

Information Paper

Subject: Pretrial Punishment

1. Purpose.

To provide an overview of the legal and regulatory background for current policies regarding pretrial punishment and to discuss some of the “dos” and “don’ts” involving pretrial punishment.

2. Resources.

1. www.apd.army.mil (provides link to all Army Regulations and the Manual for Courts-Martial)
2. The Manual for Courts-Martial (<http://www.apd.army.mil/pdffiles/mcm.pdf>)
3. AR 27-10 (<http://www.apd.army.mil/pdffiles/r27-10.pdf>)
4. Fort Knox Regulation 27-10 (<http://www.knox.army.mil/garrison/dhr/asd/docs/regs/R27-10.pdf>)

3. Questions and Contact.

If you are a leader, and you have questions about what constitutes proper and improper punishment or restraint, contact your trial counsel.

4. Discussion.

Punishing a Soldier without a finding of guilty at an Article 15 or a court-martial is illegal. Article 13 of the Uniform Code of Military Justice (UCMJ) prohibits the imposition of punishment or penalty upon an accused prior to trial, as well as pretrial arrest or confinement conditions which are more rigorous than “the circumstances required” to ensure the Soldier’s presence at trial.

To determine whether an action by the chain of command against a Soldier amounts to illegal pretrial punishment, look at the action to determine if the chain of command intended to punish the Soldier before trial. The test is whether the action was reasonable related to a legitimate governmental objective. If the action was not reasonable related to a legitimate goal – if it was arbitrary or purposeless – it is more likely illegal punishment.

For example, if the command takes any action designed to be humiliating against a Soldier accused of misconduct, makes an intentionally embarrassing public spectacle of

the Soldier, or suggests that the Soldier is already guilty before trial, those actions will likely amount to illegal pretrial punishment and should be avoided. Also prohibited are statements or actions by the command suggesting that fellow Soldiers should not associate with the Soldier.

Most of the rules about illegal punishment are designed to maintain the necessary respect for the fact that Soldiers are innocent until proven guilty and to maintain the proper regard for the fairness of the Military Justice process.

By way of example, a commander might want to court-martial a Soldier for misconduct and then the commander calls a formation and tells all present, "Nobody will associate with this Soldier. He is a criminal and will be in jail in a month. His actions are an example of what not to do." That would be problematic. The Soldiers in that formation who otherwise might have served as witnesses for the accused Soldier may now be scared to come forward because they fear the company commander's wrath. They may also lose faith in the Military Justice System because the commander has stated that the trial WILL result in confinement.

Similarly, a commander might see that a Soldier has engaged in misconduct but not want to address the misconduct through the UCMJ process. If the commander nevertheless assigns the Soldier extra duty, it may be illegal pretrial punishment. Extra duty in the form of corrective training is allowed, provided that the corrective training is specifically tailored to address the alleged misconduct or deficiency. Again, by way of example, if a Soldier is having trouble getting to formation on time, the Soldier may be directed to teach a class to his peers about the importance of timeliness in the military. That Soldier similarly may be directed to spend time researching the issue and he or she may also be directed to come to formations earlier than other Soldiers. By contrast, the Soldier may not be directed to dig fox holes and then fill them up again because that doesn't relate to the Soldier's problem.

5. Conclusion.

It all comes down to the commander's intent. The commander may direct that a Soldier receive corrective training. A commander may not use punishment as a training method. If a commander wants to punish a Soldier, it must be in the form of an Article 15 or a Court-Martial.