Counseling and Military Justice

Defense Language Institute and Foreign Learning Center
Counseling in General

• Counseling is a process

• The Army prescribes that Leaders counsel their subordinates

• The verbal and written portion of counseling occurs as a part of assessing, teaching, coaching, mentoring, broadening and team building
Event Oriented

• It may precede events, such as going to a promotion board or attending a school, or it may follow events, such as noteworthy duty performance, a problem with performance, or a personal problem.

• Event may be a serious violation of law or regulation

• Leaders use the counseling form (DA Form 4856) to record the incident
Counseling as Evidence

• Adverse Administrative and Punitive Measures
  • Article 15’s
  • Chapters
  • Courts-Martial
  • Letters of Reprimands
  • Flags
  • Bars to Reenlistment
Soldier’s Rights

- Presumption of Innocence
- Right Against Self-Incrimination
- Right Against Unreasonable Search/Seizure
- Fair and Impartial Hearings
- Right to Counsel (in most situations)
- Other Rights (discussed throughout this class)
Article 31(b) Rights

Article 31(b), UCMJ:

• To be informed of the nature of the suspected offense
• To remain silent
• To be informed that any statement you make can be used against you

Applies anytime a person subject to the UCMJ questions a Soldier suspected of an offense.

Use DA Form 3881
Punitive and Administrative Actions

• Separate independent processes which may require the same supporting documentation, i.e. DA Form 4856, Police Report, DD Form 2624 (Specimen Collection Document), etc.

• Different governing regulations

• (Potentially) different approval authorities
DA Form 4856 – 5W’s

• Describe an incident in detail

• Who is the subject, accomplice, and/or victim?

• What behavior is being identified as an issue. Are there damages or destruction and to what? What are the known facts and circumstances?

• Where did the incident occur?

• When did the incident occur vs when it was reported/discovered?

• Why – describe the reason this incident occurred?
DA Form 4856 - “Magic Bullet”

• aka “Magic Counseling Statement” or “Silver Bullet”

• Important for Separation Purposes

• AR 635-200, Para. 1-17
  • Army leaders at all levels must be continually aware of their obligation to provide purpose, direction, and motivation to Soldiers. It is essential that Soldiers who falter, but have the potential to serve honorably and well, be given every opportunity to succeed.

• counseling session must be recorded in writing. DA Form 4856 (General Counseling Form) and will include the reason(s) it is being administered, the date, the fact that separation proceedings may be initiated if the deficiencies continue, and other guidance as appropriate.
If this conduct continues, action may be initiated to separate you from the Army IA W AR 635-200, If you are involuntary separated, you could receive an Honorable Discharge, a General (Under Honorable Conditions) Discharge, or Under Other Than Honorable Conditions Discharge. An Honorable Discharge is a separation with honor based on the quality of service, which meets the standards of acceptable conduct and performance of duty. A General Discharge is a separation under honorable conditions, based on a military record being satisfactory but not sufficiently meritorious to warrant an Honorable Discharge. A discharge Under Other Than Honorable Conditions is based upon a pattern of behavior of one or more acts or omissions that constitutes a significant departure from the conduct expected of a soldier. An Honorable Discharge may be awarded under any provision. A General Discharge may be awarded for separation under Chapter 5, Chapter 9, Chapter 13, and Chapter 14. An Under Other Than Honorable Conditions Discharge may be awarded for separation under Chapter 14 for misconduct. If you receive an Honorable Discharge, you will be qualified for most benefits resulting from….
“Magic Bullet” con’t

… military service. An involuntary Honorable Discharge, however, will disqualify you from reenlistment for some period of time and may disqualify you from receiving transitional benefits (e.g., commissary, housing, health benefits) and the Montgomery GI Bill or Post 9/11 GI Bill if you have not met other program requirements. If you receive a General Discharge, you will be disqualified from reenlisting in the service for some period of time and you will be ineligible for some military and VA administered benefits, including the Montgomery GI Bill or Post 9/11 GI Bill. If you receive a discharge Under Other Than Honorable Conditions, you will be ineligible for reenlistment and for most benefits, including payment of accrued leave, transitional benefits, the Montgomery GI Bill or Post 9/11 GI Bill, and possibly transportation of dependents and household goods to home. You may also face difficulty in obtaining civilian employment as employers have a low regard for General and Under Other Than Honorable conditions discharges. Although there are agencies to which you may apply to have your characterization of service changed, it is unlikely that such application will be successful.
Disposition of Offenses
Commander’s Options

- Take No Action (after investigation)
- Take Administrative Action
- Impose Nonjudicial Punishment (Article 15)
- Court-Martial
Legal Action Request

• Commander determines adverse action is necessary

• Legal Office requires:
  • Commander’s request for legal action,
  • Counseling statements
  • Police/CID/(Investigative Agency) Report
  • FLAG
  • SRB
  • Supplementary documentation pertaining to incident (e.g. leave forms, UA’s, damage reports/invoices, pictures/video *not pornography)
FLAGS

• AR 600-8-2

• Suspension of Favorable Personnel Actions
  • Awards, Schools, Promotion
  * Leave is Commander’s Discretion

• Notification
  Counseling should include reason for the Flag, requirement for Flag removal, and action prohibited by the Flag. All flagged Soldiers will be provided a copy of the DA Form 268 when the Flag is initiated and when it is removed.
### Section I: Administrative Data

**a. Name (Last, First, Middle Initial)**

**b. DOD ID No.**

**c. Rank**

**d. Date of Rank**

**e. Specialty/MOS**

**f. Component**

**g. Unit, Org., Station, Zip Code, or APO, Major Command**

**h. UIC**

**i. Flagged Soldier’s Email Address (gov or mil)**

**j. HR Office Controlling Flagging Action**

**k. Telephone Number**

**l. This Action Is To:**

 - INITIATE A FLAG (Sections II and IV only)
 - REMOVE A FLAG (Sections III and IV only)

### Section II: Initiate A Flag

**a. Non-Transferable Flag**

- A Flag Is Initiated, Effective __________ for the Following Reason:
  - Advise Action (A)
  - Insolvency - Self initiated (B)
  - Retired OER, OER, or Retired for Cause RODER (C)
  - Security Violation or Loss of Security Clearance (E)
  - HQDA - Delay of Promotion or Removal from a Selection List (F)
  - Commander’s Investigation (I)
  - Law Enforcement Investigation (K)
  - Reserve Components - Non-compliance with 10 USC § 6209A (M)

**b. Transferable Flag**

- AGF Fail (J)
- Army Body Composition Program (K)
- Punishment Phase (H)
- Date Punishment Complete:

### Section III: Remove A Flag

**a. Flag to Remove**

- A Flag (Two-Digit Flag Code) __________, with an Effective Date Of __________ is hereby removed.

**b. Disposition**

- Initial Action Favorable (C)
- Initial Action Untenable (D)
- Initial Action Specified (E)
- Insufficient (Z)

### Section IV: Authentication

**a. Unit Commanders Name (Last, First, Middle Initial)**

**b. DOD ID No.**

**c. Rank**

**d. UIC**

**e. Component**

**f. Unit, Org., Station, Zip Code, or APO, Major Command**

**g. Unit Commanders Email Address (gov or mil)**

**h. Unit Commanders Signature**

**i. Date**

**Section V: Validation (Reserved for any flag over 6 months old)**

**a. Unit Commanders Name (Last, First, Middle Initial)**

**b. DOD ID No.**

**c. Rank**

**d. UIC**

**e. Component**

**f. Unit, Org., Station, Zip Code, or APO, Major Command**

**g. Unit Commanders Email Address (gov or mil)**

**h. Unit Commanders Signature**

**i. Date**

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**DA Form 268, APR 2021**

**Previous editions are obsolete.**
### SECTION II - INITIATE A FLAG

**a. NON-TRANSFERABLE FLAG**

- [ ] A FLAG IS INITIATED, EFFECTIVE __________________ FOR THE FOLLOWING REASON:
  - Adverse Action (A)
  - Involuntary Separation - field initiated (B)
  - Referred OER, AER, or Relief for Cause NCOER (D)
  - Security Violation or Loss of Security Clearance (E)
  - HQDA - Delay of Promotion or Removal from a Selection List (F)
  - AMEDD Lack of License or Certification (I)
  - Commander’s Investigation (L)
  - Law Enforcement Investigation (M)
  - Reserve Components Non-compliance with 10 USC §10206 (N)
  - JAG Lack of License or Certification (O)
  - Deny Auto Promotion to PV2/PFC/SPC (P)
  - Lautenberg Amendment (Q)
  - Administratively Non-deployable for Retention (R)
  - No Family Care Plan (S)
  - Deny Auto Promotion to 1LT/CW2 (T)
  - Drug Abuse (U)
  - Alcohol Abuse (V)
  - HQDA - Involuntary Separation (W)

**b. TRANSFERABLE FLAG**

- [ ] ACFT Failure (J)
- [ ] Army Body Composition Program (K)
- [ ] Punishment Phase (H)
  - Date Punishment Complete: __________________
FLAGS con’t

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DATE

AR 15-6 Investigation/Commander’s Inquiry
## FLAGS con’t

### SECTION II - INITIATE A FLAG

**A FLAG IS INITIATED, EFFECTIVE _________ FOR THE FOLLOWING REASON:**

- [x] Law Enforcement Investigation (M)

**DATE**

**Local PD, MPI, CID, FBI, ATF, DEA**

### a. NON-TRANSFERABLE FLAG

- [ ] Adverse Action (A)
- [ ] Involuntary Separation - field initiated (B)
- [ ] Referred OER, AER, or Relief for Cause NCOER (D)
- [ ] Security Violation or Loss of Security Clearance (E)
- [ ] HQDA - Delay of Promotion or Removal from a Selection List (F)
- [ ] AMEDD Lack of License or Certification (I)
- [ ] Commander’s Investigation (L)
- [x] Law Enforcement Investigation (M)
- [ ] Reserve Components Non-compliance with 10 USC §10206 (N)
- [ ] JAG Lack of License or Certification (O)
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- [ ] No Family Care Plan (S)
- [ ] Deny Auto Promotion to 1LT/CW2 (T)
- [ ] Drug Abuse (U)
- [ ] Alcohol Abuse (V)
- [ ] HQDA - Involuntary Separation (W)

### b. TRANSFERABLE FLAG

- [ ] ACFT Failure (J)
- [ ] Army Body Composition Program (K)
- [ ] Punishment Phase (H)

**Date Punishment Complete: ___________________**
After determining misconduct initiate when pending:

Art 15, UCMJ; CM; civilian criminal charges, restraint, or confinement; reduction board; and/or Reprimands
When pending adverse action for Drugs or Alcohol use flag accordingly not (A)
FLAGS con’t

Initiate when the punishment period is one month or longer.

Remove the “Adverse Action” Flag the same day unless additional adverse action is pending. e.g. after second reading of Article 15.
Do not initiate until Commander conducts (board) notification procedure per AR 635-200
The Army desires to retain Soldiers of high moral character, competence, and demonstrated adaptability. 
- Soldiers who do not meet this standard will be barred from further service.

Bars may be initiated for a variety of misconduct or general poor performance.

Initiation of administrative separation or bar to reenlistment required for:
- Failure to make satisfactory progress in Army Body Composition Program.
- 2 consecutive APFT failures.
- Removal for cause from NCOES courses.
- Full list in AR 601-280
 References

• Counseling (AR 600-20)
• Administrative Reprimands (AR 600-37)
• Bar to Reenlistment (AR 601-280)
• FLAG (AR 600-8-2)
• Administrative Reductions (AR 600-8-19)
• Administrative Separations (AR 635-200)
Military Justice Shop Roles

(Military Justice Paralegals)

- Legal Action Submissions
- Counseling Expectations
- Required Documentation
- Legal Updates
- General Facts of Non-judicial Punishment, and Administrative Actions.

(Chief of Justice, Attorney)

- Legal Advisement
- Conditions on Liberties
- The “Can I, Should I, Do I’s ?”
- Search Procedures
Questions??