A GUIDE FOR THE AR 15-6 INVESTIGATING OFFICER IN INFORMAL INVESTIGATIONS

PREPARED
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1. **Purpose.**

a. This guide is intended to assist you, as an Investigating Officer (IO), in conducting a timely, thorough, and legally sufficient AR 15-6 informal investigation. An informal investigation differs from a formal investigation in that the IO follows the informal procedures set forth in AR 15-6, Chapter 4, rather than the formal procedures specified in Chapter 5. In addition, there are no respondents designated in an informal investigation. While there may be one or more persons believed to be responsible for the matter under investigation (suspects), they do not have the rights of a respondent in an informal AR 15-6 investigation. Note that a suspect (See paragraph 4f below.) still retains his/her right against self-incrimination. If any action is to be taken against a person found to be responsible, he will be given all of his/her "due process rights" in the subsequent action. Because of these differences, an informal investigation can be conducted more expeditiously than a formal investigation and uses fewer resources.

b. This guide is based on the 2 October 2006 edition of Army Regulation (AR) 15-6, Procedures for Investigating Officers and Boards of Officers. While AR 15-6 contains the basic rules for informal investigations in the Army, some investigations are appointed under a more specific regulation or directive (e.g., AR 735-5 provides for the investigation of the loss/damage to government property). In that case, the specific regulation may make AR 15-6 applicable to the investigation. Consequently, you have to look to both the specific regulation involved and AR 15-6

for the proper procedures to follow. If the two regulations conflict on a particular point, the provisions of the specific regulation will override the provisions of AR 15-6.

2. **What is your mission?**

a. The primary purpose of an informal investigation is to look into and report on the matters that the appointing authority has designated for inquiry. Your investigation is a fact-finding mission involving the identification and interview of witnesses and the collection and preservation of real, testimonial, and documentary evidence. Your objective is to discover and document the who, what, where, how, when, and why of the matter. Who was involved (and the extent of their involvement)? What happened? Where did it occur? How did it occur? When did it occur? Why did it occur? The IO must fix dates, places, persons and events, definitely and accurately. The information gathered by the IO must form the basis upon which decisions can be made and action taken.

b. Evidence is any information which may tend to prove or disprove facts. Evidence can be direct (e.g., testimony from a witness that she saw A shoot B) or indirect/circumstantial (e.g. testimony from a witness that A was alone in a room, that B was seen entering the room and closing the door, that a gunshot was heard, that A left the room immediately afterwards, and that the witness then went in to the room and found B lying on the floor shot). Evidence can be real, documentary, or testimonial. Testimonial evidence is a witness' oral statement which you would reduce to writing. Documentary evidence is any writing or document by which ideas are represented and which is readily identifiable on its face, e.g., a regulation, a police report, a letter, or a hand receipt. Real evidence is any tangible evidence other than a written document, e.g., a weapon or a piece of clothing.

3. **How do you start your investigation?** Review your appointment order, all information provided by the appointing authority (if any), AR 15-6, and any other pertinent regulation or directive. You review the appointment order to ascertain whether there are any special instructions. Next, you contact your Legal Advisor in the Administrative and Civil Law Division (221-2373/0485) to

arrange for a legal briefing and then promptly begin your investigation. In conducting your investigation, use AR 15-6, Chapter 3, as a guide. Pay particular attention to paragraphs 3-7 (Rules of evidence and proof of facts), 3-8 (Witnesses), 3-10 (Findings), and 3-11 (Recommendations). This will help ensure the legal sufficiency of your findings and recommendations when you submit your report to the appointing authority. Ensure your immediate commander/supervisor is aware of your appointment, because your investigating duties will normally take precedence over your other duties. Begin a chronological log documenting your investigative efforts to show later, if necessary, that you diligently pursued the investigation. Do not discuss the facts and circumstances of your investigation with your immediate commander or anyone else who does not have an official need to know. Note that you should explain who you are and the purpose of your presence whenever you enter a commander's/supervisor's area of responsibility/facility.

4. Conduct of the investigation.

a. Begin the process by thinking about what sort of information you need to gather. Do you need to interview witnesses? If so, make a list of the names and the substance of the information each witness is expected to give. Do you need documents? Where are these documents located? Do you need to visit the scene of an alleged incident? Do you need logistical support: a vehicle, camera, or clerk? After you ascertain what sort of information you need and where you are likely to find it, you are ready for the next step.

b. The next step is usually interviewing witnesses. Normally, you interview witnesses before interviewing a suspect or person believed to be responsible in order to know the right questions to ask that person. You usually get only one chance to interview a suspect, so you want to be thoroughly prepared. Except in the case of a person suspected of having committed a crime, it is usually best to engage the witness in free-flowing conversation by asking general, open-ended questions like "What happened next?" An open-ended question will generate better information than a specific question like "Did you see the HUMVEE run the stop sign?" The answer to the first question will provide a wealth of information while the answer to the second question only provides a yes or no. Do not make any promises which can not be kept, e.g., promises of confidentiality. Always

end your interview by asking if the witness knows of anyone else with useful information or if the witness has anything else to offer that he/she thinks may be relevant to the investigation.

c. There are many ways to take a statement. The witness can produce a written narrative. Or the IO can ask the witness to answer specific questions and can record the questions and answers. A better way is to interview the witness, summarize the information provided, and then ask the witness to review your summary, allowing the witness to correct or supplement the summary. The finished product will be his/her statement.

d. As an IO, you are authorized to administer oaths and take sworn statements (Art. 136, Uniform Code of Military Justice (UCMJ) for a military IO or 5 U.S. Code §303 for a civilian IO). Do not treat this aspect of your duties lightly. You should swear a witness before taking his/her statement. Have the witness raise his or her right hand and solemnly swear/affirm to the statement: Do you swear that the evidence you shall give in this investigation shall be the truth, the whole truth, and nothing but the truth, so help you God? If the witness professes not to believe in God and declines to swear an oath, change the oath to the following: Do you affirm that the evidence you shall give in this investigation shall be the truth, the whole truth, and nothing but the truth?

e. However you gather information, avoid "off-the-record" statements and record the substance of your interviews on DA Form 2823, Sworn Statement. This form is available on Forms Flow. Otherwise use plain bond or ruled paper and type or legibly print the word "CERTIFICATE" across the top of the paper. Statements should be typed if at all possible, but if not, they may be printed/written. They must be legible so they can be read by the appointing authority and by all who must take action based on the report. The statement of each witness must be dated and signed by the individual making the statement. If the individual is unavailable or refuses to sign the statement, the IO will note, over his own signature, the reasons why the witness has not signed and will certify that the statement is an accurate summary of what the witness said.

f. There are no respondents (AR 15-6, paragraph 1-7) in an informal investigation. However, there may be an individual or individuals whom it is reasonable to suspect may have committed a

crime based on the evidence known to the IO. The test is an objective, rather than a subjective, test. The test is not whether you suspect the individual, but whether a reasonable IO, knowing the same things that you know, would suspect the individual of committing the crime. A crime is defined as a violation of one of the punitive articles (Articles 77 through 134) of the UCMJ. This includes violations of state and/or federal criminal laws as well. In the case of a suspect, the soldier will be advised of his rights against self-incrimination under Article 31 of the UCMJ. A civilian will be advised of his rights under the Fifth Amendment to the Constitution. It is recommended that the procedure for explaining rights set forth on the back of DA Form 3881, Rights Warning Procedure/Waiver Certificate, be used. This form is available on Forms Flow.

g. Read the Article 31/Fifth Amendment rights as set forth on the back of the DA Form 3881. You should not change the words, even when explaining them. If the suspect indicates that he/she does not understand the rights, determine what is not understood. Then proceed to that spot in the rights warning and repeat the rights advisement as written. Do not attempt to put the rights advisement into your own words. After one or two repeats, suspects will usually indicate that they understand and you can proceed. If the suspect repeatedly indicates that he/she does not understand, what the suspect is really saying is that he/she does not intend to waive his/her Article 31 rights. If a suspect indicates that he/she is not going to waive his rights, then all questioning must cease. In that event, seek legal advice before proceeding further.

h. If a suspect indicates that he/she wants to talk to a lawyer, then all questioning must cease until the suspect has had a reasonable opportunity to see a lawyer. If the suspect already has a lawyer, then the lawyer must be given a reasonable opportunity to be present at the questioning, notwithstanding the fact that the suspect says he doesn't want/need the lawyer. If you want to question the individual on a matter totally unrelated to the matter for which the individual is represented by an attorney, you need not contact the attorney. However, you must not discuss anything concerning the matter for which the individual is already represented by the attorney. In a situation such as this, it is always wise to seek legal advice first.

i. If a witness is represented by a lawyer, remember that the lawyer's job is a partisan one to advise and counsel his/her client. Do not ask the lawyer for legal advice. Your Legal Advisor is identified in the Letter of Appointment. If not, you may obtain a Legal Advisor by contacting the Chief of the Administrative and Civil Law Division, Office of the Staff Judge Advocate, AMEDDC&S and FSH, 221-2373/0485. Do not accept legal advice or argument from a witness' counsel without discussing it with your Legal Advisor. Should you encounter any difficulties with a witness' counsel, you should immediately contact your Legal Advisor.

j. No adverse inference will be drawn against individuals for invoking their rights under Article 31 or the Fifth Amendment. If a reluctant military witness has no Article 31 rights, then he or she may be ordered to testify by their commander. The right to invoke Article 31 or the Fifth Amendment is personal. No one may assert it to protect anyone other than himself/herself. There may, however, be privileged communications involved. If so, consult your Legal Advisor.

k. The rules in the Manual for Courts-Martial, Part III, concerning privileged communications between lawyer and client (Military Rule of Evidence (MRE) 502), with clergy (MRE 503), between husband-wife (MRE 504), and with psychotherapists (MRE 513) apply. Present or former inspector general personnel will not be required to provide evidence regarding information that they obtained while acting as Inspectors General. There are other records, such as ASAP or "limited use records", the use or release of which is restricted by regulation. Any questions concerning this type of information should be discussed with your Legal Advisor.

l. An informal investigation may use whatever method it finds most efficient and effective for acquiring information. Relevant information may be obtained by personal interview, correspondence, telephone inquiry, or other informal means. It should not duplicate the investigative work already being done in an ongoing investigation, e.g., a military police investigation. However, an AR 15-6 investigation can still be conducted concurrently with another ongoing investigation of the same matter. The IO should request a copy of the relevant evidence (statements) from the other investigation to add to his/her report.

m. As an IO with an official need to know, you should have access to all relevant government records. If someone denies you access, you should seek legal advice immediately. An IO may consider any evidence which in the minds of reasonable people is relevant and material to the issue. An IO may not consider privileged communications, polygraph tests (unless the subject agrees), off the record statements, bad faith unlawful searches, and involuntary (coerced/forced/tricked) statements.

n. When interviewing a civilian employee who is a member of a bargaining unit, the employee is entitled to have a union representative present if the employee so requests, <u>and</u> the employee reasonably believes disciplinary action may be taken against him/her. There is no obligation to inform the employee of this right and no obligation for you to make arrangements with the union. If an employee requests union representation, just reschedule the interview for at least a day later. This will allow the employee to arrange for union representation. NOTE: Most nonsupervisory employees at Fort Sam Houston are members of a bargaining unit, as are some supervisory employees within the USAG. If there are any questions, contact the Labor Counselor at 221-2373/0485 (Building 134). If the Labor Counselor is not available, contact your Legal Advisor.

o. An IO, who during the course of the investigation discovers the need for a lawful search and seizure, should contact the Chief, Criminal Law Division, at 221-0289/1488, for assistance in obtaining a search authorization from the military magistrate, appropriate commander, or judge. A search authorization may be obtained where there is probable cause to believe that the fruits or evidence of a crime may be found in the location to be searched.

p. An IO, who during the course of the investigation discovers that the completion thereof requires examining the conduct or performance of duty of, or may result in findings and recommendations adverse to, a person senior in rank or position to him/her, will report this fact to the appointing authority. The appointing authority may replace the IO with a more senior officer or determine that it is impractical because of military exigencies and direct the IO to continue.

q. If in the course of the investigation something happens that could cause the appointing authority to consider enlarging,

restricting, or terminating the investigation, the IO should report this situation to the appointing authority at once.

r. The Privacy Act requires that whenever personal information is solicited from an individual and the information will be filed so as to be retrievable by reference to the name or other personal identifier of that individual, he/she must be advised orally or in writing of the information listed in AR 15-6, Appendix B, paragraph B-1a. Generally, a Privacy Act statement is only required when soliciting information from an individual who is or could have been designated as a respondent in a formal board/investigation (i.e., a suspect). A copy of a Privacy Act Statement, suitable for your use, is enclosed (last page). The suspect need not sign the Privacy Act Statement. If there are any questions concerning the Privacy Act, contact your Legal Advisor.

5. Report of Proceedings.

a. Unless the appointing authority has authorized an oral report, the IO will utilize a DA Form 1574, Report of Proceedings By Investigating Officer/Board of Officers (this form is available on Forms Flow), with exhibits and enclosures (see paragraphs 5c and d below) to constitute the report. An Index of Exhibits and Enclosures is attached immediately behind the DA Form 1574 (and continuation sheets if used). It is the duty of the IO to ascertain and consider the evidence on all sides of each issue thoroughly and impartially, and to make findings and recommendations that are warranted by the facts and comply with the instructions of the appointing authority. A finding is a clear, concise, and detailed statement of fact that can be readily deduced from the evidence in the record. Each finding must be based on the evidence and should reference the exhibit(s) which supports it. Each finding must be supported by a "preponderance of the evidence", that is, a greater weight of evidence than supports a contrary conclusion. This is evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion (minimum 51% probability).

b. Sometimes an IO feels that there is a need to explain the circumstances surrounding an event, the chronology, or how/why the IO made a certain finding, in order to help the commander

more clearly understand the case. This information, which is too much to include in the findings, can be put in an IO's Memorandum for Record (MFR) and attached to the report as Exhibit 1. At Fort Sam Houston, an IO is required to prepare an MFR in every investigation and explain, at a minimum, how the IO arrived at his/her finding(s).

c. A recommendation should be clear, concise, and specific. A recommendation must be consistent with, and should logically follow from, the findings. Recommendations generally cover the pecuniary, disciplinary, and corrective phases of the matter investigated.

d. Exhibits are the items of evidence considered by the IO. Possible exhibits include statements and transcripts of testimony by witnesses, real evidence, and documentary evidence. Because attaching real evidence (physical objects) to the report is usually impractical, clear and accurate descriptions (such as written statements) or depictions (such as photographs) may be substituted in the report. The exhibit should tell where the real document or evidence can be found. The IO must ensure that the real evidence itself, including the chain of custody, is preserved. Exhibits are marked numerically and attached immediately under the Index.

e. Enclosures are significant letters and other papers that relate to the administrative aspects of the investigation and are not evidence. Examples include the memorandum of appointment (always the first enclosure), copies of correspondence or other written communications to or from the appointing authority, Privacy Act statements, and explanations by the IO of any unusual delays, difficulties, irregularities, or other problems encountered. Enclosures are consecutively numbered with roman numerals (I, II, III, IV,...) and are attached behind the exhibits.

f. Unless the appointing authority or another directive provides otherwise, the written report (original and one copy) should be submitted to the Staff Judge Advocate, not the appointing authority. If there are any questions concerning AR 15-6 investigations, you may contact the Administrative and Civil Law Division, Office of the Staff Judge Advocate, AMEDDC&S and FSH, at 221-2373/0485.

PRIVACY ACT STATEMENT

[Use ONLY if the AR 15-6 Report of Investigation will be filed under the witness' name or other personal identifier (AR 15-6, paragraph 3-8e); generally, this is only applicable to the "subject" of the investigation.]

1. PURPOSE: The authority for the collection of personal information during the conduct of this informal investigation under AR 15-6 is 10 U.S. Code §3013.

2. PRINCIPAL PURPOSE: The purpose for soliciting this information is to ascertain sufficient factual information on which to make findings and recommendations to assist the appointing authority in determining the appropriate disposition of this matter.

3. ROUTINE USES:

a. Any information you provide may be filed in a system of records under your name or other personal identifier and used for any lawful and official purpose.

b. Any information you provide is disclosable to members of the Department of Defense (DOD) who have an official need for this information in the performance of their duties. Blanket routine uses listed in AR 340-21 also apply. In addition, the information may be disclosed to government agencies outside DOD as follows:

(1) To members of the Department of Justice when necessary in the defense of litigation against DOD or members of DOD as a result of actions taken in their official capacity.

(2) To members of the Department of Justice when necessary for the further investigation of criminal misconduct.

4. DISCLOSURE:

a. For an individual who may be ordered to testify (no right to refuse to testify): Providing the information is MANDATORY. Failure to provide information could result in disciplinary or other adverse action against you under the Uniform Code of Military Justice, Army regulations, or Office of Personnel Management regulations, as appropriate.

b. For an individual who is warned of his rights under Article 31, UCMJ, or the Fifth Amendment to the U.S. Constitution: Providing information is VOLUNTARY. There will be no adverse effect on you for failure to furnish information,

other than that which might result as a consequence of the appointing authority having less than complete information on which to base his disposition of this matter.

DATE: _____ NAME: _____