

UNITED STATES
DEPARTMENT OF THE ARMY

Antideficiency Act (ADA) Investigation Manual

FIRST EDITION



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**Antideficiency Act
(ADA)
Investigation Manual**

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OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
(FINANCIAL MANAGEMENT AND COMPTROLLER)

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FOREWORD

Two years ago my office conducted a survey of former investigating officers of alleged violations of the Antideficiency Act. We found that while most of these individuals already possessed the requisite fiscal background, many stated that they were lacking in investigative techniques – in short, the “how to” of conducting investigations.

Numerous references abound regarding ADA violations, from the originating statutes themselves residing in the U.S. Code, to fiscal law course desk books to various regulations and implementing instructions on ADA violations and other types of investigations. In an effort to save you precious time, this document is provided as a compilation of the aforementioned references – and then some. This manual is intended to serve as a training aid and an all-encompassing guide for newly appointed ADA investigating officers and their reviewers or appointing officials.

Although completion of a fiscal or appropriation law course is a prerequisite to being appointed as an ADA investigating officer, a refresher of this material is included in this manual. This knowledge is often forgotten if not used frequently and is provided here as a reminder of your previous formal training. You don’t always need to know the answers off the top of your head, but you do need to know what questions to ask and where to look for the answers.

This manual is the first of its kind, despite its long established need. As such, we will be refining the document over the next few years to make it *your* manual. As you are conducting your investigations, please feel free to consult your chain of command and this office to address any questions you might have. Your comments and suggested changes are welcome and may be sent to us by phone at 703-697-0757 (DSN 227), by mail at SAFM-FO, 109 Army Pentagon, Washington, DC 20310-0109, or by email to adelsber@hqda.army.mil.

Neil R. Ginnetti
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CONTENTS

	<u>Page</u>
I. Introduction	1
1. Purpose of Investigation	1
2. Responsibility and Personal Liability of Investigator	2
3. Assignment of Support Team Members	2
4. Administrative Matters	3
II. Examine and Review the Antideficiency Act	5
1. The Antideficiency Act Description	5
2. Prohibitions of the Antideficiency Act	5
3. What Constitutes an Antideficiency Act Violation?	6
4. Antideficiency Act Legal Foundations	7
4.1 Constitutional Foundation	7
4.2 Statutory Foundation	7
4.3 Regulatory Foundation	7
4.4 Apportionment	7
4.4.1 Definition	7
4.4.2 Purpose of Apportionment	8
4.5 Administrative Division of Apportionment	8
4.5.1 Administrative Fiscal Controls	8
4.5.2 Subdivisions of Funds	8
4.6 Apportionment and Fund Control	9
4.6.1 Further Limitations on Expenditures or Obligations	9
4.6.2 Limitations on Voluntary Services	10
4.6.3 Gratuitous Services Distinguished	11
4.6.4 Voluntary Creditor Rule	11
4.6.5 Passenger Carrier Use	11
5. Codification of the Antideficiency Act	12

CONTENTS (cont'd)

6.	Purpose	13
6.1	Constitutional Foundation	13
6.2	Statutory Foundation	13
6.3	Regulatory Foundation	14
6.4	Statutory Framework	14
6.5	Statement of Purpose	14
6.6	Determining the Proper Purpose	15
6.7	The Necessary Expense Rule	15
6.8	Frequently Questioned Expenses	16
6.8.1	Travel	16
6.8.2	Attendance at Meetings and Conventions	16
6.8.3	Entertainment	16
6.8.4	Clothing	17
6.8.5	Decorations	17
6.8.6	Business Cards	17
6.8.7	Telephone	18
7.	Time	18
7.1	Constitutional Foundation	18
7.2	Statutory Foundation	18
7.3	Regulatory Foundation	19
7.4	Period of Availability for Various Appropriations	19
7.5	Funding Replacement Contracts	19
7.5.1	Policy	19
7.5.2	Bid Protests	19
7.5.3	Terminations for Default	22
7.5.4	Terminations for Convenience of the Government	22
7.6	Limitations Based upon the Bona Fide Needs Rule	23
7.6.1	Statutory Basis	23
7.6.2	Practical Considerations	23
7.6.3	Bona Fide Need Rule Applied to Supply Contracts	23
7.6.4	Bona Fide Need Rule Applied to Service Contracts	24
7.6.5	Bona Fide Need Rule Applied to Training Contracts	25
7.6.6	Bona Fide Need Rule Applied to Maintenance and Repair Contracts	25
7.6.7	Bona Fide Need Rule Applied to Construction Contracts	25

CONTENTS (cont'd)

8. Amount	26
9. Exceptions	27
9.1 Humanitarian Assistance Exceptions to the Rule	27
9.2 Defense Emergency Response Fund (DERF)	27
9.3 Stafford Disaster Relief and Emergency Assistance Act	27
10. Antideficiency Act Violations	28
10.1 Establishing Liability	28
10.2 Sanctions or Criminal Penalty	29
10.3 Matters of Proof	29
10.4 Proximate Cause	30
10.5 Statute of Limitations	30
10.6 Examples of Violations	30
11. Legal Rights	31
11.1 United States Code Title 10, Section 831, Article 31	31
11.2 United States Constitution AMENDMENT 5	32
11.3 Privacy Act of 1974	32
11.4 Purpose of Freedom of Information Act (FOIA)	33
III. Conducting an Investigation of an Alleged ADA Violation	35
1. Confer with Support Team	35
2. Scrutinize the Investigation Checklist	35
3. Research Efforts	35
4. Analyzing a Fiscal Law Problem	36
4.1 General	36
4.2 Identify the Funds	36
4.3 Availability as to Purpose	36
4.4 Availability as to Time	36
4.5 Availability as to Amount	37
5. Developing an Investigation Plan	37

CONTENTS (cont'd)

6.	Conducting Interviews	37
6.1	Preparation for Interviews	38
6.1.1	Administrative	38
6.1.2	Substantive	38
6.2	Type of Interview	38
6.2.1	Formal Interviews	39
6.2.2	Informal Interviews	42
6.3	Modes of Interview	42
6.3.1	Face to Face	42
6.3.2	Telephone Interviews	43
6.3.3	Interviews by Others	43
6.4	Witness Availability and Cooperation	44
6.4.1	Within DA	44
6.4.2	Witnesses from Other Services	44
6.4.3	Non-DoD Civilians	44
6.4.4	Control of Witnesses	44
6.5	Other Participants in Interviews	45
6.5.1	Interpreters	45
6.5.2	Attorneys	45
6.5.3	Friends	45
6.5.4	Union Representatives	45
6.6	Self Incrimination	46
6.7	Rights Warning	46
6.8	Taking Breaks	47
6.9	Interview Sequence	47
6.9.1	Usual Sequence	48
6.9.2	Exceptions	49
6.10	Time	49
6.11	Location	50
6.11.1	Your Office	50
6.11.2	Witness' Workplace	50
6.11.3	Hotel or Motel	50
6.11.4	Other Installations	51
6.11.5	Witness' Home	51

CONTENTS (cont'd)

6.12	Interviewing Techniques	51
6.12.1	Importance of Interviewing	51
6.12.2	Preparation	51
6.12.3	Attitude and Demeanor of Investigating Officers	52
6.12.4	Formulating Questions	52
6.12.5	Control	53
6.12.6	Interviewing Non-DA Civilians	55
6.12.7	Observations by Interviewer	55
6.12.8	Memorandum for Record	56
6.12.9	Use of Polygraph	56
6.12.10	Interviewing DOs and DON'Ts	56
7.	Assemble and Assess Carefully Documented Evidence	57
7.1	Overview	57
7.2	Categories of Evidence	57
7.2.1	Documentary Evidence	57
7.2.2	Physical Evidence	58
7.2.3	Oral Statement	58
7.2.4	Personal Observation	59
7.3	Types of Evidence	60
7.3.1	Direct Evidence	60
7.3.2	Circumstantial Evidence	60
7.3.3	Hearsay Evidence	60
7.3.4	Opinion	60
7.4	Facts	60
7.5	Evaluating Evidence	61
7.6	Rules of Evidence	62
7.7	Determining the Existence of Alleged Violation(s)	62
7.8	Preparing Findings and Recommendations	63
IV.	Enter Second Phase of Investigation	65
1.	No Violation(s) Found	65
1.1	Conclude Investigation	65
1.2	Write Preliminary Report	65

CONTENTS (cont'd)

2. Violation(s) Found	65
2.1 Preliminary Report or Report on Violation	65
2.2 Identifying Circumstance	66
2.3 Developing Corrective Actions	70
2.4 Recommending Disciplinary Actions	70
2.5 Administrative Discipline	70
3. Final Report	71
APPENDIX I	73
Responsibilities of Antideficiency Act Investigation Appointing Officer or Designated Representative	73
Responsibilities of the MACOMADA Program Manager, Antideficiency Act Investigation, IO Orientation	75
Checklist for the MACOM Appointing Officers and ADA Program Manager	78
APPENDIX II	81
Checklist for the MACOM Investigating Officer	81
APPENDIX III	85
Timetable	85
APPENDIX IV	89
Subject Notification Format (For Non-criminal Allegations)	89
Subject Notification Format (For Criminal Allegations)	90
Investigation Plan Outline	91
Format to Schedule Witnesses	93
Summarized Testimony Format	94
Pre-Tape Briefing	95
Privacy Act Information	97
Testimony Information Sheet	98
Rights Warning/Waiver Certificate	99

CONTENTS (cont'd)

APPENDIX V	103
Witness Interview Guide	103
Recall Witness Interview Guide	106
Subject Interview Guide	108
Recall Subject Interview Guide	111
Interview Suspect Guide	113
Recall Suspect Interview Guide	116
APPENDIX VI	119
Examples	
Flash Report	121
Preliminary Report, Example 1	123
Preliminary Report, Example 2	127
Final Report to OSD	130
OSD Report to OMB	134
OSD Report to the President	135
OSD Report to the President of the Senate	136
OSD Report to the Speaker of the House of Representatives	137
DA Report of No Violation to DOD Comptroller	138
REFERENCES	139
ABBREVIATIONS AND ACRONYMS	141
GLOSSARY	143

I. Introduction

Your command has discovered an alleged Antideficiency Act (ADA) violation and has most likely already submitted a Flash Report to HQDA.

You have just been appointed investigating officer for the alleged violation. What do you do now? The fact that you are reading this page should indicate that you have already met with the appointing officer or designated representative. At that meeting, you received an orientation in which you were provided with information to assist you in conducting the investigation, including this manual. Moreover, you may have already met with the support team who will assist you with the investigation.

As investigating officer, complete your review of this manual before beginning the investigation. **This document is not intended to be all-inclusive**, however, it will provide clarification of the ADA investigation and attempt to simplify your work as investigating officer. Other scheduled tasks that you should complete before starting the investigation are to:

- review the flash report, checklist and timetable
- contact the support team, especially legal counsel
- ask questions to clear up issues of concern
- talk with experienced investigating officer
- check the appendices to the manual
- read the entire manual
- determine additional informational needs

NOTE: Material for the ADA Investigation Manual was gleaned from several sources of information. Please consult the References for listings of related works used. You will want to read more about it for yourself.

1. PURPOSE OF INVESTIGATION

An investigation is required to determine if a violation of the ADA has occurred. A flash report documents that an alleged violation has occurred. The validity of a potential violation shall be confirmed during the preliminary review and before a formal investigation begins. The formal phase of the investigation will determine the following:

- the relevant facts and circumstances concerning the violation
- the cause of the violation
- the appropriate corrective actions
- the lessons learned
- the individual who was responsible for the violation.

Section II of this manual will present additional information covering ADA regulations in greater

detail.

2. RESPONSIBILITY AND PERSONAL LIABILITY OF INVESTIGATOR

The investigating officer conducts the ADA investigation and must possess the ability to gather facts and use good judgment when analyzing those facts. The investigator is to make an accurate, timely, impartial and complete report, ensuring that the investigation and summary reports are prepared in accordance with the Department of Defense guidance. The investigating officer must also:

- acquire information
- collect evidence
- interview witnesses, subjects/suspects
- document all sworn statements and evidence
- determine the facts of the ADA violation
- report findings and recommendations to the appointing officer
- identify individual responsible for the violation

When investigating an alleged ADA violation, the investigating officer is responsible for maintaining fairness, impartiality, confidentiality and thoroughness. Investigations of alleged ADA violations are administrative, and not judicial, actions.

The investigating officers (IO) should be non-adversarial and conduct themselves professionally. The IO should not become biased during the course of the investigation. The investigating officer is not a prosecutor conducting a trial - ADA investigators are fact finders. The role of the IO is to protect the best interests of the government as well as the rights and confidentiality of all involved individuals. Investigating officers are protected from civil liability as long as they conduct the ADA investigations in accordance with Department of Defense regulations and act within the scope of their official duties.

The primary duties of an investigating officer are: to ascertain and consider the evidence on all sides of an issue; to be thorough and impartial; to make findings and recommendations warranted by the facts and comply with the instructions of the appoint authority; and to report the findings and recommendations to the appointing authority.

3. ASSIGNMENT OF SUPPORT TEAM MEMBERS

The investigation of an alleged ADA violation will include a number of legal issues during the course of an investigation where statements will be taken. An investigating officer should always seek legal advice as soon as possible after he is informed of this duty as often as needed while conducting the investigation. 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 investigating officer in framing the issues, identifying the information required, planning the

investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his judgment for that of the investigating officer.

The potential violation might involve a complex situation and a multitude of functional areas where a support team will be imperative. The appointing officer shall ensure that the investigating officer receives adequate support, including access to additional personnel with the requisite knowledge in all of the functional areas involved. The support team should include legal counsel, resource management, and functional area technical support.

Interaction between the support team and investigating officer is the essence of the entire investigation process and will improve the timeliness and accuracy of findings and recommendations. Early consultations between everyone involved will prevent major errors in the preliminary and final reports.

4. **ADMINISTRATIVE MATTERS.** As soon as the investigating officer receives appointing orders, he should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to field training exercise. The chronology should be a part of the final case file.

II. Examine and Review the Antideficiency Act

1. THE ANTIDEFICIENCY ACT DESCRIPTION

The Antideficiency Act is not a specific statute. Rather, it is a collection of statutes, primarily Sections 1341, 1342 and 1517 of Title 31 of the United States Code, that contain provisions commonly referred to as the Antideficiency Act. (The ADA was formerly codified under Sections 3678 and 3679 of the Revised Statutes, from which violations once derived their common usage names: the old terms, “3678” or “3679” violations are still occasionally heard.) The ADA requires the head of each executive agency to prescribe by regulation a system of administrative control of funds. It describes the legal requirements for allotment structures and definition of the role of key officials; fixes responsibilities for antideficiency violations, or regulation relating thereto; and provides the means for reporting such violations to the President and Congress through the Office of Management and Budget (OMB).

The fiscal principle inherent in the ADA is the idea that you “pay as you go.” With very limited statutory exceptions, government officials cannot make payments, or commit the government to make payments at some future time, unless there are or will be sufficient available funds through normal appropriation procedures to cover the cost.

2. PROHIBITIONS OF THE ANTIDEFICIENCY ACT

Congress passed the ADA to curtail certain funding abuses within the federal government, e.g., agencies might spend all their funding within the first few months of the fiscal year, then incur additional obligations and ask Congress for more funding. Also, agencies would incur obligations in excess of or in advance of an appropriation. The current form of the law prohibits the following:

- making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless otherwise authorized by law;
- involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law;
- accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property; and
- making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations.

3. WHAT CONSTITUTES AN ANTIDEFICIENCY ACT VIOLATION?

With the prohibitions in mind, an ADA violation occurs when -

- a formal subdivision of funds is overobligated, overdisbursed, or obligated in advance of the appropriation;
- a revolving, management, or working capital fund has an appropriation level deficit cash balance with the U.S. Treasury;
- a statutory limitation is exceeded by more than the stated reprogramming authority
 - at budget line level for unexpired procurement appropriations;
 - at program element level for unexpired research, development, test, and evaluation (RDTE) appropriations;
 - at budget activity or project level for unexpired military construction and family housing construction appropriations;
- voluntary services are accepted, except as authorized by statute;
- new obligations or any expenditures or adjustments are made or authorized in a closed account except as authorized by special circumstances, such as to correct clerical errors as provided by Treasury Financial Management Bulletin No. 94-04;
- a specific statutory limitation (minor construction limit, investment/expense threshold, etc.) is breached.

A violation of the ADA occurs when there is a breach of the formal subdivision of funds or any other specific statutory limitation. Suspected violations of the ADA must be investigated and actual violations of the ADA must be reported to the Secretary of Defense, Office of Management and Budget, President of the United States, and the U.S. Congress. Commitments, obligations, or disbursements in excess of informal subdivisions of funds (such as allowances or targets) are not ADA violations, but if they cause the governing formal fund subdivision to be breached, then a violation of the ADA has occurred. The official who exceeds the allowance or target could be held responsible for the resultant violation of the ADA.

4. ANTIDEFICIENCY ACT LEGAL FOUNDATIONS

(Note: Source of the following information is the Army Fiscal Law Course.)

4.1 Constitutional Foundation

U.S. Constitution, Article 1, Section 8, Clause 1 - The power to tax and spend.

U.S. Constitution, Article I, Section 8, Clause 16 - Organizing and training the militia.

U.S. Constitution, Article I, Section 9, Clause 7 - No money spent except as a consequence of a lawful appropriation.

4.2 Statutory Foundation

31 U.S.C. §§ 1511 - 1519 (require apportionment and administrative subdivisions of appropriations).

31 U.S.C. § 1341 (prohibits obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).

31 U.S.C. § 1342 (prohibits government employees from accepting voluntary services).

4.3 Regulatory Foundation

DOD Directive 7200.1, Administrative Control of Appropriations (May 1995).

DOD 7000.14-R, Financial Management Regulation, Vol 14 (Aug 1995).

DFAS Regulation 37-1, Army Accounting and Fund Control (Sep 1995).

4.4 Apportionment (31 U.S.C. §§ 1512 - 1513)

4.4.1 Definition

An apportionment is a distribution by the Office of Management and Budget (OMB) of amounts available in an appropriation into amounts available for specified time periods, activities, projects, objects, or combinations thereof. OMB Cir. A-34, para. 21.1.1. An officer or employee of the United States may not make or authorize an expenditure or obligation that exceeds an apportionment. 31 U.S.C. § 1517(a)(1).

4.4.2 Purpose of Apportionment

Funds are apportioned to prevent obligation at a rate that would require a deficiency or a supplemental appropriation. As a general rule, an agency may not request an apportionment that will indicate a need for such appropriations. 31 U.S.C. § 1512.

Apportionment at a rate that would require a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:

- military and civilian pay increases;
- laws enacted after budget submission which require additional expenditures; or
- emergencies involving life or property.

An agency also violates the apportionment statutes if a drastic curtailment of agency activity is necessary to enable it to complete the fiscal year without exhausting its appropriation.

4.5 Administrative Division of Apportionments (31 U.S.C. § 1514)

4.5.1 Administrative Fiscal Controls.

The head of each executive agency is required to establish a system of administrative controls that will (1) restrict obligations or expenditures to the amount of apportionments and (2) enable the agency to fix responsibility for exceeding an apportionment. The pertinent regulations are:

- OMB Circular A-34, para 31.5, Instructions on Budget Execution.
- DOD Directive 7200.1, DOD 7000.14, Vol 14, App A, Administrative Control of Appropriations.
- DFAS-IN 37-1, Army Accounting and Fund Control.

4.5.2 Subdivisions of Funds (OMB Circular A-34, para 21.1; DOD 7000.14-R, Vol 14, App A)

Allocations and Allotments. In DoD, these terms denote a formal subdivision of funds below an apportionment. In the Army, these formal subdivisions are transmitted on a computer generated form (DA1323) called a Funding Authorization Document. These are subdivisions that 31 U.S.C. Section 1514 prescribes generally.

Allowance. This is a distribution of funds that is not considered to be a formal subdivision under 31 U.S.C. § 1514. It does not create Antideficiency Act restrictions. It may also be transmitted on a computer-generated form, called a Fund Allowance System document.

An officer or employee may not make or authorize an obligation or expenditure that exceeds a formal subdivision established by regulations prescribed under 31 U.S.C. § 1514. See 31 U.S.C. § 1517(a)(2).

Activities must report suspected violations (31 U.S.C. 1351).

4.6 Appropriation and Fund Control

4.6.1 Further Limitations on Expenditures or Obligations (31 U.S.C. § 1341)

An officer or employee may not make or authorize an obligation or expenditure exceeding an amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A). The Honorable Glenn English, House of Representatives, B-223857, February 27, 1987 (unpub.).

The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment, e.g., expired appropriations.

The GAO has opined that this statute prohibits not only obligations in excess of appropriated amounts, but also obligations that violate statutory restrictions or other limitations on obligations or spending.

An officer or employee may not involve the government in a contract or obligation for payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments Under Licensing Agreement, 66 Comp. Gen. 556 (1987) (20 year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

An officer or employee may not make or authorize an expenditure or obligation or involve the government in a contract for the payment of money required by law to be sequestered. 31 U.S.C. § 1341(a)(1)(C) and (D).

A contracting officer may obligate in excess of, or contract in advance of, an appropriation if authorized by law. Statutory authority must specifically authorize entering into contract prior to, or in excess of, an appropriation. The Army Corps of Engineers Continuing Contracts, B-187278, 56 Comp. Gen. 437 (1977).

Example: 41 U.S.C. § 11a permits the Secretary of the Army to contract for fuel for one year and pay for it with either current FY funds or the ensuing year's funds.

Caveat: General authority to enter into multiyear contracts (10 U.S.C. § 2301(a)(2)) is not an exception, but specific authority granted by 10 U.S.C. § 2306(g) and (b) is an exception. See DFARS 217.103-70 and 104-70; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream, B-224081, 67 Comp. Gen. 190 (1988) (DLA lacked authority to execute multiyear contract).

Some specific Antideficiency Act issues:

A violation of the Bona Fide Needs statute, 31 U.S.C. § 1502, may result in a violation of 31 U.S.C. § 1341 or of 31 U.S.C. Section 1517.

A violation of the Purpose Statute, 31 U.S.C. § 1301(a), may also result in a violation of §§ 1341 or 1517. Department of Labor - Interagency Agreement Between Employment and Training Administration and Bureau of International Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); To the Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984). Obligation of funds for an improper purpose does not create an antideficiency violation if:

proper funds were available at the time of the erroneous obligation; and

proper funds were available when the erroneous obligation was discovered and corrected.
DFAS 37-1, para. 7-8.

4.6.2 Limitation on Voluntary Services (31 U.S.C. § 1342)

An officer or employee may not accept voluntary services or employ personal services exceeding that authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb 27, 1987 (unpub).

Voluntary services are services rendered without a prior contract for compensation or an advance agreement that services will be gratuitous. Army's Authority to Accept Services From the American Association of Retired Persons/National Retired Teachers Association, B-204326, July 26, 1982 (unpub.). Acceptance of voluntary services does not create a legal obligation.

Examples of voluntary services authorized by law include:

5 U.S.C. Section 593 (agency may accept voluntary services in support of alternative dispute resolution)

5 U.S.C. § 3111 (student intern programs)

10 U.S.C. § 2602 (President may accept assistance from Red Cross)

10 U.S.C. § 10212 (reserve officers as military consultants)

10 U.S.C. § 1588 (military departments may accept voluntary services to assist museums, natural resources programs, or family support programs, etc.).

33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).

The *Emergency Exception* is an exception limited to situations where immediate danger exists. Voluntary Servs. -- Towing of Disabled Navy Airplane, A-431142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923) (exception applied). This exception does not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

4.6.3 Gratuitous Services Distinguished

It is not a violation of the ADA to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Army's Assoc., B-204326, Jul 26, 1982 (unpub.); To the Adm'r of Veterans' Affairs, B44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov 15, 1988 (unpub.); The Agency for Int'l Dev.-Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Servs. Comm'n, B66664, 26 Comp. Gen 956 (1947).

Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program--State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, Jan 2, 1987 (unpub.) (augmentation would occur) with Senior Community Servs. Employment Program, B222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). But cf Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

4.6.4 Voluntary Creditor Rule

A voluntary creditor is one who uses personal funds to pay a perceived valid obligation of the government. As a general rule, recovery of such payments is barred.

4.6.5 Passenger Carrier Use (31 U.S.C. § 1344)

An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is used for official purposes. Federal Energy Regulatory Comm'n's Use of Gov't Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov't Vehicles for Transp.

Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not reportable as antideficiency violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm'n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).

Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.

The agency head may determine that domicile-to-office transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344 (b)(8).

The statute authorizes domicile-to-duty transportation if it is necessary for field work or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).

Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.

This statute does not apply to the use of government vehicles (leased or owned) when government employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-work Transportation for Ambassador Donald Rumsfeld, B-210555.5, December 8, 1983 (unpub.).

5. CODIFICATION OF THE ANTIDEFICIENCY ACT

When the Antideficiency Act was codified into Title 31 of the United States Code, its provisions were incorporated into a number of sections of that title. The sections that are most frequently cited are sections 1341, 1342, and 1517.

The following three bulleted items summarize the highlights. The full wording of the three sections of Title 31 maybe found in DoD 7000.14.R Vol. 14, Appendix B.

- Title 31, United States Code, Section 1341, Limitation on Expending and Obligating Amounts. Section 1341 forbids any officer or employee of the United States from:

obligating, expending, or authorizing the use of funds exceeding the amount available in an appropriation or fund.

involving the Federal Government in any contract or obligation for the payment of money before an appropriation is made available.

obligating, expending, or authorizing of funds required to be sequestered.

involving the Federal Government in any contract or obligation for the payment of money required to be sequestered.

- Title 31, United States Code, Section 1342, Limitation of Voluntary Services. Section 1342 forbids the acceptance of voluntary services on behalf of the Federal Government, or employment of personal services in excess of that authorized by law, except as it may be necessary in emergencies involving the safety of human life or the protection of property.

This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term ‘emergencies involving the safety of human life or the protection of paid in property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

- Title 31, United States Code, Section 1517, Obligation and Expenditure Limits. Section 1517 forbids the overobligation and overexpenditure of an apportionment or an amount permitted by a regulation prescribed for the administrative control of appropriations.

6. PURPOSE

6.1 Constitutional Foundation

Article I, Section 8, Clause 1. Congress has the power to tax and spend.

Article I, Section 9, Clause 7. No money shall be drawn from the Treasury, but in consequence of appropriations made by law.

6.2 Statutory Foundation

31 U.S.C. § 1301(a). Purpose statute.

10 U.S.C. § 2805. Minor military construction.

10 U.S.C. § 114(a). Authorizations required.

31 U.S.C. § 3302(b). Miscellaneous receipts.

18 U.S.C. § 209. Salaries of Government employees.

31 U.S.C. § 1535. Economy Act.

10 U.S.C. § 2608. Donations.

6.3 Regulatory Foundation

DFAS-IN 37-100-FY

6.4 Statutory Framework

Purpose of expenditure must be proper:

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law. 31 U.S.C. § 1301(a).

As an appropriation must be derived from an act of Congress, it is up to Congress to determine the purpose for which an appropriation may be used.

6.5 Statement of Purpose

Appropriations acts are of paramount importance in determining purpose. Appropriations are differentiated by service (Army, Navy, etc.), component (Active, National Guard, etc.), and purpose (Operation and Maintenance, Procurement, etc.). Types of appropriations include:

Defense Appropriations Act -

Military Personnel - Used for pay for personal needs. Examples: subsistence, initial clothing issue, pay, quarters allowance, PCS travel.

Operation and Maintenance (O&M) - Used for pay for day-to-day operations. Examples: pay and benefits of civilian employees, awards, contractual services, utilities, maintenance (recurrent work to prevent deterioration), repair (overhaul, reprocessing, or replacement to reverse deterioration), TDY travel, supplies, paper, cleaning materials, repair parts for all equipment, office machines (under \$100,000).

Procurement - Used for production and modification of aircraft, missile, weapons, tracked vehicles, ammunition, and other procurement. Examples: tanks, jeeps, sedans, weapons, rifles, ammo, artillery, missiles, gun tubes, etc.

Research, Development, Test, and Evaluation (RDT&E) - Used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment.

Military Construction Appropriations Act -

Used to pay for any new or continuing construction projects listed as line items in the Military Construction Appropriations Act and authorized in the Military Construction Authorization Act.

A statutory exception exists for unspecified minor construction. 10 U.S.C. § 2805. DoD Directive 4270.36, AR 415-35, AFR 86-1.

Projects of \$1.5 million or less may be done from Military Construction Appropriations although not specified in the act.

Projects of \$500,000 or less may be done from Operation and Maintenance funds in the Defense Appropriations Act.

Authorization acts usually accompany appropriations acts and may include clarifying language.

Appropriations for certain purposes (aircraft, vessels, missiles, research and development) require separate statutory authorization (10 U.S.C. § 114(a)). When funds are authorized and appropriated with different limitations, the more restrictive limitation controls.

Legislative History is the record of congressional deliberations which precede the passage of a statute.

The President's budget and the budget justifications contain detailed descriptions of the purpose proposed for the requested appropriations. The budget contains computer tables showing where funds are to be spent called P-1 and R-1 documents.

6.6 Determining the Proper Purpose

Test for a Proper Purpose:

- The expenditure of an appropriation must be for a particular statutory purpose, or necessary and incident to the proper execution of the general purpose of the appropriation.
- The expenditure is not prohibited by law.
- The expenditure must not be otherwise provided for, that is, must not fall within the scope of some other appropriation.

6.7 The Necessary Expense Rule

"...(T)he standard for measuring the propriety of a particular expenditure not specified in the statute is the "necessary expense" test traditionally used in determining purpose availability under 31 U.S.C. §1301(a). Under this test, an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment

of that function, and if it is not otherwise prohibited by law." Internal Service Federal Credit Union-Pre-automatic Teller Machine, 66 Comp. Gen. 356 (1987).

Every item of expenditure need not be specified in an appropriation act. The spending agency has reasonable discretion in determining how to carry out the purpose of an appropriation. An appropriation made for a specific purpose is available for expenses necessarily incident to achieving that purpose.

A necessary expense does not have to be the only way or even the best way to achieve the purpose of the appropriation. Secretary of the Interior, 34 Comp. Gen. 599 (1955). It must, however, be more than merely desirable. Utility Costs Under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).

Determinations are fact/agency/purpose specific and made on a case-by-case basis.

When new or additional duties are imposed by legislation or Executive Order, and no additional appropriations are provided, the current appropriation may be charged if a sufficient relationship exists. Director, National Science Foundation, 46 Comp. Gen. 604 (1967), The Honorable Bill Alexander, 63 Comp. Gen. 422 (1984).

6.8 Frequently Questioned Expenses

6.8.1 Travel

Reimbursement for travel expenses incurred on official travel is authorized by statute. Before this legislation was enacted, such expenses were reimbursable as a necessary expense. 4 Comp. Gen. 475 (1898).

6.8.2 Attendance at Meetings and Conventions

Government employees may attend nongovernment-sponsored meetings at government expense if it is (1) part of an authorized training program (5 U.S.C. § 4109) or (2) related to agency function or management (5 U.S.C. § 4110).

Government employees may attend government sponsored meetings as a necessary expense.

Military personnel may attend nongovernment-sponsored meetings with administrative approval. 37 U.S.C. § 412. Approval is not needed for government meetings. Secretary of the Navy, 50 Comp. Gen. 527 (1971).

6.8.3 Entertainment

Appropriated funds may not be used for entertainment except when specifically authorized by statute and also authorized or approved by the proper administrative officer. Administrator, Veterans Administration, 43 Comp. Gen. 305 (1963).

- Coffee and donuts unauthorized. Department of the Army -- Claim of the Hyatt Regency Hotel, December 22, 1989 (unpub.).
- Live musical performance exception for agency EEO cultural and ethnic programs. Internal Revenue Service -- Live Entertainment and Lunch Expense for National Black History Month, 60 Comp. Gen. 303 (1981).
- Fireworks unauthorized. Navy Fireworks Display, B-205292, 82-2 CPD 1, January 8, 1982.
- Refreshments both allowed and not allowed. Refreshments at Awards Ceremony, 65 Comp. Gen. 738 (1986), Administrator, Veterans Administration, 43 Comp. Gen. 305 (1963).

6.8.4 Clothing

Most items of wearing apparel are the personal responsibility of an employee. However, there are three statutes under which purchase of apparel may be authorized: 5 U.S.C. § 7903 (special clothing for hazardous occupations), 5 U.S.C. § 5901 (uniform allowances), and Occupational Safety and Health Act of 1970 (protective clothing).

- Safety shoes authorized. Internal Revenue Service -- Purchase of Safety Shoes, 67 Comp. Gen. 104 (1987).
- Evening clothes for diplomats okay. United States Embassy, London -- Rental of Ceremonial Dress, 68 Comp. Gen. 638 (1989).

6.8.5 Decorations

- Agencies may purchase decorative items if consistent with work-related objectives and not for personal convenience. Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985).
- Personal Christmas cards not proper expenditures. The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985).
- Seasonal decorations proper. Department of State and General Services Administration-- Seasonal Decoration, B-226011, 67 Comp. Gen. 87 (1987).

6.8.6 Business cards

Business cards are a personal expense and not chargeable to public funds. Forest Service-- Purchase of Information Cards, B-231830, 68 Comp. Gen. 467 (1989), Promotional and Business Expenditures in the Sale of Commemorative Coins, B-206273.2, 68 Comp. Gen. 583 (1989).

6.8.7 Telephone

Except for long-distance official business calls, installation and charges in a private residence are generally not allowed. 31 U.S.C. § 1348. Telephone in temporary quarters allowed. Use of Appropriated Funds to Install Telephone Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD, Para 180 (appropriated funds may not be used to install telephone lines in Director's residence). Note: DOD has statutory authority to install telephone lines in residences for national defense purposes. 31 U.S.C. § 1348(d).

7. TIME

7.1 Constitutional Foundation

U.S. Constitution, Article I, Section 8, Clause 1 - The power to tax and spend.

U.S. Constitution, Article I, Section 8, Clause 16 - Organizing and training the militia.

U.S. Constitution, Article I, Section 9, Clause 7- No money spent except as a consequence of a lawful appropriation.

7.2 Statutory Foundation

31 U.S.C. § 1552. An appropriation is available for obligation for a definite period of time, and it must be obligated during this period of availability. If it is not, the authority to obligate expires.

The Annual Appropriations Acts.

31 U.S.C. § 1341(a)(1)(B). Funds may not be obligated prior to signature of the Appropriations Act and receipt of the funds from the Office of Management and Budget through higher headquarters.

31 U.S.C. § 1502. Appropriations are available for obligation during the year in which they are appropriated. Funds are presumed to be available for obligation for one year.

31 U.S.C. § 1502. Funds may not be obligated after the expiration of their period of availability.

7.3 Regulatory Foundation

DOD FMR 7000.14-R, Vol 14.

DFAS Regulation 37-1, Army Accounting and Fund Control (1995).

7.4 Period of Availability for Various Appropriations

Operation & Maintenance (O&M) Funds - 1 year.

Research, Development, Test & Evaluation (RDT&E) Funds - 2 years.

National Guard & Reserve Equipment - 3 years.

Procurement Funds - 3 years.

Military Construction - 5 years.

Stock and Industrial Funds - Indefinite (No Year).

Multi-Year - Varies up to five years depending on the program. The Defense Department receives a variety of special purpose appropriations, some of which are available for more than one year. For example, O&M, Humanitarian Assistance -- 2 years; and O&M, Goodwill Games -- 2 years.

(See Figure II-1, Appropriation life.)

7.5 Funding Replacement Contracts

7.5.1 Policy

There are three important exceptions to the general prohibition on obligating funds after the period of availability: bid protests, terminations for default and terminations for convenience.

7.5.2 Bid Protests

[F]unds available to an agency for obligation for a contract at the time a protest is filed in shall remain available for obligation for 100 working days after the date on which the final ruling is made on the protest. This authority applies to protests filed at the GAO or in a court. 31 U.S.C. § 1558.

This statutory provision was incorporated at FAR ~33.102(b). 55 Fed. Reg. 55,782 (1990), (Federal Acquisition Circular 90-3).

Appropriation Availability

- **Available for obligation equates to time limits to make new obligations.**
 - *OMA and FHO - one year or annual accounts*
 - *RDTE - two years*
 - *Procurement (APA, MIPA, WTCVA, OPA & PAA) - three years*
 - *MCA - five years*
 - *BRAC - # of years specified in law (FY91-10 yrs, 93-9 yrs, &95-7 yrs)*
 - *AWCF (capital budget) - no-year account (available w/o year limitation)*
 - *FMS (trust fund) - also no-year appropriation, but executed like annual account*

For OMA

it is the time to obligate funds, but some contractual/in house effort or deliveries may extend into next year

In procurement, it is the time required to accomplish effort with 12-month buys to avoid production breaks.

Procurement includes ALT, PLT, and a 12-month Funded Delivery Period (FDP).

If FDP extends beyond appropriation availability, then advance procurement is authorized to maintain 3-year account.

Figure II-1. Appropriation life.

Appropriation Life - Established by Laws

- Availability - time to make obligations (1 year or multiyear depending upon appropriation)
- Expired for obligation - no new projects, but can make obligation adjustments (up and down). For example, adjust contract incentives estimate or reprocure components because of vendor default.
- 5 years to pay the bills and disburse funds (same for all appropriations).
- Appropriation closes - new money needed for additional disbursements - future payments (from current appropriation) after 30 Sep for cancelling account, which is last year of appropriation life.

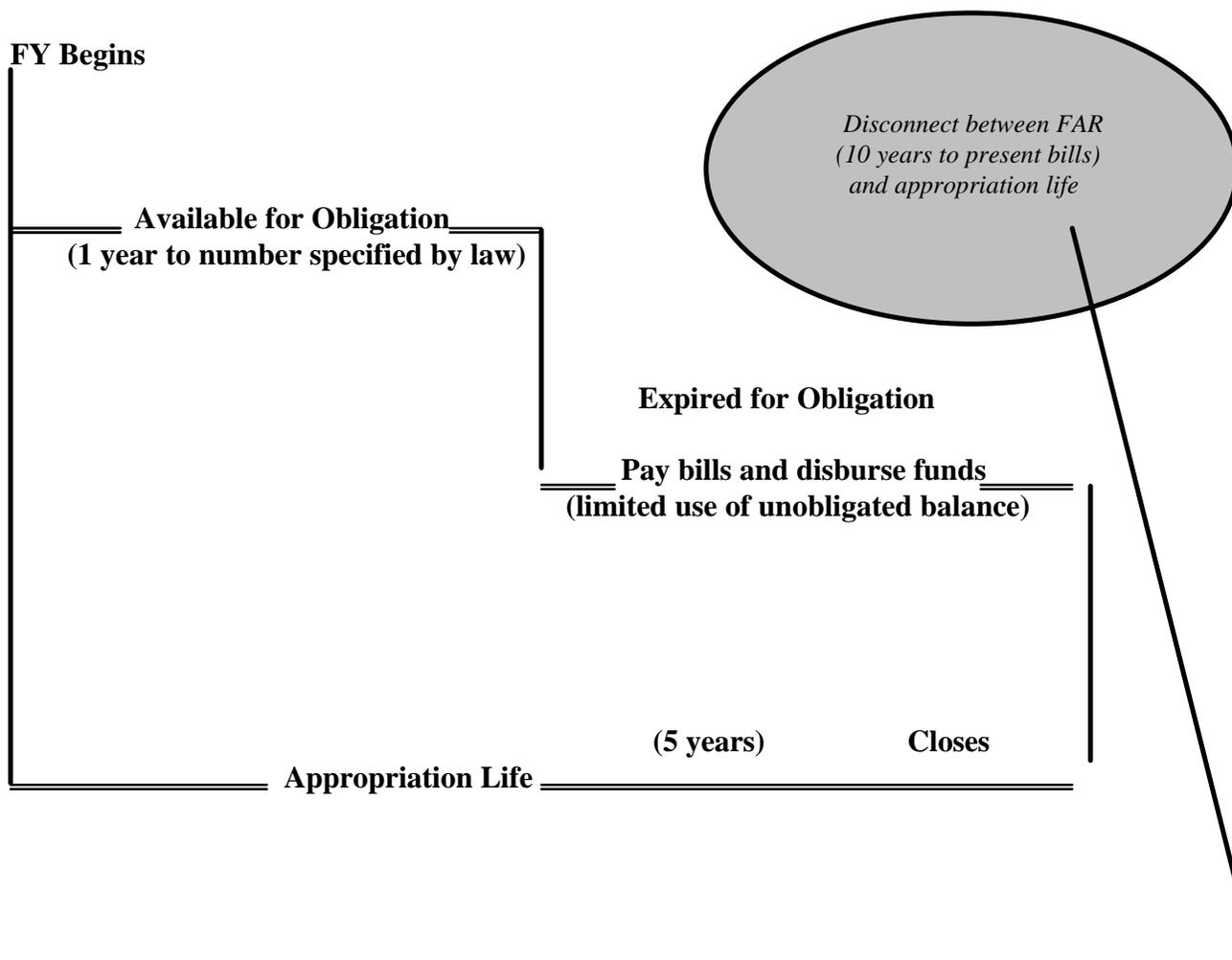


Figure II-1 (cont.). Appropriation life.

7.5.3 Terminations for Default

If a contract or order is terminated for default, and a bona fide need still exists for the supplies or services, the original funds remain available for obligation for a reprocurement, even if they would otherwise have expired. The reprocurement contract must be entered into without undue delay and must be for substantially the same item or service. DFAS 37-1, para. 9-5(h), Citing, Louis W. 155 Comp. Gen. 1351 (1976); See also Funding of Replacement Contracts, 60 Comp. Gen. 591 (1981).

To the extent that additional funds are required for the replacement contract, and the funds have otherwise expired, the original year's funds may be used to fund the additional cost. Louis W. Rosine Co., 55 Comp. Gen. 1351 (1976); See also Funding of Replacement Contracts, 60 Comp. Gen. 591, 594 (1981).

7.5.4 Termination for Convenience of the Government.

The general rule is that a prior year's funding obligation is extinguished upon termination of a contract for convenience, and funds do not remain available to fund a replacement contract in a subsequent year where a contracting officer terminates a contract for the convenience of the government.

The Comptroller General adopted an important exception to this rule in Funding of Replacement Contracts, 68 Comp. Gen. 158 (1988), and Navy, Replacement Contract, 70 Comp. Gen. 230 (1991), 91-1 CPD para. 117. Funds originally obligated in one fiscal year for a contract that is later terminated for convenience in response to a court order or to a determination by the General Accounting Office or other competent authority that the award was improper.

This authority was expanded in 1991 to include terminations for convenience resulting from a contracting officer's determination that the award was clearly erroneous.

If the original award is determined to be improper and the contract is terminated for convenience, either by the contracting officer or as the result of an order by a judicial body, the funds originally obligated remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions:

- the original award was made in good faith;
- the agency has a continuing bona fide need for the goods or services involved;
- the replacement contract is of the same size and scope as the original contract;
- the replacement contract is executed without undue delay after the original contract is terminated for convenience; and

- the original award was improper, the contracting officer must execute a written determination stating the factual and legal basis for the conclusion that the award was improper.

7.6 Limitations Based upon the Bona Fide Needs Rule

7.6.1 Statutory Basis

The statutory basis: "[t]he balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law." 31 U.S.C. § 1502(a).

Appropriated funds may only be obligated for properly incurred expenses. That is, the requirement must be a bona fide need of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition. See Magnavox - Use of Contract Underrun Funds, B-207453, September 16, 1983, 83-2 CPD para. 401; To the Secretary of the Army, 33 Comp. Gen. 57 (1953).

The bona fide needs rule applies only to appropriations with limited periods of availability for obligation.

7.6.2 Practical Considerations

A bona fide needs inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government.

The needs of the government and the nature of a product or service determine when bona fide need arises.

The term "bona fide need" has meaning only in the context of a fiscal law analysis. A bona fide needs analysis is separate and distinct from an analysis of contract specifications and whether or not they are a legitimate expression of the government's minimum needs.

Determining the bona fide need for an acquisition requires the application of judgment.

Each bona fide need determination is fact specific.

Bona fide need is determined at the time of an obligation of the appropriated funds.

7.6.3 Bona Fide Need Rule Applied to Supply Contracts

Generally, bona fide need is determined by the date the government actually requires the supplies being acquired, i.e., when the government actually will be able to use the items.

Accordingly, funds are obligated for the fiscal year in which the supplies will be delivered for use. To Chairman, United States--Atomic Energy Commission, B-130815, 37 Comp. Gen. 155

(1957); To Betty F. Leatherman, Department of Commerce, 44 Comp. Gen. 695 (1965); To Administrator, Small Business Administration, 44 Comp. Gen. 399 (1965).

Supply needs of a future fiscal year are the bona fide need of the subsequent fiscal year, unless exception applies. Two recognized exceptions are: the lead-time exception and the stock level exception.

Lead-time exception to the bona fide need rule: It is appropriate to take into consideration the normal production lead-time in determining the bona fide need for an acquisition.

- For example, if the normal lead-time between order and delivery of an item is 45 days, an obligation of fiscal year 1996 funds is appropriate for a delivery on or before 15 November 1996. (Remember 1 October 1996 is the beginning of fiscal year 1997.) This is a bona fide need of fiscal year 1996. If delivery after 15 November 1996 is permitted by the government, there is no bona fide need for the item in fiscal year 1996, because the necessary lead-time prior to delivery permits the item to be ordered and delivered in FY 1997.
- If the government establishes a delivery date for an item and that delivery date is both beyond the normal lead-time and in the next fiscal year, funds for the next fiscal year must be used. In the example above, if delivery is permitted after 15 November 1996, fiscal year 1997 funds must be used.

Stock level exception to the bona fide need rule: It is also appropriate to purchase sufficient supplies necessary to maintain adequate and normal stock levels.

- For example, a contract to maintain the normal, authorized stock levels of repair parts may be awarded in September 1996, and requiring delivery in September 1996, using FY 1996 funds, even if it is known that the repair parts will not be used until early October 1996.
- Current year funds may be used to replace stock consumed in the current fiscal year, even though the replacement stock may not be used until the following fiscal year.
- Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

7.6.4 Bona Fide Need Rule Applied to Service Contracts

General rule: Services are the *bona fide* need of the fiscal year in which performed. DFAS-IN Reg. 37-1, para. 9-5c; DFAS-IN Reg 37-1, tbl 9-1; AFR 170-8, para. 4c(2); Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); EPA Level of Effort Contracts, 65 Comp. Gen. 154 (1985). Thus, service contracts generally may not cross fiscal years and agencies must fund service contracts with dollars available for obligation on the date the contractor performs the services. DFAS-IN Reg 37-1, para. 9-5c(3)(g).

Nonseverable service exception: If the services produce a single or unified outcome, product, or report, the services may be regarded as being nonseverable. If so, the entire effort may be funded with dollars available for obligation at the time the contract is executed, and the contract may cross fiscal years.

Statutory exception to the bona fide need rule concerning services: There are statutory exceptions to the general rule that contracts for severable services are the bona fide need of the fiscal year in which the services are performed. 10 U.S.C. § 2410a as modified by the 1998 DOD Authorization Act, para. 801. Severable services contracts for a period not to exceed 12 months may be awarded at any time during the fiscal year, and they may be completely funded with current appropriations.

See Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274, May 22, 1996, 96-1 CPD para. 247 (Air Force may award two vehicle maintenance contracts charging fiscal year 1994 money for each contract so long as each contract is properly awarded in fiscal year 1994 and each contract does not exceed 12 months in duration).

7.6.5 Bona Fide Need Rule Applied to Training Contracts

Training courses that begin on or about the first of October may be paid for with the prior year's appropriation if the scheduling of the course is beyond the control of the agency and the time between award of the contract and performance is not excessive. Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-238740, 70 Comp. Gen. 296 (1991).

7.6.6 Bona Fide Need Rule Applied to Maintenance and Repair Contracts

Current funds may be obligated for maintenance and repair contracts near the end of the fiscal year, even if performance may not begin until the next fiscal year. DFAS 37-1, para. 9-5c(3)(b) Tbl. 9-1, fn. 6. This authority is limited to the following situations:

- the requirement must represent a bona fide need of the current fiscal year;
- the contract must contain a specific provision requiring that the work must actually start on or before January 1 of the following calendar year, except in contracts with a foreign government or contracts entered into pursuant to a binding international agreement.

Commencement of work is evidenced by physical on-site evidence based upon a visual inspection or by documentary evidence of costs incurred and materials ordered.

7.6.7 Bona Fide Need Rule Applied to Construction Contracts

The government must consider **normal** weather conditions when planning for outdoor construction or renovation projects. A project that cannot reasonably be expected to commence before the onset of winter weather is not the *bona fide* need of the prior fiscal year. DFAS-IN Reg. 37-1, para. 9-5c(3)(n). For example, the government probably should not award a contract

to pave 10 miles of roads in Fairbanks, Alaska, on 30 Sep. 1997, and funded with FY 97 dollars, unless the government intends to demand immediate performance of the work.

If mission requirements make it impossible to allow the commencement of the work until 15 December, the requirement is not the bona fide need of the prior fiscal year.

Factors within the government's control are most important in determining bona fide need. Cf, Theodor Arndt GmbH & Co., B-237180, January 17, 1990, 90-1 CPD para. 64 (agency decision to wait until Fiscal Year 1990 to award a service contract, with performance commencing on 15 October 1989, is correct where services are not needed until that date). In analyzing the bona fide need for a given item, the following factors are appropriate for consideration:

- the required delivery date in the contract;
- the normal rate of consumption;
- the date when the government is making facilities, sites, or tools available; and
- the degree of actual control the government has over the date that work may be commenced.

For example, if a legal office will not be available for renovation until 25 December 1996 because a brigade is deploying on the 20th of December and cannot be disrupted between 1 October and 20 December, and if the normal lead-time for starting a renovation project of this type is 15 days, the renovation is a bona fide need of Fiscal Year 1997 because the contract could be awarded in FY 1997 and performance could commence by the time that the brigade vacated the building. Accordingly, use of Fiscal Year 1996 funds violates the bona fide need rule.

These principles apply to Job Order contracts entered into under the authority of AFARS 17.9000.

8. AMOUNT

Title 31, United States Code, Section 1341, Limitation on Expending and Obligating Amounts. Section 1341 forbids any officer or employee of the United States from:

- obligating, expending, or authorizing the use of funds exceeding the amount available in an appropriation or fund;
- involving the Federal Government in any contract or obligation for the payment of money before an appropriation is made available;
- obligating, expending, or authorizing of funds required to be sequestered; or

- involving the Federal Government in any contract or obligation for the payment of money required to be sequestered.

Section 1004, Public Law 102-484 permits, in certain circumstances, currently available appropriations to be charged when sufficient obligation authority does not exist in certain expired accounts.

The amount charged to a currently available appropriation may not exceed 1 percent of the appropriation for the currently available account being charged, or 1 percent of the appropriation of the expired account, whichever is less.

9. EXCEPTIONS

9.1 Humanitarian Assistance Exceptions to the Rule

National Defense Authorization Act for Fiscal Year 1993, Section 304 amended subchapter 11 of chapter 152 of Title 10, United States Code, by adding 10 U.S.C. § 2551, which provides, in part, that “To the extent provided in defense authorization Acts, funds authorized to be appropriated to the Department of Defense for a fiscal year for humanitarian assistance shall be used for the purpose of providing transportation of humanitarian relief and for other humanitarian purposes worldwide.”

9.2 Defense Emergency Response Fund (DERF)

The Department of Defense Appropriations Act of 1990 established the DERF to "be available for providing reimbursement to currently applicable appropriations of the Department of Defense for supplies and services provided in anticipation of requests from other Federal Departments and agencies and from State and local governments for assistance on a reimbursable basis to respond to natural or manmade disasters. The Fund may be used upon a determination by the Secretary of Defense that immediate action is necessary before a formal request for assistance on a reimbursable basis is received. There shall be deposited to the Fund: (a) reimbursements received by the Department of Defense for the supplies and services provided by the Department in its response efforts and (b) appropriations made to the Department of Defense for the Fund. Reimbursements and appropriations deposited to the Fund shall remain available until expended.”

9.3 Stafford Disaster Relief and Emergency Assistance Act

Public Law 93-288, 42 U.S.C. 5121, et seq.

The Federal Response Plan (FRP): The FRP is a Memorandum of Understanding between FEMA and other Federal agencies, which provide domestic disaster assistance, including DoD. The FRP implements the FEMA Director’s authority under E.O. 12148 to “establish Federal

policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies.”

12 Emergency Support Functions (ESF): ESF 3 - Public Works; ESF 9 - Urban Search and Rescue

DoD Implementing Regulations: DoD 3025.1 Use of Military Resources During Peacetime Civil Emergencies within the United States, its Territories, and Possessions, May 23, 1980; and AR 500-60, Disaster Relief, 1 August 1981.

Reimbursement: 44 CFR § 206.8 FRP. Financial Management Annex (FM-1). FEMA mission assignment, taskings, letters, fund cites are contained in FEMA tasking letters.

10. ANTIDEFICIENCY ACT VIOLATIONS

10.1 Establishing Liability

An accountable officer is any government officer or employee who, by reason of his employment, is responsible for or has custody of government funds. Any government officer or employee, military or civilian, who physically handles government funds, even if only once or occasionally, is “accountable” for those funds while they are in his custody.

Certifying Officers and Other Accountable Officers Distinguished:

Certifying Officer - a person who certifies that payment vouchers are correct and ready for payment. A certifying officer does not have public funds in his possession.

Other Accountable Officers - any other officer or employee, including one not involved directly in government fiscal operations, who has custody or control of federal funds.

Disbursing Officer - is one who disburses funds and renders accounts in accordance with laws and regulations governing disbursement of public funds.

Cashier - is one appointed to perform limited cash disbursing functions or other cash-handling operations to assist a finance officer or a Class B agent officer (a subordinate/assistant of the finance officer).

Other Agents and Custodians - Paying, Collection, and Imprest fund agents. See DoD Regulations 7000.14.R, Vol. 5, para. 020604; Vol. 5, para 020701; and para. 020901 to read more about paying agents.

Accountable officers are strictly and automatically liable for losses or erroneous payments of public funds. Accountable officers are “insurers” of public funds in their custody or for which they are otherwise responsible. Liability does not attach for losses due to acts of God or acts of

the public enemy. Lack of fault or negligence, however, may provide a basis for relief from the obligation to repay the loss.

Will a commanding officer's order to issue an improper payment shield a disbursing officer from liability? The Disbursing Officer (DO) is protected from illegal orders if the DO requires the commander to issue a written order before payment.

Before initiating collection for a loss, the appropriate agency must permanently establish the accountable officer/employee's liability. "Permanently establish" means that the officer/employee has agreed to repay the loss or the appropriate authority has denied relief.

DoD Regulation 7000.14-R requires a formal investigation when a commander suspects fraud caused a loss. The commander may formally investigate other losses as well. DoD Regulation 7000.14-R, Vol. 5, para. 060503. See also DoD Regulation 7000.14-R, Vol. 5, section 0607 (Investigation requirements and procedures). Consult legal counsel.

10.2 Sanctions or Criminal Penalty

If a violation has been determined to have been knowingly and willfully committed, there are statutory provisions requiring criminal penalties. Thus, an officer or employee found responsible for committing a violation knowingly and willfully may be subject to criminal penalties. The investigating officer shall terminate all investigations that provide any indications that the violation was knowingly and willfully committed. The investigating officer should consult with legal counsel to determine if the investigation should be referred to the appropriate criminal investigation organization for action.

- Both sections 1350 and 1519 of Title 31, United States Code, discuss criminal penalties for violations of the ADA. Title 31, United States Code, section 1350, prescribes that "an officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both." Title 31, United States Code, section 1519, includes the violation of section 1517(a) and provides the same level of punishment. Criminal penalties for military personnel may include punishment under Article 15 of the Uniform Code of Military Justice or trial by Court-Martial.
- When submitting a final summary report of violation to the Office of the Under Secretary of Defense(Comptroller) that may require criminal penalties, a statement to that effect -- which is required by OMB Circular No. A-34 -- shall be included in the summary report from the Assistant Secretary of the Military Department for Financial Management, or the Comptroller or Senior Financial Manager for other DoD Components.

10.3 Matters of Proof

Evidentiary Showing. To qualify for relief from liability for a loss or deficiency under the statutes, an accountable officer/employee generally must prove that he was acting in an official capacity

and was not negligent, or that any negligence did not cause the loss. See DoD Regulation 7000.14-R, Vol. 5, app. C, para. C107.

The “Reasonable Person” Standard of Care. It is necessary to determine whether the officer/employee was negligent, a “reasonable care” standard is applied. Liability results when an accountable officer/employee’s conduct constitutes simple or ordinary negligence, not gross negligence. The standard is whether the accountable officer/employee did what a reasonably prudent and careful person would have done to safeguard his own property under similar circumstances. This is an “objective” standard. It does not vary with such factors as the level of experience or the age of the particular accountable officer concerned. Failure to follow regulations is negligence. Hence, accountable officers/employees must familiarize themselves with applicable regulations. See DoD Regulation 7000.14-R, Vol. 5, para. 010401.B

If there is no clear evidence of negligence, the fact that a loss or deficiency has occurred creates a rebuttable presumption of negligence on the part of the accountable officer or employee. This presumption arises from the accountable officer/employee’s strict liability for any loss or deficiency. The accountable officer/employee can rebut this presumption of negligence by presenting affirmative evidence that he exercised due care.

10.4 Proximate Cause

If the accountable officer/employee was negligent, the Comptroller General will consider whether the negligence was the proximate cause of the loss or deficiency. If negligence occurred and it was the proximate cause of the loss or deficiency, relief from liability may not be granted. If an accountable officer was negligent but the negligence was not the proximate cause of the loss or deficiency, relief may be granted under the statute.

10.5 Statute of Limitations

The statute of limitations for settling accounts of an accountable officer is three years after agency accounts are substantially complete. After this period, the account is settled by operation of law, and an accountable officer has no personal financial liability for a loss in question.

“Substantially complete” means the time when, absent fraud by the officer or civilian, the agency can audit the paperwork upon which the officer or civilian based his action. For DoD, DoD Regulation 7000.14-R has detailed examples of when the 3-year period begins. DoD Regulation 7000.14-R, Vol. 5, para. 060802.

The statute of limitations does not apply if a loss is due to fraud or other criminal acts of an accountable officer or civilian. 31 U.S.C. § 3526(c) (2).

10.6 Examples of Violations

The most common types of violations in the Department of Defense can be significantly decreased by proactive measures specifically tailored to address the causes and corrective actions required to

prevent their occurrence. DoD personnel with responsibilities for the control and use of funds should be aware of these common types of violations and be required to take positive actions to avoid their occurrence.

The five types of circumstances that account for most of the violations of the ADA in the Department are as follows:

- exceeding limits on the use of Operation and Maintenance (O&M) funds for minor construction projects;
- exceeding the fund availability amount in an appropriation or exceeding the amount of an allotment/suballotment;
- using O&M funds to acquire equipment items that exceed the designated amount for the mandatory use of procurement funds (expense versus investment threshold rule);
- not recording obligating documents in a timely or accurate manner which results in overobligating funds already obligated (because the obligating document was not recorded timely or correctly); and
- obligating in advance of funds being provided.

Additional causes of violations include:

- established internal controls and standard operating procedures not followed;
- inadequate supervisory involvement or oversight;
- lack of appropriate training; and
- inadequate standard operating procedures and internal controls.

11. LEGAL RIGHTS

11.1 United States Code Title 10, Section 831, Article 31

Compulsory self-incrimination prohibited:

- “No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
- “No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is

accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

- “No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
- “No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.”

11.2 United States Constitution Amendment 5

Criminal actions -- Provisions concerning -- Due process of law and just compensation clauses:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Three elements that must exist simultaneously before Fifth Amendment is violated are (1) compulsion of (2) testimonial communication that is (3) incriminating, and if any of these conditions is not satisfied, compelled self-incrimination within meaning of Fifth Amendment is not at stake. The Fifth Amendment protects a person from compelled self-incrimination at all times, not just upon arrest or during custodial interrogation.

The object of the Fifth Amendment provision “that no person shall be compelled in any criminal case to be a witness against himself” was to declare that person should not be compelled, when acting as witness in any investigation, to give testimony which might tend to show that he committed crime.

11.3 Privacy Act of 1974

Provision of the Privacy Act, section 552a of Title 5 United States Code, requiring each agency that maintains a system of records to allow individuals to gain access to their records was not a pro tanto repeal of this section and is not the sole means of access for first-party information.

An individual may utilize Privacy Act, section 552a of this title, or this section or both to seek access to information about himself in agency records, and is entitled to cumulative total of access rights under the two sections.

While section 552a of this title was designed to provide individuals with more control over gathering, dissemination and accuracy of agency information about themselves, this section was intended to increase the public's access to governmental information.

11.4 Purpose of Freedom of Information Act (FOIA)

The purpose of FOIA is to permit the public to scrutinize government's performance of its duties and promote governmental honesty and, thus, doubts as to propriety of disclosure are to be resolved in favor of openness. The overriding purpose of the Freedom of Information Act is to mandate policy of broad disclosure of government documents and maximum feasible public access to government information. Disclosure rather than secrecy is the basic objective.

III. Conducting an Investigation of an Alleged ADA Violation

1. CONFER WITH SUPPORT TEAM

If you are not clear about an issue, develop a list of questions for legal counsel as well as other members of the support group. Always write down questions that arise during the investigation so when you confer with legal counsel you can address all of the important issues. It is of utmost importance that you maintain close connections with legal counsel. Legal counsel is your most important link with the interpretation of regulations and statutes related to ADA.

Once the members of the support group are appointed, you should schedule appropriate times to meet and/or confer with them that is convenient for everyone. It does not have to be a group meeting, but develop a plan where you can contact members when you need help and need it quickly. Consultations should be scheduled throughout the duration of the investigation. Do not try to fly alone on this one.

Appendix III of this manual is a suggested HQDA timetable to assist you in scheduling your investigation. The investigation must be completed without delay. Make sure that you understand the due date for the Preliminary Report and/or the Final Report. Those due dates as well as the Date of Discovery will determine the length of time for the investigation. Get a clear understanding when the appointing officer expects you to return with a report. The timetable is part of the DoD regulations, and extensions are granted for special situations only by the Principal Deputy Assistant Secretary of the Army (FM&C).

2. SCRUTINIZE THE INVESTIGATION CHECKLIST

Appendix II of this manual is a checklist designed as a quick reference to help the investigating officer keep track of the step-by-step procedures to be followed during the investigation. It is set in sequential order and when used correctly will help prevent the omission of important information from the investigation. The checklist will assist in documentation of the investigation and the preparation of the final report of violation and ensure that the IO has covered all the basic elements necessary.

3. RESEARCH EFFORTS

During the investigation, an investigating officer may be required to perform extensive research. The research effort may include accounting directives and regulations, directives and regulations related to the functional area involved (such as civil engineering or contracting), legal directives, public law, and legal opinions. An investigating officer shall normally review all specific documentation in the functional area involved related to the violation such as purchase requests, contracts, word orders, vouchers, and supporting materials, etc.

4. ANALYZING A FISCAL LAW PROBLEM

4.1 General

The support team confronted with a fiscal law issue should resolve the issue using a simple, four-step approach:

Step 1: Identify the appropriation proposed for obligation and expenditure.

Step 2: Determine whether the appropriation is available for the purpose served by the obligation or expenditure.

Step 3: Determine whether the appropriation is available at the time of the obligation or expenditure.

Step 4: Determine whether the appropriation is available in the amount of the obligation or expenditure.

4.2 Identify the Funds

The first step in the analysis of a fiscal law problem is to identify the funds by examining the accounting classification code or fund cite.

4.3 Availability as to Purpose

The second step in the analysis of a fiscal law problem is to determine whether the specific appropriation is available for a specific expenditure. The four-digit appropriation designator identifies the appropriation in question. An attorney should then research whether the appropriation is available for the proposed expenditure. You may conclude the suggested appropriation is proper, another appropriation is proper, or no available appropriation is proper. If no appropriation is proper, the only solution may be to request Congress, through command channels, to pass a proper appropriation.

Even if the appropriation is legally available for the stated purpose, internal policy, including the rules on reprogramming discussed in DOD Manual 7110-1-M, Budget Guidance Manual (May 1990), may affect the propriety of a particular expenditure.

Furthermore, if your analysis suggests that your agency must use a different appropriation for the specific expenditure, that determination may affect your analysis as to time and amount.

4.4 Availability as to Time

The third step in the analysis of a fiscal law problem is to determine whether the specific appropriation is available: (1) at the time the goods or services are needed, (2) at the time the

obligation for the goods and services is made or adjusted, and (3) at the time funds are disbursed from the treasury.

Correcting an error in the fiscal year of an appropriation may affect the availability as to purpose because the language of appropriation acts varies from year to year. Correcting fiscal year errors also may cause the obligation or expenditure to exceed the amount available.

4.5 Availability as to Amount

The last step in the analysis of a fiscal law problem is to determine whether sufficient budgetary authority from the proper fiscal year and appropriation is available at the time of obligation or expenditure to pay the legal liability. You may have a sufficient amount of the wrong appropriation, but not enough of the correct appropriation.

Analysis of amount comes last because severe criminal and administrative consequences may result from exceeding the amount available to support an obligation. Although there have been no criminal prosecutions under the Antideficiency Act to date, administrative sanctions have cut short numerous otherwise promising careers. Your analysis of the purpose and time dimensions of a fiscal law problem may avoid these unpleasant consequences.

5. DEVELOPING AN INVESTIGATION PLAN

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

The investigating officer should 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. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required. (See Appendix IV, Investigation Plan Outline.)

6. CONDUCTING INTERVIEWS

The predominant category of evidence gathered by an investigating officer (IO) is oral statement. The method used to gather this evidence is the interview. In every interview, the IO has three

major concerns: the rights of the individual being questioned; confidentiality; and the evidence to be obtained. The process used by IO to conduct interviews is designed to protect rights and enhance confidentiality. The IO's preparations and skills as an interviewer affect the quantity and quality of the evidence gathered. In investigations, the IO sometimes gathers sworn, recorded testimony by conducting formal interviews. This section describes the process used by IOs to conduct both formal and informal interviews.

6.1 Preparation for Interviews

As with most activities, preparation is vital to success. Preparations fall into two areas: administrative and substantive.

6.1.1 Administrative

Ensure that you have the proper administrative details completed prior to the interview. These include selecting the right interview guide and filling in the blank spaces with information from the appointment letter. If you are going to request a social security number, have a copy of the Privacy Act Statement available. If you are interviewing a suspect or taping, there are Appendices available to assist you with this process. Set up and test your tape recorders; have extra batteries and a sufficient number of blank tapes on hand.

NOTE: As a matter of routine, once you complete a case, erase your tapes, remove the old labels and affix new blank labels.

6.1.2 Substantive

Prepare an interrogatory (list of questions) for the interview. The process of building an interrogatory begins with your assessment of the evidence you believe the witness possesses. You then craft questions to gather that evidence. Wargame possible answers the interviewee might provide. The interrogatory provides you a road map for the interview and helps ensure you do not forget to ask questions on all key points. If you plan to have the interviewee comment on documentary evidence, ensure that you have the documents at hand in the order that you plan to introduce them during the course of the interview. Witnesses may ask you to remove their names from their statements before presentation to the individual named responsible for the ADA violation.

6.2 Type of Interview

Depending on the nature of the allegations, sensitivity of the case, and location of witnesses, your interview may be anything from a very brief, informal telephone call (documented in a summary) to a formal recorded session lasting several hours.

6.2.1 Formal Interviews

Formal interviews are conducted in four phases: pre-tape; read-in; questioning; read-out.

Pre-tape The pre-tape is an informal briefing given by you to the interviewee. It serves several purposes. It familiarizes the witness with the interview process and helps to put them at ease (most witnesses have never been involved in an investigation or inquiry). It provides you an opportunity to establish a dialog with the witness. A skillful interviewer uses the pre-tape briefing to condition the witness to respond to questions. Most importantly, the pre-tape covers key information and administrative details. These include:

- Advising the witness of the Privacy Act. (Required if you ask for the witness's social security number, home address, or home telephone number.)
- Advising the witness of the Freedom of Information Act (FOIA) and that his testimony may be requested for unofficial purposes.
- Emphasizing confidentiality, but not guaranteeing it. Witnesses must understand that their testimony can be used for official purposes.
- Advising a suspect of his rights. A suspect is someone accused of a criminal wrongdoing. In an ADA case, this means that the person is suspected of knowingly and willfully violating the ADA.

There are step-by-step guides to conducting various types of interviews at Appendix V of this manual that include an outline of a pre-tape briefing. You should become familiar with its contents and brief the witness in your own words.

Introduce yourself and show your credentials. Your credentials include your appointment letter and your ID card.

Explain that the interview will be conducted in four parts (pre-tape, read-in, questions and answers, and read-out) and explain that the procedures are standard for ADA investigations.

Explain your confidential fact-finding role, and that both hearsay and opinion can be accepted as testimony.

Explain how the investigation protects the confidentiality of the witness, but that law or regulation may in some instances result in the release of any testimony. For example, a court may order the release of record from the investigation.

State that the interview will be conducted while the witness is under oath or affirmation and that it will be recorded. Do not ask the witness whether they want to be recorded or take the oath. If they raise the question, explain the importance of taking sworn, recorded testimony.

Explain that a prepared script is used during the read-in and read-out portions of the interview to ensure the witness's rights are explained as required by law and regulation.

NOTE: Guides exist for each category of witness and type of interview in the appendices.

Explain that you will ask questions and give the witness time to respond.

Explain that at the end of the interview you will again read from a prepared script and the witness will be given an opportunity to present additional material that pertains to the investigation.

Tell the witness that because the interview is recorded, all responses must be verbal; not to speak while anyone else is speaking; and to avoid actions, such as tapping on the table, which might obliterate words in the recording.

Caution the witness to discuss classified information only if necessary and to identify any classified information given. Instruct the witness to ask you to turn off the tape recorder prior to discussing classified information so you can determine whether the information is necessary to the case and needed in the transcript. If any portion of the tape contains classified information, then the tape must be classified. And, if any classified information is used in your report, the report also must be classified and protected as appropriate.

Explain that the final product of the investigation will be a report to the appointing authority.

Explain that the Freedom of Information Act allows members of the public (anyone) to make requests for any government record. This includes IO records, such as the transcript of the interview or the report of this investigation. Explain that ADA records (testimony and any information extracted from testimony and included in the Report of Investigation (ROI) can be protected from a FOIA release if the witness wants it protected. Explain that at the end of the interview, as part of the read-out script, you will ask the witness whether or not they consent to release. A "yes" will mean they consent to release and a "no" means they do not consent to release, should there be a request. You should explain that while IO records are protected from unnecessary release, the records can be used for official purposes as necessary throughout the Federal government and that FOIA consent has nothing to do with that use.

You must be sensitive to the fact that many witnesses misunderstand the FOIA release question. Some believe that you will think that they are trying to hide something if they do not consent to release. You should not advise them how to answer this question, but do make them aware of what it means. Additionally, you should tell them that you draw no inference about whether they are truthful or not from their answer regarding FOIA.

Provide the witness a copy of the Privacy Act Statement and allow him to read it. Ask if he has any questions. This will save time after you start the interview. If there are questions, tell him that the purpose of providing this form is to show that we have the authority to request personal information and that release of their social security number is voluntary. This statement is not a

consent to release to a third party and does not have to be signed. It will be referred to in the read-in.

Have the witness complete the applicable information on a Testimony Transcript Information Sheet. Explain that the header sheet is designed to assist whoever does the transcribing. During the interview, correct spellings of proper names and acronyms will be recorded on this sheet. After the interview, fold the header sheet and secure it around the tapes from that interview with a rubber band. This organizes your tapes and ensures that the transcriber does not attribute testimony to the wrong witness.

Explain that you can turn off the recording devices and discuss points off tape, but that everything said is considered on the record and may be used in the investigation regardless of whether the tape is recording. Explain that you can also turn off the tapes for breaks as required.

If appropriate, you may want to verify the status of the witness (active Army, USAR, ARNG, Federal technician, state technician, or civilian) to determine his rights and whether he is subject to the Uniform Code of Military Justice(UCMJ).

While not required, you may explain to civilian federal employees their right to have a union representative present.

If you are interviewing a suspect, execute the DA 3881 Rights Warning Procedure/Waiver Certificate during the pre-tape. You will refer to it during the formal read-in.

Read-in The read-in is a formal script that is used to begin the interview. Before an interview, you should select the correct interview guide, fill in the blank spaces with personal data and information from the investigation's action memorandum and directive. If you are conducting an inquiry and have no action memorandum or directive, fill in the allegations about which you are inquiring. During the interview, complete the pre-tape, turn on the tape recorder, and read the read-in script verbatim. This ensures and documents that you fully and correctly advised the witness, subject, or suspect of the process and their rights.

NOTE: The read-in and read-out scripts were carefully prepared to ensure that they are technically correct. Do not paraphrase the material in them. The only modifications you should make are if an individual advises you that he will neither swear nor affirm (you indicate that the testimony is not sworn) or if you are conducting a recall and the previous testimony was not sworn (add the oath to the recall read-in).

Questioning Questions are the foundation of an interview. During preparation, develop an interrogatory, to elicit the anticipated evidence from the witness. Once the interview begins, be flexible. Alter the questions, or the order in which you ask them, based upon the mood of the witness and variances in the information actually presented. You must be prepared to ask "hard" or embarrassing questions in a calm, forthright, and professional manner. Example: "Did you have knowledge that the violation was going to occur?" You must also ask questions that allow

them to comment on the allegations and all adverse information that will be used in the report, even if only to deny the allegations.

Read-out The read-out is a formal script that closes the interview. A key portion of the read-out is advising the witness of the FOIA and having them respond "yes" or "no" on tape to indicate whether or not they consent to release of their testimony. Another key item is the admonition to the witness regarding confidentiality.

6.2.2 Informal Interviews

Informal interviews consist of three phases: an introduction, questioning, and a closing.

Introduction The introduction is very similar to the pre-tape in a formal interview. Using the standard outline helps to ensure that each witness gets the same information, that you cover all essential topics, and that your presentation is smooth and confident. As a minimum, you should discuss the investigation process, the IO role, Privacy Act, FOIA, and rights warning (if required).

Questions There is no difference between questioning in an informal interview and questioning in a formal interview. The evidence that you expect to gather affects the questions you draft in your interrogatory. The information you receive and the demeanor of the witness affects how you actually ask the questions. These factors are independent of the type of interview you conduct.

Closing Once you complete your questioning, you must close out the interview. You should close out with some type of statement that allows the individual to know what to expect. Be candid. If you don't think you will ever contact the witness again, say so. If you sense the possibility that the witness fears retribution for cooperating with the IO, tell them to contact you or your office if they become the target of retribution.

When conducting an interview, do not speculate on the outcome of a case or commit yourself to a milestone for its completion.

Ask the witness whether he consents to release his testimony in response to unofficial requests under the FOIA. (See the Read-out portion of the Witness Interview Guide in Appendix V.) If you do not ask the question, and there is a request for the record, the information he provided must be treated as releasable. Finally, you should request that the individual not discuss the case with anyone except an attorney should they choose to consult one.

6.3 Modes of Interview

6.3.1 Face to Face

This is the most efficient method of communication and is the ideal method for conducting IO interviews during investigations. Face-to-face interviewing allows you to judge the non-verbal reactions of the individual, enhancing your ability to establish and maintain rapport and ask

effective follow-up questions. You should always attempt to interview your key witnesses and the subject or suspect face to face.

6.3.2 Telephonic Interviews

Both formal and informal interviews may be conducted over the telephone. A telephonic interview is an excellent time and money-saving method for interviewing distant witnesses. While you cannot judge the witness' non-verbal communications, you can often gain insights from the witness' inflection or tone of voice.

Normally, you must contact witnesses in advance to schedule telephonic interviews. Many witnesses are not prepared to devote the required time to you when you first contact them. Also, you must be concerned about confidentiality. If you call them at work, they may not have the desired degree of privacy in their office. You should always strive to have the witness in a location that provides privacy during the interview.

You might not be ready to conduct an interview with this first call. Do not attempt to conduct an interview at this point if you have not completed your background preparation.

Once the call is placed, you read the lead-in script that verifies the witness's identification and the fact that the witness has been properly sworn and advised of their rights. Close the interview by use of the script in the appropriate interview guide.

A detailed list of questions is essential for a telephone interview. Try to anticipate the witness' answers and have follow-on questions prepared.

If you record a telephonic interview, you must inform all parties that the call is being recorded. Taping telephone conversations without the knowledge of all parties can violate Federal law. You can purchase simple devices through the supply system that allow your tape recorder to adapt to a telephone. You may also use a speakerphone if available. This allows you to record the conversation and aids in the process. You are not required to ask whether someone consents to a recorded telephone interview. Military and DA civilians must cooperate. A civilian not connected with the military is not required to cooperate. Therefore, they may decline being recorded just as they may decline the interview altogether. If the individual seems uncomfortable with the telephonic interview process, regardless of whether they are required to cooperate, you have a problem you must overcome.

6.3.3 Interviews by Others

In some cases you may coordinate for another support team to interview witnesses for you. You must provide the interrogatories and enough background information so the support team can conduct intelligent interviews. It is helpful to provide the support team with anticipated answers that you expect from each witness. Also provide the support team a copy of your directive as well as copies of any documentary evidence they might need during the interviews. After the

interviews are completed, the assisting support team sends you the tapes or copies of the transcripts. After you have acknowledged receipt of the testimony, the assisting support team destroys all file material.

6.4 Witness Availability and Cooperation

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 investigating officer should discuss this matter with the local labor counselor. Commanders and supervisors, however, 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.

6.4.1 Within DA

AR 20-1 requires DA personnel to cooperate with IO. If you have a witness who is reluctant to cooperate in either an investigation or an inquiry, the best course of action is to persuade them that cooperation is in their best interest as well as their organization's. If unsuccessful, you should seek the assistance of the witness' commander or immediate supervisor. They can order or direct military members to cooperate. Both military and civilians are prohibited from actively interposing to thwart the investigation.

6.4.2 Witnesses From Other Services

You may have occasion to interview witnesses from other branches of the armed forces. Make arrangements in the same way you do for Army witnesses. If you anticipate or have problems arranging interviews with members from another service, coordinate through the local commander or inspector general.

6.4.3 Non-DoD Civilians

You cannot compel civilians not employed by DoD to cooperate with you. You have no authority to subpoena civilian witnesses. Contact your legal counsel for advice.

6.4.4 Control of Witnesses

It is difficult to conduct an investigation if the witnesses talk to each other about the case. Ensure you inform each witness of the requirement not to reveal to anyone the questions or topics discussed during the interview.

6.5 Other Participants in Interviews

6.5.1 Interpreters

If an interpreter is required, caution him on the privileged nature of the investigation. Administer the following oath at the beginning of the investigation, but do not repeat it for each witness:

OATH: “Do you, _____, solemnly swear (or affirm) that you will interpret truly the testimony you are called upon to interpret, so help you God?”

6.5.2 Attorneys

Suspects have a right to have an attorney present during their interview. You may choose to allow witnesses or subjects who request the presence of a lawyer during an interview to do so; however, they have no right to demand the presence of a lawyer. Remember, the purpose of a lawyer in an interview is only to advise the witness, subject, or suspect not to incriminate himself. You must prohibit a lawyer from answering questions for the suspect or from advising you on the conduct of the interview. If you encounter difficulties with an attorney during an interview, take a break and contact legal counsel for advice. It is always best to explain the ground rules to both the suspect and the attorney during the pre-tape. This often precludes problems later during the interview.

If a witness or subject demands his right to have a lawyer present during the interview, what should you do? Explain that an IO interview is not a court of law and the proceedings are administrative in nature. Additionally, they do not have a right to have a lawyer present because they are not a suspect and do not have criminal allegations against them. You may allow the individual to have a lawyer. Should a witness or subject request to see a lawyer during an interview, it is again your choice. In most cases it is best to allow them to do so. To not allow them to do so could cause them to become very defensive and reluctant to answer questions.

6.5.3 Friends

Persons being interviewed may request to have friends present. No one has a right to have a friend present. If you choose to allow a friend to be present, you must control him. The friend is for moral support of the witness only, and should remain silent. Inform the friend of confidentiality and ask that he not reveal information.

6.5.4 Union Representatives

Some civilian employees of DA may have the right to have a representative from the union at your installation present during their interviews. Others may request a union representative, even if it is not their right. It is your responsibility to control a union representative at your interview, whether they are there by right or with your permission. In most cases, the role of the union representative is to observe and advise the witness. Check with legal counsel regarding the collective bargaining agreement at your installation.

6.6 Self Incrimination

You must always be alert for the witness or subject who, while testifying, implicates himself as a suspect or discloses additional violations. The admission of possible criminal wrongdoing need not be related to the case you are investigating. This also applies to suspects who may implicate himself in an area outside the scope of your investigation. If an individual implicates himself in criminal activity: stop, read and execute the rights warning procedure and waiver on DA Form 3881, and continue the interview only if the individual waives his rights.

6.7 Rights Warning

All soldiers suspected of criminal misconduct must first be advised of their rights. DA Form 3881 should be used to record that the witness understands his 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 case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his 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.

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, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a Report of Survey, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

Use the DA Form 3881, Rights Warning Procedure/Waiver Certificate to advise suspects and those who incriminate themselves of their rights. Consult your legal counsel concerning its proper use. The general procedures are to have them read the front side, Part I, which you will have filled out in advance. Then read the backside, Part II, aloud to the suspect while they read another copy. Ask them the four waiver questions. Finally, have them sign the waiver in Section B. You and a witness must also sign the appropriate blocks in Section B. Rehearse the DA 3881 with your local Judge Advocate General's office.

Should you have to execute a DA Form 3881 during an interview and you are not sure what to put as the charges, take a break and call your legal counsel. If the legal counsel is unavailable, a general description of the charges, in your own words (i.e., failure to follow a regulation; misuse of government equipment), will suffice. If you question a suspect a second time on the same allegations for which you already completed a DA Form 3881 (and they waived their rights), you do not have to complete a new DA Form 3881. However, if you are questioning the suspect concerning new allegations, you must complete a new DA Form 3881. The original copy of the DA Form 3881 should be included with the suspect's testimony in the Report of Investigation (ROI).

6.8 Taking Breaks

Should you or the witness need to take a break for any reason while conducting recorded testimony, state for the record (on tape) the circumstances and time before shutting off the recorders. When ready to resume the interview, turn on the recorders, state the time and whether the people in attendance are the same or not. If someone has departed or someone new is present, give their names and briefly explain the reason for the change. As an example, a lawyer who was not there at the start of the interview may be present after the break.

6.9 Interview Sequence

Determining the sequence in which you will conduct interviews is a key step in the planning process. The investigating officer 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. Organizing the witness interviews will save time and effort that would otherwise be spent backtracking to reinterview prior witnesses concerning information provided by subsequent witnesses. While reinterviewing 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.

- When planning who to interview, 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 interviews of key witnesses to be as complete as possible, avoiding the backtracking described above.
- 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, investigating officers should 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.
- 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, for example, 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 investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

6.9.1 Usual Sequence

Experience shows that the best sequence is to first interview the complainant, then experts, witnesses, with suspects or subjects last. Naturally, the sequence of interviews will vary based on the nature of the allegations and on the availability of the witnesses, subjects or suspects. Many inexperienced investigators are inclined to resolve cases quickly by talking to subjects or suspects first. Avoid that pitfall by following the recommended sequence which will:

- Give you information needed to ask the right questions of the subject or suspect.
- Enhance truth telling (i.e., people are more likely to be truthful if they know you have done your homework).
- Enable you to immediately challenge statements that are inconsistent with other evidence or appear untrue.
- Allow you to advise subjects or suspects of all adverse information against them and allow them an opportunity to comment. This is a right they have as part of an administrative investigation. You will have more adverse information at the end of an investigation than at the beginning. The individual whom you name responsible will have an opportunity to review and comment on your completed report.
- Decrease the likelihood for a recall interview. An interview conducted too early in the inquiry process increases the likelihood of the need for a recall interview and may unnecessarily consume more of your time.
- Protect the legal rights of all persons involved. Because you will become more progressively knowledgeable about the case, you are more likely to protect the legal rights of all persons involved. For example, you are less likely to interview someone as a witness when they should have been treated as a suspect.

You should also consider the order in which you will interview witnesses. Frequently, investigators will group witnesses by the evidence they are expected to provide. For example, all witnesses who observed a specific event might be interviewed sequentially. Another alternative is to interview witnesses in chronological order.

6.9.2 Exceptions

There are circumstances that may cause you to interview the subject or suspect early in the investigation or inquiry. These are:

- You have anonymous allegations and cannot readily identify any witnesses.
- You have vague or anonymous allegations that the subject may be able to clarify. The subject or suspect may provide you the names of witnesses.
- The subject or suspect has information not readily available elsewhere that you need early in the inquiry.
- The subject or suspect is about to retire or permanent change of station (PCS) to a distant location, and flagging is not appropriate.
- You believe this is one of those rare occasions when the need for speed justifies the risk. Evidence might be fleeting -- where someone deliberately tries to destroy it.

6.10 Time

Another key planning consideration is the time it will take to conduct each interview. There are no hard and fast rules -- some interviews move along quickly, others drag. As a minimum, you should plan for the following:

Rapport building Set aside 10 - 15 minutes to put the witness at ease before you begin your interview.

Pre-tape or introduction Plan to spend 15 minutes covering the points of your pre-tape, if formal; or introduction, if informal. More time is required if you must execute a rights warning certificate.

Questions and answers Always consider the possibility of unexpected issues or allegations arising during the interviews and allow a few extra minutes.

Protect confidentiality Provide adequate time to allow one witness to leave and another to arrive without violating confidentiality. As a contingency, you should plan on what to do when you have a witness in your interview room and another waiting outside to be interviewed. Many IO's take a break and leave their interviewee in the interview room while they move the person waiting outside to another location.

Administration Plan time for you and your partner to compare notes, prepare for the next interview, and take care of personal needs. Experience has shown that an interview that turns out being shorter than planned is far better than an interview that takes more time than scheduled.

6.11 Location

You can conduct interviews almost anywhere. The major consideration in choosing a location is privacy. Some locations, however, offer other advantages as well.

6.11.1 Your Office

Experience has proven that an office is often the best place to conduct interviews.

You control the environment You can avoid interruptions such as ringing telephones and people entering unannounced. Someone from the support team can control other witnesses. Should you sense that a witness is going to be difficult, you may be able to ask for assistance from a more experienced interviewer or an interviewer of higher rank.

Confidentiality Your office is probably located away from the subject or suspect's workplace. Witnesses can discreetly visit your office.

Efficiency Conducting interviews at your office maximizes your efficiency. You do not have to spend time traveling and you have your administrative support immediately available.

6.11.2 Witness' Workplace

Another choice is to interview at the suspect's, subject's, or witness' office. The advantages are that the interviewee may be more at ease, more willing to cooperate, and more willing to share their information. Often, your willingness to come to the witness' location for the interview can help establish a rapport with a reluctant or defensive witness. They may also have ready access to information, records or documents. The disadvantages are that many people at that office may find out that you are there, and rumors could result. Additionally, you have little control over privacy and probably cannot prevent unwanted interruptions. A subject or suspect may want you to conduct the interview in their office because they feel more in control. If you have interviewed the proper witnesses, gathered the facts, and prepared for the interview, it will make little difference.

6.11.3 Hotel or Motel

There will be times when you may need to travel, and your interviews may have to be conducted at a motel or hotel. This can be done effectively if you plan ahead. When possible, arrange for a neutral interview location (have your orders cut to allow you to rent a conference room, extra room, or business suite). When notifying someone that you will interview them at a motel, set up an initial meeting in a public place such as the lobby. There you can properly identify yourself and make the interviewee more at ease.

NOTE: While you are not prohibited from interviewing one-on-one, even if the interviewee is of the opposite sex, having a partner while interviewing may make the interviewee more comfortable and provide everyone involved with a measure of protection from possible allegations.

6.11.4 Other Installations

If you must travel to another installation, you can request that the local commander provide you an interview room. You need to ensure they are aware of your needs and requirements. Additionally, consider asking the local commander to make witness notifications for you. They are known in the command, know the local environment, and can possibly enhance the confidentiality of your investigation. Consider using a Reserve Center or National Guard Armory as an interview location if there is no installation nearby. Coordinate with the reserve component.

6.11.5 Witness' Home

At times you may have to interview a witness (usually a civilian) at their home. This can be undesirable because you lack control. Interviews conducted in a home are fraught with distractions, e.g., pets, phone calls, family members. Additionally, the physical characteristics of the site may not be good. In all cases you want to ensure that your interview location is private enough to ensure that you can protect confidentially of witnesses and preclude unnecessary disclosure of the details of the case.

6.12 Interviewing Techniques

6.12.1 Importance of Interviewing

The basis for the resolution of many ADA cases is intelligent, careful questioning. Effective questioning can only be accomplished by skill, preparation, and experience. Therefore, IOs conduct interviews with a question and answer period rather than taking written statements. The previous section focused on the process of conducting interviews. This section focuses more on the art of interviewing. Unless otherwise noted, the word witness in this section refers to subjects and suspects as well.

6.12.2 Preparation

There is no substitute for detailed preparation! Know what you are talking about; know what evidence you want; keep in mind the who, what, when, where, why, and how of the case. You must have sufficient background knowledge about the witness to select the correct approach to questioning, to assess the witness' truthfulness, and to demonstrate the thoroughness of your investigation

6.12.3 Attitude and Demeanor of Investigating Officers

Attitude and demeanor contribute immeasurably to the success or failure of the interview. Remember each witness is unique and will react differently. Therefore, you must adapt your

technique accordingly. In questioning witnesses you should:

- Gain and maintain the witness' respect. Be professional!
- Adopt an objective and friendly, but not familiar, attitude.
- Try to put the witness at ease and then direct the conversation to the matters being investigated. If the witness proves to be hostile, adopt a firmer attitude.
- Be courteous, sincere, and self-confident. Do not deceive, browbeat, threaten, coerce, or make promises. Do not apologize for doing your job.
- Remain an impersonal, calm, objective fact-finder. Do not shout, lose your composure, or otherwise show emotion.
- Maintain an attitude of fairness.

6.12.4 Formulating Questions

A well thought out interrogatory is the key to a successful interview. Use care when determining the order of your questions. You can put the witness at ease by asking background questions first in order to establish rapport. Your interrogatory should include the anticipated answers or right answers. If you cannot anticipate the answer, be ready to follow-up with other prepared questions. Try to avoid being surprised, but don't let surprises upset you. Do not hesitate to take a break to think your way around surprises or develop changes in your line of questioning. A well thought out question is better than a reactive question.

Get to the point at the appropriate time during the interview. There is a real art form in asking the hard questions at the correct time. You need to establish background information and put the witness at ease before getting into difficult areas which could cause the witness to become defensive. The best approach is usually to first ask background questions which are pertinent, but not controversial, then work the witness toward the more difficult subjects. A defensive witness may not want to answer your questions. Waiting too long can appear to be "beating around the bush" or "fishing" which can be just as bad.

Word your questions so the information comes from the witness. Providing too much information in your question may identify your source to the witness. Avoid questions that can be answered by yes or no. For example, if you want to know if the witness was at a certain place on a particular day, do not ask them if they were there. But rather, ask where they were that day.

Ask one question at a time, then patiently wait for the answer. If the witness hesitates, don't immediately start rephrasing the question -- he simply may need time to think. In many instances, a witness starts to answer a question and one or both investigators interrupt with another question or clarification before the witness has completed answering the original question. Make a note,

and ask the question when the witness finishes the answer. Usually if a witness does not understand a question, he will ask for clarification.

Avoid making detailed statements followed by "Is that correct?" Do not put words in the mouth of a witness. However, it may be appropriate to summarize to the witness what you think he said.

Use language the witness understands and try to persuade the witness to avoid jargon or slang. If jargon, slang or acronyms are used, clarify them during the interview.

Rephrase the question if the answer you receive is incomplete or not to the point.

Do not ask compound questions -- they elicit incomplete answers, and it is difficult to determine later which question the witness answered.

Should you ask about locations or positions, it is frequently helpful to have the witness draw a rough diagram or sketch. This diagram or sketch can be entered into the investigation report as an exhibit where it can help a reader to better understand the testimony.

6.12.5 Control

Maintain absolute control of the interview. It is *your* interview.

Allow discussions of unrelated matters to place witnesses at ease, but never allow a witness to take the initiative.

Listen attentively, evaluate the information received, and resolve inconsistencies with follow-up questions. The investigating officers should agree prior to the interview as to who will concentrate on the prepared interrogatory and who will listen for unanticipated leads and information. This agreement also lessens the chance of one investigator unnecessarily interrupting the other and possibly changing the thrust of the original question.

Allow the witness to give testimony freely and without fear, but do not permit him to give flippant or evasive answers, or to become argumentative.

Determine the basis for the witness' opinion.

Ask questions for clarification when answers contain trade names, technical wording, acronyms, slang, or colloquial expressions. However, do not interrupt by asking how to spell a name or to obtain other identifying data. This interruption of the witness train of thought often causes loss of the thought. Make a note and ask the question after the witness finishes the answer or at the end of the interview.

Determine the source of hearsay evidence so that direct evidence may be obtained.

Pursue the issue when an answer, tone of voice, or non-verbal signal indicates the witness has additional information.

Guide the talkative witness to the issues and pertinent answers.

Use simple, direct questions to elicit information when the witness is hostile or reluctant.

Appeal to military witnesses' sense of duty to overcome their normal reluctance to make adverse statements about others.

Persuade civilian witnesses to cooperate by appealing to their patriotism or desire to see justice done, and tell them how valuable their cooperation is to the Army.

Continue to question a witness who avoids answering questions by saying, "I don't remember." Point out that they may be failing to remember facts that persons would normally recall.

Use skill and tact to confirm or deny suspicions that a witness is untruthful. Confront the untruthful witness with proof of their falsehood in order to elicit a change in their testimony. Experience has shown that it is best to read the witness the advisement concerning false swearing, also known as the "Liar's Paragraph" as a last resort (see Appendix V, Witness Interview Guide, paras 7a and 7b). Only do so when you are sure and have the facts. Remember it is not necessary that you have someone who is a subject or suspect admit his wrongdoing. If you have the preponderance of evidence that substantiates an allegation, the only purpose for talking to a subject or suspect is to get their side of the story (administrative due process right). The fact that a witness has lied to you during a case can be important and should be addressed in your report.

Ask yourself if all pertinent points have been covered. Are the answers complete? If you have any doubt as to what the witness is saying, ask, "What I hear you saying is" or "Do you mean by that . . . ?", then repeat your understanding to the witness.

Just prior to the end of the interview, you may want to summarize important answers with such statements as "I understand that what you have testified to is this: one, . . . ; two, . . . ; three" This technique is specifically applicable when it concerns an element of essential information. You will want to be careful. Be sure you are accurate. A witness will tend to believe and agree with whatever you say even if incorrect. This is especially true when the witness feels overwhelmed and nervous about the interview process or really wants to please you.

Ask the hard questions that concern the witness' specific role in what has been alleged. Do not allude to the subject matter -- be direct and specific. If you mean improper use of funds, say improper use of funds. If the hard question is not asked, it most likely will go unanswered. Often the questions can be embarrassing or sensitive to you and the witness. Preparation will make you comfortable, and your comfort will put the witness at ease with the hard questions.

Demonstrate proper courtesy, but do not be intimidated by a senior official whom you are questioning.

6.12.6 Interviewing Non-DA Civilians

You do not have the authority to require the appearance or testimony of non-DA civilian witnesses. Your techniques in dealing with non-DA civilians will frequently determine if you can gain their cooperation and testimony. Consider these techniques when dealing with civilian witnesses:

- Adopt an objective, empathetic attitude.
- Explain the procedures that will be followed and the rationale, because some civilians may not understand your role or may view the investigation more as an inquisition. Anticipate potential problems. Do not use military jargon and acronyms.
- Attempt to conduct all interviews at your location. If the witness does not agree to this, then conduct the interview at a neutral place like a hotel or motel conference room. If the witness still refuses, it is permissible to conduct the interview where the witness suggests. However, make sure you take appropriate measures to avoid the appearance of impropriety. Be aware of the impact you have, as IO, when you go to a person's place of business to conduct an interview. There may be rumors that adversely affect the witness. If you make witnesses aware of this, he often will change his mind about interviewing at his place of work. Civilian clothes could be appropriate when interviewing civilian witnesses at their home or work place.
- Explain the IO concept of confidentiality and the methods used to protect the rights of all those involved in the investigative process.
- Should the witness be very reluctant to participate in a formal interview, explain the emphasis on the IO process of sworn, recorded testimony. If the witness remains reluctant, then continue the interview without recording the session. Complete a summary of the information provided.
- Consider other alternatives if there is continued reluctance to testify after repeated explanations. For example, if a witness refuses to give oral testimony, ask for a written statement. Ask yourself if this witness' testimony is critical to your investigation. Can this information be obtained from another source? A decision not to interview a reluctant witness is sometimes best.

6.12.7 Observations by Interviewer

Your observations are of value when developing follow-on questions and may be of value when weighing the evidence or credibility of a witness. During the questioning, continuously evaluate the mannerisms and emotional state of the witness. Hesitation, evasiveness, body movements, and fidgeting may indicate the witness is not telling the truth or is concealing information. Such behavior may only mean that the witness is nervous with the interview process. This is where your ability to put the witness at ease is very important. You are better able to judge when a specific question causes the witness obvious discomfort. It may be worth rephrasing the question, or it may be appropriate to direct your question to their discomfort. For example: "I sensed a change in your voice when I asked that question, why?" When appropriate, write an

memorandum for record (MFR) which describes physical mannerisms. Use caution, however, in interpreting physical mannerisms, and avoid attaching undue or unfounded significance to them.

6.12.8 Memorandum for Record

An MFR is a suitable way to record your observations, to identify exhibits, or to record other information important to the investigation. Remember, when you include an MFR with your observations in your report, you become a witness in your case.

Prepare MFRs while the matters are fresh in your mind. Take a few minutes after the interview to either make notes on the testimony transcript information sheet or dictate your observations on the tape immediately after the recorded testimony.

The MFR should contain:

- what was observed; where, when, and how, if applicable
- why the action was recorded
- what was found
- explanatory notes, comments, or comparisons
- the signature of at least one investigating officer

6.12.9 Use of Polygraph

The polygraph, commonly termed "lie detector," is not an appropriate method for gathering evidence in an ADA investigation. An investigation that requires the use of the polygraph has gone beyond the scope of what is appropriate for an ADA. Consult your legal counsel.

6.12.10 Interviewing DOs and DON'Ts

DOs

- DO maintain a high standard of professional conduct.
- DO get the witness to fully explain his answers.
- DO develop facts.
- DO honor the rights of the witness.
- DO be fair.
- DO be thorough, objective, and discreet.
- DO ask the hard questions.
- DO thoroughly research the standard.
- DO prepare for the unexpected.

DON'Ts

DON'T browbeat, mislead, threaten, or intimidate.
DON'T make promises.
DON'T advise or counsel.
DON'T guarantee testimony cannot be used for adverse action.
DON'T lose your temper or patience.
DON'T argue or make snide remarks.
DON'T tell an untruth to get a truth.
DON'T unnecessarily reveal the identity of other witnesses.
DON'T be embarrassed by silences; give the witness time to think.
DON'T ask long, multiple, or involved questions.
DON'T lead the witness.
DON'T put words in the witness' mouth.

7. ASSEMBLE AND ASSESS CAREFULLY DOCUMENTED EVIDENCE

7.1 Overview

Investigations are focused searches for evidence to substantiate or refute allegations. The "bottom line" of an investigation is the conclusions IO draws from evaluating the credible evidence gathered. Consequently, it is essential that the IO has a good understanding of the nature of evidence.

7.2 Categories of Evidence

Evidence generally falls into one of four major categories: documentary, physical, oral statements and the IO's personal observation. Most investigations depend upon the testimony of witnesses. Some investigations require extensive use of documentary and physical evidence.

7.2.1 Documentary Evidence

Documentary evidence includes written items, photographs, maps, sketches, regulations, laws, records (travel vouchers, evaluation reports, medical records) and other types of written material. Nearly all investigations include some documentary evidence. Gather it early in the investigation, and identify it by showing the date obtained, whether it is an original or copy, location of the original, identity of the custodian and signature of the investigating officer. When practical, use copies of documents, and leave the originals with their proper custodians. One of the most important pieces of documentary evidence in any investigation is the standard upon which the allegations are based.

7.2.2 Physical Evidence

Physical evidence consists of objects or conditions that establish facts. It is the least common category of evidence found in investigations. Physical evidence may or may not accompany the ROI.

Normally, an object is not required to accompany an ROI. If you do need to forward an object with an ROI, securely attach it to the ROI and identify it by showing:

- the name of the object
- where and when the object was obtained
- custodian or person from whom obtained
- its function, if applicable
- serial number, size, make, brand name, or other identifying information
- monetary value, if applicable
- description of container, if appropriate
- state of serviceability

Most physical evidence will not be included with the ROI because of size, perishability, monetary value, or other reasons. Photograph, sketch or describe these objects in an MFR that contains the information and attach it as an exhibit to the ROI.

7.2.3 Oral Statement

An oral statement is evidence given orally by a "competent" witness (in the legal definition of the term competent). Oral statements are the primary means of gathering evidence in the IO investigation. Oral statements fall into two categories, testimony and statements.

Testimony A sworn, recorded oral statement is called testimony. 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. Individuals who do not wish to swear an oath may affirm that their testimony is truthful. Testimony is the primary means of gathering

<p>THE OATH "DO YOU SWEAR THAT THE TESTIMONY YOU ARE ABOUT TO PROVIDE SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD."</p>
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evidence in investigations and may be used in inquiries. Recorded testimony is normally transcribed verbatim. Verbatim transcripts can be prepared by court reporters (sometimes available from the legal counsel), contract transcriptionists, or typed by the IO. Verbatim transcripts are time consuming and expensive to prepare and review, but provide the most

accurate record. The IO who conducted the interview normally must certify the accuracy of the transcript by reading it and making corrections as he listens to the tape.

Verbatim testimony may not always be practical. If assets or time are limited, take sworn, recorded testimony, and initially only prepare a summary. If you turn the case over to a follow-on investigator or terminate the case prior to completion, transcription may not be necessary. Should you determine a transcript is necessary as the case proceeds, you can prepare it at that time. Another alternative is to only transcribe the testimony of key, necessary witnesses (complainant and subject or suspect, for example). You can summarize evidence from other witnesses.

NOTE: When taping interviews, if possible use two tape recorders in order to have a backup system. Keep in mind the purpose for recording is to make an accurate record of what is said during the interview. For accuracy, you may tape interviews even if you do not intend to prepare a verbatim transcript. When in doubt, tape!

Statements Information gathered during an interview that is not sworn is referred to as a statement. The interview may be conducted as part of an investigation and may or may not be recorded. The statement can be documented as a summarized statement by the IO who conducted the interview on DA Form 2823. If the witness testimony involves technical terms that are not generally known outside the witnesses' field of expertise, the IO should ask the witness to define the terms the first time used. When you prepare the summary, you must be extremely careful to write what the witness actually said, not what you think the witness said. Claims by witnesses that IO misquoted them occur occasionally. Draft the summary immediately following the interview to avoid having to rely upon your memory several hours or days later. You may also ask the interviewee to verify your summary of the interview. For accuracy, you may tape verbal statements even if they are not sworn. This is particularly important if the issues or allegations are serious, complex, or conflicts with other evidence. When taping a telephonic interview, ensure you inform the interviewee that you are recording.

If you are unable to obtain an oath, you must evaluate whether administering the oath is necessary or appropriate. Some considerations are the nature of the allegations or issues and the expected evidence the witness might provide. Swearing-in the witness adds formality to the interview and may enhance the accuracy of the information presented by the interviewee. The oath creates the belief and expectation in the witnesses' mind that they must be truthful or suffer the consequences. For military personnel, a false official statement (sworn or not sworn) is a criminal offense. For non-government civilians, false sworn statements are a violation of federal law. When evaluating evidence, sworn statements are generally given more weight than unsworn statements.

7.2.4 Personal Observation

You can document physical conditions you observe in an MFR. Your observations or measurements in an MFR can supplement or provide background for reports or testimony by technicians or authorities whose expertise may be better evidence than your non-expert observation alone. Certain observations or events that occur during an interview (witness comments while off-tape, for example) may be worthy of an MFR.

Investigating officers should minimize the use of personal observation. By introducing personal observations as evidence, you make yourself a witness in the case (perhaps opening yourself to allegations of bias). As an alternative, you might have another individual observe the conditions in question and then interview the other individual as a witness.

7.3 Types of Evidence

7.3.1 Direct Evidence

First-hand knowledge, or direct evidence, proves or disproves an issue through the use of facts. For example, if a witness states "I saw the subject's car at the headquarters on day x at time y," you have direct evidence that the subject's car was at the headquarters at that date and time. Direct evidence should be verified (corroborated) by other evidence, if possible.

7.3.2 Circumstantial Evidence

Circumstantial evidence tends to prove or disprove an issue by inferences. The statement, "I saw the subject's car parked in front of the headquarters on day x at time y," is circumstantial evidence that the subject was inside the headquarters at that time. Circumstantial evidence is not an inferior kind of evidence to be used only when there is no direct evidence. It may not have the weight of direct evidence, but it is still valid evidence. It can be used with direct evidence to establish a fact. Some issues such as command climate and unit morale are seldom established by direct evidence. Frequently, they are established by circumstantial evidence alone.

7.3.3 Hearsay Evidence

Hearsay is what one individual says another person said. It is an acceptable source of information in ADA investigations. However, you should attempt to verify hearsay by contacting the person having direct knowledge of the information (the person who said whatever the witness heard).

7.3.4 Opinion

Opinion, a person's belief or judgment, may be used as evidence. Opinions of qualified experts are commonly used as evidence in ADA investigations. You may ask witnesses for their opinions, but you need to develop the reasons why they reached their opinions. Clearly identify such testimony as opinion.

7.4 Facts

ADA investigations are fact finding in nature. Facts include events that are known to have happened and things that are known to be true. Some matters are easily established as facts, while others are difficult. In solving a disputed issue, use judgment, common sense, and your own experience to weigh the evidence, consider its probability, and base your conclusions on the most credible evidence. A general guide when attempting to establish facts is to obtain the testimony of two or more sworn, competent witnesses who agree on a single point. A fact is also established

by a combination of testimony, documentary evidence, and physical evidence that agree on a single point.

7.5 Evaluating Evidence

The critical analytical task performed by the IO in each investigation is the evaluation of the evidence. To draw a conclusion, the IO must determine if there is a preponderance of credible evidence as viewed by a reasonable person. Preponderance is defined as "superiority of weight." In layman's terms, preponderance means "more likely than not" (or 51%). The preponderance of credible evidence is a lesser standard than "beyond a reasonable doubt," which is used in criminal proceedings. A preponderance of credible evidence is sufficient to resolve an allegation.

AR 15-6, Procedure for Investigating Officers and Boards of Officers, uses the same standard of proof and has this discussion: "The weight of the evidence is not determined by the number of witnesses or volume of the exhibits, but by considering all the evidence and evaluating such factors as the witness' demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indications of veracity."

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 should be based on evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

To evaluate the evidence, you must first determine the facts that must be supported or refuted to indicate whether or not the ADA violation occurred. You must then collate the evidence pertaining to each fact and determine the credibility of each item of evidence. This is often a difficult task. Some witnesses provide inaccurate information, others fail to provide the whole truth or slant the truth to their advantage, and a few lie outright. You must look for and address voids and conflicts in the evidence. You must seek corroboration. You must assign a relative value to each item of evidence -- some evidence is more important than other evidence. Finally, you must determine if a preponderance of the credible evidence proves or disproves that the ADA violation occurred. This is a highly subjective process. Remember, the more thorough you are in gathering pertinent evidence, the more likely you can be objective in evaluating the facts.

You repeat this evaluation process for each of the facts essential to the case. Finally, given a set of supported or refuted facts, you must determine whether a preponderance of credible evidence exists regarding the allegation as a whole. If a preponderance indicates that the allegation occurred, the allegation is substantiated. If a preponderance indicates that the allegation did not occur, the allegation is not substantiated. If there is no preponderance of credible evidence, the allegation is neither substantiated nor refuted. Neither-nor conclusions should be avoided. When faced with a neither-nor situation you should evaluate your process and attempt to gather additional evidence that will substantiate or refute the allegation.

An IO is not bound by the rules of evidence that apply in a court of law. Nor must an IO prove an allegation beyond a reasonable doubt. But the process of evaluating evidence is not easy -- few cases are black and white; most are gray. Thoroughness, objectivity, and good judgment are critical aspects of an IO evaluation process in every investigation.

7.6 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 to 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 inspector general 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, incurrence, or aggravation of a disease or injury may not be admitted.

The investigating officer should consult the legal advisor if he has any questions concerning the applicability of any of these rules.

7.7 Determining the Existence of Alleged Violation(s)

A finding is a clear and concise statement of a fact readily deduced from evidence in the report. It is directly established by evidence in the report or is a conclusion of fact by the investigating officer. Negative findings (such as the fact that the evidence does not establish a fact) can be appropriate. The findings should be necessary and sufficient to support each recommendation. If the results of a formal investigation determine that there was no violation, the investigation report shall include that conclusion supported by appropriate justification to convince the appointing authority and other who may review the investigation that the finding of no fault, no loss, or no wrongdoing (no ADA violation) is supported by the evidence.

7.8 Preparing Findings and Recommendations

After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer 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 investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer 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? Exact descriptions and values of any property at issue in the investigation should be provided.

Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that will become part of the report. Exhibits should 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.

IV. Enter Second Phase of Investigation

1. NO VIOLATION(S) FOUND

1.1 Conclude Investigation

The Office of the Assistant Secretary of the Army (Financial Management and Comptroller) shall evaluate the “no violation” investigation report and submit a copy to the office of the Deputy General Counsel (Ethical and Fiscal) (DGC(E&F)) for a review and concurrence.

If the ASA(FM&C) and the DGC(E&F) agree with the conclusion of “no violation,” no further action is required. The investigating officer has completed his assignment.

1.2 Write Preliminary Report

A Preliminary Report is required for “no violation(s) found” and for “violation(s) found”. You cannot conclude either issue without a formal written report to the appointing officer and/or ADA program manager.

If, however, the ASA(FM&C) and the DGC(E&F) do not agree that there was “no violation,” the report shall be returned to the applicable major command. That official shall be requested to reopen the investigation and report the results, provide additional documentation of “no violation,” or accomplish some other action within a specified timeframe.

2. VIOLATION(S) FOUND

One of the most important responsibilities of investigating a violation of the ADA is that of documenting the results and preparing the necessary reports.

2.1 Preliminary Report or Report on Violation

At the conclusion of an investigation, the investigating officer shall prepare a Preliminary Report or Report of Violation(s) that documents the results of the investigation. The investigating officer shall use the checklist provided to ensure that all appropriate elements have been considered in the report.

The appointing official, ADA program manager, and legal counsel shall also ensure that the report includes all pertinent items. Documentation evidencing all material elements of the violation and supporting the conclusions reached shall be included with the report. The holder of funds shall be identified by name and position and an evaluation made of the exercise of his or her responsibilities.

The person(s) named responsible for a violation -- even if no longer working where the violation occurred, or retired, or separated from DOD -- shall be notified in writing that he has been so named (Figure IV-1) and shall be given an opportunity to:

- read the report of the facts and circumstances leading to the determination of responsibilities.
- provide a statement of any circumstances they believed to be extenuating.
- provide an additional statement after a final determination of responsibility has been made, but prior to final disposition of the case. This statement should not be based on an uncompleted investigation.

The statement should acknowledge that he has read the report and understands that he is being held responsible for the violation. If the individual can provide additional information, pertinent to the particular case, which was not addressed in the investigation and has a bearing on responsibility for the violation, he has the right, and should be requested, to do so.

The individual also may refute statements made by others and make other comments. The final written statement, including any extenuating circumstances, shall be included in the Preliminary Report and attached to the Final Report of violation submitted to the Assistant Secretary of the Army (Financial Management and Comptroller).

If the person(s) named responsible refuses to give a statement, request the person(s) to submit a signed statement of declination (Figure IV-2). A recommended procedure is to include a declination along with the letter of notification. It is also recommended to send the letter via return receipt requested. If he refuses to sign a declination, include a statement to that effect, signed by an appropriate official, in the report. Likewise, if no response is received within the allotted time (i.e., 15 - 30 days), include a copy of the return receipt, and so indicate in the report. If the person(s) named responsible for the violation cannot be located despite a diligent effort, a statement to that effect, signed by an appropriate official, shall be included in the report.

The report shall include an evaluation of any new or conflicting facts or circumstances when the statement of the responsible individual(s) differs from the report contents.

The report shall include a statement as to whether the person(s) determined to be responsible for the violation either did or did not knowingly and willfully incur the violation. If, in the judgment of the investigating officer, the violation was willfully committed, consult legal counsel.

2.2 Identifying Circumstances and Fixing Responsibility

The investigating officer shall consider carefully the facts and circumstances of the situation before fixing responsibility for a violation. Commanding officers, budget officers, or fiscal officers may be named because of their overall responsibility or position, or the fact that they are designated as the holder of a subdivision of funds, if they failed to properly exercise their

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
NATIONAL GUARD BUREAU
2500 ARMY PENTAGON
WASHINGTON, D.C. 2-310-2500

NGB-XXX-Y

MEMORANDUM FOR MAJOR MAJOR MAJOR

SUBJECT: Antideficiency Act Violation - Anystate Army National Guard

1. Reference, "Report of Violation, subj: Alleged Antideficiency Act Violation - Anystate Army National Guard, ASA(FM&C) Case Number 9_-" (enclosed).
2. I have conducted an investigation regarding reimbursement requirements for the military support for civil authorities, public affairs, and community relations missions conducted by the Anystate Army National Guard between 10 Nov 19__ and 1 April 19__. As a result of my investigation, I have determined that Antideficiency Act violations did occur, and I have named you as a responsible individual (as defined in DOD 7000.14R, Financial Management Regulation, Volume 14, Administrative Control of Funds and Antideficiency Act Violations).
3. Per AR 37-1, paragraph 29-16c(12), and DOD 7000.14R, the report of my investigation is being submitted to you to review and to examine the evidence on which the determination was based. You should be aware of your rights under Article 31, Uniform Code of Military Justice. You may consult with legal counsel. You have the right under the self-incrimination clause of the Fifth Amendment, U.S. Constitution not to provide any evidence or be a witness against yourself.
4. After your review of the report and the evidence, you may submit a sworn or unsworn, written, or oral statement regarding the alleged violation. If you wish to make a statement, it should be submitted to _____ (Attn: _____), Army National Guard Readiness Center, _____. Your statement should be submitted by 15 January 19__.

Encl

JOHN Q. PUBLIC
COL, ARTILLERY
Investigating Officer

Figure IV-1. Sample notification to party named responsible for violation.

DEPARTMENT OF THE ARMY
NORTH ATLANTIC DIVISION, CORPS OF ENGINEERS
90 CHURCH STREET
NEW YORK, NY 10007-2979

IN REPLY REFER TO

Office of Counsel

Lieutenant Colonel (Ret.) Knott Bytha Booke
123 My Way
Upthecreek, Anystate 77777

Dear Lieutenant Colonel Booke:

I have enclosed a copy of the Final Summary Report on the antideficiency violation related to DACB88-99-Y-1010, Three-gang Coyote Catcher, Fort Woolbegone, Anotherstate. As I previously mentioned, you have the opportunity to respond to this report in accordance with DFAS 37-1. This report finds you as the responsible individual for the violation. Your execution of Modification P00001 violated 31 USC 1341(a)(1)(B) by making a contractual obligation of an appropriation in advance of funds. I have also enclosed a copy of this statute for your convenience.

In accordance with the applicable regulations, you are entitled to submit a sworn or unsworn, written or oral, statement regarding the violation after receiving. If you do not wish to give such a statement, please sign and date the declination shown at the bottom of this page.

I would appreciate it if you would provide the statement or the declination within the next two weeks. Please contact me at 410-555-1111 if you have any questions.

Sincerely,

Clarence Darrow
Assistant Division Counsel

Enclosures

I, Lieutenant Colonel (Ret.) Knott Bytha Booke, decline to provide a statement in the matter of the Final Summary Report on the antideficiency violation related to DACB88-99-Y-1010, Three-gang Coyote Catcher, Fort Woolbegone, Anotherstate.

Lieutenant Colonel (Ret.) Knott Bytha Booke

Date: _____

Figure IV-2. Sample notification, with declination statement.

responsibilities. However, the investigation shall attempt to discover the specific act -- or the failure to take an action -- that caused the violation and who was responsible for that act or the failure to take an action. A report of violation is considered incomplete until an individual(s) has been named as responsible for a violation. A conclusion that no one could be determined to be responsible for a violation is not acceptable. A commander must impose discipline based on the facts of the case and any mitigating circumstances. Report disciplinary action taken, not recommended, or proposed.

- A report of violation(s) shall include assignment of responsibility to one or more individuals for a violation so that appropriate administrative or disciplinary action, if any, may be imposed as required by law.
- All relevant aspects of the case, including all persons and records connected with the event, shall be investigated fully.
- Key personnel involved in a violation shall be interviewed.
- If an employee to be interviewed is a member of a bargaining unit, the investigating officer shall comply with appropriate statutory and collective bargaining agreement protections for such employee.
- Key facts associated with the events leading to the potential violation shall be examined and documented in the report and any conflicts should be addressed immediately by the investigation officer.
- If a series of events at several levels led to the violation, the report should clearly identify what happened at each level and how the events contributed to the violation.
- The investigating officer must logically support from the documented facts a determination that one or more of the individuals involved are responsible for causing the violation.
- The investigating officer shall show clearly what each person involved did, or failed to do, that caused the violation. The following questions should be considered:

Did the violation occur because an individual carelessly disregarded instructions?

Did the violation occur because an individual was inadequately trained or lacked knowledge to perform their job properly? If so, was the individual or supervisor at fault?

Did the violation occur because of an error or mistake in judgment by an individual or a supervisor?

Did the violation occur because of lack of adequate procedures and controls? If so, who was at fault?

Did the violation occur because of other reasons? If so, who was at fault?

- If, at anytime during an investigation, the investigating officer believes there may be a criminal issue(s) involved, the investigation shall be stopped immediately. The investigating officer should consult with legal counsel to determine if the issue should be referred to appropriate criminal investigators for resolution.

2.3 Developing Corrective Actions

Once the causes and the individual(s) responsible for the violation have been determined, officials of the DoD Component under investigation, working with the investigating officer, shall determine the corrective actions that are necessary to ensure that a violation of a similar nature will not recur. Those actions shall be included in the final reports.

2.4 Recommending Disciplinary Action

At the conclusion of an investigation, appropriate disciplinary action (to include no disciplinary action) shall be determined for the individual(s) named as responsible for the violation. That determination shall be based on consultations involving the individual's commander, the investigating officer, the staff judge advocate, and others with appropriate authority but on the ultimate responsibility of the appropriate commander or other official. The recommended disciplinary action, if any, shall be based on the severity of the violation, the degree of responsibility of the named individual and any mitigating circumstances. If responsibility for the violation is that of an individual(s) from an organization outside the organization under investigation, use the following procedure:

When the violation affects the funds of another DoD Component or the responsible individual is from another DoD Component, the appointing official shall (through the appropriate chain of command):

immediately notify the Office of the Under Secretary of Defense (Comptroller);

advise the other DoD Component involved before submission of the final report of violation(s); and

obtain coordination on the report from the other DoD Component involved.

2.5 Administrative Discipline

A military member or DoD employee who is responsible for an ADA violation shall be subject to appropriate administrative discipline.

Disciplinary action shall be administered on a case-by-case basis as determined by the appropriate authority. The level of discipline administered to the individual responsible shall be commensurate

with the nature and seriousness of the offense, the record of the person responsible, their level of experience, the degree and level of responsibility of the individual.

Administrative discipline for a civilian employee may include written admonishment or reprimand, reduction in grade, suspension from duty without pay, or removal from office.

Military personnel may be subject to appropriate administrative discipline or may be subject to action under the Uniform Code of Military Justice.

Even though the individual determined to be responsible for a violation is no longer on active duty or employed by the applicable DoD Component, appropriate disciplinary action may be pursued. If disciplinary action is taken, such action shall be documented in the individual's personnel file in accordance with established policies.

3. FINAL REPORT

After the second phase of the investigation is completed or the requested action has been taken, the investigating officer shall submit the revised report through command channels to the applicable Assistant Secretary of the Military Department for Financial Management, or equivalent, for the preparation of a report of violation in accordance with the procedures in DoD 7000. 14-R, Chapter 7, Section B. (See samples in Appendix VI.)

APPENDIX I

Responsibilities of Antideficiency Act Investigation Appointing Officer or Designated Representative

An alleged Antideficiency Act violation is discovered and reported to you through the chain of command. A Flash Report must be submitted to the Assistant Secretary of the Army (Financial Management and Comptroller) within 15 days of the date of discovery of the alleged violation. The contents of the flash report appear in the sample in Appendix VI.

As the appointing officer, you are to begin preparations to select an investigating officer and supporting team the first day an alleged Antideficiency Act (ADA) violation is reported. An attorney, a resource manager, and a functional area technical advisor should comprise the support team. This is the team that will assist the investigating officer until the final report is written and submitted. The investigating officer should immediately begin researching the case. With the assistance of the support team expertise, he is ensuring a successful investigation.

There are a number of significant considerations to address when preparing to appoint an investigating officer:

1. Has the person been trained in Fiscal and Appropriation Law? (prerequisite)
2. Does the person have the necessary skills in investigating potential violations? (prerequisite)
3. Is the person senior in grade or rank to the person(s) being investigated? (preferable, but not required) [Note: If the person being investigated is a General Officer or member of the Senior Executive Service, contact the Inspector General, under the provisions of AR 20-1.]
4. Does the person have adequate knowledge of the functional area under investigation? (Prerequisite for the team but not necessarily for the IO: if not a resident skill of the investigating officer, ensure there is an appropriately assigned support team member.) Since the results of an investigation may have a significant impact on policies, procedures, or careers of government personnel, the appointing authority should select the best qualified support team personnel for the duty, based on their education, training, experience, length of service, and temperament.

The following persons may appoint investigating officers for informal investigations:

- any general 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 grade of major or above;
- any state adjutant general; and
- a DA civilian supervisor paid under the Executive Schedule, SES, or OS/GM 14 above, provided the supervisor is the head of an agency or activity or the chief of a division or department.

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.

Appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. The appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The appointment letter should clearly state the purpose and scope of the investigation, the points of contact for assistance, and the nature of the findings and recommendations required.

APPENDIX I

Responsibilities of the MACOM ADA Program Manager Antideficiency Act Investigation IO Orientation

The investigating officer receives an appointment letter informing him of his selection to investigate an alleged ADA violation. You should schedule an orientation session with the IO and his support team as soon as possible. The appointment letter may include the time, date, and place for the in-brief. The meeting should be held within fifteen days of the date of discovery of an ADA violation. The in-brief session is an orientation for the investigating officer that should be informative and thorough. During the in-brief session, the investigating officer is presented a Resource Packet that includes all of the following:

- flash report for subject case
- assigned control number by fiscal year (assigned by HQDA upon receipt of flash report)
- draft audit report of violation(s) (if applicable)
- ADA Investigation Manual

At the orientation, you should clearly explain the nature of the task to be performed. During the opening statement to the investigating officer and the support team, you should address the following:

- purpose of the investigation
- flash report
- audit report, if applicable
- investigating officer responsibilities
- support team responsibilities
- legal issues in question
- ADA Investigation Manual
- any other relevant information

Allow interaction between the support team and encourage them to ask questions about the investigation. The investigating officer must understand that he is the lead and responsible person for the entire investigation. The Preliminary and/or Final reports are his responsibility. It should be further explained that procedures contained in this manual (originating from DOD Directive 7000.14-R) take precedence over procedures contained in AR 15-6, Procedure for Investigating Officers and Boards of Officers, during the investigation of alleged ADA violations.

APPENDIX I

An ADA investigation should receive the highest priority because of the reporting requirements to OSD, OMB, Congress and the President. The support team will assist in alleviating some of the time requirements for any one individual. The team will be comprised of an attorney, resource manager, and a functional technical area support person(s). The IO should request whatever facilities, assistance, and other administrative support are required.

The briefer should inform the IO about accumulating costs. “When conducting an investigation outside the major command to which the investigating officer is assigned, incidental costs (TDY, local travel, etc.) incurred shall be identified and accumulated. Reimbursement shall be requested, in accordance with established regulations.” Ref. DoD 7000.14-R, Ch. 5, pg. 5-4, para. L.

Explain that the investigator’s role is to:

- maintain confidentiality:

do not reveal sources of information

do not tell to whom you have talked

do not give specifics of allegations except for subjects/suspects

protect confidentiality of everyone but do not guarantee protection

- collect and examine evidence
- make complete and impartial representation of evidence
- recommend (but no authority to make) legal findings, impose punishment or direct corrective action
- protect best interests of U. S. Army
- establish truth or falsehood of allegations
- clear a person’s good name if innocent

Clarify for the investigating officer the following information:

- interview ground rules:

sworn and recorded testimony

all answers must be spoken

classified information

break procedures

APPENDIX I

- release of testimony
- privacy Act of 1974
- testimony Information Sheet
- confirm witness status (i.e., if USAR or ARNG, dual status personnel)
- rights warning/waiver

Summation:

- administrative procedure, not court of law
- can accept and use hearsay and opinion
- keep case confidential
- Privacy Act of 1974 pertains to U.S. citizens only, unlike the Freedom of Information Act, which applies to the world.

APPENDIX I

CHECKLIST for the MACOM APPOINTING OFFICERS AND ADA PROGRAM MANAGER

A check and review of the investigating officer's report of investigation of an alleged
Antideficiency Act violation
(Check blank as you complete a step)

- Appointing Officer's memorandum and a review of the Flash Report
- The case control number (assigned by HQDA, ASA(FM&C))
- Title of the appropriation/fund involved
- Treasury symbol
- Amount of violation
- Date of occurrence
- Date of discovery
- Description of how the potential violation was identified
- Name and title of the investigating officer
- Dates, place and scope of the investigation
- Evidence clearly documented
- Evidence relevant to the case
- Evidence appears to be complete
- Significant factors missing that should be considered
- There appear to be no relevant unanswered questions
- Findings clearly stated, logical and supported by evidence relevant to the case
- Each finding is based upon testimony properly cross-referenced to the testimony
- Findings and conclusions are fully substantiated by evidence and testimony
- All conflicts in testimony were addressed
- There is an explicit statement that a violation occurred or that no violation occurred
- For violations, a citation of the section of the Antideficiency Act that was violated is included
- The final report names at least one individual as being responsible for the violation
- Evidence supports the determination of responsibility made by the investigating officer
- Individual(s) named responsible identified by name, rank/grade, position title, job series, and organization
- Identified the date of the potential violation and the amount

APPENDIX I

___ Report includes a clear description of the causes and circumstances surrounding the violation(s):

- ___ a. description clearly states what the officer(s) or employee(s) responsible for the violation did, or failed to do, that caused the violation;
- ___ b. state whether the violation was due to careless disregard of instructions, an error; or a
- ___ c. lack of adequate training, procedures, controls, or due to other reasons.

NOTE: The report should not be so brief that it does not clearly convey the essential facts and circumstances of what happened. Clearly state in sufficient detail what happened.

NOTE: Identify the name and position of the holder of the funds subdivision (for example, installation commander) and an evaluation of the performance of his fund control responsibilities. The level of command immediately above the holder normally will furnish this evaluation. This evaluation may be omitted if the holder of funds is named the responsible individual for the violation.

___ Each individual named responsible was:

- ___ a. advised that he may consult with legal counsel;
- ___ b. advised that a violation has been determined to have occurred;
- ___ c. advised that he is named a responsible individual for the violation;
- ___ d. advised that he will be allowed to review the report and examine evidence on which the determination was based (witnesses providing statements may request that their name be disassociated with their statement);
- ___ e. allowed to submit a sworn or unsworn statement regarding the alleged violation after reviewing the report and evidence; if the individual declines to make a statement, the Final Report should so indicate, and include the individual's signed declination or a return receipt from the Post Office; and
- ___ f. allowed to designate witnesses to testify in his or her behalf.

___ The rights of the individual(s) named responsible were protected.

___ There were indications in the preliminary or final report that suggest their rights were not fully protected. If so, the case may have to be reinvestigated.

___ All witnesses -- designated by the individual(s) named responsible -- were interviewed

___ If not, valid reasons are included why they were not interviewed

APPENDIX I

- ___ There was or was not any relevant new information provided by the oral or written statements by the individual(s) named responsible, or their designated witnesses
- ___ If there was, the report should address this new evidence and its bearing on the responsibility of the named individual(s)
- ___ The Final Report explicitly states whether the violation was willfully and knowingly committed
- ___ If there are indications that the violation was willfully and knowingly committed, the investigation should have been referred to criminal investigators

NOTE: “If, at any time during an investigation, the investigating officer believes there may be a criminal violation(s) involved, the investigation shall be stopped immediately. The investigating officer should consult with legal counsel to determine if the issue should be referred to appropriate criminal investigators for resolution.” DoD 7000. 14-R Chapter 5, para. I.5

- ___ Investigating officer included a discussion of the following items and appropriate actions have been taken by the local command:
 - ___ a. discipline the named individual(s), if appropriate
 - ___ b. provide a statement by the local commander justifying the action taken
 - ___ c. identify and install corrective actions to prevent similar violations in the future
 - ___ d. improve procedures and controls, if appropriate
 - ___ e. identify lessons learned from this case
 - ___ f. final report was signed by the investigating officer

APPENDIX II

CHECKLIST for the MACOM INVESTIGATING OFFICER

Procedural Steps of the Antideficiency Act Investigation Process
(Check blank as you complete a step.)

PREPARATION

I. First Phase of the Investigation of an Alleged ADA Violation

- ___ A. Attend in-brief session
 - ___ 1. Confer with Support Team, especially legal counsel
 - ___ 2. Determine schedule for future consultations
- ___ B. Review the following:
 - ___ 1. In-Brief and Resource Packet
 - ___ a. Flash Report
 - ___ b. Draft Audit Report (if applicable)
 - ___ c. ADA Investigator's Handbook
 - ___ C. Acquire a clear understanding of ADA
 - ___ D. Reference applicable regulations
 - ___ E. Review decisions in related cases, if desired
 - ___ F. Investigative Plan
 - ___ 1. 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 efficient manner?
 - ___ 2. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?
 - ___ 3. Does the plan identify information not immediately available and outline steps to quickly obtain the information?
 - ___ 4. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?
 - ___ 5. Is the information collected (witness statements, MFRs of phone conversations, photographs, etc.) being retained and organized?
 - ___ 6. Is routing coordination with the legal advisor being accomplished?
- ___ G. Develop questions to assist in understanding the investigation
 - ___ 1. Understand the facts and circumstances of potential violation
 - ___ 2. Confirm or dispute the existence of the potential violation
 - ___ 3. Stay focused on investigation
- ___ H. Set-up schedule and mark your calendar for the following:
 - ___ 1. Consultation with Support Team
 - ___ 2. Meet with Legal Counsel
 - ___ 3. Talk with former investigating officer (optional)

APPENDIX II

APPLICATION

- ___ 4. Meet with staff who reported alleged violation
 - ___ a. Discuss violation
 - ___ b. Develop clear understanding of their concerns
 - ___ 5. Write interview questions in advance
 - ___ 6. Develop a list of people to interview
 - ___ a. Witness(es)
 - ___ b. Subject(s)/Suspect(s)
 - ___ 7. Gather and review evidence
 - ___ 8. Travel (if needed)
 - ___ 9. Draft Report
 - ___ I Consult with legal counsel and support team
 - ___ J Interview necessary personnel
 - ___ K Record each piece of evidence collected
 - ___ L Make copies of transactions that caused the potential violation
 - ___ M Trace and document the following:
 - ___ 1. authorization or approval of transaction(s)
 - ___ 2. relevant decisions leading up to the potential violation
- II. End First Phase of Investigation - No Violation Found
- ___ A. Draft Preliminary Report and submit to appointing officer with finding of no violation
 - ___ B. If no ADA violation is substantiated, the case is closed, *pending concurrence and final determination* by ASA(FM&C) and Army General Counsel
- III. End First Phase - Violation(s) Found / Begin Second Phase
- If an ADA violation is substantiated, proceed to identify responsible individual, recommended disciplinary action and required corrective action.
- ___ A. Obtain legal opinion
 - ___ B. Report the investigation results to Appointing Officer
 - ___ C. Prepare Preliminary-Interim report with violation
 - ___ D. Seek assistance from the MACOM ADA Program Manager

APPENDIX II

- ___ E. Preparing the Findings and Recommendations
 - ___ 1. Is the evidence assembled in a logical and coherent manner?
 - ___ 2. 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?
 - ___ 3. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?
 - ___ 4. Are the findings and recommendations responsive the tasking in the appointment memorandum?
 - ___ 5. 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. Written report should include all of the following:
 - ___ 1. Case control number
 - ___ 2. Title of fund(s) involved
 - ___ 3. Where the violation occurred
 - ___ 4. Amount of violation
 - ___ 5. Date of violation
 - ___ 6. Date of violation discovery
 - ___ 7. State which ADA statute was violated (Title 31 US Codes: 1341(a)(1)(A),(B),(C),(D); 1342;1517(a)(1),(2))
 - ___ 8. Name and position of individual(s) responsible for violation
 - ___ 9. Organization of individual(s) responsible for violation
 - ___ 10. Whether the violation was an overobligation of appropriation, apportionment, or allotment
 - ___ 11. Effect of violation on the next higher level of funding
 - ___ 12. Cause and circumstances surrounding the violation
- ___ G. Final Report should include [see Final Report of Violation, Appendix VI]:
 - ___ 1. Legal opinion
 - ___ 2. Name of responsible person
 - ___ 3. Statement on knowledge of violation by responsible person
 - ___ a. Responsible persons legal rights and response
 - ___ (1) Advised held responsible for violations
 - ___ (2) May consult legal counsel
 - ___ (3) Can submit sworn or unsworn statement
 - ___ (4) Allowed designated witnesses in their behalf
 - ___ b. Evaluate conflicting facts and circumstances
 - ___ 4. Corrective action taken
 - ___ 5. Disciplinary action taken
 - ___ 6. System adequacy
 - ___ 7. Other Comments

APPENDIX II

- ___ H. Review Final Report
- ___ I. Sign Final Report

EVALUATION

IV. Closure

- ___ A. Conclusion(s)
- ___ B. Recommendation(s)
- ___ C. Lessons Learned
- ___ D. Additional Information
- ___ E. Consult legal counsel
- ___ F. Submit Final report to appointing officer

APPENDIX III

TIMETABLE

To the Investigating Officer:

The investigation of an alleged ADA violation must be completed in a timely manner. As the investigating officer, it is your responsibility to stay on schedule. If the support team has assigned tasks pertinent to the case, you must keep them on schedule as well.

Upon discovery and identification of a potential violation, a flash report is issued within 15 days. The appointing officer will submit your name as the IO as soon as the appointment is made. If this information is available at the time the flash report is submitted, it should be included.

The results of the preliminary investigation must be completed within 90 days from the date of discovery of the violation. If the preliminary investigation concludes that no violation occurred, you will write the Preliminary Report. The investigation will end upon concurrence with ASA(FM&C) and Army General Counsel of the report findings.

If the preliminary investigation concludes that an ADA violation occurred, as the investigating officer, you and the support team will continue the investigation. You will be given 60 additional days to complete the investigation and identify responsibility for the violation.

A 30-day extension may be requested to complete an investigation. You must be able to justify an extension in your request. The Principal Deputy Assistant Secretary of the Army (FM&C) must approve any request for extension.

Attached is a suggested HQDA timetable. Use it as a guide to schedule your investigation.

APPENDIX III

TIMETABLE

Antideficiency Act Milestones

Phase One: Ninety (90) days

Day One

Date of Discovery -- Alleged Violation Reported

Day 15 - Phase One

Flash Report completed
Appoint investigating officer
Appoint support team
In-Brief session

Day 16

Consult legal counsel
Begin investigation
Investigation must be completed in 75 days
Review the Antideficiency Act
Examine and review Resource Packet
Read all applicable regulations
Read decisions in other cases
Develop questions related to the violation
Check timeframe and mark calendar
Examine Checklist
Confer with support team

Day 20

Continue consultation with support team (when necessary)
Meet with a previous investigating officer (optional)
Meet with staff requesting or reporting investigation
Research violations(s)
Write interview questions
Conduct interview(s)
Document evidence
Make travel arrangements, (when necessary)

Day 65

Consult with legal counsel
Confer with support team
Determine existence of violation(s) or
No violation(s)

APPENDIX III

Day 70

- Consult legal counsel
- Conclude Investigation
- Write Preliminary Report
- Contact appointing officer

Day 75

- Consult legal counsel
- Confer with appointing officer
- Sign Preliminary Report
- Submit report to appointing officer
- Close Investigation, upon ASA(FM&C) and Army General Counsel approval/concurrence

Phase Two: Violation(s) Found. Continue Investigation Sixty (60) additional days

Day 76

- Consult legal counsel
- Submit Preliminary-Interim Report to appointing officer
- Analyze violation(s) found
- Consult resource manager
- Confer with support team

Day 85

- Determine responsible person
- Notify responsible person
 - Discuss legal rights
 - Provide opportunity for response
 - Review additional information
- Develop conclusions
- Consult legal counsel
- Draft written report
- Recommend disciplinary action

Day 130

- Final consultation with legal counsel
- Confer with support team
- Prepare Final Report
- Lessons learned
- System adequacy

APPENDIX III

Review Final Report
Additional information

Day 150

Interim Report necessary if extension requested
Complete Final Report
Sign Final Report
Submit Final Report to appointing officer

APPENDIX IV

SUBJECT NOTIFICATION FORMAT

(For Non-criminal Allegations)

To: (Rank and Name) _____

Position and Organization: _____

Phone number: _____

(CHECK WHEN DONE)

1. () _____, this is _____ from the _____ IO Office. We have been directed by _____ (directing authority) to investigate allegations that you: (as stated in action memorandum)

2. () It will be necessary to interview you regarding these matters. (Choose a. or b.)

a. You will be contacted by [Investigating Officer(s)] _____ or _____ to make necessary arrangements; or

b. We want to interview you at (time) _____ on (date) ____ at (location) _____. Our telephone number is _____.

3. () You are a subject in this investigation. Although the allegation(s) against you is/are non-criminal, you do not have to answer any questions that may tend to incriminate you. The investigators will give you an opportunity to respond to the allegation(s). You have the right to consult with an attorney before being questioned, but you do not have the right to have an attorney present during the interview.

4. () _____ has been notified of this investigation.

5. () We are required to protect the confidentiality of ADA investigations and the rights, privacy, and reputations of all people involved in them. We ask people not to discuss or reveal matters under investigation. Accordingly, we ask that you not discuss this matter with anyone except your attorney, if you consult one, without permission of the investigating officers.

6. () _____ was (telephonically/personally) notified of the above at _____(time) on _____ (date).

(Signature of Notifying Official)

APPENDIX IV

SUSPECT NOTIFICATION FORMAT
(Criminal Allegations)

To: (Rank and Name) _____
Position and Organization: _____
Phone number: _____

(CHECK WHEN DONE)

1. () _____, this is _____ from the _____ IO Office. We have been directed by _____ (authority) to investigate allegations that you: (as stated in action memorandum)

2. () It will be necessary to interview you regarding these matters. (Choose a. or b.)

a. You will be contacted by (Investigation Officers) _____ or _____ to make necessary arrangements; or

b. We want to interview you at (time) _____ on (date) ____ at (location) _____. Our telephone number is _____.

3. () You are a suspect in this matter. Therefore, you do not have to answer any questions or say anything. Anything you say or do can be used as evidence against you in a criminal trial. You have the right to talk to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. The lawyer can be a civilian you arrange at no expense to the government. (If suspect is subject to UCMJ add the following): Or a military lawyer detailed for you at no expense to you, or both.

4. () _____ has been notified of this investigation.

5. () We are required to protect the confidentiality of ADA investigations and the rights, privacy, and reputations of all people involved in them. We ask people not to discuss or reveal matters under investigation. Accordingly, we ask that you not discuss this matter with anyone except your attorney, if you choose to consult one, without permission of the investigating officers.

6. () _____ was (telephonically/personally) notified of the above at _____ (time) on _____ (date).

(Signature of Notifying Official)

APPENDIX IV

INVESTIGATION PLAN OUTLINE

MEMORANDUM FOR RECORD

SUBJECT: Investigation Plan - (Case Name)

1. Mission. (Information should be similar to that stipulated in the first paragraph of your Appointing Officer's Directive.)
2. Facts bearing on mission.
 - a. Background and Allegations. (Information should be similar to that contained in the flash report. However, the allegations should be specific enough to adequately describe the scope of the investigation. Note when the directive was signed, by whom and reference any relevant correspondence from or to VIPs.)
 - b. Applicable Regulations and Reference Publications. (List those applicable regulations/publications that apply to the allegation(s). For example, if the allegations pertained to procurement irregularities, the Federal Acquisition Regulation (FAR) would probably be a reference. Ensure the referenced regulation was in effect at the time of the alleged incident.)
 - c. Commands involved. (List the various commands that might be involved. For example, if the allegation pertained to an incident in a unit in Europe, the commands could include the specific division, corps and, possibly, HQ, USAREUR.)
 - d. Staff Agencies Having Knowledge of Case. (Include any staff agencies made aware of the allegation(s) and how they were informed. Identify any staff agency that may be a proponent for regulations or guidelines that could be related to the allegation(s).)
3. Evidence and Data Required.
 - a. Witnesses. (From information available to you, list the names of witnesses that you want to interview for each allegation. Remember, the number of witnesses and possibly the allegations, within the scope of the directive, may change. You may not need to question all witnesses about every allegation.)

APPENDIX IV

(1) Allegation 1: (State the specific allegation)

(a) Witness #1

(b)

(2) Allegation 2: (State the specific allegation)

(a) Witness #1

(b)

b. Documents. (List documents and records you need to substantiate or refute the allegation. These may include SOPs, training records, contracts and more.)

c. Physical evidence. (List any required physical evidence).

4. Administrative Matters.

a. Itinerary: (When, where, and how you plan to conduct the investigation. The list should include: courtesy calls, transportation requirements, lodging requirements, interview locations, and witness interview sequence.)

b. Notifications. (Identify commanders and Subject(s)/Suspect(s) who should be notified IAW this Guide and the directing authority's guidance.)

(1) Command(s).

(2) Subject(s)/suspect(s).

c. Travel Requirements. (TDY orders, passports, car rentals.)

List of Enclosures
that may be relevant

INVESTIGATOR'S SIGNATURE

APPENDIX IV

FORMAT TO SCHEDULE WITNESSES

To: (Rank and Name) _____

Position and Organization: _____

Phone number: _____

(CHECK WHEN DONE)

1. () _____, this is _____ from
_____ Office. We have been directed by the
_____ to investigate the following allegations: (as stated in directive)

NOTE: Use the general wording from the directive. If you need to be more specific, use the wording from the action memorandum but don't tell the witness more than he or she needs to know!

2. () We do not suspect you of wrongdoing, but believe you have information relevant to the investigation and need to interview you as a witness. We would like to interview you at (time) _____ on (date) _____ at (location) _____. The investigators are _____ and _____. Our telephone number is _____.

3. () _____ has been notified of the investigation. (Can omit for non-DOD civilians.)

4. () We are required to protect the confidentiality of ADA investigations and the rights, privacy, and reputations of all people involved in them. We ask people not to discuss or reveal matters under investigation. Accordingly, we ask that you not discuss this matter with anyone except your attorney, if you choose to consult one, without permission of the investigating officers.

5. () _____ was (telephonically/personally) notified of the above at _____ (time) on _____ (date).

(Signature of Notifying Official)

APPENDIX IV

SUMMARIZED TESTIMONY FORMAT

Summarized (sworn and recorded) testimony of (NAME), (SSN), (DUTY POSITION), (LOCATION), obtained by interview at (LOCATION), (DATE), from (TIME) to (TIME) hours by (INVESTIGATION OFFICERS)

Name of Witness:

Grade of Witness:

SSN of Witness:

Organization:

Duty assignment of Witness:

Telephone number of Witness:

(NAME) was interviewed and informed of the role of the IO, that we were conducting an investigation, that testimony would be recorded and either transcribed verbatim or summarized and would become part of the report. The witness was informed of the authority for the investigation, information required by the Privacy Act of 1974, and of the rights of a witness.

.....
(Present a brief summary of the KEY POINTS of the witness' testimony. Do not include information provided by the witness that is not EVIDENCE relevant to the investigation.)
.....

(NAME) did/did not agree to the release of this testimony outside official channels.

John L. Doe
LTC, IO
Investigating Officer

APPENDIX IV

PRE-TAPE BRIEFING

1. Identify Investigators -- Show Military ID and IO Appointment Letter
2. Show Directive
3. Explain Investigative Procedure - "This is a four part interview..."
 1. PRE-TAPE briefing (doing now).
 2. Formal READ-IN. (Formality designed to ensure rights of individual fully explained and legal requirements are met.)
 3. Questioning.
 4. Formal READ-OUT.
4. Explain the investigator's role
 - Confidential fact finders for directing authority.
 - Collect and examine all pertinent evidence.
 - Make complete and impartial representation of all evidence.
 - No authority to make legal findings, impose punishment, or direct corrective action.
 - Dual Role of IO:
 - Protect best interests of DOD
 - Establish truth of allegations or establish that allegations are not true and clear a person's good name. Anyone can make allegations. The investigator has the authority to make recommendations.
 - IO confidentiality:
 - Protect the confidentiality of everyone involved but do not guarantee that protection.
 - Will not reveal sources of information.
 - Will not tell you to whom we have talked.
 - Will not tell you specific allegations being investigated (except for subjects and suspects).
5. Interview ground rules
 - Sworn and recorded testimony. We normally take sworn and recorded testimony. Recorders improve accuracy.
 - All answers must be spoken. Tape recorder cannot pick up nods or gestures.
 - Classified information: If classified information comes up, we will discuss off tape first.
 - Break procedures: Can go off tape at any time, but
 - We never go off record.

APPENDIX IV

6. Release of your testimony

- The last question we ask you during the READ-OUT is whether you consent to release your testimony to members of the public under the FOIA.
- FOIA allows members of the public to request government records for unofficial purposes. It is your choice whether you want to protect your testimony from release outside the Federal government.
- You will be asked to decide at the end of the interview if you consent to the release of your testimony (we do not infer anything from your answer).
- "NO" = Do not consent. "YES" = Do consent.
- Our report, INCLUDING YOUR TESTIMONY, will be used as necessary for official government purposes.

7. Privacy Act of 1974

- Disclosure of SSN is voluntary.
- Describes authority to ask for personal information.
- LET THEM READ PRIVACY ACT STATEMENT. Will refer to it during the formal read-in.

8. Testimony Information Sheet (Header Sheet)

- Individual fills out first four (4) lines (name, rank, address, phone, SSN).
- Used by investigators for notes, acronyms, proper names, etc.
- Aids in preparing an accurate transcript.

9. Confirm Witness Status

10. Rights warning/waiver. EXECUTE DA FORM 3881 (When appropriate.)

11. Summation

- Administrative procedure, not court of law.
- Can accept and use hearsay and opinion.
- We protect everyone's confidentiality, but do not guarantee confidentiality.
- TO KEEP THIS CASE AS CONFIDENTIAL AS POSSIBLE YOU WILL BE ASKED NOT TO DISCUSS YOUR TESTIMONY WITH ANYONE WITHOUT OUR PERMISSION.

NOTE: PROVIDE INTERVIEWEE WITH APPROPRIATE DOCUMENT. PRIVACY ACT PERTAINS TO US CITIZENS ONLY, UNLIKE FOIA, which applies to the world.

APPENDIX IV

PRIVACY ACT INFORMATION

DATA REQUIRED BY THE PRIVACY ACT OF 1974 PRIVACY ACT STATEMENT FOR PERSONAL INFORMATION TAKEN DURING INSPECTOR GENERAL WITNESS TESTIMONY

AUTHORITY: Title 5 US Code, Section 552a.

PRINCIPAL PURPOSE(S): Information is collected during an investigation to aid in determining facts and circumstances surrounding allegations/problems. The information is assembled in report format and presented to the official directing the inquiry/investigation as a basis for Department of Defense/ Department of the Army decision making. The information may be used as evidence in judicial or administrative proceedings or for other official purposes within the Department of Defense. Disclosure of Social Security Account Number, if requested, is used to further identify the individual providing the testimony.

ROUTINE USES:

- a. The information may be forwarded to federal, state or local law enforcement agencies for their use.
- b. May be used as a basis for summaries, briefings or responses to Members of Congress or other agencies in the Executive Branch of the Federal Government.
- c. May be provided to Congress or other federal, state and local agencies, when determined necessary by The Inspector General (DAIG).

MANDATORY OR VOLUNTARY DISCLOSURE AND EFFECT ON INDIVIDUAL NOT PROVIDING INFORMATION:

For Military Personnel: The disclosure of Social Security Account Number is voluntary where requested. Disclosure of other personal information is mandatory and failure to do so may subject the individual to disciplinary action.

For Department of the Army Civilians: The disclosure of Social Security Account Number is voluntary. However, failure to disclose other personal information in relation to your position responsibilities may subject you to adverse personnel action.

FOR ALL OTHER PERSONNEL: THE DISCLOSURE OF SOCIAL SECURITY ACCOUNT NUMBER, WHERE REQUESTED, AND OTHER PERSONAL INFORMATION IS VOLUNTARY AND NO ADVERSE ACTION CAN BE TAKEN AGAINST YOU FOR REFUSING TO PROVIDE INFORMATION ABOUT YOURSELF.

APPENDIX IV

TESTIMONY INFORMATION SHEET

INFORMATION FOR HEADING of TESTIMONY TRANSCRIPT

To be completed in each interview, including recall witnesses.

Testimony of (Full Name):

(FIRST) (MI) (LAST)

SSN: _____, Rank/Grade: _____

Position/Title: _____, Organization: _____

Address: _____ ZIP: _____ Phone: _____

XX

(Completed by IO)

Testimony taken at: _____, Date: _____

From: _____ (hrs), To: _____ (hrs).

By: _____ and _____

Does this witness consent to release? ____ Yes ____ No

APPENDIX IV

RIGHTS WARNING/WAIVER CERTIFICATE

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE			
For use of this form, see AR 190-30, the proponent agency is ODCSOPS			
DATA REQUIRED BY THE PRIVACY ACT			
AUTHORITY:	Title 10, United States Code, Section 3012(g)		
PRINCIPAL PURPOSE:	To provide commanders and law enforcement officials with means by which information may be accurately identified.		
ROUTINE USES:	Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.		
DISCLOSURE:	Disclosure of your Social Security Number is voluntary.		
1. LOCATION	2. DATE	3. TIME	4. FILE NO.
5. NAME (Last, First, MI)	8. ORGANIZATION OR ADDRESS		
6. SSN			
PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE			
Section A. Rights			
<p>The investigator whose name appears below told me that he/she is with the United States Army _____ and wanted to question me about the following offense(s) of which I am suspected/accused: _____</p> <p>Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:</p> <ol style="list-style-type: none"> 1. I do not have to answer any questions or say anything. 2. Anything I say or do can be used as evidence against me in a criminal trial. 3. (For personnel subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both. <li style="text-align: center;">- or - (For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins. 4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below. 			
5. COMMENTS (Continue on reverse side)			
Section B. Waiver			
I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.			
WITNESSES (If available)		3. SIGNATURE OF INTERVIEWEE	
1a. NAME (Type or Print)		4. SIGNATURE OF INVESTIGATOR	
b. ORGANIZATION OR ADDRESS AND PHONE			
2a. NAME (Type or Print)		5. TYPED NAME OF INVESTIGATOR	
b. ORGANIZATION OR ADDRESS AND PHONE		6. ORGANIZATION OF INVESTIGATOR	
Section C. Non-waiver			
<ol style="list-style-type: none"> 1. I do not want to give up my rights. <div style="display: flex; justify-content: space-between; align-items: center;"> <input type="checkbox"/> I want a lawyer <input type="checkbox"/> I do not want to be questioned or say anything. </div> 2. SIGNATURE OF INTERVIEWEE 			
ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED			

APPENDIX IV

PART II - RIGHTS WARNING PROCEDURE	
THE WARNING	
<p>1. WARNING - Inform the suspect/accused of:</p> <ol style="list-style-type: none"> a. Your official position. b. Nature of offense(s) c. The fact that he/she is a suspect/accused. <p>2. RIGHTS - Advise the suspect/accused of his/her rights as follows: "Before I ask you any questions, you must understand your rights." <ol style="list-style-type: none"> a. "You do not have to answer my questions or say anything." b. "Anything you say or do can be used as evidence against you in a criminal trial." c. (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer </p>	<p>can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both "</p> <p style="text-align: center;">- or -</p> <p><i>(For civilians not subject to the UCMJ)</i> You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins "</p> <ol style="list-style-type: none"> d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate " <p>Make certain the suspect/accused fully understands his/her rights.</p>
THE WAIVER	
<p>"Do you understand your rights?" (If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)</p> <p>"Have you ever requested a lawyer after being read your rights?" (If the suspect/accused says "yes," find out when and where. If the request was recent (<i>i.e., fewer than 30 days ago</i>), obtain legal advice on whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)</p>	<p>"Do you want a lawyer at this time?" (If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)</p> <p>"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" (<i>If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.</i>)</p>
SPECIAL INSTRUCTIONS	
<p>WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.</p> <p>IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.</p> <p>PRIOR INCRIMINATING STATEMENTS:</p> <ol style="list-style-type: none"> 1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions. 	<p>2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.</p> <p>NOTE: If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.</p> <p>WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS: If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")</p>
<p>COMMENTS (<i>Continued</i>)</p>	

REVERSE OF DA FORM 3881

* U.S. Government Printing Office 1992-311-830/60267

APPENDIX IV

RIGHTS WARNING/WAIVER CERTIFICATE

NOTES:

- (1) Complete administrative data on the front side of the DA 3881 prior to the interview. Summarize the allegations contained in the action memorandum. Ask the suspect to review the personal data and other information. Advise the suspect that you will formally advise him of his rights, explain his options and then, ask him if he is willing to waive his rights by signing the DA 3881. Also inform the suspect that you will refer again to the rights warning/waiver when you conduct the read-in (if you are conducting a formal interview).
- (2) Read the appropriate paragraphs in Part II on the back of the DA 3881 (THE WARNING) to the suspect verbatim. Ensure the suspect understands what you have read. Note that different paragraphs are applicable for military personnel only and civilian personnel only.
- (3) Ask the suspect verbatim the four questions in the second part of Part II on the back of the DA 3881 (THE WAIVER). Ensure the suspect answers "yes" or "no" to the questions. Do not accept "I guess so" as an answer.
- (4) If the suspect waives his rights, ask him to sign the front of the DA 3881 in block 3. of Section B (SIGNATURE OF INTERVIEWEE). If the suspect does not agree to waive his rights, have him check the appropriate block and sign in Section C (NON WAIVER).
- (5) Do not recall a suspect who has earlier invoked his rights, unless such recall is agreed to and coordinated with his attorney. He will be notified of unfavorable information in writing and advised that he has the right to comment on the information if he chooses.
- (6) See notes in Suspect Read-In Script in dealing with a witness who becomes suspected of knowingly making a false statement under oath or of having committed another criminal offense.
- (7) If you have any questions regarding the DA Form 3881 or encounter any difficulty when executing the warning/waiver, consult with legal counsel.

APPENDIX V

WITNESS INTERVIEW GUIDE

(BEGIN READ-IN. DO NOT USE YOUR OWN WORDS)

1. The time is _____. This tape-recorded interview is being conducted on (date) _____, at (location) _____ (if telephonic, state both locations). Persons present are the witness (name) _____, the investigating officers _____, _____, (court reporters, attorney, union representative, others) _____. This (investigation directed by _____) concerns allegations that: (as stated in directive)

NOTE: If the investigation concerns classified information, inform witness that the report will be properly classified and advise witness of security clearances held by IO personnel. Instruct witness to identify classified testimony.

2. An investigating officer is an impartial fact finder. Testimony taken by an IO and reports based on the testimony may be used for official purposes. Access is normally restricted to persons who clearly need the information to perform their official duties. In some cases, disclosure to other persons may be required by law or regulation, or may be directed by proper authority. Upon completion of this interview, I will ask you whether you consent to the release of your testimony if requested by members of the public pursuant to the Freedom of Information Act.

3. Since I will ask you to provide your social security number to help identify you as the person testifying, I provided you a Privacy Act Statement. (If telephonic, it may have been necessary to read the Privacy Act Statement.) Do you understand it? (Witness must state yes or no)

4. You are not suspected of any criminal offense and are not the subject of any unfavorable information.

5. Before we continue, I want to remind you of the importance of presenting truthful testimony. It is a violation of Federal law to knowingly make a false statement under oath. Do you have any questions before we begin? Please raise your right hand so I may administer the oath.

Do you swear that the testimony you are about to give shall be the truth, the whole truth and nothing but the truth so help you God?

NOTE: The witness should audibly answer, "yes" or "I do." If the witness objects to the oath, the word "swear" may be changed to the word "affirm," and the phrase "so help me God" may be omitted.

APPENDIX V

6. Please state your: (as applicable)

- Name
- Rank (Active/Reserve/Retired)
- Grade/Position
- Organization
- Social security number (voluntary)
- Address (home or office)
- Telephone number (home or office)

(END READ-IN)

XX

7. Question the witness.

NOTE: (1) If during this interview the witness suggests personal criminal involvement, the witness must be advised of his rights using DA Form 3881, Rights Warning Procedure/Waiver Statement. Unless rights are waived, the interview ceases. If during the interview you believe the witness has become a subject, advise him that he need not make any statement that may incriminate him.

NOTE: (2) If during the interview it becomes necessary to advise a witness about making false statements or other false representations, read the following statement to the witness, as applicable:

7a. For active duty or USAR/ARNG personnel subject to UCMJ:

I consider it my duty to advise you that any person subject to the UCMJ who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing the same to be false, may be subject to action under the provisions of UCMJ, Art. 107. Additionally, under the provisions of the UCMJ, Art. 134, any person subject to the UCMJ who makes a false statement, oral or written, under oath, believing the statement to be untrue, may be punished as a court-martial may direct.

Do you understand? (Witness must state yes or no)

7b. For USAR/ARNG and civilian personnel not subject to UCMJ:

I consider it my duty to advise you that under the provisions of section 1001, title 18, United States Code, whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by a trick, scheme, or device, a material fact, or makes any false, fictitious, or fraudulent statement or representation,

APPENDIX V

shall be fined not more than \$10,000 or imprisoned for not more than five years, or both. Additionally, any person who willfully and contrary to his oath testifies falsely while under oath may be punished for perjury under the provisions of section 1621, title 18, United States Code.

Do you understand? (Witness must state yes or no)

XX

(BEGIN READ-OUT)

8. Do you have anything else you wish to present?

9. Who else do you think we should talk to, and why?

10. We are required to protect the confidentiality of IO investigations and the rights, privacy, and reputations of all people involved in them. We ask people not to discuss or reveal matters under investigation. Accordingly, we ask that you not discuss this matter with anyone except your attorney, if you choose to consult one, without permission of the investigating officers.

NOTE: Others present should also be advised against disclosing information.

11. Your testimony may be made part of an official ADA record. Earlier, I advised you that while access is normally restricted to persons who clearly need the information to perform their official duties, your testimony may be released outside official channels. Individual members of the public who do not have an official need to know may request a copy of this record, to include your testimony. If there is such a request, do you consent to the release of your testimony outside official channels? (Witness must state "yes" or "no.")

12. Do you have any questions? The time is _____, and the interview is concluded. Thank you.

XX

(END READ-OUT)

APPENDIX V

RECALL WITNESS INTERVIEW GUIDE

(BEGIN READ-IN. DO NOT USE YOUR OWN WORDS)

1. The time is _____. This tape-recorded recall interview is being conducted on (date) _____ at (location) _____(if telephonic, state both locations). The persons present are the witness (name) _____, the investigating officers _____, _____, (court reporter, attorney, union representative, others) _____. This is a continuation of an interview conducted on (date)_____ as part of an (investigation directed by _____/inquiry) concerning allegations of: (as stated in directive)

NOTE: If the investigation concerns classified information, inform witnesses that the report will be properly classified and advise witnesses of security clearances held by IO personnel. Instruct witnesses to identify classified testimony.

2. You were previously advised of the role of an investigating officer, of restrictions on the use and release of records, and of the provisions of the Privacy Act. Do you have any questions about what you were previously told? (Witness must state yes or no).

3. You were also informed you are not suspected of any criminal offense and are not the subject of any unfavorable information. During the previous interview, you were put under oath before giving testimony and were reminded it is a violation of Federal law to knowingly make a false statement under oath. You are still under oath.

4. For the record, please state your: (as applicable)

Name

Rank (Active, Reserve, Retired)

Grade/Position

Organization

Social security number (voluntary)

Address/Telephone (home or office)

(END READ-IN)

APPENDIX V

XX

5. Question the witness.

NOTE: If during this interview the witness suggests personal criminal involvement, the witness must be advised of his rights using DA Form 3881, Rights Warning Procedure/Waiver Statement. Unless rights are waived, the interview ceases. If during the interview you believe the witness has become a subject, advise him that he need not make any statement that may incriminate him. See Witness Read-In Script for dealing with false statements.

XX

(BEGIN READ-OUT)

6. Do you have anything else you wish to present?

7. Who else do you think we should talk to, and why?

8. We are required to protect the confidentiality of ADA investigations and the rights, privacy, and reputations of all people involved in them. We ask people not to discuss or reveal matters under investigation. Accordingly, we ask that you not discuss this matter with anyone except your attorney, if you choose to consult one, without permission of the investigating officers.

NOTE: Others present should also be advised against disclosing information.

9. In our first interview, I advised you that your testimony may be made part of an official ADA report and that while access is normally restricted to persons who clearly need the information to perform their official duties, any member of the public could ask for a copy of these records. You (did/did not) consent to the release of your testimony. Do you consent to the release of the testimony you gave today? (Witness must state "yes" or "no.")

10. Do you have any questions? The time is _____, and this recall interview is concluded.

Thank you.

XXXXXXXXXXXXXXXXXXXX(END READ-OUT)XXXXXXXXXXXXXXXXXXXXXXXXXXXX

APPENDIX V

SUBJECT INTERVIEW GUIDE

(BEGIN READ-IN. DO NOT USE YOUR OWN WORDS)

1. The time is _____. This tape-recorded interview is being conducted on (date) _____ at _____ (location) _____ if telephonic, state both locations). Persons present are (subject's name) _____, the investigating officers _____, _____, (court reporters, attorney, union representative, others) _____. This (investigation directed by _____) concerns allegations that: (as stated in directive)

NOTE: If the investigation concerns classified information, inform subject that the report will be properly classified and advise subject of security clearances held by IO personnel. Instruct subject to identify classified testimony.

2. An investigating officer is an impartial fact finder. Testimony taken by an IO and reports based on the testimony may be used for official purposes. Access is normally restricted to persons who clearly need the information to perform their official duties. In some cases, disclosure to other persons may be required by law or regulation, or may be directed by proper authority. Upon completion of this interview, I will ask you whether you consent to the release of your testimony if requested by members of the public pursuant to the Freedom of Information Act.

3. Since I will ask you to provide your social security number to help identify you as the person testifying, I provided you a Privacy Act Statement. (If telephonic, it may be necessary to have read the Privacy Act Statement.) Do you understand it?

4. While you are not suspected of a criminal offense, we have information that may be unfavorable to you. We are required to give you the opportunity to comment on these matters. However, you do not have to answer any question that may tend to incriminate you. The information is that:

5. Before we continue, I want to remind you of the importance of presenting truthful testimony. It is a violation of Federal law to knowingly make a false statement under oath. Do you have any questions before we begin? Please raise your right hand so I may administer the oath.

Do you swear that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God?

NOTE: The subject should audibly answer, "yes" or "I do." If the subject objects to the oath, the word "swear" may be changed to the word "affirm," and the phrase "so help me God" may be omitted.

APPENDIX V

6. Please state your: (as applicable)

- Name
- Rank (Active, Reserve, Retired)
- Grade/Position
- Organization
- Social security number (voluntary)
- Address/Telephone (home or office)

(END READ-IN)

XX

7. Question the subject.

NOTE: (1) If during this interview, the individual suggests personal criminal involvement, the individual must be advised of his rights using DA Form 3881, Rights Warning Procedure/Waiver Statement. Unless rights are waived, the interview ceases.

NOTE: (2) If, during the interview, it becomes necessary to advise a subject about making false statements or other false representations, read the following statement to the subject:

7a. For active duty or USAR/ARNG personnel subject to UCMJ:

I consider it my duty to advise you that any person subject to the UCMJ who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing the same to be false, may be subject to action under the provisions of UCMJ, Art. 107. Additionally, under the provisions of UCMJ, Art. 134, any person subject to the UCMJ who makes a false statement, oral or written, under oath, believing the statement to be untrue, may be punished as a court-martial may direct.

Do you understand? (Subject must state yes or no)

7b. For USAR/ARNG and civilian personnel not subject to UCMJ:

I consider it my duty to advise you that under the provision of section 1001, title 18, United States Code, whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by a trick, scheme, or device, a material fact, or makes any false, fictitious, or fraudulent statement or representation, shall be fined not more than \$10,000 or imprisoned for not more than 5 years, or both.

APPENDIX V

Additionally, any person who willfully and contrary to his oath testifies falsely while under oath may be punished for perjury under the provisions of section 1621, title 18, United States Code.

Do you understand? (Subject must state yes or no)

8. Do you have anything else you wish to present?

XX

(BEGIN READ-OUT)

9. Who else do you think we should talk to, and why?

10. We are required to protect the confidentiality of ADA investigations and the rights, privacy, and reputations of all people involved in them. We ask people not to discuss or reveal matters under investigation. Accordingly, we ask that you not discuss this matter with anyone except your attorney, if you choose to consult one, without permission of the investigating officers.

NOTE: Others present should also be advised against disclosing information.

11. Your testimony may be made part of an official ADA record. Earlier, I advised you that while access is normally restricted to persons who clearly need the information to perform their official duties, your testimony may be released outside official channels. Individual members of the public, who do not have an official need to know, may request a copy of this record, to include your testimony. If there is such a request, do you consent to the release of your testimony outside official channels? (Subject must state "yes" or "no.")

12. Do you have any questions? The time is _____, and the interview is concluded. Thank you.

XX

(END READ-OUT)

APPENDIX V

RECALL SUBJECT INTERVIEW GUIDE

(BEGIN READ-IN. DO NOT USE YOUR OWN WORDS)

1. The time is _____. This tape-recorded recall interview is being conducted on (date) _____ at (location) _____; if telephonic, state both locations). The persons present are (subject's name) _____, the investigating officers _____, (attorney, union representative, others) _____. It is a continuation of an interview conducted on (date) _____ as part of an (investigation directed by _____) concerning allegations of: (as stated in directive)

NOTE: If the investigation concerns classified information, inform subject that the report will be properly classified and advise subject of security clearances held by IO personnel. Instruct subject to identify Classified testimony.

2. You were previously advised of the role of an investigating officer, of restrictions on the use and release of records, and of the provisions of the Privacy Act. Do you have any questions about what you were previously told? (Subject must state yes or no).

3. You were also informed you are not suspected of any criminal offense. Therefore, I am not advising you of the rights to which such a person is entitled. I do want to remind you that you do not have to answer any question that may tend to incriminate you. You are reminded it is a violation of Federal law to knowingly make a false statement under oath.

4. Since our previous interview, our investigation has developed unfavorable information about which you have not yet had the opportunity to testify or present evidence. The unfavorable information is:

5. Earlier, we placed you under oath. You are advised you are still under oath.

6. For the record, please state your: (as applicable)

Name

Rank (Active, Reserve, Retired)

Grade/Position

Organization

Social security number (voluntary)

Address/Telephone (home or office)

(END READ-IN)

APPENDIX V

XX

7. Question the subject.

NOTE: See notes in Subject Read-In Script for dealing with false statements and Suspect Read-In Script for dealing with suggested criminal involvement.

XX

(BEGIN READ-OUT)

8. Do you have anything else you wish to present?

9. Who else do you think we should talk to, and why?

10. We are required to protect the confidentiality of ADA investigations and the rights, privacy, and reputations of all people involved in them. We ask people not to discuss or reveal matters under investigation. Accordingly, we ask that you not discuss this matter with anyone except your attorney, if you choose to consult one, without permission of the investigating officers.

NOTE: Others present should also be advised against disclosing information.

11. In our first interview, I advised you that your testimony may be made part of an official ADA record and that any member of the public could ask the ADA Program Manager for a copy of these records. You (did/ did not) consent to the release of your testimony. Do you consent to the release of the testimony you gave today? (Subject must state "yes" or "no.")

12. Do you have any questions? The time is _____, and this recall interview is concluded. Thank you.

(END READ-OUT)

XX

APPENDIX V

INTERVIEW SUSPECT GUIDE

(BEGIN READ-IN. DO NOT USE YOUR OWN WORDS)

1. The time is _____. This tape-recorded interview is being conducted on (date) _____ at _____ (location) (If telephonic, state both locations). Persons present are (suspect's name) _____, the investigating officers _____, _____, (court reporters, attorney, union representative, others) _____. This (investigation directed by _____) concerns allegations: (as stated in directive)

NOTE: If the investigation concerns classified information, inform suspect that the report will be properly classified and advise suspect of security clearances held by IO personnel. Instruct suspect to identify classified testimony.

2. An investigating officer an impartial fact finder for the commander. Testimony taken by an IO and reports based on the testimony may be used for official purposes. Access is normally restricted to persons who clearly need the information to perform their official duties. In some cases, disclosure to other persons may be required by law or regulation, or may be directed by proper authority. Upon completion of this interview, I will ask you whether you consent to the release of your testimony if requested by members of the public pursuant to the Freedom of Information Act.

3. Since I will ask you to provide your social security number to help identify you as the person testifying, I provided you a Privacy Act Statement. (If telephonic, it may have been necessary to read the Privacy Act Statement.) Do you understand it? (Suspect must state yes or no)

4. You are advised that you are suspected of the following allegations, which we want to question you about:

(Advise suspect of general nature of all allegations made against him. Refer to action memorandum.)

5. I previously advised you of your rights and you signed a DA 3881 waiver certificate.

Do you understand your rights? (Suspect must state yes or no)

Do you agree to waive them at this time? (Suspect must state yes or no)

6. Before we continue, I want to remind you of the importance of presenting truthful testimony.

APPENDIX V

It is a violation of Federal law to knowingly make a false statement under oath. Do you have any questions before we begin? Please raise your right hand so I may administer the oath.

Do you swear that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God?

NOTE: The suspect should audibly answer, "yes" or "I do." If the suspect objects to the oath, the word "swear" may be changed to the word "affirm," and the phrase "so help me God" may be omitted.

7. Please state your: (as applicable)

- Name
- Rank (Active/Reserve/Retired)
- Grade/Position
- Organization
- Social security number (voluntary)
- Address/Telephone number (home or office)

(END READ-IN)

XX

8. Question the suspect.

NOTE: If, during the interview, it becomes necessary to advise suspect about making false statements or other false representations, read the following statement to the suspect as applicable.

8a. For active duty or USAR/ARNG personnel subject to UCMJ:

I consider it my duty to advise you that any person subject to the UCMJ who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing the same to be false, may be subject to action under the provisions of UCMJ, Art. 107. Additionally, under the provisions of UCMJ, Art. 134, any person subject to the UCMJ who makes a false statement, oral or written, under oath, believing the statement to be untrue, may be punished as a court-martial may direct. Do you understand? (Suspect must state yes or no)

8b. For USAR/ARNG and civilian personnel not subject to UCMJ:

I consider it my duty to advise you that under the provisions of section 1001, title 18, United States Code, whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by a trick, scheme, or

APPENDIX V

device, a material fact, or makes any false, fictitious, or fraudulent statement or representation, shall be fined not more than \$10,000 or imprisoned for not more than 5 years, or both. Additionally, any person who willfully and contrary to his oath testifies falsely while under oath may be punished for perjury under the provisions of section 1621, title 18, United States Code. Do you understand? (Suspect must state yes or no)

NOTE: If, during this interview, the individual should become suspected of having committed an additional criminal offense, readvise the suspect of his rights concerning the additional offense. The DA Form 3881 will be annotated and initialed by suspect and investigator(s).

XX

(BEGIN READ-OUT)

9. Do you have anything else you wish to present?

10. Who else do you think we should talk to, and why?

11. We are required to protect the confidentiality of ADA investigations and the rights, privacy, and reputations of all people involved in them. We ask people not to discuss or reveal matters under investigation. Accordingly, we ask that you not discuss this matter with anyone except your attorney, if you choose to consult one, without permission of the investigating officers.

NOTE: Others present should also be advised against disclosing information.

12. Your testimony may be made part of an official ADA record. Earlier, I advised you that while access is normally restricted to persons who clearly need the information to perform their official duties, your testimony may be released outside official channels. Individual members of the public who do not have an official need to know may request a copy of this record, to include your testimony. If there is such a request, do you consent to the release of your testimony outside official channels? (Suspect must answer "yes" or "no.")

13. Do you have any questions? The time is _____, and the interview is concluded. Thank you.

XX

(END READ-OUT)

APPENDIX V

RECALL SUSPECT INTERVIEW GUIDE

(BEGIN READ-IN. DO NOT USE YOUR OWN WORDS)

1. The time is _____. This tape-recorded recall interview is being conducted on (date)_____ at (location) _____ if telephonic, state both locations). The persons present are (suspect's name) _____, the investigating officers _____, _____, (attorney, union representative, others) _____. It is a continuation of an interview conducted on (date)_____ as part of an (investigation directed by _____) concerning allegations of: (as stated in directive)

NOTE: If the investigation concerns classified information, inform suspect that the report will be properly classified and advise suspect of security clearances held by IO personnel. Instruct suspect to identify classified testimony.

2. You were previously advised of the role of an investigating officer, of restrictions on the use and release of records, and of the provisions of the Privacy Act. Do you have any questions about what you were previously told?

3. During our previous interview, you were advised that you were suspected of:

You were warned of your rights, and you signed a DA Form 3881 in which you consented to answer questions. I will show you that DA Form 3881 now. You are reminded it is a violation of Federal law to knowingly make a false statement under oath.

NOTE: Show DA Form 3881 to suspect.

4. Since our previous interview, I have obtained new information about which you have not yet had the opportunity to comment.

NOTE: If new information is criminal, re-advise the suspect of his rights and annotate/initial DA Form 3881. If new information is unfavorable, advise the suspect that he does not have to answer any question that may incriminate him.

5. Earlier, we placed you under oath. You are advised you are still under oath.

APPENDIX V

6. For the record, please state your: (as applicable)

- Name
- Rank
- Grade/Position
- Organization
- Social security number (voluntary)
- Address/Telephone (home or office)

(END READ-IN)

XX

7. Question the suspect.

XX

(BEGIN READ-OUT)

8. Do you have anything else you wish to present?

9. Who else do you think we should talk to, and why?

10. We are required to protect the confidentiality of ADA investigations and the rights, privacy, and reputations of all people involved in them. We ask people not to discuss or reveal matters under investigation. Accordingly, we ask that you not discuss this matter with anyone except your attorney, if you choose to consult one, without permission of the investigating officer.

NOTE: Others present should also be advised against disclosing information.

11. In our first interview, I advised you that while access is normally restricted to persons who clearly need the information to perform their official duties, your testimony may be made part of an official ADA record and that any member of the public could ask for a copy of these records. You (did/did not) consent to the release of your testimony. Do you consent to the release of the testimony you gave today? (Suspect must answer "yes" or "no.")

12. Do you have any questions? The time is _____, and this recall interview is concluded. Thank you.

(END READ-OUT)

APPENDIX VI

EXAMPLES

APPENDIX VI

FLASH REPORT

MEMORANDUM FOR: Deputy Assistant Secretary of the Army (Financial Operations), Office of the Assistant Secretary of the Army (Financial Management and Comptroller), 109 Army Pentagon, Washington, DC 20310-0109

SUBJECT: Alleged ADA Violation - Motorola Contract _____, Case No. 97-__

1. Reference DFAS-In Regulation 37-1, Finance and Accounting Policy Implementation, 18 September 1995.

2. In accordance with reference above, paragraph 29- 13, flash report of an alleged Antideficiency Act Violation (ADA) follows:

a. Accounting classification of funds involved.

(1) 2102020 _____
(\$169,949)

(2) 2122020 _____
(\$123,874).

(3) 2132020 _____
(\$123,874).

(4) 2142020 _____
(\$123,874).

b. Name and location of the activity where the alleged violation occurred. Regional Contracting Office - _____.

c. Name and location of the activity issuing the fund authorization. For 2A(1) and (2) DEH, _____, APO AE _____. For 2A (3) and (4) - HQ _____, APO AE _____.

APPENDIX VI

FLASH REPORT

_____-_____-_____
SUBJECT: Alleged ADA Violation - Motorola Contract _____

d. Amount of fund authorization or limitation that was allegedly exceeded. Initial contract was allegedly awarded for five years or \$665,448 of which \$495,499 was in advance of appropriations obligations.

e. Amount and nature of the alleged violation \$495,499 contract in advance of appropriations.

f. Date the alleged violation occurred: 19 September 1990. Date of Discovery: 26 November 1996.

g. Means of Discovery. Legal memorandum dated 3 March 1995, from _____ identified two alleged ADA violations involving Motorola contract _____. The first alleged violation was legally determined not to be an ADA violation of the expense/investment threshold via OJA legal memorandum dated 23 October 1996. The second alleged ADA violation involving contract award in advance of appropriations was confirmed by OJA on 26 November 1996 to be an alleged ADA violation.

h. The preliminary investigation will be conducted by Mr. _____, _____ Finance Command, Office of the Staff Finance and Accounting Officer, DSN _____.

COL, QM
Commanding

APPENDIX VI
PRELIMINARY REPORT

EXAMPLE 1

CASE 96-__

INTRODUCTION

The following information on processing and reporting potential Antideficiency Act (ADA) violations is provided as required by undated change to DFAS-IN-37-1, and guidance from _____, SAFM-FO.

1. CASE CONTROL NO: 96-__

2. ACCOUNTING CLASSIFICATION OF FUNDS INVOLVED:

2162020 _____

3. NAME, AND LOCATION OF THE ACTIVITIES WHERE THE ALLEGED VIOLATION OCCURRED

4. NAME AND LOCATION OF THE ACTIVITY ISSUING THE FUND AUTHORIZATION

5. U.S. CODE VIOLATION - APPLICABLE SECTION/SUBSECTION

a. 31 USC Sec. 1301 (a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

APPENDIX VI

PRELIMINARY REPORT

EXAMPLE 1

b. This preliminary investigation determined that a Purpose Violation occurred, based on DA legal opinion addressed in para 6b and para 10h below. There was no evidence of an Antideficiency Act Violation at any time.

6. AMOUNT AND NATURE OF ALLEGED VIOLATION

a. ___ issued a total of \$4,300,000 of FY 96 Operation and Maintenance, Army (OMA) funds for _____

_____. Of this, \$2,938,261 was obligated. This was in addition to \$2,300,000 FY 96 Research Development Test & Evaluation, Army (RDTEA) obligations.

b. In Aug 96, The Deputy General Counsel (Ethics & Fiscal), Headquarters, Department of the Army (HQDA) determined RDT&E to be the appropriate source of funds for _____.

c. As a result, \$2,938,261 of FY 96 RDTEA funds were issued to replace the deobligated (incorrect) OMA funds, which corrected the purpose violation. (para 10. f.)

7. EFFECT ON NEXT HIGHER LEVEL OF FUNDING

The investigation determined that RDTEA funds were available continually after the initial issuance and obligation of the OMA funded MIPRs. Accordingly, the Purpose Violation was correctable during the entire period and did not result in an Antideficiency Act Violation.

8. DATE ALLEGED VIOLATION OCCURRED

___ issued the first OMA MIPR on _____ and the last one on _____. The receiving activities accepted the MIPRs both as direct cite and reimbursable during that time period.

APPENDIX VI

PRELIMINARY REPORT

EXAMPLE 1

9. DATE AND DESCRIPTION OF HOW THE ALLEGED VIOLATION WAS DISCOVERED

In May 96, the OMA vs. RDTEA issue surfaced at the _____ during a legal review of a _____ contract citing OMA funding (issued by ___ MIPR, _____). Subsequent funding drills at ___ that identified ___ program requirements, prompted similar discussions. Accordingly, the issue was referred to the Office of General Counsel, DA, by ___ Command Counsel on _____. A written opinion was received on _____. (See pare 10 d. and 10 h.)

10. DETAILED STATEMENT OF THE CAUSE AND CIRCUMSTANCES OF THE ALLEGED

a. As addressed in pare 6a, the _____, was funded with both FY 96 RDTEA and FY 96 OMA. In Jan 96, ___ issued two OMA MIPRs totaling \$1,300,000 to ___ and ___ for _____. OMA funds were used because it was determined that the efforts in support of ___ were sustaining operational missions, and therefore fell outside the scope of RDTEA (the basic funding source for the _____).

b. In Mar 96, additional requirements totaling \$3,000,000 were identified to _____, through _____ by the _____ Project Office. ___ accepted them as ___ requirements in Apr 96, and subsequently issued OMA MIPRs to activities identified by the _____.

c. As a result of the issue addressed in paragraph 9 above, research into the fiscal propriety of OMA funds for _____ efforts began, and electronic mail correspondence ensued between ___ Legal, ___ Resource Management, and the _____ Project Office, to gather all the pertinent facts to determine exactly which funding was proper. There were discussions for and against OMA; the ___ efforts making distinction difficult.

d. On _____, ___ Command Counsel formally requested a written opinion from Office of the General Counsel, DA (enclosure 1) on the appropriate source of funds for operational aspects of the _____.

APPENDIX VI

PRELIMINARY REPORT

EXAMPLE 1

e. On _____, ___ issued a Flash Report indicating a potential Antideficiency Act Violation, and developed plans for correction, pending DA legal consideration.

f. During the period __ through _____, the OMA obligations were reversed and replaced with RDT&E funding (see para 6 above).

g. On _____, the ___ Deputy Chief of Staff for Resource Management tasked the _____ Comptroller to conduct the preliminary investigation and prepare the report.

h. On _____, ___ received the written DA legal opinion (enclosure 2) that RDTEA was the appropriate source of funds for the operational aspects of _____, including ___ efforts. This validated the purpose violation.

CONCLUSION

The Preliminary Investigation and Report was completed by the Investigative Team on _____. The Investigation determined that there was a Purpose Violation, which did not result in an Antideficiency Violation at any time (see para 5b).

JOHN DOE
Team Leader
Case No. 96-__

DATE

APPENDIX VI

PRELIMINARY REPORT

EXAMPLE 2

ALLEGED VIOLATION OF ANTIDEFICIENCY ACT
REQUIRED INFORMATION - PRELIMINARY REPORT

1. CASE CONTROL NUMBER.

2. ACCOUNTING CLASSIFICATION OF FUNDS INVOLVED.

Military Construction, Defense Agencies (97 7/1500) (97 3/7 0500)
Foreign Currency Fluctuation, Defense, Construction (97X0803)

3. ACTIVITIES WHERE ALLEGED VIOLATION OCCURRED.

4. ACTIVITIES ISSUING THE FUND AUTHORIZATION.

5. APPLICABLE SUBSECTIONS OF THE U. S. CODE THAT WERE ALLEGEDLY VIOLATED.

31 U. S. Code Section 1517(a)(2)

6. AMOUNT AND NATURE OF THE ALLEGED VIOLATION.

We were unable to validate the reported \$57,902.59 overobligation in the Fiscal Year 1987 Foreign Currency Fluctuation account because the obligation documents had been destroyed. The Fiscal Year 1993 Foreign Currency Fluctuation account was overobligated by at least \$451,248.93. In the attached report, we discuss why we couldn't reconcile the reported overobligation of \$987,383 to this amount.

7. STATEMENT ABOUT EFFECT ON NEXT HIGHER FUNDING LEVEL.

There is no effect on the next higher level, _____
_____. There were sufficient funds to cover the overobligation.

APPENDIX VI

PRELIMINARY REPORT

EXAMPLE 2

8. DATE THE ALLEGED VIOLATION OCCURRED.

The FY 93 Foreign Currency Fluctuation account obligation authority was exceeded on _____.

9. DATE AND SOURCE OF DISCOVERY.

DoD Inspector General found inconsistencies in financial reports during an audit and reported a potential violation (DODIG Quick Reaction Report 96 _____).

10. DATE PRELIMINARY INVESTIGATION BEGAN.

11. DETAILED STATEMENT ON THE CAUSES AND CIRCUMSTANCES.

The management controls at _____ did not adequately reduced the risk of overobligating the foreign currency fluctuation account in three areas: 1) _____ posted obligations from the cash book instead of using source documents itemizing the transactions. 2) They also failed to project their future foreign currency fluctuation allotment requirements. 3) Additionally, reports showing overobligations were routine, but no one at _____ or _____ reported these situations as potential ADA violations. It was not until the DODIG report that any potential violation was surfaced.

1) _____ recorded obligations without adequate documentation. They did not receive a copy of the disbursement voucher and subsequently used the Cash Book to record aggregate obligations. These obligations could not be traced to specific projects. _____ personnel stated they had attempted to obtain disbursement vouchers in 1992, but disbursing activities would not cooperate. _____ should have elevated the matter to either _____ in order to adequately fulfill their fund control responsibilities.

2) DoD guidance recommended _____ forecast funding requirements for 6 months of disbursements. _____'s monthly foreign currency fluctuation report showed that it was not in compliance with the guidance. This report had been submitted to _____ with no projected requirements. _____ did not question the report.

APPENDIX VI

PRELIMINARY REPORT

EXAMPLE 2

3) Both ____ and ____ routinely received fund control reports that showed ____ overobligations. In none of these instances did anyone report a potential ADA violation. Army Audit's review of the fund control reports showed ____ reported four overobligations:

- FY 90 account was about \$1.6 million overobligated on _____.
- FY 92 account was \$222,421 overobligated on _____.
- FY 94 account was \$41,567 overobligated on _____.
- FY 95 account was \$34,862 overobligated on _____.

The Army Audit Agency was informed by _____ personnel that sufficient funds are available at the appropriation level to correct the overobligations.

APPENDIX VI

FINAL REPORT TO OSD

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
FINANCIAL MANAGEMENT
109 ARMY PENTAGON
WASHINGTON DC 20310-0109

MEMORANDUM FOR DEPUTY CHIEF FINANCIAL OFFICER, OFFICE OF THE
UNDER SECRETARY OF DEFENSE COMPTROLLER)

SUBJECT: Report of Antideficiency Act Violation OSD Case #97-___/Army Case #96-___

An Antideficiency Act violation occurred at the _____ in _____ at the end of Fiscal Year 1995. This violation involved the improper use of a government credit card and was discovered as a result of _____ and _____'s controls over credit card purchases.

The Director of Public Works at _____ contracted for a sprinkler system and concrete steps, using the credit card as a payment vehicle to split the purchase using separate credit card invoices spread over time. At the end of Fiscal Year 1995, \$37,561.13 remained in unpaid bills; however unobligated balances were available only in the amount of \$10,439.07. This resulted in a violation of 31 USC 1517 on 30 September 1995 in the amount of \$27,122.06.

Our report on this case has been prepared in accordance with DOD Regulation 7000.14, dated 1 August 1995, and includes the corrective actions taken by the _____ and _____. These actions were reviewed and should preclude similar funding violations. These actions are addressed in the attached report. Although the investigating officer found that the responsible employee willfully and knowingly violated the Antideficiency Act, the evidence set forth in the report of investigation indicates that he willfully and knowingly violated government credit card procedures, but that the Antideficiency Act was not willfully and knowingly violated. Further, in view of the administrative discipline imposed against the responsible employee, referral of this matter to the Department of Justice is unwarranted.

My point of contact for this report is _____, who can be reached at _____, fax number _____.

Ernest J. Gregory
Deputy Assistant Secretary of the Army
(Financial Operations)

Attachment

APPENDIX VI

FINAL REPORT TO OSD

DEPARTMENT OF THE ARMY
REPORT OF ANTIDEFICIENCY ACT VIOLATION
OSD CASE 97-___/ARMY CASE 96-___

1. Appropriation Involved: 2152020, Operation and Maintenance, Army, apportioned
2. Where Violation Occurred:
 - a. _____
 - b. _____
3. Name and Location of Activity Issuing the Fund Authorization:

4. Amount of Violation: \$27,122.06
5. Date of Violation: 30 September 1995
6. Date of Discovery: 11 January 1996. One of the employees who was approached to process split payments questioned the impropriety and surfaced her concern to the Director of Contracting.
7. Type of Violation: 31 USC 1517 (a)(2) ,
8. Effect of Violation on Next Higher Level of Funding: Headquarters, Department of the Army funding was not exceeded.
9. Name and Position of the Responsible Person: Mr. _____, SSN: ___-__-____, Director of Public Works, _____
10. Signed Statement of the Responsible Individual: Mr. _____'s statement is attached.
11. Cause and Circumstances Surrounding the Violation:
 - a. The Director of Public Works for _____ circumvented prescribed contracting procedures by splitting the purchase of a sprinkler system, using the credit card as a payment vehicle to split the purchase using separate invoices spread over time. He instructed the vendor and his employees to process each invoice under the \$2,500 threshold. In an attempt to conceal contract improprieties, he disregarded prescribed year-end reporting procedures for credit card purchases - procedures specifically designed to disclose all outstanding credit card obligations prior to fiscal year-end closing.

APPENDIX VI

FINAL REPORT TO OSD

-2-

b. As a result of holding unreported invoices, \$31,681.13 remained in unpaid bills at the close of Fiscal Year 1995. He held these bills until another credit card holder returned from leave in November 1995. In a related situation, this office also held \$5,880.00 in invoices until FY 96 for legitimate FY 95 obligations for concrete steps. The total of valid FY 95 obligations held for obligation and payment with FY 96 funds was \$37, 561.13.

c. The unobligated available balance on 30 September 1995 was only \$10,439.07. Although sufficient unobligated balances were available when the obligations were incurred, Mr. _____'s failure to report these obligations caused an overobligation 30 September 1995 in the amount of \$27,122.06, the difference between the unpaid bills and the unobligated balance.

12. Disciplinary Action Taken: The Commander, _____, in his final decision on 9 September 1996, removed Mr. _____ from his managerial position and duties as Director of Public Works for _____. The individual was offered, and accepted, placement as an Environmental Protection Specialist in a non-managerial , non-supervisory capacity. The reassignment encompassed a reduction in grade from GS-12 to GS-11 without an entitlement to pay and grade retention. Additionally, a letter of reprimand was issued to the Commander _____.

13. Corrective Action Taken:

a. _____'s controls over credit card purchases were instrumental in the discovery and disclosure of the reported violation of the Antideficiency Act. However, in an effort to further strengthen already existing controls, additional requirements affecting the year-end closeout process were added. Credit card holders are now required to submit a year-end report by 15 September, regardless if purchases have occurred or not. The intent of this control is to preclude the intentional concealment of questionable year-end purchases. The reports are to be submitted directly to the responsible resource management office rather than the Director of Contracting.

b. Accounting adjustments have been made to rectify the disbursement of FY 96 funds in satisfaction of obligations incurred in FY 95. The obligations now correctly reflect the use of FY 95 funds instead of FY 96 funds.

14. Systems Adequacy: The system of administrative controls prescribed by the Office of the Under Secretary of Defense (Comptroller) and the Assistant Secretary of the Army (Financial Management and Comptroller) were considered adequate.

APPENDIX VI

FINAL REPORT TO OSD

-3 -

15 . Name of Holder of Funds: The holder of the funds at the time the violation occurred was _____, Director of Public Works, _____. The Commander, _____, withdrew the authority to certify appropriated funds from the Director of Public Works and transferred authority to the Director of Resource Management. This improved oversight and control over the flow of funds by establishing a line of certification authority flowing from the Commanding General to the Director of Resource Management. This situation is not indicative of the overall fund controls by _____.

Helen T. Coy
Assistant Secretary of the Army
(Financial Management and Comptroller)

Attachment

APPENDIX VI

OSD REPORT TO OMB

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

Honorable Franklin D. Raines
Director
Office of Management and Budget
Washington, DC 20503

Dear Mr. Raines:

Enclosed is a letter transmitting to the President a report of a violation of the Antideficiency Act.

The Army violation, case number 97-___, which totaled \$27,122, occurred in the FY 1995 Operation and Maintenance, Army (O&M,A) appropriation at the _____, _____, _____. The violation occurred when the Director of Public Works improperly used a government purchase card to contract for a sprinkler system and concrete steps. Since sufficient O&M,A funds were not available to correct the funding error, there was a violation of Title 31, United States Code, subsection 1517(a)(2).

One individual was named responsible for the violation. The individual was removed from his managerial position and accepted placement in a nonmanagerial/nonsupervisory position with a reduction in grade from GS-12 to GS-11 and no entitlement to pay and grade retention. The Army concluded that there was no willful intent, on the part of the individual, to violate the provisions of the Antideficiency Act.

Subsequently, the Army took action to correct the funding for the Antideficiency Act violation. To preclude a recurrence, the Army strengthened its already existing controls and added requirements affecting the year-end closeout process. Purchase card holders are now required to submit a report, prior to year-end closeout, to the responsible resource management office identifying all purchases made.

Title 31, United States Code, section 1351, requires that violation reports be submitted to the President and the Congress. In accordance with Office of Management and Budget Circular No. A-34, this report to the President is being submitted through your office. Identical reports are being submitted to the President of the Senate and the Speaker of the House of Representatives.

Sincerely,

John J. Hamre

Enclosure

APPENDIX VI

OSD REPORT TO THE PRESIDENT

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

The President
The White House
Washington, DC 20500

Dear Mr. President:

This letter reports a violation of the Antideficiency Act.

The Army violation, case number 97-___, which totaled \$27,122, occurred in the FY 1995 Operation and Maintenance, Army (O&M,A) appropriation at the ____, _____. The violation occurred when the Director of Public Works improperly used a government purchase card to contract for a sprinkler system and concrete steps. Since sufficient O&M,A funds were not available to correct the funding error, there was a violation of Title 31, United States Code, subsection 1517(a)(2).

Enclosed is the report from the Office of the Assistant Secretary of the Army (Financial Management and Comptroller). _____, Director of Public Works, _____, was named responsible for the violation. The individual was removed from his managerial position and accepted placement in a nonmanagerial/nonsupervisory position with a reduction in grade from GS-12 to GS-11 and no entitlement to pay and grade retention. The Army concluded that there was no willful intent, on the part of the individual, to violate the provisions of the Antideficiency Act.

Subsequently, the Army took action to correct the funding for the Antideficiency Act violation. To preclude a recurrence, the Army strengthened its already existing controls and added requirements affecting the year-end closeout process. Purchase card holders are now required to submit a report, prior to year-end closeout, to the responsible resource management office identifying all purchases made.

Identical reports also are being submitted to the President of the Senate and the Speaker of the House of Representatives.

Respectfully yours,

John J. Hamre

Enclosure

APPENDIX VI

OSD REPORT TO THE PRESIDENT OF THE SENATE

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

Honorable Albert Gore, Jr.
President of the Senate
Washington, DC 20510

Dear Mr. President:

This letter reports a violation of the Antideficiency Act.

The Army violation, case number 97-___, which totaled \$27,122, occurred in the FY 1995 Operation and Maintenance, Army (O&M,A) appropriation at the ____, _____. The violation occurred when the Director of Public Works improperly used a government purchase card to contract for a sprinkler system and concrete steps. Since sufficient O&M,A funds were not available to correct the funding error, there was a violation of Title 31, United States Code, subsection 1517(a)(2).

Enclosed is the report from the Office of the Assistant Secretary of the Army (Financial Management and Comptroller). _____, Director of Public Works, _____, was named responsible for the violation. The individual was removed from his managerial position and accepted placement in a nonmanagerial/nonsupervisory position with a reduction in grade from GS-12 to GS-11 and no entitlement to pay and grade retention. The Army concluded that there was no willful intent, on the part of the individual, to violate the provisions of the Antideficiency Act.

Subsequently, the Army took action to correct the funding for the Antideficiency Act violation. To preclude a recurrence, the Army strengthened its already existing controls and added requirements affecting the year-end closeout process. Purchase card holders are now required to submit a report, prior to year-end closeout, to the responsible resource management office identifying all purchases made.

Identical reports also are being submitted to the President of the United States and the Speaker of the House of Representatives.

Respectfully yours,

John J. Hamre

Enclosure

APPENDIX VI

OSD REPORT TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

This letter reports a violation of the Antideficiency Act.

The Army violation, case number 97-___, which totaled \$27,122, occurred in the FY 1995 Operation and Maintenance, Army (O&M,A) appropriation at the ____, ____. The violation occurred when the Director of Public Works improperly used a government purchase card to contract for a sprinkler system and concrete steps. Since sufficient O&M,A funds were not available to correct the funding error, there was a violation of Title 31, United States Code, subsection 1517(a)(2).

Enclosed is the report from the Office of the Assistant Secretary of the Army (Financial Management and Comptroller). ____, Director of Public Works, ____, was named responsible for the violation. The individual was removed from his managerial position and accepted placement in a nonmanagerial/nonsupervisory position with a reduction in grade from GS-12 to GS-11 and no entitlement to pay and grade retention. The Army concluded that there was no willful intent, on the part of the individual, to violate the provisions of the Antideficiency Act.

Subsequently, the Army took action to correct the funding for the Antideficiency Act violation. To preclude a recurrence, the Army strengthened its already existing controls and added requirements affecting the year-end closeout process. Purchase card holders are now required to submit a report, prior to year-end closeout, to the responsible resource management office identifying all purchases made.

Identical reports also are being submitted to the President of the United States and the President of the Senate.

Respectfully yours,

John J. Hamre

Enclosure

APPENDIX VI

REPORT OF NO VIOLATION

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
FINANCIAL MANAGEMENT
109 ARMY PENTAGON
WASHINGTON DC 20310-0109

August 17, 1995

MEMORANDUM FOR Deputy Chief Financial Officer, Office of the Under Secretary of Defense (Comptroller)

SUBJECT: Alleged Antideficiency Act Violation Case #95-__

The alleged Antideficiency Act violation occurred at _____.
During an audit of the _____'s FY 93 financial statements, the U.S. Army Audit Agency identified 10 transactions where labor costs were transferred from one project to another or into overhead accounts without appropriate justification. The 10 transactions, totaling about \$4,568, were labor cost transactions which were rejected due to insufficient funds. Because the transactions were rejected for insufficient funds, an alleged Antideficiency Act violation was reported.

The investigation found that in eight transactions, the labor cost transfers were appropriate. These eight transactions were caused by posting errors or labor expenses which were charged to incorrect work codes. The investigator concluded that the accounting adjustments made for these eight transactions were appropriate. The investigator found that in the other two transactions the _____'s accounts did exceed available funding. For both transactions, work was performed as a reimbursable order for another activity. These reimbursable orders were not funded as a formal subdivision of funds. Upon determining that there were insufficient funds in the two accounts, the _____ took action to notify the ordering activity and obtain the necessary funds to correct the deficiency. Because there was no formal fund subdivision and the funding activities had the appropriate funds to make the required funding corrections, the investigator concluded that no Antideficiency Act violation occurred.

Considering the evidence provided by the investigator and the review of the report by the appropriate Army staff and Secretariat Offices, I conclude that no reportable Antideficiency Act violation occurred.

My point of contact for this action is _____. He can be reached at (____) ____-____.
Our fax number is (____) ____-____.

Neil R. Ginnetti
Principal Deputy Assistant Secretary of the Army
(Financial Management and Comptroller)

REFERENCES

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ABBREVIATIONS AND ACRONYMS

ADA	Antideficiency Act
AFARS	Army Federal Acquisition Supplement
DAIG	Department of the Army Inspector General
DERF	Defense Emergency Response Fund
DFARS	Defense Federal Acquisition Regulation Supplement (DFARS)
DFAS	Defense Finance and Accounting Service
ESF	emergency support functions
FAR	Federal Acquisition Regulation
FEMA	Federal Emergency Management Agency
FOIA	Freedom of Information Act
FRP	Federal Response Plan
IO	investigating officer
MCA	Military Construction, Army, an appropriation
O&M	Operations and Maintenance; also OMA, Operations and Maintenance, Army, an appropriation
OPA	Other Procurement, Army, an appropriation
PA	Procurement Appropriation, Army
RC	reserve component
RDTE	research, development, test, and evaluation; also RDT&E
ROI	report of investigation
TDA	Table of Distribution and Allowance
TDY	temporary duty
TO&E	Table of Organization and Equipment; also TOE
UCMJ	Uniform Code of Military Justice
USC	United States Code; also U.S.C.

GLOSSARY

accountable officer. Any government officer or employee who, by reason of his employment, is responsible for or has custody of government funds. Any government officer or employee, military or civilian, who physically handles government funds, even if only once or occasionally, is “accountable” for those funds while they are in his custody.

administrative limitation. A limitation imposed upon the use of an appropriation or subdivision thereof. An administrative limitation is identified on the fund allowance/authorization document and has the same effect as an administrative subdivision of funds in the control of obligations and expenditures.

administrative subdivision of appropriations. Any subdivision of an appropriation that makes funds available in a specific amount for incurring obligations.

allocation. An authorization by the Department of the Army making funds available in prescribed amounts to an operating agency for suballocation or allotment.

allotment. The administrative action of a operating agency, e.g., a MACOM, making funds allocated or sub-allocated available to a subordinate installation or activity for obligation. An anti-deficiency violation occurs if obligations incurred against the allotment exceed the amount of the allotment.

allowance. The administrative action of an operating agency making funds allocated or suballocated to it available to a subordinate installation or activity for obligation through the use of an expenditure target. Incurring obligations in excess of this target does not automatically create an antideficiency violation. However, the person responsible for exceeding the target can be held responsible for any resultant antideficiency violation.

Antideficiency Act (ADA). Legislation enacted by Congress to prevent the incurring of obligations or the making of expenditures (outlays) in excess of amounts available in appropriations or funds; to fix responsibility within an agency for the creation of any obligation or the making of any expenditure in excess of apportionment or reapportionment or in excess of other subdivisions established pursuant to sections 1341 and 1517 of 31 U.S.C; and to assist in bring about the most effective and economical use of appropriations and funds.

appointing officer. The commander of a MACOM or subordinate command who appoints the ADA investigating officer and support team members.

apportionment. A determination by Office of Management and Budget (OMB) specifying the amount of obligations allowed during a given period under an appropriation, other statutory authorization, or a combination of these per section 1512, Title 31, United States Code.

appropriation. An authorization by an act of Congress to incur obligations for specified purposes and to make subsequent payments therefore, out of the Treasury of the United States. Appropriations are classified as being annual, multiple-year, or no-year, depending on the period of time that they are available for obligation and disbursement purposes.

bona fide needs. Annual appropriations are available only to meet the legitimate, or bona fide, needs of the fiscal year for which appropriated. See 31 U.S.C. 1502(a)

budget activity. Categories within each appropriation and fund account which identify the purposes, projects, or types of activities financed by the appropriation or fund.

budget execution. The implementation and administration of the approved operating budget during the current year. Accomplishment of the mission within available resources without creating over obligation and/or over expenditures. Included in the process is the allocation, obligation, expenditure, and reporting of the resources utilized.

budget line (item number). A unique code that is used to identify systems in the procurement program. The BLIN represents a level of management. Congress funds at the BLIN level.

certifying officer. An individual authorized to certify the availability of funds on any documents or vouchers submitted for payment. He is responsible for the correctness of the facts and computations, and the legality of payment.

closed accounts. Accounts with balances canceled in accordance with title 31 U.S.C. 1552, 1555, or 1557. Such accounts are not available for obligation or expenditure for any purpose.

commitment. An administrative reservation of funds based upon firm procurement directives, orders, requisitions, or requests that authorize the creation of an obligation without further recourse to the official responsible for certifying the availability of funds. See DFAS-IN 37-1.

deposit funds/suspense. Receipts held in suspense temporarily and later refunded or paid into some other Treasury fund or other entity held by the Department of Defense as banker or agent for others and paid out at the direction of the owner.

distribution. An issuance or distribution of funds to the next lowest operating level. A distribution from OMB of amounts available in a appropriation into amounts available for specified time periods, activities, projects, objects, or combinations thereof is called an *apportionment*. At DOD and below, distributions are categorized as *formal* and *informal subdivisions* of funds. Formal subdivisions of funds include *allocations* and *allotments*, prescribed in 31 U.S.C. Section 1514, and carry Antideficiency Act restrictions. *Allowances* are informal subdivisions of funds, and do not carry ADA restrictions.

Economy Act orders. Orders placed on other governmental agencies, including orders for work or services to be performed by components of the Department of Defense, obligated in the

amount stated in the order on written acceptance by the providing agency. See 31 U.S.C. 1535-1536.

expenditure. The actual spending of money as distinguished from the appropriation of funds. Expenditures are made by the executive branch; appropriations are made only by Congress. The two rarely are identical in any fiscal year. In addition to some current budget authority, expenditures may represent budget authority made available one, two, or more years earlier. A payment by cash, check, or equivalent action that constitutes a charge against an appropriation.

expired (appropriation). An appropriation that is no longer available for obligation, except for obligation adjustments, but still available for disbursements of existing obligations.

Federal Acquisition Regulation. The FAR is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds.

Final Report. The report prepared at the conclusion of a full ADA investigation, normally by the investigating officer. It is a summary report highlighting the specific aspects of the case that are required to be reported (see Chapters III and IV and Appendix VI) and having as an enclosure the *Report of Investigation (ROI)*, which provides the full and detailed compilation of all pertinent information pertaining to the investigation. While the Army FM and General Counsel review the entire report, only the summary Final Report, without the ROI enclosure, is sent to OSD.

Flash Report. Upon detecting or learning of an alleged ADA violation, the responsible official will promptly inform the commander concerned, who will send a letter through command channels to the Assistant Secretary of the Army (Financial Management and Comptroller within 15 days of the date of discovery. The letter should include pertinent information pertaining to the alleged violation and name the investigating officer.

formal subdivision of funds. Distribution of funds below apportionment level (below OMB, as from DOD to Service or MACOM to MSC), which include *allocations* and *allotments*, that are prescribed in 31 U.S.C. Section 1514 and carry Antideficiency Act restrictions.

Freedom of Information Act. The Freedom of Information Act permits the public to scrutinize the government's performance of its duties and promote governmental honesty and, thus, doubts as to propriety of disclosure are to be resolved in favor of openness. The overriding purpose of the Act is to mandate a policy of broad disclosure of government documents and maximum feasible public access to government information. Disclosure rather than secrecy is the basic objective.

fund control. Management control over fund authorizations in order to ensure that: funds are used only for authorized purposes; funds are economically and efficiently used; and commitments, obligations, and expenditures do not exceed amounts authorized.

funding authorization document (fad). The approved funding program that is allotted by HQDA to operating agencies (MACOMs) and further allotted to subordinate installations by major program. This document serves as the authority to incur obligations for a specified period of time, usually a fiscal quarter, on a cumulative basis. It is a legal document subject to Title 31, United States Code (Antideficiency Act).

gratuitous service. A service provided with the express agreement that the provider will not seek reimbursement or compensation. See *voluntary service*.

informal subdivision. A distribution of funds below apportionment level (below OMB, as from MACOM to MSC) called an allowance that is not considered a formal subdivision under 31 U.S.C. Section 1514 and does not carry Antideficiency Act restrictions.

interrogatory. A list of written questions which are used to obtain information from a witness.

Investigating Officer (IO). A military or civilian employee of the Department of the Army assigned the responsibility to conduct an ADA investigation.

“liar’s paragraph”. An advisement to a witness concerning false swearing.

Military Construction, Army (MCA). A multiyear appropriation available for obligation for five years and used for acquisition, construction, installation and equipment of temporary or permanent public works, military installations, and facilities for which authorizing legislation is required.

Minor Military Construction. Construction projects meeting the criteria in Chapter 2 of AR 415-35 and having a funded cost of less than 1 million dollars.

multiyear appropriation. An appropriation that is available for incurring new obligations for a definite period of time in excess of one fiscal year. (e.g., Military Construction Army is a 5-year appropriation).

multiyear contract. A special contracting method used to acquire known requirements and total costs not over planned requirements for 5 years unless otherwise authorized by statute, even though total funds ultimately to be obligated are not available at the time of contract award. Contract requirements are budgeted and financed for the program year for which they are authorized. Prices are solicited both for the current 1-year program requirement alone and for the total multiyear requirement. Award is based on which alternative offers the lowest unit price to the government. If award is made on the multiyear basis, funds are obligated only for the first year’s requirement, with succeeding years’ requirements funded annually. If funds do not become available to support the succeeding years’ requirements, the agency must cancel the contract.

necessary expense. “...(T)he standard for measuring the propriety of a particular expenditure not specified in the statute is the ‘necessary expense’ test traditionally used in determining purpose availability under 31 U.S.C. §1301(a). Under this test, an expenditure is permissible if it

is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function, and if it is not otherwise prohibited by law."

nonappropriated fund (NAF). Cash and other assets received by nonappropriated instrumentalities (NAFIs) from sources other than monies appropriated by Congress. NAFs are government funds used for the collective benefit of those who generate them - military personnel, their dependents and authorized civilians. These funds are separate and apart from funds that are recorded in the books of the Treasurer of the United States. (e.g., bowling alley, golf course and club system).

nonseverable. A contractual service that produces a single or unified outcome, product, or report, the services may be regarded as being nonseverable. If so, the entire effort may be funded with dollars available for obligation at the time the contract is executed, and the contract may cross fiscal years.

obligation in advance of appropriation. Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law. A violation of the Antideficiency Act.

obligation. A reservation of funds in the amount of orders placed, contracts awarded, services rendered, or other commitments made by federal agencies that legally binds the government to make payment.

obligation authority (OA). Obligation authority refers to budget authority, usually an appropriation, by which Congress provides authority to make expenditures and outlays. Budget authority originates mainly as new obligation authority. Defense agencies use total obligation authority (TOA) to mean the amount authorized to a certain approved program, whether the obligational authority stems from the budget of the current or a previous fiscal year. The Army formally applies the term TOA in a different way. It uses TOA to refer to the total financial requirements (exclusive of reimbursements) to support the approved program (or a component) in a given fiscal year as recorded in the Army portion of the Future Years Defense Plan (FYDP).

OMA Appropriation. An annual appropriation used for day-to-day operations. Examples: include: pay and benefits of civilian employees; awards; contractual services; utilities; operation and maintenance of all Army organizational equipment and facilities; purchase of equipment and supplies; production of audiovisual instructional materials and training aids; operation of service-wide and establishment-wide activities; medical activities; operation of depots, schools, training, recruiting, and programs related to OMA; welfare and morale, information, education, and religious activities; and expenses of courts, boards, and commissions.

overexpenditure. A payment or outlay that exceeds its corresponding obligation. Title 31, United States Code, Section 1517, Obligation and Expenditure Limits, forbids the overobligation and overexpenditure of an apportionment or an amount permitted by a regulation prescribed for the administrative control of appropriations.

overobligation. Condition existing when total obligations incurred exceed total available obligational authority. Prohibited by Title 31, United States Code, Section 1517. See *overexpenditure*.

period of availability. The specific period of time during which an appropriation is available for obligation. If the appropriation is not obligated during this period of availability, the authority to obligate it expires. (31 U.S.C. § 1552.)

preliminary ADA analysis. An initial review and analysis conducted by an investigating officer of a particular allegation to determine if the circumstances of the case are of sufficient magnitude, seriousness, or validity to warrant either an investigation or some other form of action.

Preliminary Report. In an Antideficiency Act violation investigation, the Preliminary Report is the report prepared by the investigating officer summarizing the results of the Preliminary Investigation which is the first stage of the investigation process and which is conducted to determine whether or not an ADA violation occurred. The Preliminary Report encloses the *Report of Investigation (ROI)*, which provides the full and detailed compilation of all pertinent information pertaining to the investigation.

President's Budget. The document the President sends to Congress in January - February of each year estimating U.S. government receipts and outlays for the ensuing fiscal year and recommending appropriations in detail.

Privacy Act. A statute that prohibits release of personal information concerning individuals except in certain specified situations. See 5 U.S.C 552a.

Procurement Appropriation. An appropriation usually available for 3 years that is used for production and modification of aircraft, missile, weapons, tracked vehicles, ammunition, and other equipment. Examples of materiel acquired with this appropriation include: tanks, jeeps, sedans, weapons, rifles, ammo, artillery, missiles, and gun tubes.

program element. The 11 major defense programs subdivide into program elements (PEs). Each is identified in the Army Management Structure (AMS) by a numeric code. Within the Operation and Maintenance, Army (OMA) appropriation, each PE is identified by six digits found to the left of the decimal in the Army Management Structure Code (AMSCO). PEs represent integrated activities combining men, equipment, and facilities that together constitute an identifiable military capability or supporting activity. A PE constitutes the basic building block of the Future Years Defense Program (FYDP). PEs may be aggregated in one way for program purposes, in another for budget reviews, and in still other ways as necessary for management purposes.

proximate cause. That cause which, in natural sequence, unbroken by any intervening causes, produces an injury and without which the result would not have occurred. Proximate cause is also defined as the primary cause from which the injury follows as a natural, direct, and immediate consequence, and without which the injury would not have occurred.

purpose code (statute). The purpose statute provides that "appropriations shall be applied only to the objects for which the appropriations were made, except as otherwise provided by law." See 31 U.S.C 1301(a).

Real Property Maintenance Account (RPMA). A collective term for the functional categories of activities described in the Army Management Structure (AMS) as .K0000 (Maintenance of Real Property) and .L0000 (Minor Construction).

reapportionment. A revision of previous apportionment of budgetary resources for an appropriation or fund account. A revision would ordinarily cover the same period, project, or activity covered in the original apportionment.

“reasonable person” standard of care. A standard used to determine whether an accountable officer/employee did what a reasonably prudent and careful person would have done to safeguard his own property under similar circumstances. This is an “objective” standard that does not vary with such factors as the level of experience or the age of the particular accountable officer concerned. Failure to follow regulations is then negligence. Liability results when an accountable officer/employee’s conduct constitutes simple or ordinary negligence, not gross negligence. (DoD Regulation 7000.14-R, Vol. 5, para. 010401.B.)

replacement contract. A contract replacing a contract terminated for default, where the government’s requirements for the goods or services sought under the terminated contract still exist. See *reprocurement*.

Report of Investigation. The Report of Investigation (ROI) provides the full and detailed compilation of all pertinent information pertaining to an ADA investigation. It is prepared by the investigating officer and is presented as an enclosure to the Preliminary Report and the Final Report. (See Chapters III and IV and Appendix VI.)

reprocurement. A new procurement action to replace one terminated for default, where the government’s requirement for the goods or services still exists. A *replacement contract* is the instrument of that reprocurement.

reprogramming. Reapplication of funds from one project to another or transfers of funds from one appropriation to another to resolve financial shortfalls or to adjust programs to meet unforeseen requirements. Reprogramming actions are subject to designated thresholds and congressional requirements for advance notification/ approval.

Research, Development, Test, and Evaluation (RDTE). A multiple year appropriation generally available for obligation for two years that is used for research and development work by

a government agency or by private individuals or organizations under contractual or grant arrangements with the government. It is used for all fields of basic and applied scientific research, development, test, and evaluation, including the physical sciences and engineering, and for associated maintenance and operation of facilities and equipment.

revolving fund. Working capital funds used to finance operations from the time that specific work is begun to the time that payment is received from the customer. See *working capital fund*.

sequestration. The cancellation of budgetary resources provided by discretionary appropriations or direct spending law to reduce deficits. See 2 U.S.C. 900 and following.

severable. Divisible. A contract is considered to be severable for funding purposes when it provides for continuing and recurring services. The services provided under a severable contract must be charged to the fiscal year(s) in which they are rendered unless a specific statute provides otherwise. (For example: 10 U.S.C. 3410a.)

statutory limitation. A restriction on funds or program created as a result of an act of Congress.

suballotment. A further distribution of an allotment received by a station to another station or activity.

support team. A group of individuals knowledgeable in all functional areas potentially involved in an alleged ADA violation who are appointed at the onset of an ADA investigation by the appointing officer to assist the investigating officer as needed in the course of the investigation. The core of the team consists of representatives from legal counsel, resource management, and the primary functional area involved, but may include additional representatives if the situation warrants.

termination for convenience. A government termination of a contract made not because of fault of the contractor but because of circumstances (such as the end of the government's need for the goods or services provided by the contract) that make it in the government's interests to terminate the contract "for the convenience of the government".

unexpired. An appropriation account that is available for obligation during the fiscal year(s) designated.

voluntary creditor. One who uses personal funds to pay a perceived valid obligation of the government. As a general rule, recovery of such payments is barred.

voluntary service. Voluntary services are services rendered without a prior contract for compensation or an advance agreement that services will be gratuitous. An officer or employee may not accept voluntary services or employ personal services exceeding that authorized by law, except for emergencies involving the safety of human life or the protection of property.

working capital fund. A fund established to finance and hold inventory or operate industrial type facilities. Inventory or services are sold to customers with proceeds deposited back into the fund becoming available to finance more inventory or services. Working capital funds are a "no year" appropriation. Also known as *revolving funds*.

