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Administrative Separations for Misconduct: An Alternative or Companion to Military Courts-Martial

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Summary

The recent reports of abuse of prisoners held by U.S. military personnel have raised questions about how the armed forces control servicemembers. Congress, under the authorities vested in it by the U.S. Constitution, has enacted procedures for addressing misconduct by servicemembers. One such procedure is an administrative separation under which a member's continued suitability for service is determined. Administrative separations are non-punitive and can be initiated for a number of reasons, including misconduct or criminal offenses. They may be used in place of or after the servicemember has been subject to a court-martial or nonjudicial punishment. This report provides an overview of administrative separations as an alternative or companion to courts-martial.

Background

Cognizant of the military's need for good order and discipline, Congress, exercising its power under Article I of the U.S. Constitution,¹ has enacted procedures to allow military commanders to punish and discipline military servicemembers. The most commonly known method of punishment is courts-martial, the military criminal courts. However, based on the military's unique structure and needs,² Congress has also provided for administrative disciplinary measures, either directly or by authorizing the service

¹ Under Article I, sec. 8 of the U.S. Constitution, Congress has the power to raise and support Armies; provide and maintain a Navy; and provide for organizing and disciplining them.

² *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (recognizing the "need for special regulations in relation to military discipline. . ."); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) ("Military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian").

Secretaries to issue rules and regulations.³ These administrative disciplinary measures range from formal or informal counseling to administrative separations.⁴

The administrative separation process is designed with the overall goal of disciplining soldiers in order to conform their conduct to the requirements of good order and discipline. However, unlike courts-martial or nonjudicial punishment, administrative separations are not intended to serve as punishment.⁵ The main purpose of administrative separations is to determine the servicemember's suitability for continued service in the military. They can be initiated for a number of reasons, including misconduct or criminal offenses, with separate procedures for enlisted servicemembers and commissioned officers. Administrative separations can result in one of three types of discharges: honorable, general under honorable conditions, and other than honorable conditions.⁶ The type of discharge received will dictate the benefits, such as veterans benefits, servicemembers will qualify for once released from active duty. This report provides a brief overview of administrative separations for both enlisted servicemembers and commissioned officers based on misconduct. The report does not cover the rules or procedures, which may differ, applicable to separations based on other reasons such as hardship.

Enlisted Separations Due to Misconduct

Enlisted servicemembers continue to serve in the military until the expiration of the enlistment contract, an administrative separation, or a discharge resulting from a court-martial. Congress has vested ample authority with the Secretaries of the military services to prescribe rules and regulations for the administrative separation of enlisted personnel. With the exception of punitive discharges, an administrative separation can result in any

³ See, e.g., 10 U.S.C. §§ 815 and 1161 *et seq.*

⁴ Other forms of administrative measures include admonitions or reprimands, demotions, and nonjudicial punishments. Nonjudicial punishments, authorized under Article 15 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 815, are a means of addressing minor crimes.

⁵ Some may argue that administrative separations are “punitive” since some courts have found that a discharge under other than honorable conditions, which may be awarded as a result of an administrative separation, stigmatizes the servicemember's reputation, impedes his ability to gain employment, and serves as *prima facie* evidence against the servicemember's character, patriotism and loyalty. *Stapp v. Resor*, 314 F.Supp. 475 (S.D.N.Y. 1970); *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 995 (D.C. Cir.1969); *Van Bourg v. Nitze*, 388 F.2d 557, 559 n. 1 (D.C. Cir. 1967). For an explanation of the different types of discharges see note 6, *infra*.

⁶ An honorable discharge is appropriate when the quality of the service has generally met standards of acceptable conduct and performance or is otherwise meritorious. A general under honorable conditions discharge is appropriate when the service has been honest and faithful but there are significant negative aspects of the service which outweigh the positive aspects. Discharges under other than honorable conditions may be issued when there has been significant departure from conduct expected of servicemembers; it is authorized only if the servicemember had the opportunity to request an Administrative Board. Department of Defense Directive (DoD Dir.) 1332.14, E3.A2.1.3.2., *available at* [<http://www.dtic.mil/whs/directives/>].

type of discharge, including an honorable, general, and other than honorable discharge.⁷ Under this authority, the Secretary of Defense has issued regulations governing administrative separations of enlisted servicemembers.⁸ These regulations have been incorporated by each branch of the military through the issuance of its own regulations.⁹

A servicemember's command may choose to initiate administrative separation proceedings against a servicemember following a court-martial that did not result in punitive discharge or nonjudicial punishment. The command may also choose to initiate administrative separation proceedings in lieu of taking any other disciplinary action. A servicemember may be processed for administrative separation for a number of reasons. These reasons may include allegations of misconduct based on a pattern of minor disciplinary infractions, a pattern of misconduct,¹⁰ or the commission of a serious offense¹¹ for which a court-martial was not contemplated or did not result in a punitive discharge, or a civilian conviction.¹²

When separation is contemplated the servicemember is afforded certain rights. At the outset of the process servicemembers are notified of these rights in writing. This notification includes the factual basis of the proposed separation, the least favorable discharge being considered, the right to obtain copies of the documents being forwarded in support of the proposed separation, the right to submit statements, the right to counsel, and, if he or she qualifies for one,¹³ the right to an Administrative Board, a hearing to contest the separation or the type of discharge sought.¹⁴ If a servicemember is not entitled to an administrative separation board, the member may still submit letters and evidence on his or her behalf to prove suitability for continued service.

Administrative Separation Boards. Administrative Separation Boards (hereinafter "Boards"), although not punitive in nature, are similar to trials in that they are adjudicatory in nature. They are intended to determine the servicemember's suitability for continued service in the military and, if not, how their past service should be

⁷ 10 U.S.C. § 1169; S. Rep. No. 301, 90th Cong., 1st Sess. 10, reprinted in 1967 U.S. Code Cong. & Adm. News 2635, 2645. Only courts-martial may adjudge a bad-conduct or dishonorable discharge, the two types of punitive discharges. *Neal v. U.S.*, 177 Ct.Cl. 937 (1966).

⁸ DoD Dir. 1332.14, *available at* [<http://www.dtic.mil/whs/directives/>].

⁹ The Army uses Army Regulations (AR), the Air Force uses Air Force Instructions (AFI), and the Navy and Marine Corps use the Military Personnel Manual (MILPERSMAN).

¹⁰ The pattern of misconduct can consist of discreditable involvement with civil or military authorities, or conduct prejudicial to good order and discipline. DoD Dir. 1332.14, E3.A.1.1.11.1.1.2.

¹¹ The serious offense must be one that warrants separation and for which a punitive discharge would be authorized under the U.C.M.J. *Id.*

¹² The civilian conviction must be one that warrants separation, for which a punitive discharge would be authorized under the U.C.M.J., and where the sentence by civilian authorities includes confinement for six months or more. *Id.*

¹³ Only servicemembers who have served for at least six years of combined active and reserve duty are entitled to an administrative board. DoD Dir. 1332.14, E3.A3.1.2., E3.A3.1.3.1.

¹⁴ DoD Dir. 1332.14, E3.A3.1.2.1.7.

characterized.¹⁵ The Boards are composed of at least three officers, the “judge” and “jury,” who both decide on procedural issues and vote on whether the evidence supports separation and if so, the character of the separation. An enlisted servicemember in the rank of at least E-7 and senior to the servicemember may also be appointed. A non-voting legal advisor, the “prosecutor,” may be appointed to assist the Board.¹⁶ Much like at a trial, the servicemember has the right to testify on his or her own behalf, be represented by counsel, call witnesses on his or her behalf, question witnesses testifying against him or her, and present arguments on his or her behalf.¹⁷ However, rules of evidence applicable during a criminal trial do not apply at a Board.¹⁸ The standard of proof is “preponderance of the evidence,” rather than the “beyond a reasonable doubt” standard of criminal trials, and the recommendation of the Board need not be unanimous.¹⁹

Once the Board makes its recommendation, the record of the proceedings is forwarded to the “separation authority”²⁰ for an independent review. In case of a recommendation of an other than honorable discharge, the proceedings are also reviewed by an attorney.²¹ If the Board recommends retention and the “separation authority” believes separation is warranted, the separation authority will forward his or her recommendation and the Board’s recommendation to the Secretary of the servicemember’s military branch for final review and decision.²² Additional challenges to the service’s decision may be brought by the servicemember in the Court of Federal Claims²³ and the respective board of correction of military records.²⁴

Officer Separations Due to Misconduct

Commissioned officers may be administratively separated from the military for substandard performance, misconduct, moral or professional dereliction, or because the

¹⁵ The type of discharge recommended characterizes the service. *See* note 6, *supra*.

¹⁶ DoD Dir. 1332.14, E3.A3.1.3.5.1.

¹⁷ DoD Dir. 1332.14, E3.A3.1.3.5.6.

¹⁸ DoD Dir. 1332.14, E3.A3.1.3.5.5.

¹⁹ DoD Dir. 1332.14, E3.A3.1.3.5.7.

²⁰ The “separation authority” will usually be the commanding officer of the servicemember’s unit who must be in the grade of lieutenant colonel or commander or higher.

²¹ DoD Dir. 1332.14, E3.A3.1.3.6.2. Review by an attorney is also mandatory when, regardless of the type of discharge recommended by the Board, the servicemember identifies specific legal issues for consideration by the separation authority.

²² DoD. Dir. 1332.14, E3.A3.1.3.6.

²³ The Court of Federal Claims has jurisdiction over claims founded upon Acts of Congress such as pay status. A servicemember’s right to pay under 37 U.S.C. § 204 serves as the basis for jurisdiction. *West v. United States*, 35 Fed. Cl. 226, 230 (1996).

²⁴ Pursuant to 10 U.S.C. § 1552, each service branch has established a board which may correct any military record when necessary to correct an error or remove an injustice. This board can only correct the characterization of the service or discharge awarded. *See also*, 10 U.S.C. § 1553, right to have discharge reviewed.

officer's retention is not consistent with the interests of national security.²⁵ Congress has directed the Secretary of the military department concerned, within the limitations set by the Secretary of Defense, to prescribe regulations to permit review at any time of a commissioned officer's record to determine if the officer will need to show cause for retention in the service.²⁶ As a result, the Secretary of Defense has issued regulations governing the separation procedures for regular and reserve commissioned officers.²⁷

A commissioned officer may be separated from the military for, among other reasons,²⁸ an act or acts of misconduct including (1) serious or recurring wrongdoing, punishable by military or civilian authorities; (2) intentional or discreditable mismanagement of personal affairs (including financial affairs); (3) drug abuse; (4) intentional neglect of, or failure to perform, assigned duties; or (5) intentional misrepresentation of facts in obtaining an appointment or in official statements or records.²⁹ When administrative separation is contemplated, the "show cause" authority³⁰ reviews the officer's record to determine if the officer will be required to show cause for retention on active duty.³¹ Upon examining the officer's record, the "show cause" authority can either close the case or refer it to a "Board of Inquiry"³² (hereinafter "BOI"), a hearing where the officer is required to show retainability.³³

Boards of Inquiry. BOIs are convened by the Secretary of the officer's military branch and are similar to a trial where evidence is presented for and against the officer.³⁴ The "judge" and "jury" at the BOI will be at least three active duty officers of a grade above lieutenant colonel or commander, senior in rank to and of the same military branch as the officer required to show cause for retention.³⁵ The officers need not be attorneys or have legal training. As in a trial, the BOI is required to give a fair and impartial hearing to the officer and to consider all relevant evidence prior to determining whether

²⁵ 10 U.S.C. § 1181.

²⁶ *Id.*

²⁷ Department of Defense Instruction (DoD Inst.) 1332.40, *available at* [<http://www.dtic.mil//whs/directives/>]. As with the regulations governing enlisted separations, these regulations have also been incorporated by each branch of the military through the issuance of its own regulations.

²⁸ Officers may also be administratively separated for example if they lose their professional qualifications or for substandard performance. *See* 10 U.S.C. § 1181.

²⁹ DoD Inst. 1332.40, E2.2.

³⁰ The "show cause" authority is the commander initiating administrative separation proceedings. It can be the military branch's Secretary, commanders of reserve personnel centers, commanders of a brigade or unit, an air command or the commander in chief of a fleet, and all general or flag officers in command who have a military attorney or legal advisor available. DoD Inst. 1332.40, E1.1.2.1.

³¹ DoD Inst. 1332.40, E3.2.1.

³² DoD Inst. 1332.40, E3.2.2.

³³ 10 U.S.C. § 1182; DoD Inst. 1332.40, E3.3.

³⁴ *Id.*

³⁵ 10 U.S.C. §§ 1182, 1187; DoD Inst. 1332.40, E4.2.

separation is warranted and, if so, the type of discharge the officer should receive.³⁶ A non-voting attorney may be appointed to assist the BOI and acts as the “prosecutor.”³⁷ Unlike a trial where the prosecutor needs to prove the defendant’s guilt beyond a reasonable doubt, the BOI need only find that a preponderance of the evidence supports cause for separation.³⁸ A unanimous finding is not required. Rules of evidence applicable at criminal trials are not applicable at BOIs; any relevant evidence may be introduced for or against the officer.

The officer facing the BOI has rights similar to those of a defendant at a criminal trial. The officer has the right to (1) notice of the hearing and the reasons for it at least 30 days in advance, (2) a reasonable time to prepare to show reasons for his retention, (3) appear in person and be represented by counsel, and (4) have full access and copies of the records relevant to his or her case.³⁹ Analogous to “double jeopardy” in a criminal context, if the BOI determines that the officer should be retained, he or she cannot be brought to another BOI for the same charges unless the findings or recommendations of the BOI are determined to have been obtained by fraud or collusion.⁴⁰

If the BOI recommends that the officer be separated, the record is referred to a “Board of Review”(hereinafter “BOR”). The BOR conducts a review similar to an appellate review of a criminal conviction.⁴¹ The BOR is composed of three officers of the same qualifications as the BOI. It reviews the record and recommends retention or separation.⁴² If the BOR recommends separation, it refers the record to the Secretary of the military department concerned so that he or she may direct separation or retention.⁴³ The Secretary’s decision is final. However, the decision to separate may be challenged by the officer in the Court of Federal Claims or the respective board of correction of military records.⁴⁴

³⁶ 10 U.S.C. § 1182; DoD Inst. 1332.40, E3.3.3.

³⁷ DoD Inst. 1332.40, E4.1.(b)-(c).

³⁸ DoD Inst. 1332.40, E3.3.3.

³⁹ 10 U.S.C. § 1185; DoD Inst., 1332.40 E5.4.

⁴⁰ 10 U.S.C. § 1182.

⁴¹ *Id.*; DoD Inst., E3.4, 4.2.

⁴² DoD Inst. 1332.40, E3.4.4.

⁴³ 10 U.S.C. § 1184; DoD Inst. 1332.40, E3.5.

⁴⁴ *See* notes 23 & 24, *supra*.

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