

Department of the Army
United States Military Academy
West Point, New York 10996-5000

1 November 2009

**ADMINISTRATIVE PROCEDURES
FOR MISCONDUCT HEARINGS DIRECTED UNDER
THE PROVISIONS OF ARMY REGULATION 210-26,
UNITED STATES MILITARY ACADEMY**

MAJA

FOR THE SUPERINTENDENT:

OFFICIAL:
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COL, SC
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/ Original Signed /
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LTC, AG
Adjutant General

DISTRIBUTION:
A-E (Electronic)

Summary: This regulation implements the United States Military Academy (USMA) guidance by prescribing policies and guidance for administrative procedures for misconduct hearings directed under the provisions of Army Regulation 210-26, USMA.

Applicability: This regulation applies to commanders and managers of mission activities of the USMA. It remains in effect until cancelled or superseded by another regulation.

Supplementation: Supplementation of this regulation is prohibited without prior approval from Directorate of Resource Management.

Interim Changes: Interim changes to this regulation are not official unless they are authenticated by the Adjutant General. Users will destroy interim changes on their expiration date unless sooner superseded or rescinded.

Suggested Improvements: The proponent agency of this regulation is Office of the Staff Judge Advocate. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) to the Office of the Staff Judge Advocate, attention MAJA-AL, USMA, West Point, New York 10996-5000.

***This regulation supersedes USMA Regulation 1-10, dated 18 February 1992.**

Supplementation of this regulation is prohibited without the prior approval of Headquarters, United States Military Academy, ATTN: MAJA.

1. **General.**

a. Applicability. These procedures govern the conduct of investigations directed pursuant to paragraph 6 of Army Regulation (AR) 210-26, United States Military Academy, 26 July 2002.

b. Nature of Investigation. The investigation is a non-adversarial, fact-finding hearing conducted by an Investigating Officer (IO) appointed by the Superintendent.

c. Investigating Officer. The IO will be an officer in the grade of Lieutenant Colonel or higher, or an officer of lower grade with legal training and experience.

d. References.

(1) AR 210-26.

(2) AR 15-6, Procedures for Investigating Officers and Boards of Officers, 2 October 2006.

(3) Manual for Courts-Martial United States (MCM), 2008 Edition.

(4) Joint Travel Regulation (JTR), Volume 2, Appendix E.

2. **Prehearing Actions.**

a. Notice to Respondent. The IO will provide the respondent a copy of all documents in the case file, together with a memorandum of notification. Absent unusual circumstances, or a waiver by the respondent, the hearing may not take place earlier than the seventh calendar day following the day notice is given; if the hearing takes place prior to the seventh day, the reasons therefor will be set out in the record. The Staff Judge Advocate, or his/her designee, must concur in holding the hearing prior to the seventh day, if this is based on unusual circumstances, and not on a waiver by the respondent. The memorandum of notification will set forth the following:

(1) The date, hour, place of the hearing, and the appropriate military uniform.

(2) The matter to be investigated, including specific allegations in sufficient detail to enable the respondent to prepare.

(3) The respondent's right to counsel (see paragraph 3c).

(4) The name and address (if known) of each witness expected to testify at the hearing.

(5) The respondent's rights to be present, offer evidence, call witnesses, and make an opening statement and closing argument (see paragraphs 2d, 3d, and 3e).

(6) That the Superintendent may consider matters from the respondent's personnel and disciplinary records without referral to the respondent for comment, and that the respondent is authorized to review such files upon request.

b. Coordination with Legal Advisor. The IO should consult with a legal advisor designated by the Staff Judge Advocate for advice and guidance in conducting the investigation.

c. Determining what Witnesses to Call. In preparing for the hearing, the IO will ordinarily be able to determine the identities of necessary witnesses from the case file. Paragraph 3g(1) gives guidelines for determining the necessity of witness's personal testimony at the hearing. The IO should not communicate with prospective witnesses concerning the substance of their knowledge of the case. Only evidence properly received during sessions of the hearing may be considered in making findings and recommendations. In an unusual situation, the IO may identify a prospective witness, but be unable to determine from the case file if that person has any knowledge concerning the case. If this situation arises, the IO may communicate with that prospective witness but only for the purpose of determining the witness, general knowledge concerning the case. The IO should not attempt to determine the substance or extent of such knowledge. The IO should consult with the legal advisor for advice and guidance before communicating with any prospective witnesses, except on administrative matters.

d. Respondent's Witnesses. Upon receipt of a timely written request, the IO will arrange for the presence of all witnesses requested by the respondent, if determined by the IO to be necessary, and if reasonably available (see paragraph 3g(1) below). The respondent has the burden of demonstrating the necessity of personal testimony.

3. Conduct of the Investigation.

a. Oaths. Witnesses testifying at the investigative hearing (including telephonically) will be sworn. The IO is authorized to administer oaths in the performance of his/her duties (Article 136, UCMJ).

b. Challenges. The respondent may question the IO regarding possible bases for challenge, and may challenge the IO for cause. This will normally occur before the fact-finding portion of the investigation begins, but may be done during any portion of the investigation when the respondent discovers possible grounds for challenge. Lack of impartiality or failure to meet the qualifications in paragraph 1c are the only bases upon which a challenge for cause may be made. The IO will rule on the challenge. If the IO rules adversely to the respondent on a challenge, the respondent may request the Superintendent to consider the challenge, but the investigation may continue while the challenge is pending.

c. Counsel. The respondent may consult with legal counsel prior to the hearing. The respondent will not be represented by counsel at the investigative hearing, although counsel may be present as spectators. For purposes of consultation, the respondent may obtain civilian counsel at no expense to the Government, may consult with military counsel provided by the Office of the Staff Judge Advocate, or may do both.

d. Rights of Respondent at Hearing. The respondent will, in all but exceptional circumstances, be present at all open sessions of the investigative hearing. The absence of the respondent from any session and the reason therefore will be shown in the record of the proceedings. The respondent may elect to waive his/her right to be present at an open session of the hearing, by affirmative waiver communicated to the IO on the record or in writing, or by willfully absenting himself/herself without authority following notification pursuant to paragraph 2a above. The absence of the respondent does not relieve the IO of the duty to make a thorough, complete, and impartial inquiry of the matter referred for investigation. The respondent may object to testimony and to other evidence. The respondent may call witnesses and present evidence in his/her own behalf. The respondent may cross-examine all witnesses. The respondent may testify or remain silent. If the respondent elects to testify, the respondent will execute a Privacy Act statement. No adverse inference may be drawn from the respondent's decision not to testify.

e. Opening Statement and Closing Argument. The respondent may make an unsworn opening statement prior to the beginning of the fact-finding portion of the investigation. At the conclusion of the hearing the respondent has the right to make an unsworn argument to the IO on the merits of the allegation, and concerning possible recommendations by the IO. These rights apply regardless of whether the respondent elects to testify. The IO must bear in mind that the respondent's unsworn statement and argument are not evidence. They are made to help the IO understand and weigh the evidence and should be regarded by the IO as such.

f. Proof of Facts.

(1) *General.* Facts and circumstances relevant to the matter under investigation are most often proved or disproved, either directly or through inference, by real (tangible) evidence; documentary evidence; testimony or statements of witnesses; and matters of universal knowledge of which official notice may be taken without proof. The fact that an item of evidence does not fit within these categories does not prevent its consideration if it is relevant.

(2) *Real Evidence.* A tangible object (e.g., weapons, clothing, fingerprint) which is relevant to the subject of the inquiry is real evidence. Whenever an item of real evidence would aid in establishing the existence or nonexistence of a fact, that item or a photograph, description, or other suitable reproduction of it should be included in the record of proceedings, together with any statements of witnesses necessary to identify the item and verify the accuracy of the reproduction. If the physical layout of a building, room, or other place is relevant, the IO, together with the respondent, may visit the scene, if practicable.

In any event, a diagram should be included in the record. The IO should not overlook the value of his/her own observations respecting real evidence.

(3) *Documentary Evidence.* Documentary evidence consists of records, reports, letters, and other written, printed, or graphic material which indicate the existence or nonexistence of a fact. The IO should be alert to discover all such evidence relevant to the matter under inquiry and to include the originals or copies in the record.

(4) *Testimony or Statements of Witnesses.* Oral or written accounts of relevant matters usually constitute an indispensable part of the evidence considered in an investigation.

(5) *Official Notice.* Official notice may be taken of facts which are of common knowledge (e.g., general facts and laws of nature; general facts of history; location of major elements of the Army; and organization of the Department of Defense and its components); there is no need to obtain specific evidence to prove such facts. Official notice includes, but is not limited to, those matters of which judicial notice may be taken (see MCM, Military Rules of Evidence 201 and 201A). The record of proceedings should reflect matters which the IO officially notices.

g. Witnesses.

(1) *General.* There is no authority to subpoena witnesses to appear and testify at the hearing. Military personnel and Federal civilian employees, however, may be ordered to do so by an appropriate commander or supervisor. Other civilians who agree to appear may be issued invitational travel orders in certain cases (see JTR, Appendix E); this must be approved by the Superintendent. Each witness should be informed of the nature of the investigation before his/her statement or testimony is taken. Appearance as a witness is an official duty for both military personnel and Federal civilian employees, and takes precedence over other duties, including cadet duties. Considerations in determining the necessity of personal testimony by witnesses include the relevancy of the testimony, whether it is cumulative, whether its significance outweighs the delay, expense, or difficulty in obtaining it, and whether reasonable alternatives, such as telephonic testimony, or written statements provided by the witness, are available. If a witness's, personal testimony is determined to be necessary, and if they are determined to be reasonably available, written notice should ordinarily be given to them to help ensure their presence at the investigation.

(2) *Treatment of Witnesses; Rights Warning.* No military witness will be compelled to incriminate himself/herself or to answer any question the answer to which may tend to incriminate the witness; no military witness will be interrogated, or be asked to give any statement if he/she is suspected of an offense without first informing the witness of the nature of the accusation and advising the witness that he/she does not have to make any statement regarding the offense of which he/she is accused or suspected and that any statement made by the witness may be used as evidence against him/her in a trial by court-martial; no military witness will be compelled to make a statement or produce evidence if the statement or evidence is not material to the issue and may tend to degrade him/her (see Article 31, Uniform Code of Military Justice, MCM). No witnesses not subject to the UCMJ will be required to make a statement or produce evidence that would deprive them of rights against self-incrimination under the Fifth Amendment of the U.S. Constitution. When a military witness is suspected of an offense under the UCMJ, the witness' rights under Article 31 will be explained; this should be done using the procedure for explaining rights set forth on DA Form 3881 (Rights Warning Procedure/Waiver Certificate). The IO should protect all witnesses against improper questions, unnecessarily harsh or insulting treatment, or unnecessary inquiry into personal affairs. In certain cases, the appropriate authority may provide a military witness immunity and require testimony notwithstanding Article 31 and the Fifth Amendment. The Staff Judge Advocate will be consulted concerning grants of immunity.

(3) *Attendance as Spectators.* Witnesses other than the respondent normally will not be present at the investigative proceedings, except when testifying. In some cases, however, it is necessary to allow an expert witness to hear evidence presented by other witnesses so that he/she may be sufficiently advised of the facts to give informed testimony as to the technical aspects of the case. In such instances, the

record of proceedings should reflect what witness was present during the testimony of other witnesses. As an exception to these provisions, witnesses may remain in the hearing room following their testimony, at the discretion of the IO.

(4) *Testimony and Statements.* Witness testimony usually is elicited by questions and answers during a hearing. Written statements may also be considered, whether sworn or unsworn, whether made before or during the investigation, and whether or not the person making the statement also testifies. Witness statements obtained during collateral investigations (e.g., CID, MPI) also may be used, as may investigative and other official reports. A witness may be asked to confirm a prior written statement (which will first be made an exhibit), and he or she is subject to questioning on the substance of such statement, both by the IO and the respondent. Witness testimony may be taken telephonically, under circumstances by which the IO may reasonably conclude that the witness's identity is as claimed.

(5) *Discussion of Evidence Presented.* The IO will direct military, and civilian witnesses who are subject to Army authority, and request other witnesses, not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings, until the investigation is completed.

h. Spectators. Normally, members of the respondent's family, members of the Corps of Cadets, and Department of Defense personnel with an official interest in the proceedings may attend as spectators. The general public and media representatives may not attend unless approval is obtained from the Superintendent. The IO is authorized, with the concurrence of the legal advisor, to exclude some or all spectators, individually or by category, from portions, or all of the proceedings, if the subject matter is classified, inflammatory, or otherwise exceptionally sensitive, or if necessary to preserve the decorum or integrity of the proceedings, as in cases of inappropriate behavior by spectators. The Superintendent may also specify whether the proceedings will be open or closed.

i. Rules of Evidence.

(1) *General.* These proceedings are administrative and not judicial in nature. Therefore, the rules of evidence prescribed for trials by courts-martial, or for court proceedings generally, are not applicable. Accordingly, subject only to the limitations set forth below, anything which in the minds of reasonable persons is relevant to the matter under investigation may be properly considered as evidence.

(2) *Best Evidence.* An investigation is not precluded from considering any evidence merely because there maybe better evidence available to prove the same fact. The IO should make a reasonable effort to procure the best evidence reasonably available under the circumstances.

(3) *Limitations.* Investigations under this regulation are not subject to exclusionary or other evidentiary rules precluding the use of evidence. The following limitations, however, do apply:

(a) *Privileged Communications.* Military Rules of Evidence 502 and 503, concerning privileged communications between lawyer and client and with clergy, apply.

(b) *Polygraph Tests.* No evidence of the results, taking, or refusal of a polygraph (lie detector) test will be received or considered by the IO.

(c) *Self-Incrimination.* See paragraph 3g(2) above.

(d) *Involuntary Admissions.* A confession or admission obtained by unlawful coercion or inducement likely to affect its truthfulness will not be accepted as evidence. The fact that a respondent was not advised of his or her rights under Article 31, UCMJ, or the Fifth Amendment, or of his or her right to a lawyer does not, of itself, prevent acceptance of a confession or admission as evidence.

(e) *Bad Faith Unlawful Searches.* If members of the Armed Forces acting in their official capacity (such as military police acting in furtherance of their official duties) conduct or direct a search that is unlawful under the Fourth Amendment of the U.S. Constitution, evidence obtained as a result of that search may not be considered against any respondent whose rights were violated by the search. Such evidence is acceptable only if it can reasonably be determined by the IO that the evidence would inevitably have been discovered. The IO may receive advice from the legal advisor on any question arising during the investigation.

j. Ruling on Procedural Matters. All rulings on procedural matters (e.g., motions, objections to the introduction of evidence and to other matters, and requests for delay) are made by the IO. The IO may receive advice from the legal advisor on any question arising during the investigation.

k. Communications with the Superintendent. If, in the course of the investigation, facts become known which may cause the Superintendent to consider enlarging, restricting, or terminating the proceedings, or cancelling or otherwise modifying any instruction in the original appointment, the IO should report the matter to the Superintendent with recommendations for disposition.

1. Findings and Recommendations.

(1) *General.* A finding is a clear and concise statement of a fact that can be readily deduced from the record. It is directly established by evidence in the record or is a conclusion of fact by the IO. Negative findings (e.g., that the evidence does not establish a fact) are often appropriate. The number and nature of the findings required depend on the instructions of the Superintendent.

(2) *Required and Optional Findings; Variances.* The IO must make a finding of whether each alleged violation referred for investigation is supported by the evidence. Other findings may be made on related matters.

(a) *Minor Variances.* The IO can find that a violation of Regs USMA occurred in a manner, at a place, or at a time different from that alleged, and may enter a finding to that effect, so long as the variance is minor.

(b) *Major Variances.* A major variance would be one in which a violation of a completely different or additional provision of a regulation or UCMJ article was found, or in which a violation of an alleged provision of a regulation or UCMJ article was found to have occurred in a manner completely different from that alleged. If it appears during the course of an investigation that a major variance in the findings may be required, the IO will inform the respondent, and may seek guidance from the Superintendent pursuant to paragraph 3k above. This procedure should be used if the variance is in the manner of occurrence of an already-alleged violation of a regulation or UCMJ article. The Superintendent may refer the matter as an additional or substitute allegation for investigation. If this occurs, the IO will inform the respondent of the referral, and will continue with the investigation. However, the respondent must be given reasonable time to consult with their legal counsel before the investigation may continue. After the respondent has been given a reasonable amount of time to consult with their legal counsel, the investigation will continue immediately. Alternatively, rather than consulting with the Superintendent, the IO may make findings on the matter in the form of a collateral finding of facts and circumstances surrounding commission of the referred offense; in this case, the collateral finding is not usable to substantiate a violation of a regulation or UCMJ article, but is usable by the Superintendent in determining an appropriate sanction for the referred offense. This alternative should only be used if the variance is based on an apparent violation of a non-alleged provision of a regulation or UCMJ article.

(3) *Standard of Proof.* The findings of the IO must be supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion. The weight of the evidence is not determined by the number of witnesses or volume of exhibits, but by considering all the evidence and evaluating such factors as the consistency or inconsistency of various items of evidence, the witnesses, demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indications of veracity.

(4) *Recommendations.* The IO, in addition to making findings, may make any recommendations deemed appropriate. The findings and recommendations may be announced to the respondent by the IO in open session, or in the written record of investigation, at the IO's discretion.

4. Post-Hearing Process.

a. Record of Proceedings.

(1) *Allegation supported by Evidence.* The IO is responsible for the preparation of a summarized record of the proceedings in any case resulting in a finding adverse to the respondent.

(2) *Allegation Not Supported by Evidence.* When the IO finds that the evidence is insufficient to support the allegations, no record is required, other than to the extent necessary to reflect the IO's findings and recommendations.

(3) *Authentication.* The IO will certify the accuracy of the record and authenticate the findings and recommendations reflected therein.

b. Further Processing. Following authentication, the record, with a full accounting of the time required to conduct the investigation, will be provided to the Staff Judge Advocate for further processing.

(1) *Allegation Not Supported by Evidence.* If there is no finding adverse to the respondent, the procedures in 4b(2) below are inapplicable, and the file may be presented to the Superintendent for information and then closed, or then be sent to the Commandant, if appropriate. The file will be sent to the Commandant following presentation to the Superintendent if the IO recommends that disciplinary action be taken or considered for violations of standards other than those found in USMA regulations or the UCMJ, such as a violation of the honor code. If the finding was not announced to the respondent during the hearing, the respondent will be provided a copy of the record to inform him/her of the finding; otherwise, the record need not be served.

(2) *Allegation Supported by Evidence.* If there is a finding adverse to the respondent, then the following procedures will be used.

(a) *Legal Review and Commandant's Recommendation.* Prior to action by the Superintendent, the record of proceedings will be reviewed by the Staff Judge Advocate to determine whether legal requirements have been complied with, the effect of any error (including whether any error has a material, adverse effect on the respondent's substantial rights), whether the findings of the IO are supported by the requisite proof, and whether the recommendations are supported by the findings. The Staff Judge Advocate may also make recommendations concerning disposition of the case. The Staff Judge Advocate will prepare a written review and forward the record and review to the Commandant of Cadets prior to submission to the Superintendent. The Commandant may make recommendations and comments for the Superintendent's consideration.

(b) *Submission by Respondent.* A copy of the record, including the IO's findings and recommendations, the Staff Judge Advocate's legal review, and the Commandant's recommendations and comments, if any, will be provided to the respondent, who may submit written comments for consideration by the Superintendent. The respondent will have 72 hours (excluding weekends and Federal holidays and training holidays) from the time of service to submit comments. If the respondent fails to submit comments within 72 hours, he/she will be deemed to have waived the right to submit comments. The Staff Judge Advocate or his/her designee may approve a request for an extension of time to submit comments. The request for an extension should be made within the 72 hours of service. Following receipt of the respondent's comments, or expiration of the time to comment, whichever occurs first, or upon receipt of notice from the respondent of waiver of the opportunity to comment, the Staff Judge Advocate will present the case file to the Superintendent for action; normally, the Staff Judge Advocate will provide proposed action documents at that time.

c. Action by the Superintendent.

(1) *Generally.* The Superintendent is bound by a finding of the IO that an allegation or portion thereof is not supported by the requisite amount of evidence. The Superintendent is not bound by other findings or by any recommendations of the IO. The Superintendent may consider any relevant information in making a decision, even though that information was not considered at the hearing by the IO. Matters from the respondent's personnel and disciplinary records may be considered without referral to the respondent for comment. If other additional information is to be considered and the information is adverse to the respondent, and if the respondent has not otherwise had an opportunity to rebut or comment on the material, he/she will be advised in writing, and will be given an opportunity to reply in

writing and submit relevant material. His/her reply will be considered along with the additional information.

(2) *Errors.* Generally, procedural errors or irregularities in an investigation do not invalidate the proceeding or any action based on it.

(a) *Harmless Errors.* Harmless errors are defects in the procedures or proceedings that do not have a material adverse effect on an individual's substantial rights. If the Superintendent notes a harmless error, he or she may still take final action on the investigation.

(b) *Minor Errors Requiring Correction.* If the IO failed to make a finding or recommendation required by the memorandum of appointment or this regulation, or if there has been a minor procedural error or omission which may be corrected without prejudice to a respondent, the Superintendent may return the case to the IO for corrective action.

(c) *Substantial Errors.* Substantial errors are those that have a material adverse effect on an individual's substantial rights. If such an error is present, the Superintendent may not use the affected portion of that investigation as the basis for adverse action against the person whose substantial rights were prejudiced, unless the error is corrected. If the error can be corrected without prejudice to a respondent, the Superintendent may return the case to the IO for corrective action, if necessary. In case of an error which cannot be corrected otherwise, the Superintendent may set aside the findings and recommendations and refer the case to a new IO. The new IO may be furnished any evidence properly considered at the previous hearing. Additional evidence also may be considered at the new hearing. The Superintendent may take action on portions of investigations not affected by substantial errors, regardless of whether corrective action is taken on the affected portion.

(d) *Failure to Object.* No error is substantial within the meaning of this paragraph if there is a failure to object or otherwise bring the error to the attention of the IO at the appropriate point in the proceedings. Accordingly, errors described in (c) above may be treated as harmless if the respondent fails to point them out. Nevertheless, the Staff Judge Advocate shall address errors which would be considered substantial but for the provisions of this subparagraph in the review of the record of proceedings and advise the appropriate action to be taken with respect thereto.

(3) *Action.* Action by the Superintendent will be taken pursuant to paragraph 10.12, Regs USMA.

5. **Sexual Assault and Other Violent Crimes.** In cases of alleged sexual assault and other violent crimes, the Commandant will refer the case using the formal board procedures set forth in AR 15-6. When these procedures are used, the board will consist of one officer at the grade of Lieutenant Colonel or higher, who will be appointed from a standing list of IO's. The Commandant will initiate this option in cases involving alleged sexual assault and other violent crimes. After completion of the formal investigation, the post hearing procedures set forth in paragraph 4, above, will be followed.

6. **Change.** These procedures are subject to change by the Superintendent.