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General Counsel

PROCEDURE FOR INVESTIGATING OFFICERS



BY ORDER OF THE DIRECTOR

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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 9, 1990.

MANAGEMENT CONTROL SYSTEM: This directive does not contain Management Control provisions that are subject to evaluations, testing and other requirements of DeCAD 70-2 and as specified by the Federal Managers' Financial Integrity Act.

HOW TO SUPPLEMENT: Regions may not supplement this directive.

HOW TO ORDER COPIES: Commissaries needing additional copies will submit requirements on DeCA Form 30-21 to Region/IM.

SUMMARY: This directive provides guidance and instructions relating to inquiries or investigations not governed by the Inspector General Regulation, DeCAD 90-2.

OFFICE OF PRIMARY RESPONSIBILITY (OPR): HQ DeCA/GC

COORDINATORS: HQ DeCA/DO/DP/IG/IR/SSA/CCE

DISTRIBUTION: E

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Chapter 1

INTRODUCTION

1-1. **PURPOSE:** This directive establishes procedures for inquiries and investigations not specifically authorized by any other directive. This directive may be used as a general guide for inquiries and investigations authorized by another directive, but in that case its provisions are not mandatory.

1-2. **EXPLANATION OF TERMS:**

a. **Adverse administrative action.** Adverse action taken by appropriate authority against an individual, civilian or military, other than actions taken pursuant to the Uniform Code of Military Justice (UCMJ) or the Manual for Courts-Martial (MCM).

b. **Appointing Authority.** The individual who directs an inquiry or investigation.

c. **Inquiry.** An inquiry is a determination of the facts by checking records and correspondence, reviewing applicable directives, examining material evidence, and interviewing witnesses. It requires the appointment of an inquiry officer and a written Report of Inquiry that fully documents the case under examination.

d. **Inquiry or Investigating Officer (IO).** The inquiry or investigating officer can be any commissioned officer, warrant officer, senior non-commissioned officer (top three enlisted grades), civil service employee holding a grade of GS-11 or above, or a group of the above individuals detailed by the appointing authority to conduct an inquiry or investigation.

e. **Investigation.** An investigation determines the facts of a serious or complex matter. It requires the appointment of an IO and a written Report of Investigation supported by exhibits and statements of witnesses.

f. **Statement.** A written or verbal declaration of events made to an IO by a witness, subject, or suspect. DeCA Form 90-11, Sworn Statement, may be used to take a written statement.

g. **Subject.** An individual against whom allegations have been made; as in the subject of an inquiry or investigation.

h. **Suspect.** An individual suspected of a criminal offense. A person is treated as a suspect when the facts and circumstances known at the time of the interview are sufficient to support a reasonable belief that the person to be interviewed may have committed a crime.

i. **Witness.** Anyone interviewed during an inquiry or investigation.

1-3. **TYPES OF INQUIRY OR INVESTIGATION:**

a. **General.** An administrative fact-finding procedure under this directive may be either an inquiry or an investigation.

b. **Inquiry.** An inquiry is an informal procedure. It may be used to ascertain the magnitude of the problem and to identify witnesses. An investigation may draw upon the results of an inquiry. Ordinarily the taking of statements of witnesses is not required.

c. **Investigation.** An investigation is a formal proceeding to determine the facts and circumstances of a serious or complex matter.

d. **Concurrent Inquiries or Investigations.** A fact finding inquiry or investigation under this directive may be conducted before, concurrently with, or after an inquiry or investigation into the same or related matters by another command or agency. Appointing authorities and IOs will ensure that procedures under this directive do not hinder or interfere with a concurrent inquiry or investigation directed by higher headquarters or being conducted by a criminal investigative agency. In cases of concurrent or subsequent inquiries and investigations, coordination with the other command or agency should be made to avoid duplication of investigative effort where possible.

1-4. **FUNCTION OF THE INQUIRY OR INVESTIGATION:** The primary function of any inquiry or investigation is to ascertain facts and to report them to the appointing authority. It is the duty of the IO to ascertain and consider the evidence on all sides of each issue, thoroughly and impartially, to make findings and, when directed, recommendations, that are warranted by the facts. The inquiry or investigation must comply with the instructions of the appointing authority. While it should note other matters identified, it must remain focused on the circumstances under inquiry or investigation as ordered by the appointing authority. Collateral matters should not be incorporated into the scope of an inquiry or investigation unless the appointing authority so directs. The IO may contact the appointing authority to receive further instructions at any time.

1-5. **USE OF RESULTS OF INQUIRIES AND INVESTIGATIONS IN ADVERSE ADMINISTRATIVE ACTIONS:**

a. This directive does not require that an inquiry or investigation be conducted before adverse administrative action, such as relief for cause, can be taken against an individual. However, if an inquiry or investigation is conducted using the procedures of this directive, the information obtained, including findings and recommendations, may be used in any administrative action against an individual, subject to the limitations of b below.

b. The Federal Personnel Manual controls adverse actions against civilian personnel and establishes the required procedural safeguards. In every case involving contemplated formal disciplinary action against civilian employees, the servicing civilian personnel office and labor counselor will be consulted before the employee is notified of the contemplated adverse action.

1-6. **SUSPECTS OR SUBJECTS:** Appointing authorities have a right to use inquiries and investigations to obtain information necessary or useful in carrying out their official responsibilities. The fact that an individual may be a suspect, subject, or have an interest in the matter under inquiry or investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual. Furthermore, there is no requirement to refer a completed inquiry or investigation to the individual for review or comment unless it, or portions of it, are required to be used as evidence in a proposed adverse action.

Chapter 2

RESPONSIBILITIES OF THE APPOINTING AUTHORITY

2-1. AUTHORITY TO APPOINT:

a. The following may appoint inquiries and investigations into matters within their areas of responsibility.

- (1) The Director, DeCA.
- (2) The Deputy Director, DeCA.
- (3) The Chief of Staff, DeCA.
- (4) Any DeCA Region Director or Commander.

b. When more than one appointing authority has an interest in the matter requiring inquiry or investigation, a single inquiry or investigation should be conducted whenever practicable. In case of doubt or disagreement as to who should appoint the inquiry or investigation, the first common superior of all organizations concerned will resolve the issue.

c. Appointing authorities may request that persons from outside their organizations conduct inquiries and investigations under their jurisdictions.

2-2. **METHOD OF APPOINTMENT.** Inquiries and investigations may be appointed orally or in writing. Any written appointment will be in the form of a memorandum of appointment (See **Appendix A**). Whether oral or written, the appointment should specify clearly the purpose and scope of the inquiry or investigation and the nature of the findings and recommendations required (See **Appendix B**).

2-3. **WHEN TO APPOINT:** Unless another directive requires the appointment of an IO for a particular matter under investigation or inquiry, investigations and inquiries into any allegations may be appointed and conducted pursuant to this directive. Matters referred through the DeCA Inspector General, which have not been appointed by Headquarters, DeCA as Inspector General investigations or inquiries, should be controlled by this directive. However, in those cases an additional summary report may be required to answer specific allegations, for example, the DeCA Case Completion Report, for fraud, waste and abuse allegations received by DeCA or the Defense Hotline Completion Report.

2-4. ADMINISTRATIVE SUPPORT:

a. The appointing authority will arrange necessary facilities, clerical assistance, and other administrative support for IOs. Normally, statements of witnesses will be summarized, however, the appointing authority in his or her discretion may require verbatim transcripts of witness testimony. If summarized statements are prepared, they must be signed by the witness, unless for some reason, e.g., a telephone interview, that is impractical.

b. Depending upon the subject matter, the appointing authority or the IO may arrange for resource personnel to assist in the inquiry or investigation, for example, auditors, meat or produce specialists, EEO specialists, Employee Relations Specialists, etc. In appropriate cases resource personnel may be formally appointed as Technical Advisors to the IO.

2-5. **ACTION OF THE APPOINTING AUTHORITY:**

a. **Basis of Decision.** The appointing authority is neither bound nor limited by the findings or recommendations of an inquiry or investigation. The appointing authority may consider any relevant information in making a decision to take adverse action against an individual, even information that was not considered during the inquiry or investigation.

b. **Legal review.** The appointing authority should submit a report of inquiry or investigation to the General Counsel, DeCA, or the appropriate Regional Counsel, for legal review in all cases involving serious or complex matters, particularly where the findings and recommendations may result in adverse administrative actions or will be relied upon in actions by higher headquarters. The legal review should address:

- (1) Whether the inquiry or investigation complied with legal requirements.
- (2) What effect any errors would have.
- (3) Whether sufficient evidence supports the findings of the inquiry or investigation or those substituted or added by the appointing authority.
- (4) Whether the recommendations are consistent with the findings.

c. **Effect of Error.** Generally, procedural errors or irregularities in an inquiry or investigation do not invalidate the inquiry, investigation or any action based on it.

(1) **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 appointing authority notes a harmless error, he or she may still take final action on the inquiry or investigation.

(2) **Appointing Errors.** Where an inquiry or investigation is convened or directed by an official without the authority to do so (see para 1a above), the proceedings are a nullity, unless an official with the authority to appoint such an inquiry or investigation subsequently ratifies the appointment.

(3) **Substantial Errors.** Substantial errors are those that have a material adverse effect on an individual's substantial rights. An example is the denial of a suspect's right to counsel.

NOTE: Even if substantial error exists, evidence developed by the inquiry or investigation may be used in connection with any action under the UCMJ, Civilian Personnel Directives, or any other directive that contains its own procedural safeguards.

Chapter 3

GENERAL GUIDANCE FOR INQUIRY AND INVESTIGATING OFFICERS

SECTION A-CONDUCT OF THE INQUIRY OR INVESTIGATION

3-1. **THE IO:** An IO is the personal representative of the appointing authority. The appointing authority conveys authority for the inquiry or investigation to the IO. This authority extends to all subordinate echelons of the command and requires the compliance and cooperation of the subordinate directors/commanders.

- a. Whenever possible, the IO will be senior in grade to the person or persons being investigated.
- b. The IO must be impartial, unbiased, and totally objective. The IO's job is to find the facts and compile an accurate and impartial report. The IO is not a judge, jury, prosecutor or defense counsel.
- c. The IO must use the facts and background information he or she finds to draw conclusions which are consistent with the facts, and, when requested, recommendations (See **Appendix C**). If a recommendation that disciplinary or an adverse action be taken is made, it *will not* specify a suggested punishment. Other recommendations, for example, suggestions for management improvement, should be as specific as possible.

3-2. **OATHS:**

- a. **Requirement.** IOs need not be sworn. Witnesses in an inquiry or investigation may be sworn at the discretion of the IO. The memorandum of appointment may require the swearing of witnesses.
- b. **Administering oaths.** IOs are authorized to administer oaths in the performance of such duties. (See **Appendix C** for the oath format).

3-3. **CHALLENGES:** An IO is not subject to challenge. However, any person who is aware of facts indicating a lack of impartiality or other qualification on the part of an IO should present the facts to the appointing authority.

3-4. **COUNSEL:** Civilian suspects may obtain counsel, at no expense to the Government, who may attend but not participate in proceedings of the inquiry or investigation. Military suspects may contact the military defense counsel at the installation of their assignment. The inquiry or investigation will not be unduly interrupted to allow the person to consult with counsel. When a civilian employee is a member of an appropriate bargaining unit, the exclusive representative of the unit has the right to be present whenever the employee is a respondent or witness during the proceedings if requested by the employee and if the employee reasonably believes that the inquiry or investigation could lead to disciplinary action against him or her.

3-5. **PRESENCE OF THE PUBLIC AND RECORDING OF PROCEEDINGS:**

- a. **The Public.** Proceedings of an inquiry or investigation are not open to the public.
- b. **Recording.** An IO may record any interview taken. If an interview is recorded, the recording, whether or not transcribed, will be submitted to the appointing authority with the report of

inquiry or investigation. A subject of, or witness to, an inquiry or investigation may record his or her interview with the prior approval of the appointing authority.

3-6. **RULES OF EVIDENCE AND PROOF OF FACTS:**

a. **General.** Proceedings under this directive are administrative, not judicial. Therefore, IOs are not bound by the rules of evidence for trials by courts-martial or for court proceedings generally. Accordingly, anything that in the minds of reasonable persons is relevant and material to an issue may be accepted as evidence. For example, medical records, counseling statements, police reports, and other records may be considered regardless of whether the preparer of the record is available to give a statement or testify in person. All evidence will be given such weight as circumstances warrant.

b. **Official Notice.** Some facts are of such common knowledge that they need no specific evidence to prove them (e.g., general facts and laws of nature, general facts of history, location of DeCA Regions, and organization of the Department of Defense (DoD) and its components), including matters of which judicial notice may be taken.

c. **"Off the Record" Statements.** Findings and recommendations of the IO must be supported by evidence contained in the report. Accordingly, witnesses may not make statements "off the record." Confidentiality of statements may not be granted to any witness.

d. **Ordering Witnesses to Make Statements.**

(1) Federal employees have a duty to speak about official matters within their areas of responsibility. Refusal to speak may subject the employee to disciplinary action for the refusal (this is separate from any disciplinary action which may be taken for the conduct under inquiry or investigation). For other matters not involving an employee's responsibilities, the employee may invoke their right against self incrimination if the statement would divulge criminal activity on their part (see sub-paragraphs (2), (3), and (4) below). Should any employee refuse to cooperate, the IO should contact the DeCA General Counsel, or the appropriate Regional Counsel, for legal advice.

(2) No military witnesses will be compelled to incriminate themselves, to answer any question the answer to which could incriminate them, or to make a statement or produce evidence that is not material to the issue and that might tend to degrade them (see UCMJ, Art. 31). Military personnel must be advised of their rights under Article 31 when they are suspected of committing an offense violating the Uniform Code of Military Justice.

(3) No witness, 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. Civilian personnel are advised of their rights when a "custodial interview" of them is conducted. A "custodial interview" occurs when a person is arrested or taken into custody. No person in DeCA is authorized to take an individual into custody, however, if a witness is already in custody by the police or military investigators, a custodial interview may be conducted.

(4) A person refusing to provide information under (2) or (3) above must state specifically that the refusal is based on the protection afforded by Article 31 or the Fifth Amendment. The IO will, after consultation with the DeCA General Counsel or the appropriate Regional Counsel, unless impractical to do so, decide whether the reason for refusal is well taken. If it is not, the witness may be ordered to answer.

(5) Whenever it appears appropriate and advisable, an IO should explain their rights to witnesses. A service member, for example, who is suspected of an offense under the UCMJ, such as

dereliction of duty, will be advised of his or her rights under Article 31 of the UCMJ before being asked any questions concerning the suspected offense. The service member will be given a reasonable amount of time to consult an attorney, if requested, before answering any such questions. No adverse inference will be drawn against service members who invoke that right under Article 31. It is recommended that the procedure for explaining rights set forth on DeCA Form 90-10 (Rights Warning Procedure/Waiver Certificate) be used.

(6) The right to invoke Article 31 or the Fifth Amendment is personal. No one may assert the right for another person, and no one may assert it to protect anyone other than himself or herself. An answer tends to incriminate a person if it would make it appear that person is guilty of a crime.

e. **Immunity.** No person in DeCA has the authority to grant of immunity to any other person.

f. **Involuntary Admission.** A confession or admission obtained by unlawful coercion or inducement likely to affect its truthfulness will not be accepted as evidence in a criminal proceeding. However, the fact that a subject or suspect 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.

g. **Unlawful Searches.** Evidence obtained as a result of any search or inspection may be attached to the report and considered, even if it has been or would be ruled inadmissible in a criminal proceeding.

h. For further information concerning evidentiary matters Chapter 4, Section A, DeCAD 90-2, Administrative Inquiries and Investigations, may be consulted. This Directive will be followed if any conflict exists with the provisions of DeCAD 90-2.

3-7. **WITNESSES:**

a. **General.**

(1) IOs do not have authority to subpoena witnesses to appear and testify. An appropriate commander or supervisor may, however, order military personnel and Federal civilian employees to appear and testify. Other civilians who agree to appear may be issued invitational travel orders in certain cases (see Joint Travel Directives, Vol 2, para C6000.11). The IO normally should inform witnesses of the nature of the inquiry or investigation before taking their statements or testimony.

(2) During an inquiry or investigation under this directive, the exclusive representative of an appropriate bargaining unit has the right to be present whenever a civilian employee of the unit is a suspect or witness during the proceedings if requested by the employee and if the employee reasonably believes that the inquiry could lead to disciplinary action against him or her. These are known as the Weingarten Rights, an explanation of which are found at **Appendix D**. Unless required by the collective bargaining agreement, there is no requirement to advise the employee of this right. If the employee requests the presence of the exclusive representative, a reasonable amount of time will be allowed to obtain him or her. The servicing civilian personnel office and labor counselor will be consulted before denying such a request.

b. **Taking Testimony or Statement.**

(1) Statements must accurately reflect a witnesses' account of the facts. A statement may be obtained at informal sessions in which the witness first relates his or her knowledge and

subsequently summarizes it in writing. Generally, all statements should address the concepts of "who, what, when, where, why, and how." A tape recorder may be used to facilitate later preparation of written statements, but the witness should be informed if one is used. The IO should assist the witness in preparing a written statement to avoid inclusion of irrelevant material or the omission of important facts and circumstances. However, care must be taken to ensure that the statement is phrased in the words of the witness. The interviewer must scrupulously avoid coaching the witness or suggesting the existence or nonexistence of material facts. The witness must be asked to read, correct, and sign the final statement.

(2) Whether the witness swears to the statement is within the discretion of the IO. If the statement is to be sworn, use of DeCA Form 90-11 (Sworn Statement) is recommended. If the witness is unavailable or refuses to sign, the person who took the statement will note, over his or her own signature, the reasons the witness has not signed and will certify that the statement is an accurate summary of what the witness said.

(3) IOs may use any previous statements of a witness as evidence on factual issues.

(4) An inquiry or investigation may use whatever method it finds most efficient and effective for acquiring information. Although witnesses may be called to present formal testimony, information also may be obtained by personal interview, correspondence, telephone inquiry, or other informal means.

c. **Discussion of Evidence.** An IO may direct witnesses who are subject to DeCA's authority, and request other witnesses, not to discuss their statements or testimony with other witnesses or with persons who have no official interest in the proceedings until the inquiry or investigation is complete. This precaution is appropriate to eliminate possible influence on the testimony of witnesses still to be heard.

d. For further information concerning interview techniques Chapter 4, Section B, DeCAD 90-2, may be consulted. This Directive will be followed if any conflict exists with the provisions of DeCAD 90-2.

3-8. **COMMUNICATIONS WITH THE APPOINTING AUTHORITY:** If in the course of the inquiry or investigation something happens that could cause the appointing authority to consider enlarging, restricting, or terminating the proceedings, altering the composition of the fact-finding body or otherwise modifying any instruction in the original appointment, the IO should report this situation to the appointing authority with recommendations.

SECTION B-FINDINGS AND RECOMMENDATIONS

3-9. FINDINGS.

a. **General.** A finding is a clear and concise statement of a fact that can be readily deduced from evidence in 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 purpose of the inquiry or investigation and on the instructions of the appointing authority. The IO should normally not exceed the scope of findings indicated by the appointing authority. The findings should be necessary and sufficient to support each recommendation.

b. **Standard of Proof.** The findings of inquiries and investigations 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 witness's demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indications of veracity.

c. **Form.** Findings should be stated to reflect clearly the relevant facts established by the evidence and the conclusions thereon of the IO. If findings are required on one subject, they should normally be stated in chronological order. If findings are required on several distinct subjects, they normally should be stated separately for each subject and chronologically within each one.

3-10. **RECOMMENDATIONS:** Recommendations will not be made unless the appointing authority specifically requests that they be included. The nature and extent of recommendations required also depend on the purpose of the inquiry or investigation. Each recommendation, even a negative one (e.g., that no further action be taken) must be consistent with the findings. IOs should make their recommendations according to their understanding of the rules, directives, policies, and customs of the service, guided by their concept of fairness both to the Government and to individuals.

SECTION C - REPORT OF INQUIRY OR INVESTIGATION

3-11. **FORMAT:** The report will be written unless the appointing authority has authorized an oral report. The report should be prepared in accordance with the example at **Appendix E** (Inquiry) or **F** (Investigation). **Appendix G** contains a checklist for preparing reports.

3-12. **EXHIBITS:**

a. **General.** In written reports, every item of evidence received by the inquiry or investigation should be marked as a separate exhibit. Unless a verbatim record was directed, statements or transcripts of testimony by witnesses should also be exhibits. Exhibits should be numbered consecutively.

b. **Real Evidence.** Because attaching real evidence (physical objects) to the report is usually impractical, clear and accurate descriptions (such as written statements) or depictions (such as photographs) may be substituted in the report. In any case, the real evidence itself should be preserved, including chain of custody, where appropriate, for use if further proceedings are necessary. The exhibit in the report should tell where the real evidence can be found. After final action has been taken in the case, the evidence should be disposed of as directed by the DeCA General Counsel or the appropriate Regional Counsel.

c. **Documentary Evidence.** When the original of an official record or other document that must be returned is an exhibit, an accurate copy may be used in the written report. The exhibit in the report should tell where the original can be found.

d. **Official Notice.** Matters of which the IO took official notice (para 5b) normally need not be recorded in an exhibit.

3-13. **ATTACHMENTS:** In written reports, all significant letters and other papers that relate to administrative aspects of the inquiry or investigation and that are not evidence should be numbered consecutively and made attachments, including such items as these:

a. The memorandum of appointment or, if the appointment was oral, a summary by the IO including date of appointment, identification of the appointing authority and of all persons appointed, purpose of the inquiry or investigation, and any special instructions.

b. Copies of other correspondence pertaining to the inquiry or investigation.

c. Written communications to or from the appointing authority.

d. Explanation by the IO of any unusual delays, difficulties, irregularities, or other problems encountered.

3-14. **SIGNATURE:** Unless otherwise directed, a written report of proceedings should be signed by the IO.

3-15. **SAFEGUARDING A WRITTEN REPORT:**

a. The appointing authority will file or designate an office for the filing of reports. Since many reports contain sensitive information they should be stored in a locked container. However, in order to prevent confusion over the type of inquiries or investigations directed, the record copy of reports completed under this Directive will not be filed in the Inspector General's Office.

b. When the report contains material that requires protection but does not have a security classification, the report should be marked "For Official Use Only."

c. No one will disclose, release, or cause to be published any part of the report, except as required in the normal course of forwarding and staffing the report or as otherwise authorized by law or directive, without the approval of the appointing authority. **NOTE:** Until the report is approved by the appointing authority, it is not final and may be considered a "working paper" or "internal memorandum."

3-16. **SUBMISSION OF REPORT:** A written report should be submitted, in two complete copies, directly to the appointing authority or his or her designee.

3-17. **ACTION OF THE APPOINTING AUTHORITY:** The appointing authority will approve the report or return it to the IO if further action, such as taking further evidence or making additional findings or recommendations, is required. Such additional proceedings will be conducted under the provisions of the original appointing memorandum, including any modifications, and will be separately signed.

SAMPLE LETTER OF APPOINTMENT

CC (Date)

MEMORANDUM FOR [NAME OF IO, IF MILITARY INCLUDE GRADE]

SUBJECT: Appointment of (Investigating) (Inquiry) Officer

You are hereby appointed an (investigating) (inquiry) officer pursuant to DeCAD 80-12, to conduct an (investigation) (inquiry) into allegations. Details pertaining to those allegations are (attached)(located in the file prepared by the DeCA Inspector General).

You are authorized to interview personnel, take statements or testimony, and examine records. All records, files, and correspondence relative to the matter under (investigation) (inquiry) and controlled by the Defense Commissary Agency will be made available to you.

DeCAD 80-12, Chapter 3, contains instructions regarding preparing the report of (investigation) (inquiry). You should meet with (call) _____, who will provide additional information about investigative techniques and procedures and serve as point of contact on these matters during your detail. (This will normally be the General Counsel, DeCA or the appropriate Regional Counsel. It may also include Technical Representatives.)

(Your report will include recommendations.) **NOTE:** The investigating or inquiry officer will not make recommendations in the report unless this sentence is included.

Submit your findings (and recommendations) in two copies to the undersigned within 10 days.

Signature of Appointing Authority

Attachment
a/s

**GUIDELINES FOR APPOINTING AUTHORITY
WHEN ORDERING OR REVIEWING INVESTIGATIONS OR INQUIRIES**

1. Has the appointing order been coordinated with the General Counsel or appropriate Regional Counsel?
2. Have you asked for recommendations from the IO? Are the IOs recommendations really necessary?
3. Does the appointment require the IO to consult with the General Counsel or appropriate Regional Counsel?
4. Has the report been reviewed by the General Counsel or appropriate Regional Counsel? (Although not mandatory, a legal review may be helpful to you and other reviewing authorities.)
5. Does the report meet the requirements of this Directive?
6. Has evidence been included in the report to refute or sustain the contentions set forth in rebuttals, appeals, or other documents?
7. Are you satisfied with the completeness of the report? If the report is incomplete, you may return it to the IO for further action.

**INSTRUCTIONS FOR
INQUIRY AND INVESTIGATION OFFICERS**

1. Have you read DeCAD 80-12?
2. Have you read all available reports, statements, etc.?
3. Have all witnesses been questioned under oath?

(DO YOU SWEAR (AFFIRM) THAT THE STATEMENTS YOU WILL MAKE CONCERNING THE MATTER UNDER (INVESTIGATION) (INQUIRY) ARE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?)

NOTE: Whenever possible written statements should be taken on DeCA Forms 90-10 or 90-11.

4. Has a military witness whose conduct is under inquiry or investigation and who is a suspected of an offense under the Uniform Code of Military Justice been warned of his or her rights under Article 31?

(I AM _____ (GRADE, IF ANY AND NAME). I AM INVESTIGATING THE ALLEGED OFFENSE(S) OF _____ OF WHICH YOU ARE SUSPECTED. I ADVISE YOU THAT UNDER THE PROVISIONS OF ARTICLE 31, UCMJ, YOU HAVE THE RIGHT TO REMAIN SILENT, THAT IS SAY NOTHING AT ALL. ANY STATEMENT YOU MAKE, ORAL OR WRITTEN, MAY BE USED AS EVIDENCE AGAINST YOU IN A TRIAL BY COURTS-MARTIAL OR IN OTHER JUDICIAL OR ADMINISTRATIVE PROCEEDINGS. YOU HAVE THE RIGHT TO CONSULT A LAWYER. YOU HAVE THE RIGHT TO HAVE A LAWYER PRESENT DURING THIS INTERVIEW. YOU HAVE THE RIGHT TO MILITARY LEGAL COUNSEL FREE OF CHARGE. IN ADDITION TO MILITARY COUNSEL, YOU ARE ENTITLED TO CIVILIAN COUNSEL AT NO EXPENSE TO THE UNITED STATES. YOU MAY REQUEST A LAWYER AT ANY TIME DURING THIS INTERVIEW. IF YOU DECIDE TO ANSWER QUESTIONS WITHOUT A LAWYER PRESENT, YOU MAY STOP THE QUESTIONING AT ANY TIME. DO YOU UNDERSTAND YOUR RIGHTS? DO YOU WANT A LAWYER? DO YOU WANT TO MAKE A STATEMENT?)

NOTE: *If the first and second questions are answered YES and third is NO, proceed with the interview. If the first and/or second are NO, no questions may be asked. If the third is YES, refer a military member to the appropriate defense counsel.*

a. Civilians are advised of their rights under the Fifth Amendment to the Constitution *only* if a custodial interview is conducted. (Custodial interviews are normally conducted by police investigators. No one in DeCA is authorized to conduct custodial interviews.)

b. If someone becomes a suspect as a result of a question answered, stop questioning and give the appropriate warning. If you have questions about the propriety of a rights advisement, call the General Counsel or appropriate Regional Counsel before proceeding.

5. You may contact the General Counsel or appropriate Regional Counsel at any time during the inquiry/investigation.

WEINGARTEN RIGHTS

I. INTRODUCTION.

The Civil Service Reform Act of 1978 provides that an employee, upon request, has the right to union representation during an investigation conducted by management, where the employee being questioned reasonably believes that the investigation may result in discipline. This right is commonly referred to as an employee's "Weingarten right," after a 1975 U. S. Supreme Court decision involving a company of that name which granted this same right to workers in private industry. The provision of the Civil Service Reform Act granting employees similar rights is based upon that decision; hence the nickname "Weingarten rights." This right provides that:

When the Employer conducts a non-formal investigatory interview, the employee being interviewed is entitled upon request to the presence of a Union representative if the employee reasonably believes that the interview may result in disciplinary action.

Although this statement appears to be straightforward and uncomplicated, there is much more to it than meets the eye. Determining whether or not an employee has "Weingarten rights" can sometimes be difficult. To assist you in making this determination, the following guidance is provided. It is in a question and answer format and is designed to cover many of the situations you are likely to face in this area. If you have additional questions concerning "Weingarten rights," refer them to your servicing Employee Relations Specialist.

II. WHEN AND HOW AN EMPLOYEE EXERCISES WEINGARTEN RIGHTS.

1. QUESTION: How are an employee's "Weingarten rights" triggered? How will I know that I'm involved in a potential Weingarten situation?

ANSWER: The right *only* arises in situations where you are investigating actions of the employee, where that employee believes discipline may result from your questioning, *and* where that employee *requests* union representation. His request is your first alert. Absent a request for such representation, you may go about your business as usual.

2. QUESTION: Do these rights also apply to interviews of employees conducted by agents of a military criminal investigative unit, the military or security police, or the safety office?

ANSWER: Yes. Under the law, if individuals from these offices are investigating a matter "which the employee reasonably believes may result in disciplinary action against the employee," the same rules and guidance applies to them.

3. QUESTION: When I call an employee in for questioning in a Weingarten-type situation, do I have to inform that employee of his rights before I begin questioning?

ANSWER: No. The law provides that each agency shall *annually* inform employees of their rights. This will be done by an activity-wide notice and is the responsibility of the Directorate of Personnel and Training. This is the *only* notification required; supervisors are *not* obligated to read an employee his "Weingarten rights" like you see on the police shows on television each time you question an employee. (Note that it may be required that an employee be read his constitutional rights in certain situations.)

4. QUESTION: Does an employee's request for representation in a Weingarten situation have to be in writing?

ANSWER: No. A simple oral request will suffice.

5. QUESTION: How do I know if an employee "reasonably believes" that discipline will result from my questioning?

ANSWER: The best yardstick is your own mind. Is it your intent in asking the employee questions to obtain information concerning an incident so that the employees responsible may be disciplined? Could the employee's specific answers result in discipline *based upon the information he discloses*? If your answer to any of these questions is yes, then your questioning is probably a "Weingarten-type interview," and the employee will have a right to union representation. If you have a question in this regard, you should contact your servicing Employee Relations Specialist for advice. Merely postpone your interview until you are sure of your obligations (see Section V below for situations where an employee does not have Weingarten rights).

6. QUESTION: Can an employee be represented by his family lawyer or other personal representative of his own choosing in a Weingarten situation?

ANSWER: No. The right to be represented under the law applies to the union. *Only* the union (steward, officer, business agent, etc.) can represent an employee in a Weingarten situation.

7. QUESTION: Okay, I want to question an employee about suspected misconduct and he requests that his steward be present; do I have to talk to both of them?

ANSWER: No. You can decide *not* to question the employee at all and cancel the interview if the employee requests union representation. If you decide to do this, no reason should be given; just cancel the interview. You would still be free to discipline an employee suspected of misconduct, but you would do so on the basis of information received from *other sources*.

8. QUESTION: Can I tell the employee that I will not hold the interview if the steward is present?

ANSWER: As noted in Question 7, you may cancel the interview. This leaves the employee with the choice between answering your questions without his steward present or forgoing the interview and losing any benefit he might have gained from answering questions. Again, you *need not* and should not give any reason for canceling the interview if the employee requests representation. You *cannot* imply that things may go easier with the employee if he answers your questions without his steward present (or harder if the employee insists on representation). Note that we do not encourage or discourage you from canceling an investigatory interview if an employee requests representation; it is your decision.

9. QUESTION: Does all this add up to make the participation of a suspected employee in an investigation voluntary on the part of that employee?

ANSWER: No. You can insist on questioning an employee and insist that an employee answer your questions. Once you have determined that you will question the employee, the only issue left to decide is whether or not a representative will be present during the questioning. The employee, of course, has the option of requesting or not requesting representation while being questioned (as previously mentioned, if an employee does not request representation, you may continue questioning). Should you choose to cancel the interview if the employee requests representation, the employee may, of course, then choose to allow you to continue questioning without the presence of his steward.

III. THE UNION REPRESENTATIVE: HIS ROLE AND STATUS.

10. QUESTION: Okay, the employee I want to question has requested his steward, and I have decided to continue with the interview with the steward present. How do I arrange for the steward to attend?

ANSWER: You are required to notify the steward of the employee's request. If that shop steward states that he will represent the employee, then you must make arrangements for that steward's release with his supervisor. If the union wants someone else to represent the employee (and it is the union's choice, not the employee's), *it is the union's* responsibility to identify that steward to you within a reasonable period of time. In any case, once the representative has been identified to you, *you are responsible* for arranging for the release of that representative.

11. QUESTION: Suppose I am willing to question the employee about alleged misconduct with the steward present. However, instead of the steward who services our area, the employee requests a steward or union official from another area. What do I do then?

ANSWER: Contact the steward requested by the employee and advise him of the employee's request. Remember, it is the union who determines who will represent an employee in a Weingarten situation. If the requested steward states that he will represent the employee, you must arrange for the release of the steward by contacting that steward's supervisor. The union may designate any steward in the organization, an officer, or the local business agent to represent the employee in such instances.

12. QUESTION: What if the steward is just not available when I wish to conduct my investigation? Am I required to wait for him?

ANSWER: Again, this depends on the circumstances of the particular situation. If the steward will be available in an hour or so, it is reasonable to postpone the investigatory interview until he can attend. If the steward states that he will not be available for an extended period of time (for example, three days or more), *contact your Employee Relations Specialist*. In this instance, it may be necessary to advise the next higher or nearest available steward of the employee's request and the unavailability of the designated steward, or it may be appropriate to proceed with the questioning without a steward present.

13. QUESTION: I think I understand now. Given a genuine Weingarten situation (that is, an investigatory interview) and an employee request for representation, I cannot conduct the investigation unless the union steward is present. Is that right?

ANSWER: No. When the employee requests representation and you decide to proceed with the questioning with the steward present, your obligation is to give the union an "opportunity" to be present during your investigation. If the union fails to take advantage of this opportunity (or expressly declines to do so), you may proceed with the questioning without the presence of the steward.

14. QUESTION: If I don't hear from the Union, how long do I wait before deciding that the union has waived its right to be present and proceed with my investigation?

ANSWER: If you have given the union (in the person of the steward) reasonable notice of the employee's request and a reasonable time to identify a representative and you have still not heard from them, *contact your Employee Relations Specialist*. Under certain conditions such as described above, you may proceed with your questioning, but *do not* do so without first discussing the situation with the Employee Relations Specialist. What a reasonable time is (in terms of your notice and the union's response) will vary from case to case. However, do not be in a rush. If you proceed with an investigation

prematurely, you may hurt the chances of later sustaining discipline of the employee. The disciplinary action itself is more important than questioning the employee without the steward present.

15. QUESTION: All right, I'm going to call the employee in to question him. Should I arrange for the steward to be present *in advance*?

ANSWER: No. Remember that an employee's right to representation in this situation arises only upon request. If the employee fails to request representation you may, as previously noted, proceed with the investigation. The employee *waives* his right to representation if he fails to request representation, *even* if discipline results.

16. QUESTION: When a steward represents an employee in a Weingarten situation, is he granted official time to do so?

ANSWER: The steward may be entitled to official time under the Labor Agreement. An employee being investigated is, of course, in official duty status.

17. QUESTION: Just what is the role of the steward in a Weingarten-type situation?

ANSWER: The steward is there to assist the employee in responding to your questions. He may remind the employee of facts that are favorable to the employee. The steward may also attempt to clarify facts surrounding the incident or identify other employees who may have knowledge of the incident. Again, the steward is there to *assist the employee* in your investigation; he is not there to frustrate your investigation. The steward is not acting in the same capacity as he would if he were representing an employee in a grievance; he does not speak for the employee in a Weingarten interview, nor can the steward bargain with you in an attempt to "settle" the matter.

18. QUESTION: What if an employee I am investigating states that he wants to file a grievance and requests union representation on this basis? Should this make any difference to me?

ANSWER: No. As indicated in Question 17 above, the steward is representing the *union* during the Weingarten interview. You may continue your interview without disruption even though the employee says he is aggrieved over the situation. *He cannot grieve your interview until it has been held.* He may or may not use the same steward as his grievance representative. A grievance or arbitration decision cannot interfere in your right to conduct an investigatory interview.

IV. THE INVESTIGATORY INTERVIEW ITSELF.

19. QUESTION: When a steward shows up, what if he requests 15 minutes to discuss the matter with the employee privately before I proceed with my investigation? Should I allow this?

ANSWER: No. Courts have held that the right to a representative in a Weingarten-type investigatory interview only applies to the interview itself. You are not obligated to permit the steward and the employee to confer before you begin questioning.

20. QUESTION: Okay, I am going forward with the investigation and the steward is present. Does the steward serve as the employee's lawyer? Does he object to questions or instruct the employee not to answer questions?

ANSWER: Absolutely not! The investigation is not supposed to be a confrontation between the steward and the supervisor. The steward is *not* there to speak for the employee or act as the employee's "mouthpiece." You have the right to insist on hearing only the employee's account of the matter

under investigation. However, the steward can add clarifying comments and assist your efforts; consequently, you should not prohibit the steward's participation, so long as it does not hinder your questioning.

21. QUESTION: Well, what if the steward hasn't read this guidance and starts behaving like Perry Mason and instructs the employee not to answer my questions? What do I do then?

ANSWER: You can do several things. As noted, you can advise the steward that you are interested in hearing the employee's story in the employee's own words. If the steward continues to frustrate your questioning and/or if the employee continues to refuse to answer your questions, you may advise the employee that his continued refusal in and of itself may be grounds for disciplinary action. An employee's Weingarten rights provide *no* basis for insubordination or noncooperation on the employee's part.

V. WHEN AN EMPLOYEE DOES *NOT* HAVE WEINGARTEN RIGHTS.

22. QUESTION: Do Weingarten rights apply where representatives of the Office of Personnel Management, Department of Labor, etc., who wish to investigate or question an employees?

ANSWER: No. They do not apply to OPM or Labor Department investigators, local or state police, the FBI, or other similar bodies. The law restricts Weingarten rights to investigations by "representatives of the agency," in our case, the DoD.

23. QUESTION: Say that I suspect Employee A of misconduct, and I call in Employee B to question him about Employee A's actions. Is Employee B entitled to a union representative?

ANSWER: No. The right only applies when an employee is being questioned and *that* employee believes disciplinary action *against him* will result. In the above situation, you could deny representation and insist on proceeding with the interview. A witness who is *not* the subject of the investigation does not have Weingarten rights.

24. QUESTION: During my questioning of Employee B concerning Employee A's conduct, the answers I receive lead me to believe Employee B may have been involved in the misconduct also. What happens then?

ANSWER: If you change the direction of your questioning *from* the conduct of Employee A (who is present) *to* the conduct of Employee B (the employee being questioned), *and* if Employee A had previously requested the steward, you should pause in your questioning and arrange for the steward to be present. Of course, if the employee had never requested union representation at any point, then you would not be obliged to arrange for the presence of the steward.

25. QUESTION: What happens if I am wrong in denying an employee his Weingarten rights?

ANSWER: The employee of the union could file an Unfair Labor Practice charge, alleging a violation of Title VII of the Civil Service Reform Act. If you wrongfully deny an employee his Weingarten rights, an otherwise valid disciplinary action against that employee may be set aside. *All of the above point to the importance of consulting with the Employee Relations Specialist if you are not sure of your and the employee's rights and responsibilities in a possible Weingarten situation.*

SAMPLE REPORT OF INQUIRY

MEMORANDUM FOR [APPOINTING AUTHORITY]

SUBJECT: Inquiry Concerning the Allegations of Ethical Violations at the Fort Bravo Commissary

(Name) (grade) (duty title and location of assignment of inquiry officer), under the authority of letter of appointment, DeCA/CC, dated _____, conducted an inquiry, between (dates) at Fort Bravo, Panama.

This inquiry was based on the attached anonymous letter received by the DeCA Director on (date) alleging _____.

I interviewed the following witnesses:

- a.
- b.

The testimony, statements, and observations of the inquiry officer revealed that:

- a.
- b.

Recommendations:

- a. [Only if asked for in the appointment letter]
- b.

Signature Block of IO

Attachments
Letter of Appt
[Other atchs]

SAMPLE REPORT OF INVESTIGATION

REPORT OF INVESTIGATION

[Date]

I. Authority.

1. (Name) (grade) (duty title and location of assignment of investigating officer), under the authority of letter of appointment, DeCA/CC, dated _____, conducted an inquiry, between (dates) at Fort Bravo, Panama.

II. Matters Investigated.

2. This was an investigation of ethical violations by the Commissary Officer at Fort Bravo. The basis for this investigation was an anonymous letter to the Director, Defense Commissary Agency, dated _____. The letter alleged Mr. Right, the Commissary Officer, received gratuities from vendors and as a result had granted ABC Distributors preferential treatment at the Fort Bravo Commissary.

III. Facts.

3.

4.

IV. Discussion.

5.

6.

V. Recommendations.

7. [Only if asked for in the appointment letter]

8.

Signature Block of IO

NOTE: An INDEX OF EXHIBITS and a LIST OF WITNESSES, as well as the EXHIBITS and ATTACHMENTS should be appended to the Report of Investigation.

**CHECKLIST FOR PREPARING REPORTS
BY INQUIRY AND INVESTIGATING OFFICERS**

1. Complete factual information is necessary so that the appointing authority and others have a proper basis for findings, conclusions, and recommendations.
2. Is adequate attention given to the following:
 - a. Time of day.
 - b. Dates.
 - c. Places.
 - d. Full identity of persons.
 - e. Assigned positions.
 - f. Duties.
 - g. Sequence of events.
 - h. Authenticity of documents.
 - i. Efforts made to locate property or to determine causes of a loss to the Government.
3. If applicable, does the report describe applicable procedures in effect for safeguarding, handling, and storing funds or property, to include duty and non-duty hours? Does the report describe facilities furnished the individual for protection of funds or property?
4. Does the report outline whether personnel followed proper procedures and DeCA Directives? If not, has the reason for non-compliance been shown?
5. Is it shown whether applicable instructions have been furnished person(s) concerned? Is it shown whether such instructions were written? Up to date? In effect?
 - a. Has a dated copy of any written instructions or office policies been made part of the report?
 - b. If new instructions or policies were issued, is a dated copy included?
6. If inadequate facilities, equipment, or personnel are involved, is information shown regarding efforts and actions to improve?
7. If unusual conditions of any kind are involved, have they been explained?
8. If the workload of the individual concerned may have a bearing on the report, is the volume of work fully documented?
9. Is training, experience, character, integrity, past and present overall effectiveness or persons involved included?

10. Are contractor personnel and duties properly identified?
11. Does the report include personal interviews and sworn statements, if necessary, of all witnesses or persons having knowledge of the facts?
12. Are the following excluded from the report?
 - a. Informal conversation or comments.
 - b. Statements "off the record."
 - c. Reference to extraneous matters.
 - d. Conclusions that are not supported by exhibits or other evidence of record.
13. If required by a directive, are findings specified in that directive included in the report?
14. Are separate findings made with respect to each and every person concerned with the incident?
15. Have proper legal standards been set out?
16. If required, are recommendations included?
17. Are the recommendations consistent with the findings as well as in agreement with applicable laws, directives, and policies of DeCA?
18. Are findings and recommendations substantiated by facts and evidence of record, and not based on conjecture or mere opinion?
19. Are the recommendations for corrective and precautionary action pertinent?
20. For long reports, would a Table of Contents be helpful to reviewing officials?
21. Are all exhibits, attachments, and appendices clearly marked, listed, and identified? They should include appointing orders, documents, photographs, affidavits, rebuttals, reports, etc.
22. If appropriate, is the amount of any property loss clearly stated? If the report contains references to more than one amount as the amount of the loss, such discrepancies must be explained in the report.
23. Are all documents, statements, exhibits, etc., dated?
24. Is the report signed by the IO?
25. Has the report been submitted to the appointing authority or his designee for action?