

Legal Services

Procedural Guide for Article 32(b) Investigating Officer

Headquarters
Department of the Army
Washington, DC
16 September 1990

UNCLASSIFIED

Legal Services

Procedural Guide for Article 32(b) Investigating Officer

By Order of the Secretary of the Army:

CARL E. VUONO
*General, United States Army
Chief of Staff*

Official:

THOMAS F. SIKORA
*Brigadier General, United States Army
The Adjutant General*

History. This UPDATE printing publishes a revision of this publication. Because the publication has been extensively revised, the changed portions have not been highlighted. This publication has been reorganized to make it compatible with the Army electronic

publishing database. No content has been changed.

Summary. This pamphlet is intended to provide information and reference material. While it may suggest workable solutions to legal problems, it does not purport to promulgate Department of the Army policy. Comments concerning laws, regulations, cases, or other matters represent the opinions of individual specialists in military justice. Laws, regulations, and decisions published prior to 1 January 1990 generally have been considered and included in this text.

Applicability. This pamphlet applies during peacetime and mobilization to the Active Army, the Army National Guard in Federal service under title 10, United States Code, and the U.S. Army Reserve.

Proponent and exception authority. Not applicable.

Interim changes. Interim changes to this

pamphlet are not official unless they are authenticated by The Adjutant General. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. The proponent of this pamphlet is Office of The Judge Advocate General. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to The Judge Advocate General's School, Army, ATTN:JAGS-ADC, Charlottesville, VA 22903-1781.

Distribution. Distribution of this publication is made in accordance with the requirements on DA Form 12-09-E, block number 4063, intended for command levels B, C, D, and E for Active Army, Army National Guard, and U.S. Army Reserve.

Contents (Listed by paragraph and page number)

Chapter 1

Introduction, page 1

Purpose • 1-1, page 1

General instructions • 1-2, page 1

Chapter 2

Preparing for the Investigation, page 1

General considerations • 2-1, page 1

Sequence of preparation • 2-2, page 2

Informing the accused of the investigation and the right to counsel
• 2-3, page 2

Consultation with counsel for the accused • 2-4, page 3

Securing the attendance of witnesses • 2-5, page 3

Chapter 3

The Formal Investigation, page 7

General • 3-1, page 7

Procedure for opening session • 3-2, page 7

Procedures for taking testimony and examining evidence • 3-3,
page 7

Chapter 4

Completion of the Investigating Officer's Report, page 15

Report preparation • 4-1, page 15

Considering the evidence and making a recommendation • 4-2,
page 15

Forwarding the report • 4-3, page 15

Figure List

Figure 2-1: Preliminary advice to the accused, page 4

Figure 2-2: Notification to the accused, page 5

Figure 2-3: Response of the accused, page 6

Figure 3-1: Arrangement of room for investigation, page 9

Figure 3-2: Procedure for opening session of the formal
investigation, page 10

Figure 3-3: Oaths, page 11

Figure 3-4: Examination of witnesses, page 13

Figure 3-5: Examination of evidence, page 14

Figure 4-1: Sample DD Form 457, page 16

Figure 4-1: Sample DD Form 457—Continued, page 17

*This pamphlet supersedes DA Pam 27-17, 15 March 1985.

Chapter 1 Introduction

1-1. Purpose

This guide is published for use by officers who have been appointed as investigating officers under article 32(b) of the Uniform Code of Military Justice (UCMJ). This guide should be used in conjunction with the DD Form 457 (Investigating Officer's Report) and the applicable Rules for Courts-Martial (R.C.M.) in the Manual for Courts-Martial, United States, 1984 (hereafter referred to as MCM, 1984). The investigating officer's functions are: To make *athorough and impartial* investigation into the truth of the allegations; to consider the correctness and the form of the charges; and to make recommendations as to the disposition of the charges in the interest of justice and discipline.

1-2. General instructions

a. *Duties of investigating officer.* Just as the assignment of an officer to be a court-martial member takes precedence over other military duties, your assignment as an article 32(b) investigating officer must take priority over other duties. As an officer detailed to conduct an important investigation, you will actually be performing a *judicial* function. In preparation for a complete examination of the case presented to you, your initial responsibility is to become thoroughly familiar with the contents of this guide, R.C.M. 405, and article 32, UCMJ. Your two most important and legally vital responsibilities are: To thoroughly investigate all charges and specifications alleged in the charge sheet(s); and, to complete this investigation impartially.

b. *Legal advice for investigating officer.* Upon your initial appointment and throughout the investigation, you will have occasion to seek legal advice from the office of the judge advocate serving the command of the officer directing the investigation. It is imperative that this advice come from a judge advocate who has no direct interest in the outcome of the proceedings. Normally, such a judge advocate officer will be designated, in writing or otherwise, to assist you in your role as investigating officer. Although you will receive *advice* from the designated judge advocate, the conclusions to be drawn from the evidence in the case and the recommendations concerning the disposition of the case are matters solely within your judgment and are your responsibility. The law requires that you determine these matters without reliance upon the opinions or recommendations of any other person. You must scrupulously avoid inquiries of or discussions with judge advocate officers who might be perceived as lacking impartiality in the case (for example, defense counsel or the Government representative). Such discussions often give the appearance of partiality toward either side regardless of the motivation or real interest of the investigating officer. Restricting your preliminary discussion of the case to the designated legal advisor will ensure the integrity of your judicial role and will maintain the impartiality demanded by law.

c. *Legal representation for the accused.* The accused may be represented during the investigation by a civilian lawyer of the accused's choice at no expense to the United States, by military counsel of the accused's selection (if reasonably available), or by military counsel certified under article 27(b) and detailed for that purpose by competent authority. Counsel representing the accused will be allowed to present evidence on behalf of the accused, cross-examine Government witnesses, argue for a disposition of the matter appropriate to the interests of the accused, and otherwise perform the normal functions of counsel. Whenever counsel is requested by the accused, the taking of evidence will be conducted in the presence of that counsel unless expressly excused by the accused. See paragraph 2-3 for a complete explanation of the accused's right to counsel.

d. *Legal counsel for the Government.* Although not required by law, counsel may also be detailed to represent the Government. Such counsel is *not* the legal advisor of the investigating officer, but instead, represents a party to the investigation. Accordingly, you

may *not* seek legal advice from counsel representing the Government. Counsel for the Government may present evidence, cross-examine witnesses, and argue for a disposition of the matter appropriate to the interest of the Government. You should recognize that arguments made by counsel for either side are not evidence and should carry no additional weight *merely* because of the side making the argument.

e. *Advice concerning substantive matters.* You should inform counsel for the accused and counsel for the Government, if detailed, of all matters discussed with your legal advisor in your initial briefing. If you later seek additional advice from your legal advisor, you must give prior notice to counsel for the accused and to counsel for the Government, if any, and you must provide these parties with an opportunity to respond to the advice you received. If practical, you may give counsel for both sides advance notice of your intent to seek legal advice and may allow them an opportunity to be present; however, this is not required. As a general rule, you should keep a record of the dates of consultation with your legal advisor, the matters discussed, when parties were notified of such discussions, whether counsel for the parties were present at such discussions, and any response by counsel to your legal advisor's advice.

Chapter 2 Preparing for the Investigation

2-1. General considerations

a. The case file will normally include five copies of the charge sheet; civilian or military police reports; statements of witnesses or summaries thereof; documentary evidence, such as extract copies of Standard Installation/Division Personnel System (SIDPERS) documents in cases involving unauthorized absence; and the record of previous convictions, if any. If these documents are not in the file, you should request them immediately from the appropriate agencies. The file may also include a letter of instruction from the officer who appointed you and directions to report to the office of the local judge advocate for a briefing by the judge advocate legal advisor designated to assist you.

b. The article 32 investigation is a judicial proceeding and plays a necessary role in military due process of law. The investigation is subject to subsequent review at the trial, if there is a trial, and on appeal. The ultimate outcome of the case may well depend upon whether you properly perform your duties in making certain that the accused is fully informed of and afforded all applicable rights in connection with the investigation.

c. It is important to conduct the investigation expeditiously. Usually, the officer appointing the investigating officer will set a date for completion of the report. If you cannot comply with that date, promptly report this fact in writing to the authority who directed the investigation and explain the cause of the delay in detail. Such delay on your part could result in a gross injustice to the accused and in dismissal of the charges. On the other hand, you must take the time necessary for a thorough investigation.

d. Requests for delay by the accused/defense must be in writing and must be attached to the report of investigation. The Government should be allowed an opportunity to respond to the defense requested delay. You should ensure that there are no ambiguities in the request. Additionally, you should ensure that the accused and defense counsel understand that their requested delay will not be attributable to the Government. Any reasonable request for delay by the accused should be granted.

e. The Government representative may ask you to approve a delay in the investigation. The Government representative will also normally ask that you exclude the period of delay from Government speedy-trial accountability. You should require the Government representative to put the request for delay *and* reasons for the request in writing. When these requests are made, you should review R.C.M. 707 and consult with your legal advisor. Before ruling on the Government's request, you should hold a hearing at which the defense counsel and the Government representative can present evidence