

INTRODUCTION

1. PURPOSE: This guide is intended IO assist Equal Opportunity Advisors (EOA) and investigating officers (IO) to understand the provisions of Army Regulation (AR) 15-6 and how it applies to equal opportunity investigations as governed by AR 600-20. Under the provisions of AR 600-20, para E-4b, when a commander receives a formal equal opportunity (EO) complaint, he or she will either conduct an investigation personally or immediately appoint an IO according to the provisions of AR 15-6. The guide is designed specifically for equal opportunity investigations, but most provisions apply equally to most any type of informal investigation.

2. AUTHORITY:

a. Army Regulation 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that usually have a single investigating officer who conduct interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is designated.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The IO may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned.

c. Army Regulation 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts and the making of recommendations based on those facts. The procedures in AR 15-6 may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as equal opportunity investigations governed by AR 600-20. **If such directives contain guidance that is more specific than that set forth in AR 15-6, the more specific guidance will govern.** For example, AR 15-6 does not contain time limits for completion of investigations; however, since AR 600-20 contains time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, or DA civilian employees paid under the General Schedule, Level 13 (GS-13), or above may be investigating officers. The IO must also be senior to any person that is part of the investigation if the investigation may require the IO to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, the appointing authority will select the best qualified person for the duty based on their education, training, experience, length of service, and temperament.

3. DUTIES OF AN INVESTIGATING OFFICER: The primary duties of an IO are:

- a. to ascertain and consider the evidence on all sides of an issue,
- b. to be thorough and impartial,
- c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority, and
- d. to report the findings and recommendations IO the appointing authority.

PRELIMINARY MATTERS

1. APPOINTING AUTHORITY.

a. Under AR 15-6, the following persons may appoint an IO for **informal** investigations:

- any general court-martial convening authority or special court-martial convening authority, including those who have such authority for administrative purposes only,
- any general officer,
- a commander at any level,
- a principal staff officer or supervisor in the rank of colonel or above at the installation, activity, or unit level.
- any state adjutant general, and
- a DA civilian supervisor paid under the Executive Schedule, SES, or US/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.

b. Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of \$1,000,000, the loss or destruction of an Army aircraft or missile, an injury or illness resulting in, or likely to result in, total disability, or the death of one or more persons.

2. APPOINTMENT PROCEDURES. Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment orders will specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the IO should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by

AR 15-6, nevertheless must be followed. For example, AR 15-6 does not required that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

3. OBTAINING ASSISTANCE.

a. The servicing Judge Advocate Office can provide assistance to an IO at the beginning of and at any time during the investigation. Investigating officers should always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. A legal **review is required for all EO investigations and will be included in the appointment letter (AR 600-20, para E-7)**. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an IO in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the IO.

b. **The IO is required by AR 600-20, para E-6d to obtain the assistance of the servicing EOA prior to beginning his or her investigation.** The EOA will assist the IO with question development, ensure the focus of the investigation does not shift to the victim, and remain available for consultation throughout the investigation. The IO will meet with the EOA prior to submission of the final reporting to the appointing authority. The EOA is required to attach a memorandum documenting this review and providing an assessment of the unit's EO climate prior IO the complaint as well as what the climate is as a result of the complaint, and include recommendations on ways IO improve the EO climate. The EOA is responsible for retaining the complete investigation on file IAW AR 25-400-2. **The requirement for the investigating officer (IO) meet with the EOA prior IO beginning his/her investigation should be included in the appointment orders.**

4. ADMINISTRATIVE MATTERS. As soon as the IO receives appointment orders, begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology begins with the date orders are received, whether verbal or written. Record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology will be a part of the final case file.

5. CONCURRENT INVESTIGATIONS. An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and IOs must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, IOs will coordinate with the other command or agency to avoid duplication of effort wherever possible. If available, the results of other investigations may be incorporated into the AR 15-6 investigation and considered by the IO. Additionally, an IO will immediately coordinate with the legal advisor if he or she discovers evidence of criminal misconduct.

CONDUCTING THE INVESTIGATION

1. DEVELOPING AN INVESTIGATIVE PLAN.

a. The IO's primary duty is to gather evidence and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, the IO will develop an investigative plan with assistance from the EOA that consists of (1) an understanding of the facts required to reach a conclusion and (2) a strategy for obtaining evidence. This will include a list of potential witnesses and a plan for when each witness will be interviewed. The order witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the IO to ask all relevant questions and minimizes the need to re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The IO will begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation.

2. OBTAINING DOCUMENTARY AND PHYSICAL EVIDENCE.

a. The IO may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the IO should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request will be made early so the IO may continue to work on other aspects of the investigation while the request is processed. The IO will, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.

b. **A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing.** It is just as important to back these findings up with documentary evidence as it is to document adverse findings. All too frequently an IO who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect. ***The report of investigation must include sufficient documentation to convince the appointing authority and others that may review the investigation that the evidence supports the finding of no fault, no loss, or no wrongdoing.***

4

3. OBTAINING WITNESS TESTIMONY.

a. In most cases, witness testimony will be required. Clearly the best interviews occur fact-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically will be documented in a

memorandum for record.

b. The IO must interview (LAW AR 600-20, para E-6e):

- every individual with first-hand knowledge of the facts surrounding the validity of the allegations,
- everyone who can substantiate the relationship or corroborate the relationship between the complainant and the alleged perpetrator,
- the person who initially received the formal complaint,
- the complainant(s),
- any named witnesses,
- the alleged perpetrator.

c. For EO investigations, it is recommended to first interview the complainant and interview the alleged offender last. This will provide the IO with an understanding of the situation, a development of the issues, and prevent backtracking witness statements.

d. Witness statements will be taken on DA Form 2823. Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness will be asked to define the terms the first time they are used.

e. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority may require sworn statements, or the IO may, at their discretion, ask for sworn statements. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for civilian employees (Statements taken out of the presence of the IO may be sworn before an official authorized IO administer oaths at the witness's location.)

f. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the IO should discuss this matter with the local labor counselor. Commanders and supervisors have the authority to order military personnel and to direct federal employees to appear and testify. Civilian witnesses who are not federal employees may agree to appear, and, if necessary be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained and only after coordinating with the legal advisor or appointing authority.

4. RIGHTS ADVISEMENT.

a. All soldiers suspected of criminal misconduct must first be advised of their rights. The DA Form 3881 will be used IO record that the witness understands his or her rights and elects to waive those rights and make a statement. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such cases, rights warnings must be provided as soon as the IO suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, only the individual who would be accused of the crime may assert these rights. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of illegally fraternizing with a subordinate must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning an incident involving the victim, a rights warning would not be necessary unless evidence is developed that leads the IO to believe the individual has committed a criminal offense. If it is clear that the witness has done nothing illegal, but has information about someone who did, the witness may not assert rights on behalf of the other individual.

5. SCHEDULING WITNESS INTERVIEWS. The IO will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed with another witness. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews; it is not mandatory.

- Work from the center of the issue outward. Identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the interview of key witnesses to be as complete as possible.
- Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant to the inquiry.
- Any information that is relevant should be collected regardless of the source; however, IOs must collect the best information available from the most direct source.
- It may be necessary or advisable to interview experts having specialized

understanding of the subject matter of the investigation. Under AR 600-20, para E-6d, the EOA will meet with the IO prior to conducting the investigation and will assist in developing questions to be addressed to the complainant, the alleged perpetrator, and any witnesses or third parties. The EOA's skills in complaint handling, conflict resolution, and training in the subtleties of discrimination and sexual harassment enable him or her to advise the IO in these complex areas.

- At some point, there will be no more witnesses available with relevant and useful information. It is not necessary to interview every member of a unit if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the IO must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

6. CONDUCTING WITNESS INTERVIEWS. Before conducting witness interviews, IOs may also consult the Inspector General's Office or law enforcement personnel such as Military Police officers or CID agents for guidance on interview techniques. The following suggestions may be helpful:

- Prepare for the interview. While there is no need to develop scripts for the witness interviews, IOs may wish to review the information required and with the assistance of the EOA, prepares a list of questions or key issues to be covered. This will prevent the IO from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions. such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

- Ensure the witness's privacy. The IO should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

- Focus on relevant information. Unless precluded for some reason, the IO should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and useful to the investigation is permissible. The IO should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be material and relevant to the matter being investigated. **An equal opportunity investigation will not become focused on the victim.** Relevancy depends on the circumstances in each case. Compare the following examples:

Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

- Let the witness testify in his or her own words. The IO must avoid coaching the witness or suggesting the existence or nonexistence of material facts. After the testimony is completed, the IO should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony should also reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness will be advised of its use. Additionally, the tape should be safeguarded, even after the investigation is completed.

- Protect the interview process. In appropriate cases, an IO may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still IO is heard. Witnesses, however, are not precluded from discussing matters with counsel.

7. RULES OF EVIDENCE: Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules.

- The information must be relevant and material to the matter or matters under investigation.

- Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely IO affect the truthfulness of the statement.

- The result of polygraph examinations may be used only with the subject's permission.

- Privileged communications between husband and wife, priest and penitent attorney, and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of IO reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

- "Off-the-record" statements are not acceptable.

- An involuntary statement by a member of the Armed Forces regarding the origin, incidence, or aggravation of a disease or injury may not be admitted.

Recommend the IO consult the legal advisor if there are any questions concerning the applicability of any of these rules.

8. STANDARD OF PROOF: Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by “a greater weight of evidence than supports a contrary conclusion.” That is, findings must be based on evidence, which, after considering all evidence presented, points to a particular conclusion as being more credible and probably than any other conclusion.

CONCLUDING THE INVESTIGATION

1. PREPARING FINDINGS AND RECOMMENDATIONS. After all the evidence is collected, the IO must review it and make findings. The IO should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

- **Facts:** To the extent possible, the IO should fix dates, places, persons, and events, definitely and accurately. The IO should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent?
- **Findings:** A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, IOs are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, IOs should refer to the exhibit or exhibits relied upon in making each finding. The documented evidence that will become part of the report must support findings (including findings of no fault, no loss, or no wrongdoing). Exhibits will be numbered in the order they are discussed in the findings.
- **Recommendations:** Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

2. PREPARING THE SUBMISSION TO THE APPOINTING AUTHORITY:

After developing the findings and recommendations, the IO will complete DA Form 1574 and include in the packet in the following (LAW AR 600-20, para E-6k(1-IO)):

- Orders of appointment as investigating officer.
- Copy of the DA Form 7279-R with attached continuation sheets.
- Copy of the completed/initialed Commander’s Plan to prevent reprisal.
- List of questions developed with EOA.
- Statements/synopses of interviews with complainant(s), named witnesses, and alleged perpetrator(s) and relevant members of the chain(s) of command.
- Copies of supporting documents.
- Description/assessment of unit policies, procedures which may have contributed to perceptions of unlawful discrimination or sexual harassment within the unit.

- Written approval of next higher echelon commander for any approved extensions.
- Written explanation of extenuating circumstances that prevented the IO from interviewing any named witnesses, complainants, or alleged perpetrators.
- **Written review by the EOA.**

3. LEGAL REVIEW

a. Army Regulation 600-20, para E-7, **requires the appointing authority to submit the report of investigation to the servicing Staff for Command Judge Advocate for a determination of legal sufficiency.** The appointing authority must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters. Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

- whether the investigation complies with requirements in the appointing order and other legal requirements,
- the effects of any errors in the investigation,
- whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and
- whether the recommendations are consistent with the findings.

b. A legal review is required before the appointing authority approves the findings and recommendations. After receiving the legal review and completed investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations or may direct further action, such as the taking of additional evidence or making additional findings.

CHECKLIST FOR INVESTIGATING OFFICERS

1. PRELIMINARY MATTERS

a. Has the appointing authority appointed an appropriate investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

c. Has the initial legal briefing been accomplished?

d. Has the servicing EOA been contacted?

2. INVESTIGATIVE PLAN

- a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?
- b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?
- c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?
- d. Have questions been developed with the assistance of the EOA?

3. CONDUCTING THE INVESTIGATION

- a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?
- b. Is the information collected (witness statements, MFRs of phone conversations, photographs, etc.) being retained and organized?
- c. Is routine coordination with the legal advisor and BOA being accomplished?
- d. Is the investigation becoming victim focused?

4. PREPARING FINDINGS AND RECOMMENDATIONS

- a. Is the evidence assembled in a logical and coherent fashion?
- b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?
- c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?
- d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?
- e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?
- f. Has coordination been made with the EOA to review the investigation and provide

the memorandum required by AR 600-20.

5. FINAL ACTION (QUESTIONS FOR THE EOA)

- a. Was an appropriate legal review conducted?

- b. Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved? Have the necessary taskers been prepared to implement the recommendations?

