

GUIDE TO INFORMAL INVESTIGATIONS UP AR 15-6

As prepared by:

Administrative Law Division
Office of the Staff Judge Advocate
441 1st Street, Building 1109
Fort Lee, Virginia 23801-1799
Ph: 804.765.1533 (DSN 539)

REFERENCES

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

TJAGLCS "Investigation Guide for Informal Investigations" (October 2007)

INTRODUCTION

This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations. A brief checklist is included at the end of the guide, and may be used as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

DUTIES OF AN INVESTIGATING OFFICER

The primary duties of an investigating officer are:

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

AUTHORITY

1. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned. If the appropriate authority decides to take action against an individual based upon an AR 15-6 investigation, that individual will be afforded certain due process rights before adverse action is taken.
2. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on

their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as reports of survey and line of duty investigations.

CONDUCTING THE INVESTIGATION

Administrative Matters

As soon as the investigating officer receives appointing orders, he or she 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, whether verbal or written. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology should be part of the final case file. Likewise, a chronology of events based upon physical evidence and witness interviews gathered is oftentimes a helpful supplement to the final investigation report, and can supplement the findings made by the IO.

Developing an Investigative Plan

1. 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 re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.
2. 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.

Obtaining Documentary and Physical Evidence

1. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.
2. Investigating officers are limited to what physical evidence (i.e., photos, clothing, vehicles, house) they may examine (potentially a search) or take custody of (potentially a seizure) for purpose of their investigation. The investigating officer must first attempt to obtain the rightful owner's permission to examine or take custody of privately owned items. The investigating officer's authority to search and seize privately owned property is limited by the US Constitution and Army regulation. Deliberately circumventing these limits may impact the investigation. **Consult with your legal advisor if you need to examine or take custody of privately owned property.**

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

Obtaining Witness Testimony

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

2. Witness testimony should be taken on **DA Form 2823**. Although there is a box for the witness's social security number, there is no valid reason to require that information. Investigating officers should not require the entire SSN for witness statements. If a witness has a very common name (i.e., Jon Jones, Sally Smith) using the last 4 of the SSN will be sufficient to later identify the witness. Also, home addresses and phone numbers should not be recorded on the DA Form 2823 unless absolutely necessary.

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

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

4. 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.

Rights Advisement

1. 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 or her rights and elects to waive those rights and make a statement. **It may be necessary to provide the rights warning at the outset of the interview.** In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such 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 or her rights and requests an attorney, all

questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed.

2. 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.

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 financial liability investigation, 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.

Scheduling Witness Interviews

1. 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 re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum.
2. 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.
3. Concentrate on those witnesses who would have the most direct knowledge about the events in question. 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.
4. 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.
5. 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.

Conducting Witness Interviews

1. Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The following suggestions may be helpful:
 - a. Prepare for the interview: While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and **prepare a list of questions or key issues to be covered**. This will prevent the investigating officer from

missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to **begin with open-ended questions** such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

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

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

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

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

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

d. Let the witness testify in his or her own words: Investigating officers must **avoid coaching the witness** or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural

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

Evidence and Standards of Proof

1. 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.

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

- b. 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.
- c. **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.
- d. "Off-the-record" statements will not be considered for their substance but can be relied upon to help find additional evidence.

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

2. 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.

CONCLUDING THE INVESTIGATION

Preparing Findings and Recommendations

****Example provided at the end of the guide****

1. 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.
2. 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: **Who** was involved, and to what extent? **What** occurred? **Where** did it occur? **When** did it occur? **How** did it occur? Exact descriptions and values of any property at issue in the investigation should be provided.
3. 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.
4. 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.
5. Facts, findings, and recommendations may be provided in a separate memorandum attached to the DA 1574. In that event, the DA 1574 should be appropriately annotated to identify the memorandum.

6. After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet. All administrative documents, such as the memorandum of appointment, rights warning statements, Privacy Act statements, and chronology, will be marked as enclosures. Every item of evidence offered or received by the investigating officer will be marked as exhibits, and indexed appropriately. Great care should be taken to organize the investigation in a logical, coherent manner.

Legal Review

1. AR 15-6 does not require that all informal investigations receive legal review. The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters. Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

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

2. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

CHECKLIST FOR INVESTIGATING OFFICERS

1. Investigative Plan:

- Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?
- Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?
- Does the plan identify information not immediately available and outline steps to obtain the information?
- Have adequate copies of DA Form 2328 and DA Form 3881 been made?

2. Conducting the Investigation:

- Is the chronology being maintained in sufficient detail to identify causes for unusual delays?
- Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?
- Is routine coordination with the legal advisor being accomplished?

3. Preparing Findings and Recommendations:

- Is the evidence assembled in a logical and coherent fashion?
- Is there a timeline or chronology of events to assist the Appointing Authority understand the situation and circumstances of the conduct or actions under investigation?
- 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?
- Is each recommendation supported by the findings?
- Are the findings and recommendations responsive to the tasking in the appointment memorandum?
- 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?

4. Final Action:

- Was an appropriate legal review conducted?
- Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved?
- Have the necessary taskings been prepared to implement the recommendations?

SAMPLE MEMORANDUM OF FINDINGS & RECOMMENDATIONS

MEMORANDUM FOR Commander, Unit Name, Fort Lee, Virginia

SUBJECT: AR 15-6 Investigation Findings & Recommendations

1. Pursuant to the appointing memorandum dated DD MMMM YYYY, I have completed an informal investigation UP AR 15-6 and have prepared this memorandum to serve as a record of the facts ascertained during the investigation and statement of my findings and recommendations.

2. Facts: During the course of the investigation, I looked for facts that would substantiate whether or not an inappropriate sexual relationship was taking place between SSG _____ and PFC _____. The inquiry began after SSG _____'s husband allegedly found her partially dressed in a bed with PFC _____ on DD MMMM YYYY. The following facts were gathered during the investigation:

a. In Annex A1, SGT _____ testifies that both SSG _____ and PFC _____ confided in him that they were having a sexual affair.

b. In Annex A2, Mrs. _____ testifies that her husband, PFC _____ confessed to having a sexual affair with an NCO in his unit. She also testified to the dates that her husband was on TDY to Hawaii.

c. In Annex A3, SFC _____, SSG _____'s husband, testifies to finding PFC _____ in bed with his wife on DD MMMM YYYY. He also testified to his wife's leave and trip to Hawaii that coincides with PFC _____'s TDY there.

d. In Annex A4, CW2 _____, testifies to seeing PFC _____ with a woman matching SSG _____'s description entering a hotel room next to his during the TDY to Hawaii. He also testified to hearing sexual intercourse between the two individuals.

e. Annex B1-B7, contain e-mails between SSG _____ and PFC _____, which substantiate the affair. B1-B6 are e-mails that discuss the travel plans to Hawaii and develop a plan for concealing the nature of the trip from SSG _____'s husband. In B7 SSG _____ states "I would love to be able to just stand up and tell everyone the truth, but I would be telling everyone that I am guilty."

f. Neither SSG _____ or PFC _____ would provide a statement. Both invoked their rights against self-incrimination after providing only basic information. Their rights waiver forms may be found at Annex C1-C2.

g. The following individuals were interviewed and indicated that they never saw anything inappropriate or suspicious between SSG _____ and PFC _____. This information is reflected in a Memorandum for Record, Annex D, dated DD MMMM YYYY.

(1) CPT _____: SSG _____ and PFC _____'s Company Commander.

(2) 1SG _____: SSG _____ and PFC _____'s First Sergeant.

(3) SPC _____: A member of SSG _____ and PFC _____'s squad.

3. Findings: After investigating the allegations of an inappropriate sexual relationship between SSG _____ and PFC _____, based on a preponderance of the evidence, I make the following findings:

a. that on or about DD MMMM YYYY SSG _____ and PFC _____ began having an inappropriate sexual relationship, and committed adultery. This is substantiated by two incidents, one at SSG _____'s residence, one in Hawaii, and by the statements of SGT _____ and Mrs. _____.

b. that SSG _____ and PFC _____ are both currently married, and were so at the commencement of their sexual relationship.

4. Recommendations: After considering all of the facts and evidence gathered, and in light of my findings, I make the following recommendations:

a. that SSG _____ be subject to UCMJ action under Article 134.

b. that PFC _____ be subject to UCMJ action under Article 134.

c. that the unit be required to have annual training on prohibited relationships.

5. Point of contact is the undersigned at (804) 123-4567.

6 Encls.

1. Annex A (Witness Statements)
2. Annex B (E-Mails)
3. Annex C (Rights Waivers)
4. Annex D (Memorandum for Record)
5. Annex E (Appointment Memorandum)
6. Annex F (Chronology of Events)

SHERLOCK HOLMES
2LT, QM
Investigating Officer

SAMPLE CHRONOLOGY OF EVENTS

Chronology of Events

- 1 April 2008 (0600) SSG _____ becomes squad leader in unit, PFC _____ is assigned as one of her soldiers.
- 15 June 2008 (2213) SSG _____ begins sending a series of e-mails to PFC _____ about how they can meet and be together during his TDY to Hawaii.
- 30 June 2008 (0715) PFC _____'s TDY to Hawaii begins.
- 2 July 2008 (1500) SSG _____ travels to Hawaii.
- 3 July 2008 (2300) CW2 _____ sees PFC _____ enter his hotel room with someone resembling SSG _____, and then hears intercourse between the individuals.
- 8 July 2008 (1845) PFC _____ returns from Hawaii and admits affair to his wife.
- 15 July 2008 (1130) PFC _____ confides in SGT _____ about his relationship with SSG _____.
(1430) SSG _____ confides in SGT _____ about her relationship with PFC _____ after being confronted about it.
- 15 July 2008 (2230) SSG _____ sends an e-mail to PFC _____ about the relationship.
- 16 July 2008 (1930) SFC _____, SSG _____'s husband, finds her partially undressed with PFC _____.
- 17 July 2008 (0900) LTC _____, Commander, Unit, Appoints Investigating Officer, UP AR 15-6

Chronology of Events of Investigation

- 17 July 2008 (0900) Received appointment memorandum
(1400) Met with legal advisor
- 18 July 2008 (1030) Interviewed SGT _____ (See Annex A1)
(1120) Interviewed Mrs. _____ (See Annex A2)
(1130) Secured copies of e-mails from Mrs. _____ (See Annex B)
(1500) Interviewed CPT _____ (See Memorandum of Record)
- 19 July 2008 (0700) Interviewed CW2 _____ (See Annex A4)
(0730) Interviewed 1SG _____ (See Memorandum of Record)
(0800) Interviewed PFC _____ (See Annex C1)
(0830) Interviewed SSG _____ (see Annex C2)