findings and any punishment imposed by a company-grade commander through an Article 15 hearing. It retains Servicemembers right to demand court-martial at a field-grade Article 15 hearing.

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1. TDS strongly advises that no Soldier turn down an Article 15 and demand Courts-Martial without fully consulting with a JAG from the TDS. The upgrading of the action from Non-Judicial Punishment to any level of Courts-Martial will generally include the significant possibility of greater sanctions.

c. It also requires commanders to consider all available administrative measures to address misbehavior before resorting to punitive action. The OCMJ strongly encourages commanders to use the lowest level discipline that adequately and appropriately will address the misbehavior at hand and strongly recommends commanders to consult with a Judge Advocate before holding an Article 15 hearing.

1. There is no legal prohibition from disposing of matters at levels that might seem to the Soldier as not the lowest appropriate level but it is a concept that Commanders are to follow in deciding what level of disposition to assert.

d. OCMJ promulgates the State military justice code as a military regulation. Office of the Governor delegated authority to the Adjutant General for promulgation of military justice regulation in 2007. Oregon has traditionally relied upon a statutory code of military justice.

1. Thus, the statutes which earlier set forth the substance of the military code have been essentially replaced with an entirely new process established by regulation.

e. The OCMJ more closely aligns the State military justice code format to the Federal Uniform Code of Military Justice.

4. Jurisdiction. Jurisdiction continues to apply whenever the Servicemember is in a duty status, regardless of location. However, jurisdiction also applies to conduct occurring in non-duty status that has a military nexus. Any non-military offense occurring in a military duty status or with a military nexus may have multi-jurisdictional aspects and the Servicemember may face Federal, Federal Military, State, or Municipal prosecution. Where a federal or another state agency may be involved, commanders should consult OSJA as soon as possible to avoid double jeopardy, overlapping investigations or unnecessary delay.

a. Essentially, the nexis rule allows for the Oregon National Guard to prosecute offenses under the Military Code occurring while not in a duty status but which has a connection to the military service. An example would be a bar fight in an office duty status but in uniform, or other action that tends to bring discredit upon the National Guard, the Oregon National Guard being implicated in the event. Civilian authority will get the first opportunity to prosecute, but even with that there could be military related offenses that could be charged in addition to the state law offense by civilian authority so long a double jeopardy (same overlapping criminal elements in the offense) does not arise. Different elements may allow for multiple prosecution. In any case, civilian offenses may be documented by Letter of Reprimand or counseling statement and thus documented in your records.

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5. Commanders' Inquiries and Investigations. Commanders have a duty to investigate when a Servicemember is suspected of violating the OCMJ either through a commander's inquiry or an AR 15-6 investigation. Commanders also may use either to simply obtain additional facts regarding a particular incident or situation (i.e., motor vehicle accident, Servicemember injury, missing equipment).

a. If during an investigation you are read your Article 31 "Miranda" rights, you have a right to (1) remain silent and not answer questions at that time; or (2) ask for an attorney and then you will have a reasonable period of time to consult with an attorney. Under the law you generally must take immediate steps to contact an attorney or TDS JAG Officer. See also the 4133 Memorandum on Soldiers Military Justice Rights.

6. Apprehension. A Soldier may be 'arrested' or 'apprehended' in military terms for offenses under the military code. Custody can occur at the Unit or other location, and custody can take place at the local Jail under supervision of the Sheriff (also referred to as the "local supervisory authority". That said, The Adjutant General has established Marshals at Law (MaL) program to work AWOL apprehension, and that essentially discourages Units from apprehending Soldiers who are AWOL or who have committed minor offenses. The State Provost Marshal's Office (PMO) is the point of contact for this program and PMO is to train and monitor Marshals at Law serving as AWOL apprehension team members, who investigate, make contact with, and recover AWOL Servicemember's and return them to their unit commander.

a. In apprehension matters, Soldiers should generally expect that apprehension activities at least discourage, but may legally prohibit the following:

1. Use of physical force to apprehend the Servicemember (authorized);
2. Deploy any form of weapon or restraint device (discouraged);
3. Cross state lines to make an apprehension (prohibited);
4. Enter any residence, unless invited by someone with apparent authority to do so (prohibited);
5. Remove the Servicemember from place of work, without commander's prior consent (discouraged);
6. Use physical constraints when transporting the Servicemember (discouraged);
7. Use a POV for the apprehension (discouraged);
8. Embarrass, harass, or physically threaten the Servicemember (discouraged); or
9. Direct that the Servicemember be taken to jail (discouraged);

b. In apprehension matters, Soldiers should expect that Apprehension Team Members or Unit Members pursuing an Apprehension, WILL:

1. Act in self defense, using only that amount of force reasonably necessary to eliminate the threat;
2. Use all reasonable efforts to locate and contact the Servicemember;
3. Record all activities for any future administrative or disciplinary action;
4. Treat the Servicemember with dignity and respect;
5. Before questioning the Servicemember, provide 5th Amendment rights warning;

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6. Where the Servicemember agrees, obtain reason for the Servicemember's unauthorized absence and begin to discuss ways to resolve situation;

7. Use a GSA vehicle where feasible, and a tactical vehicle if necessary; and

8. Where a Servicemember is unwilling to voluntarily accompany the MaL, advice of the consequences for failing to report.

c. In Apprehensions, Soldiers should be aware that there is no prohibition from seeking to make Apprehensions in public places or your employment. Thus, an AWOL Soldier could find themselves quite embarrassed, at the least, by the presence of Soldiers at their work to come get the Soldier for duty. Additionally, a Soldier who then thinks that they are not subject to the military code or Apprehension at that time probably is wrong as the Commander has several options to place the Soldier in a duty status for the Apprehension. Ordinarily, though, the Commander must get the Soldier into a duty pay status for the Apprehension.

7. The Commander's Duty to Consider Administrative Measures, Dispose at Lowest Level. By directive from The Adjutant General (TAG), consistent with the OCMJ and UCMJ commanders must consider all available administrative measures to address misbehavior before resorting to non-judicial punishment (NJP) or other punitive action. Administrative measures include, but are not limited to:

- a. Removal from leadership position;
- b. Written reprimand or admonition;
- c. Written counseling;
- d. Corrective training;
- e. Bar to re-enlistment;
- f. Termination of temporary military orders;
- g. Denial of pass or privilege; and
- h. MOS/AFSC reclassification.

8. TAG strongly encourages commanders to use the lowest level discipline that adequately and appropriately addresses the misbehavior at hand. Policy is that good order and discipline can be maintained through effective leadership including, when necessary, administrative corrective measures. NJP ordinarily is considered as appropriate when administrative corrective measures are inadequate due to the nature of the offense or the Servicemember's history of misbehavior.

a. The TAG has directed that Commanders should first consult with OSJA or with a unit-assigned Judge Advocate before holding an Article 15 hearing, unless extraordinary circumstances exist. OSJA or a unit-assigned Judge Advocate will discuss all available and appropriate administrative and disciplinary measures for a particular matter, advise the commander whether the evidence substantiates an allegation of misconduct and assist commanders and their staff with the preparation of documents for counseling and for any substantiated and warranted NJP.

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1. This does not prohibit the Command from ignoring this policy direction.
- b. Note, administrative actions can be taken in conjunction with NJP under Article 15 or even action in courts-martial. Such actions are not considered punishment so long as they are properly administered for the correct reasons. Wrongfully administered administrative actions, such as corrective training, can amount to unlawful punishment and cause embarrassment for command.
- c. JAG has tried to suggest to commanders that there are many issues for an offense or misbehavior by Soldiers, and that understanding such matters is important to proper disposition. Anyone's way of coping with unrelated stressors (e.g., unemployment, post-deployment, personal relationships) many times results in misconduct (i.e., AWOL, illegal drugs).
- d. For the Soldier, that merely means that collateral things that may have helped cause something to happen may be mitigating for final disposition. The commander may be and should be interested, therefore, in determining and addressing the precursor to a Servicemember's misconduct—while also addressing the misconduct itself— to assist commanders with maintaining order and discipline, reducing re-offenders and increasing retention. Of course, other times misconduct occurs simply because of the lack of maturity, responsibility and the unwillingness to adhere to military values. Nonetheless, while commanders have the affirmative duty to address any and all misconduct under their command, they and their enlisted leadership are best situated to know the Servicemember, his/her duty performance, history of service and the rehabilitative potential.
- e. Lastly, as mentioned earlier, Commanders are generally encouraged to document all incidents involving a Servicemember—regardless of military duty status— and counsel them. Furthermore, domestic violence (Lautenberg) convictions and criminal convictions of officers and senior enlisted (E-6 and above) personnel must be reported, counseled and tracked to determine the Servicemember's future potential for continued service.

1. If you have questions about Felony Matters or Lautenberg Domestic Violence Convictions, see the 4133 Memorandum on that subject.

9. Commander's Leadership Responsibility in Administering NJP. When considering how to address a particular incident, commanders have been directed that they must ensure that they can be neutral, unbiased and detached from the entire incident and its outcome. Any commander who is personally offended, or even the "victim" of the alleged misconduct will have a very difficult time providing fair and impartial action in a case. Recognizing that commanders cannot just shirk their obligations when such might be the case, the commander nonetheless must identify the conflict and seek to set aside their personal views and any predeterminations before providing the Servicemember—and the unit—a fair and impartial outcome. If the commander cannot do so, s/he has the responsibility to forward the matter to the next level commander for disposition. Moreover, a commander cannot—in addressing misconduct—be predisposed to a particular disposition, nor should the commander believe that "guidance" from a superior commander is any direction or

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indication that there ought to be a particular outcome. If a superior commander wants to control particular offenses, then s/he must withhold authority from subordinate commanders on them.

a. Article 15 Hearing – One Forum. An Article 15 hearing is but one of a couple forums that a commander may choose to dispose of alleged misbehavior. Other forums include counseling sessions and, for more severe misconduct, courts-martial. Through an Article 15 hearing, a commander determines whether a Servicemember committed the alleged misconduct and, if so, what punishment, if any, will be imposed. An Article 15 hearing, however, cannot be used as a means to achieve a specific outcome. For example, a commander must not hold an Article 15 hearing on a particular incident when s/he already has decided to demote the Servicemember before even considering all the evidence and giving the Servicemember the opportunity to be heard. Such predetermination indicates the commander is not neutral and detached on the matter and s/he should forward it to a superior commander for disposition. Rather, commanders first should consider the allegation and the Servicemember's performance and service history and then decide what administrative and/or disciplinary measures will be taken. Holding an Article 15 hearing is just one of those measures and one forum through which an allegation is substantiated or not. And when a commander determines that NJP is appropriate, all known offenses determined to be ripe for disposition through an Article 15 hearing will normally be considered during one Article 15 hearing, and not multiple hearings.

b. Company-Grade NJP. A significant change to a company-grade Article 15 hearing is a Servicemember no longer has a right to demand trial by court-martial. This right remains under the UCMJ when in Federal Status but not currently under the OCMJ. Instead, a Servicemember who receives NJP and considers the findings unsupported by the evidence or the punishment unjust or disproportionate to the offense may demand within five (5) days a de novo (complete) review of the findings and/or punishment adjudged. Such a demand triggers a stay of any adjudged punishment and a written legal review. Upon receiving the demand, the commander will promptly forward the Article 15 hearing record, all evidence and any supporting documents to the next superior commander of the grade of major or higher. Upon receipt, the superior commander will first obtain a written legal review and provide the accused Servicemember with an opportunity to be heard on the matter. Afterwards, the superior commander will make a written decision on: 1) whether to uphold or reverse any finding of guilt, and 2) whether to uphold or reduce any adjudged punishment. Because of the right to a de novo review, another important change is company-grade Article 15 hearings must have a written record and all testimonial evidence (witnesses) must be in writing. Put another way, a company-grade commander must document and justify his/her determination on whether the accused committed the alleged misconduct, the punishment s/he imposed and keep a record of the hearing.

c. Field-Grade NJP. In a field-grade Article 15 hearing, a Servicemember still has the right to demand trial by court-martial and still can appeal the NJP afterwards.

d. AGRs. The new OCMJ specifies the authority to demote is based on grade, and not status (e.g., M-day, DSG, ADSW, AGR, etc.) of the Servicemember to be reduced. Article 15, OCMJ, makes clear the officer imposing the reduction need not have actual authority to promote the

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Servicemember who is to be reduced. The imposing officer just needs to be of the grade/rank necessary to place the grade of the Servicemember who is to be reduced within that officer's promotion authority. It also allows a commander, whether occupying a part-time or full-time command position, to demote a Servicemember, whether part-time or full-time, so long as the Servicemember is within the officer's command at the time of the offense.

e. Demotions and Forfeitures. If imposed NJP includes both a reduction in grade and forfeiture, the maximum forfeiture is calculated at the reduced pay grade. Forfeitures are based on active duty base pay, not drill weekend pay.

10. Courts-Martial. The Adjutant General has withdrawn authority to convene a summary court-martial to his level, which places all authority to convene any type of court-martial (Summary, Special or General) with him. Any commander who wishes to convene a court-martial or have one convened on a particular matter may make such a request through command channels to the Adjutant General.

a. Something of particular importance about this for the Soldier is that either turning down an Article 15, demanding Courts-Martial, or doing something that justifies Courts-Martial will get the direct attention of TAG.

11. If you have more questions about the OCMJ you may wish to review the OCMJ contained in ORNGR 27-5, which is available on the 4133 website. Nothing herein constitutes legal advice and nothing herein replaces the advice of a JAG Attorney.

12. Points of Contact. POC is the current Regional Defense Counsel. The 4133 can be emailed at NGOR.JAG.4133.TDS@ng.army.mil. Website located at <http://www.oregon.gov/OMD/JAG>.

ORIGINAL SIGNED

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