

January 1, 1992

General Counsel

LITIGATION INVOLVING DeCA



BY ORDER OF THE DIRECTOR

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Colonel, USA
Chief of Staff

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AUTHORITY: Defense Commissary Agency Directives Management Program is established in compliance with DoD Directive 5105.55, Defense Commissary Agency (DeCA), November 1990.

HOW TO SUPPLEMENT: Lower echelon units may not supplement this directive.

HOW TO ORDER COPIES: Stores needing additional copies will submit requirements on DeCA Form 30-21 to Region/IM; Region/IM will consolidate Store and Region requirements on DeCA Form 30-21 and forward to HQ DeCA/IMSP.

SUMMARY: This directive assigns responsibilities and provides instructions and guidance for processing litigation involving DeCA.

OFFICE OF PRIMARY RESPONSIBILITY (OPR): HQ DeCA/GC
COORDINATORS: HQ DeCA/IR/DP/DO/IM/IG/RM/DF/PL/AM/PA/PM/CCE/LL
DISTRIBUTION: DeCA Directorates/Staff Offices
DeCA Regions
DeCA Service Centers
DeCA Commissaries

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1. FUNCTIONS OF THE GENERAL COUNSEL. The General Counsel initiates, supervises, and coordinates all actions necessary to protect the interests of the Defense Commissary Agency in all legal and administrative proceedings, tax disputes, and legal matters that arise out of or otherwise affect DeCA activities in the United States and in foreign countries. The General Counsel:

a. Maintains close liaison with the Department of Justice and assists in procuring evidence to support the position of the government, preparing pleadings and briefs, compiling evidence and evaluating it, and preparing trial and appellate presentations.

b. Makes recommendations on the initiation of legal actions and appeals and on the acceptability of proposed compromises or settlements of pending litigation or controversies.

c. Maintains close liaison with other Department of Defense agencies and the General Accounting Office, and cooperates in procuring evidence supporting the position of the government.

d. Negotiates and corresponds with, and presents evidence, pleadings, and briefs to, federal, state, and municipal regulatory bodies in administrative and quasi-judicial proceedings.

e. Except as otherwise provided by this regulation, those actions in a through d above are taken only by the General Counsel. Units subordinate to HQ DeCA must not initiate, or otherwise take, any action pertaining to these responsibilities unless specifically authorized by, the General Counsel.

f. No person on active duty with or employed by DeCA will appear as an attorney, or counsel of the DeCA, before any civil court, tribunal, administrative body or government agency in the United States or in a foreign country, or on behalf of individuals unless authorized by the General Counsel, DeCA.

2. RESPONSIBILITIES.

a. The General Counsel, DeCA will:

(1) Inform the Director, DeCA, and the General Counsel, DoD, of all court litigation affecting DeCA.

(2) Assure that all cases are handled in a highly professional and competent manner to the end that the Government's interests are adequately protected.

(3) Take appropriate action in response to litigation requests for official DoD information or the testimony of DeCA employees.

(4) Approve appeal actions and all court settlement proposals.

b. HQ DeCA, Regional and Service Center Directors/Commanders and Commissary Store Managers will:

(1) Report all new litigation involving DeCA or the performance of official duties by DeCA employees to the General Counsel.

(2) Inform the General Counsel of any changes in status of litigation cases affecting DeCA.

SECTION A - REPRESENTATION

3. REPRESENTATION OF DeCA AND DeCA OFFICIALS SUED IN THEIR OFFICIAL CAPACITIES. The Department of Justice has the statutory responsibility for representing DeCA and DeCA officials sued in their official capacities. In a particular case, this representation may be conducted by the Department of Justice attorneys in Washington, delegated entirely to a United States Attorney, or handled jointly by them in what is termed a "supervised" case. This responsibility could be delegated entirely to the General Counsel, DeCA. Upon receipt of the copy of the complaint served upon the Attorney General, the Department of Justice issues a formal request for litigation report to the General Counsel directing that it be provided to the attorney conducting the defense of the case.

4. REQUESTS BY DeCA OFFICIALS FOR REPRESENTATION BY THE DEPARTMENT OF JUSTICE. Past or present DeCA personnel or employees against whom civil or criminal proceedings are brought in their individual capacities, but which arise out of the performance of their official duties, have a right to request representation by the Department of Justice. Under certain circumstances, DeCA contractors involved in civil litigation with third parties also have a right to request representation. If such an individual or DeCA contractors desires government representation, the party should execute a written request (see Appendices 1 and 2 for the formats of such requests) and send the request through the appropriate HQ DeCA, Regional or Service Center Director/Commander to the General Counsel, DeCA. It should be noted that the government is not responsible for the expense of private counsel hired without special authorization, or for any judgements rendered against individuals in their personal capacities. Requests for government representation by past or present DeCA personnel or employees must be submitted with an affidavit or declaration by the requester. The employee must include in the affidavit or declaration sufficient factual information to demonstrate that the matter arose out of the performance of official DeCA duties. (See Appendix 3.) Also, the requester's supervisor must provide an affidavit or declaration attesting that he or she has read the complaint and the requester's affidavit or declaration, and that the matter arose out of the performance of official DeCA duties. (See Appendix 4.) For purposes of this affidavit or declaration the "supervisor" is the Commissary Officer, or HQ DeCA staff director, Regional, or Service Center Director/Commander.

5. SUITS AGAINST INDIVIDUALS. These lawsuits are processed according to procedures applicable to Requests for Representation. Immediate telephonic notification to the General Counsel is essential to protect individual defendants and the government, even when personnel are protected by statute from liability.

SECTION B - REPORTING

6. LEGAL PROCESS. The issuance of any legal process covered by this DeCAD that affects the DeCA mission or that purports to require action by DeCA personnel or employees in connection with the performance of their official DeCA duties must be reported immediately to the General Counsel. Examples of legal process are: summons; complaint; habeas corpus petitions; temporary restraining orders; subpoenas; and attachments. NOTE: These examples are not exhaustive.

7. LEGAL MATTERS OF INTEREST. Report all legal matters that are, or that could possibly be, the subject of civil litigation or criminal proceedings, if such legal matters would be of interest to DeCA. Examples of reportable legal matters include: bankruptcy proceedings involving those with whom DeCA has contracts or other debts; lawsuits between DeCA prime contractors and subcontractors where DeCA may be named as a party or where nonparty discovery is contemplated against DeCA; allegations of fraud against those with whom DeCA has contracts and DeCA is the victim. NOTE: These examples are not exhaustive.

8. HOW AND WHAT TO REPORT.

a. Reports for legal matters covered by paragraphs 6 and 7 of this DeCAD will be made by letter to the DeCA General Counsel within three working days. If reporting by letter will delay a particular legal matter, notify the General Counsel by telephone to eliminate the possibility of harm through delay. Include the following information, to the extent practicable and relevant, in the report:

- (1) Identification of parties and the court involved.
- (2) Nature of the legal matter involved and a summary of known facts, including the amount sought or other relief sought, or both, and comments on available defenses, cross-claims, or counter-claims.
- (3) Complete information regarding service of process and pleading suspense dates.
- (4) Any government indemnity rights, such as insurance, bonds, guaranty agreements, etc.
- (5) Prior action taken on the subject matter of the litigation.
- (6) Names and addresses of potential witnesses.
- (7) Status of the litigation.

b. Send all available records pertaining to the legal matter, such as correspondence, statements of witnesses, and pleadings, with the report. If, however, records are voluminous or it is not feasible to send them with the report, so indicate in the report and include the location of the records and efforts being made to preserve them. Do not delay sending the report merely because all essential information or records, have not been obtained. Send an interim report and then send another report later when the essential information or records are obtained.

9. GARNISHMENT ACTIONS.

a. The pay of DeCA personnel is subject to garnishment under Public Law 93-647, as amended (42 U.S.C. 659-662). Federal pay may only be garnished for enforcement of legal obligations to provide child support or make alimony payments. Legal process, in the nature of garnishment, that involve the pay of DeCA civilian personnel must be served upon Defense Finance and Accounting Service - Columbus (DFAS-CO-AP). If the pay of military personnel assigned to DeCA is involved, the appropriate military finance office must be served. Service of process is not considered to have been accomplished until the proper agent is served. Any federal employee at other than at the finance office designated to receive such service of process, must send it to the proper office. For actions against civilian personnel this is DFAS-CO-AP. Check with the host staff judge advocate or chief legal officer to determine where garnishment actions for military personnel should be served.

b. To be honored, any process served must clearly disclose that it pertains to a legal obligation to provide child support or make alimony payments, or it must be accompanied by documentation that will clearly establish this fact. If the validity of a legal process is questioned by the individual whose pay is to be garnished (the obligor), any challenge must be made by the obligor in the proper court. DeCA must not litigate or otherwise judge the validity of any such challenge if the garnishment order is apparently valid.

c. Any legal process should contain the information listed below (process containing insufficient information to permit identification of the obligor must be returned directly to the issuing

authority, with an explanation of the deficiency):

- (1) Name of obligor.
- (2) Obligor's place of employment.
- (3) Obligor's social security account number.
- (4) Obligor's status; for example, active duty, military, retired military, employee, or annuitant.

d. When the agent receives a properly served, apparently valid legal process, he or she will commence withholding of amounts garnished from the payment due the obligor immediately.

(1) Normal pay or disbursement cycles need not be altered to honor any, legal process.

(2) If the obligor is not and will not be due any money the legal process is immediately returned to the issuing authority by the agent, with a full explanation of the circumstances. If the obligor is due money at some point in the future, the agent immediately provides the issuing authority with an explanation of the situation and the date upon which the obligor will become due money.

(3) Where an obligor terminates his or her military employment or other relationship entitling him or her to money while undergoing garnishment withholdings under this paragraph, the agent must be notified immediately.

e. The DeCA agent designated to accept legal process for garnishment actions involving child support or alimony for civilian personnel is DFAS-CO-AP.

10. ADMINISTRATIVE PROCEEDINGS AND ACTIONS.

a. All administrative proceedings and actions that could affect the DeCA mission must be reported.

b. An example of a reportable administrative proceeding is: an administrative proceeding pertaining to a labor management relations administrative proceeding initiated under Title VII of the Civil Service Reform Act of 1978. If reporting by letter will delay, a particular administrative proceeding or action, notify the General Counsel by telephone to eliminate the possibility of harm through delay. Include in the report, to the extent practicable and relevant, the identification of the administrative body and the party or parties involved; a detailed statement of the matter involved; and the status of the administrative proceeding or action.

c. All records pertaining to the matter, such as correspondence and notices, must be sent with the report. If, however, these records are voluminous, or it is not feasible to send them with the report, so indicate in the report and include the location of the records and efforts being made to preserve them. Do not delay sending the report merely because all essential information or records have not been obtained. Send an interim report and then send another report later when the essential information or records are obtained.

11. FOLLOW-UP ACTION. Individuals reporting suits, actions, and proceedings will keep the General Counsel fully and promptly advised of all later developments. This includes sending the General Counsel, throughout the course of the proceeding, copies of all pertinent correspondence and documents.

SECTION C - CIVILIAN PERSONNEL AND LABOR CASES

12. COURT LITIGATION. Cases brought by present or former civilian employees may be instituted in federal district courts or the United States Claims Court. In Equal Employment Opportunity (EEO) cases, trial de novo (trial on the facts or trial anew as opposed to a hearing on a record or an appeal) is permitted. Most other civilian personnel cases involve appeals based wholly or in part on administrative records (i.e., personnel or supervisor's records, adverse action or other paperwork generated on the case). Also, civilian employees may appeal adverse decisions by the Merit Systems Protection Board (MSPB) to the Federal Circuit Court of Appeals. Consequently, the types of administrative records existing at the time litigation is instituted vary widely and litigation support requirements differ accordingly.

13. EEO CASES. Although employees normally are entitled to a trial de novo (trial on the facts or trial anew as opposed to a hearing on a record or an appeal), administrative records (i.e., personnel or supervisor's records, adverse action or other paperwork generated on the case) frequently play a central role in these cases. Occasionally, these records can provide a basis for summary judgment. At a minimum, these records provide the most rapid means for those involved with the litigation to become familiar with the facts and issues. Accordingly, these records must be promptly obtained from the custodian and preserved.

14. MSPB APPEALS. These appeals are based solely upon facts developed during MSPB administrative hearings. The MSPB provides official copies of the record only to the Department of Justice, not the agency involved. Thus, a lengthy delay is usually encountered before the receipt of a copy of this record in HQ DeCA. Consequently, a detailed procedural history of the case and a description of issues raised in the administrative hearings must be provided. Copies of relevant documents should be referenced and attached.

SECTION D - FOREIGN CIVIL LITIGATION

15. LITIGATION IN FOREIGN COURTS. The US Department of Justice is responsible for litigation in which the United States or its departments, agencies, or officials are named as parties, including litigation in foreign courts. Report the following matters to the host staff judge advocate or chief legal officer:

a. **Legal Actions in Which the United States Shares Costs of Judgment.** Report any suit, action, or proceeding involving DeCA activities and personnel in which the United States, although not named as a party defendant, has an interest (such as an obligation under international agreement to share the expense of any judgment finally awarded).

b. **Taxation.** Report disputes concerning the validity or refund of taxes imposed upon or assessed by a foreign authority against the property or transactions involving DeCA or its contractors.

c. **Other Legal Actions.** Report legal actions involving or arising out of DeCA activities against the United States, DeCA or any DeCA officer, official, or employee, arising out of the performance of official duties, including those arising out of DeCA contracts, subcontracts, and purchase orders, and bankruptcy, receivership, assignment, and probate proceedings.

d. **Legal Process.** Report the legal process of foreign courts affecting the accomplishment of the DeCA mission or purporting to require action by DeCA personnel (such as temporary restraining orders, subpoenas, attachments, garnishments etc.).

e. Informational reports of such litigation will be made to the General Counsel, DeCA who will

monitor foreign civil litigation involving DeCA and its officials.

16. SERVICE OF PROCESS. Any writ, summons, notice of legal proceedings, or other foreign civil process served on, or otherwise delivered to, a DeCA officer, employee, or activity is referred immediately on receipt to the host staff judge advocate. The host staff judge advocate will normally return the document to the issuing authority, with a suitable statement respectfully and tactfully explaining the lack of authority of the person or activity to accept service on behalf of the United States, and suggesting that service or delivery be made on the United States embassy or diplomatic mission, through established channels.

17. GARNISHMENT AND ATTACHMENT PROCEEDINGS. As a general rule, the United States and its agencies are not subject to garnishment orders or money attachment proceedings in foreign countries aimed at wages or other funds due and payable by the United States to alleged or adjudicated debtors of the parties on whose behalf garnishment or attachment is attempted. An exception to this rule exists in the Federal Republic of Germany. Under Article 34(3), German Supplementary Agreement to the NATO Status of Forces Agreement, the United States is required, as a result of the enactment of Public Law 93-647, to honor writs of garnishment issued by German courts against members of US forces or civilian component stationed in the Federal Republic of Germany for the purpose of enforcing child support or alimony obligations. Immediately upon receipt of any writ, order, or petition for garnishment or money attachment served on, or otherwise delivered to, a DeCA officer, employee, or activity such document will be referred to the host staff judge advocate or chief legal officer.

18. GOVERNMENT REPRESENTATION OF AN INDIVIDUAL. It is the general policy of the Department of Justice to afford counsel and representation to military personnel and civilian employees who are sued civilly in foreign courts as a result of their official duties. Requests for government representation should be submitted in writing through the host staff judge advocate or chief legal officer. The government is not responsible for expenses of private counsel incurred without specific authorization, and is not responsible for the satisfaction of any judgment against the individual sued.

19. CONTENTS OF REPORT TO GENERAL COUNSEL. Each Report, to the extent practicable and relevant, must include:

- a. Names of parties to the action or proceeding.
- b. Designation of the court or administrative body, and case or docket number.
- c. The nature of the action or proceeding, with a concise statement of known facts or situation involved.
- d. When, how, and on whom service was made.
- e. The date by which an answer must be filed or other action must be taken.
- f. The nature of principal defenses, including any, cross-claims, counterclaims and facts on which predicated.
- g. Amount claimed. (Express amount claimed in foreign currency, and the converted figure in US dollars.)
- h. Insurance data:
 - (1) Whether amount claimed is covered by insurance.

- (2) Whether insurance carrier has been notified.
- (3) Whether insurance carrier accepts full responsibility for the defense of the suit.

i. Government contractors:

(1) The nature of government contracts involved, the contract numbers and dates, and the identity of the contractors.

(2) Whether the expense of litigation and any judgment against the contractor is considered a reimbursable item of cost; if only partially reimbursable, indicate the extent.

(3) Whether the contractor wishes to employ private counsel or desires representation by the government.

j. Information as to any prior action taken involving the same subject matter.

20. ADMINISTRATIVE PROCEEDINGS. Report all proposed new or amended administrative rules or regulations of a foreign government, agency, or subdivision thereof, or any proceedings or actions in connection therewith that may affect the accomplishment of the DeCA mission (such as compulsory liability insurance on official DeCA motor vehicles, recycling or packaging restrictions or rules; labor and social security requirements, etc.) to the General Counsel, DeCA.

**FORMAT FOR A REQUEST FOR GOVERNMENT
REPRESENTATION BY DeCA OFFICIAL**

REQUEST FOR GOVERNMENT REPRESENTATION
[by DeCA member or employee]

The undersigned hereby requests the Attorney General of the United States to designate counsel to defend on behalf of the undersigned the case of -

The undersigned further recognizes that, except for negligence actions against armed forces health care personnel and operators of government motor vehicles, there is no statutory authority for the DeCA to substitute itself for me as an individual defendant. I further recognize that there is no statutory authority to pay any judgment against me out of the Treasury of the United States absent special legislation to that effect.

**FORMAT FOR A REQUEST FOR GOVERNMENT
REPRESENTATION BY AN DeCA CONTRACTOR**

REQUEST FOR GOVERNMENT REPRESENTATION
[by an DeCA contractor]

The undersigned hereby requests the Attorney General of the United States to designate counsel to defend on behalf of the undersigned the case of

It is agreed that the assumption by the Attorney General of the defense of the said case does not alter or increase the obligations of the United States under States Contract Number _____. It is further agreed that such representation will not be construed as a waiver or an estoppel of any rights which any interested party may have under the said contract.

SAMPLE DECLARATION OF DEFENDANT

(Attached to Representation Request, Appendix 1)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF

| | | |
|------------|---|----------------------------|
| Plaintiff, |) | |
| |) | |
| |) | 28 U.S.C. 1746 Declaration |
| |) | |
| |) | |
| |) | |
| Defendant. |) | |

I, _____ am, and at all times relevant to this case have been, a (civil service employee) (active duty military member) of the United States. I am presently assigned to (Installation) as (Position).

(As a federal employee, one of my responsibilities is to insure the protection of DeCA Property by reporting suspected abuse of such property to the proper authorities, and to report conflicts of interest within the Defense Department). (See Exhibit _____ attached, a copy of my, job description or military specialty code).

(On _____ I made a signed sworn statement to the Air Force Office of Special Investigations (OSI) describing what I had observed and learned. I made this statement because it was my duty as a federal employee and as a member of DeCA to report the incidents. The OSI investigated the matter.)

All of my actions in this matter were within the scope of my official DeCA duties and under color of my office as _____. I acted in the good faith belief that my action were reasonable and in accordance with the law. (My report was based on the honest belief that these offenses had occurred and only to insure DeCA property was properly safeguarded and rules and regulation were complied with.)

I declare under penalty of perjury that the foregoing is true and correct. Signed this _____ day of _____, 19__, at _____.

SAMPLE DECLARATION OF SUPERVISOR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

Plaintiff,)
)
) 28 U.S.C. 1746 Declaration
)
)
)
Defendant.)

I, _____ am, and at all times relevant to this case have been, the (Position) of the DeCA _____ at (Installation). As such, I am the (supervisor)(commander) of _____. I am familiar with the allegations of the complaint in of _____ v. _____.

I certify _____ was performing official DeCA duties when the events upon which the complaint is based occurred. His/her actions were taken in the good faith belief that they were authorized, reasonable, and in accordance with the law. (A DeCA employee is responsible for reporting all suspected incidents of theft or wrongful appropriation to the proper authorities. Resource protection and the prevention of conflict of interest are important concerns in the DeCA. All of _____ actions with respect to this case were within the scope of his/her federal employment and under color of his/her office as (Employee's Position).

I declare under penalty of perjury that the foregoing is true and correct. Signed this _____ day of _____ 19__, at _____.