



# U.S. ARMY OKINAWA

## ★ TORII STATION ★



### LEGAL ASSISTANCE

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## APPEALING OFFICER EVALUATION REPORTS (OER), NON-COMMISSIONED OFFICER EVALUATION REPORTS (NCOER) & ACADEMIC EVALUATION REPORTS (AER)

*By: ASA DIX Legal Brief*

### **Q: WHAT ARMY REGULATION (AR) GOVERNS OER, NCOER, AND AER APPEALS?**

AR 623-3, chapter 6, Evaluation Redress Program, outlines the procedures for appealing OERS, NCOERS, and AERs.

### **Q: WHAT IS THE EVALUATION REDRESS PROGRAM DESIGNED TO ACCOMPLISH?**

The redress program is based upon principles structured to prevent and/or provide a remedy for alleged injustices or regulatory violations, as well as to correct them once they have occurred. OERs, NCOERs, and AERs may have administrative errors or may not accurately record the individual's potential or the manner in which he or she performed his or her duties. The redress program protects the Army's interests and ensures fairness to the individual soldier while avoiding impugning the integrity or judgment of the rating officials without sufficient cause. Commander Inquiries and appeals are separate actions, and a Commander's Inquiry is not a prerequisite for submission of an appeal.

### **Q: WHAT ARE THE PRIMARY PROGRAM ELEMENTS OF THE EVALUATION REDRESS PROGRAM?**

The primary program elements of the evaluation redress program are as follows:

1. Communication Process. The communication process fostered by counseling and support forms afford the rated individual a forum with the rater for establishing duty requirements and discussing actual accomplishments.
2. Regulatory Requirements. Each evaluation must stand on its own without reference to facts or events occurring prior or subsequent to the rated period. Command influence on rating officials, during the preparation of the evaluation, is prohibited (AR 623-3, Chapter 6, Section I, paragraph 6-1b).
3. Commander's Inquiry. Commanders are required to look into alleged errors, injustices, and illegalities in evaluation reports, which may be brought to the Commander's attention by the rated individual or anyone authorized access to the report. (AR 623-3, Chapter 6, Section II).
4. Appeals System. Appealing an evaluation report based upon an administrative and/or substantive basis (AR 623-3, Chapter 6, Section III).
5. Army Board for Correction of Military Records (ABCMR) Appeal. File an ABCMR appeal in accordance with AR 15-185.

**Q: WHAT IS A COMMANDER'S INQUIRY?**

A Commander's Inquiry requires Commanders to look into alleged errors, injustices, and illegalities in evaluation reports, which may be brought to the Commander's attention by the rated individual or anyone authorized access to the report. The primary purpose of the Commander's Inquiry is to provide a greater degree of command involvement in preventing obvious injustices to the rated individual and correcting errors before they become a matter of permanent record. A secondary purpose of the Commander's Inquiry is to obtain command involvement in clarifying errors or injustices after the evaluation report is accepted at Headquarters, Department of the Army (HQDA). However, in these after-the-fact cases, the Commander's Inquiry is not intended to be a substitute for the appeals process, which is the primary means of addressing errors and injustices after they have become a matter of permanent record. The Commander's Inquiry will not be used to document differences of opinion between members of the rating chain (or between the Commander and members) about an individual's performance and potential. The evaluation system establishes rating chains and normally relies on the opinions of the rating officials. Rating officials should evaluate and have their opinions constitute the organization's view of the rated individual. However, the Commander may determine through his or her inquiry that the report has serious irregularities or errors such as improperly designated or unqualified rating officials; inaccurate or untrue statements; or lack of objectivity or fairness by rating officials.

**Q: WHO PERFORMS A COMMANDER'S INQUIRY?**

The Commander's Inquiry is performed by a Commander in the chain of command above the designated rating officials involved in the allegations. In headquarters and other military organizations lacking a commander, the Commander's Inquiry will be conducted by the next higher official in the rating chain above the designated rating officials involved in the allegations. The Commander will not pressure or force rating officials to change their evaluations and may not evaluate the rated individual, either as a substitute for, or in addition to, the designated rating officials' evaluations. The commander will not use the Commander's Inquiry provisions to forward information derogatory to the rated individual. To ensure the availability of pertinent data and timely completion of an inquiry conducted after the evaluation in question has been accepted at HQDA for inclusion in the individual's Official Military Personnel File (OMPF), the inquiry must be conducted by either the Commander who is still in the command position at the time the report was rendered or by a subsequent Commander in the position. The inquiry must be forwarded to HQDA no later than 120 days after the signature date of the senior rater in the case of OERs, reviewer in the case of NCOERs, or authenticating official in the case of AERs. The results of a Commander's Inquiry, being forwarded to HQDA, will include findings, conclusions, and recommendations in a format that can be filed with the report in the OMPF. The results, therefore, will include the Commander's signature, should stand alone without reference to the other documentation, and will be limited to one page. Sufficient documentation, such as reports and statements, will be attached to justify the conclusion. If the Commander finds no fault with the evaluation, then the Commander's Inquiry is filed locally and a copy given to the rated individual.

**Q: DO THE RESULTS OF A COMMANDER'S INQUIRY CONSTITUTE AN APPEAL?**

The results of a Commander's Inquiry do not constitute an appeal but may be used in support of an appeal.

**Q: WHO MAY APPEAL AN EVALUATION REPORT?**

The rated soldier or —other interested parties, as listed in AR 623-3 section 6-7, may appeal any report that is believed to be incorrect, inaccurate, or in violation of the intent of this regulation. An appeal begun by any party on behalf of a rated soldier will be referred to the rated soldier for concurrence and comment before it is submitted.

## **Q: WHAT EVIDENCE IS REQUIRED TO SUBSTANTIATE AN APPEAL?**

An evaluation report accepted for inclusion in a soldier's OMPF is presumed to be administratively correct, have been prepared by the proper rating officials, and represent the considered opinion and objective judgment of rating officials at the time of preparation. Appeals supported by statements from rating officials claiming administrative oversight or typographical error will normally be returned without action unless accompanied by additional substantiating evidence such as the published rating chain, orders, leave records, hospitalization records, human resource documents, or the results of a Commander's Inquiry. An appeal must be substantiated by clear and convincing evidence. The burden of proof rests with the appellant to produce evidence that establishes, clearly and convincingly, that—(1) the presumption of regularity should not be applied to the report under consideration and (2) action is warranted to correct a material error, inaccuracy, or injustice. Clear and convincing evidence must be of a strong and compelling nature, not merely proof of the possibility of administrative error or factual inaccuracy. If the adjudication authority is convinced that an appellant is correct in some or all of his/her assertions, the clear and convincing standard has been met with regard to those assertions. For claims of administrative error, appropriate evidence may include the published rating chain, orders, leave records, human resource documents, etc. For claims of substantive error, such as inaccuracy or injustice, evidence must include statements from third parties, rating officials or other documents from official sources. Third parties are persons other than the soldier or rating officials who have knowledge of the rated soldier's performance during the rating period. Such statements are afforded more weight if they are from persons who served in positions affording them good opportunity to observe, firsthand, the rated soldier's performance as well as interactions with rating officials. Statements from rating officials are also acceptable if they relate to allegations of factual errors, erroneous perceptions, or claims of bias. To the extent practical, such statements should include specific details of events or circumstances leading to inaccuracies, misrepresentations, or injustice at the time the report was rendered. The results of a Commander's Inquiry may provide support for an appeal request.

## **Q: WHO ADJUDICATES APPEALS?**

Appeals based solely on administrative error will be adjudicated by the Human Resources Command (HRC)—Alexandria for active duty officers, HRC—Indianapolis for active duty enlisted, HRC—St Louis, for reserve officers and enlisted, and National Guard Bureau (NGB) for Guard officer and enlisted. Claims of administrative error pertain to parts I, II, and IVc of the Department of the Army (DA) Form 2166-8. Administrative errors include deviation from the established rating chain, insufficient period of observation by the rating officials, errors in the report period, and errors in the height/weight. It should be noted that the rated soldier's signature verifies the information in part I. It also confirms that the rating officials named in part II are those established as the rating chain and authenticates the accuracy of the Army physical fitness test (APFT) performance and height and weight data entries made by the rater in part IVc. Appeals based on alleged administrative errors in those portions of a report previously authenticated by the rated soldier will be accepted only under the most unusual and compelling circumstances. The rated soldier's signature also verifies he or she has seen a completed evaluation report minus parts IIId and e. Correction of minor administrative errors seldom serves as a basis to invalidate an evaluation report. Removal of a report for administrative reasons will be allowed only when circumstances preclude correction of errors, and even then, only when retention of the report would clearly result in an injustice to the soldier. Appeals based solely on the lack of full compliance with performance counseling requirements will not normally serve as a basis to invalidate an evaluation report unless accompanied by additional evidence of inaccuracy or injustice.

## **Q: WHO ADJUDICATES APPEALS BASED UPON SUBSTANTIVE ISSUES HANDLED?**

Appeals alleging bias, prejudice, inaccurate or unjust ratings, or any matter other than administrative error are substantive and will be adjudicated by the Deputy Chief of Staff (DCS), G-1. Special Review Board (SRB). claims of inaccuracies of a substantive type pertain to parts III, IV, and V of the Department of the Army (DA) Form

2166-8. After resolution of the appeal, the reviewing agency amends the soldier's official records, if appropriate. If the soldier has been non-selected for promotion, the SRB will also determine if promotion reconsideration is warranted as a result of the change to the evaluation report. A decision to appeal an evaluation should not be made lightly. Before deciding whether or not to appeal, the prospective appellant must analyze his or her own case dispassionately. This is difficult. However, unless it is done, the chances of a successful appeal are reduced. The prospective appellant should take note of the following: (1) pleas for relief citing past or subsequent performance or assumed future value to the Army are rarely successful. (2) the following will provide limited support at best: (a) statements from people who observed the appellant's performance before or after the period in question (unless performing the same duty in the same unit under similar circumstances), (b) letters of commendation or appreciation for specific but unrelated instances of outstanding performance, and (c) citations for awards, inclusive of the same period.

#### **Q: WHAT MUST I DO ONCE I HAVE DECIDED TO APPEAL AN EVALUATION REPORT?**

Once the decision has been made to appeal an evaluation, the appellant should state succinctly what he or she is appealing and the basis for the appeal. For example, he or she should state: (1) whether the entire report is contested or only a specific part or comment, (2) the basis for his or her belief that the rating officials were not objective or had an erroneous perception of his or her performance. Note that a personality conflict between the appellant and a rating official does not constitute grounds for a favorable appeal; it must be shown conclusively that the conflict resulted in an inaccurate or unjust evaluation. Most appellants will never be completely satisfied with the evidence they have obtained. A point is reached, however, when the appellant must decide whether to submit the appeal with the available evidence or forgo the appeal entirely. Appellants should consider including whether evidence exists to support the allegation. Remember, the case will be reviewed by a board of impartial officers and/or noncommissioned officers who will be influenced only by the available evidence. Their decision will be based on their best judgment. The appellant should also consider that correcting minor administrative errors or deleting one official's rating does not invalidate the report.

#### **Q: WHAT IS THE TIMEFRAME FOR FILING AN APPEAL?**

Because evaluation reports are used for personnel management decisions, it is important to the Army and the soldier that an erroneous report be corrected as soon as possible. As time passes, people forget and documents and key personnel are less available. Consequently, preparation of a successful appeal becomes more difficult. Substantive appeals must be submitted within three years of the evaluation thru date. Failure to submit an appeal within this time may be excused only if the appellant provides exceptional justification to warrant this exception. Administrative appeals will be considered regardless of the period of the report and a decision will be made based on the regulation in effect at the time the report was rendered. However, the likelihood of successfully appealing a report diminishes with the passage of time. Therefore, prompt submission is strongly recommended.

#### **Q: HOW ARE APPEALS PRIORITIZED?**

Appellants must identify the priority of their appeals and notify the reviewing agency of any change in their priority status. Appeals are processed in the following priority:

- For Officer Evaluation Reports and Officer/Enlisted Academic Evaluation Reports.
  1. First priority. Appeals pertaining to officers who have been:
    - a. Twice non-selected for promotion and given a directed discharge, release, or mandatory retirement date within 6 months.
    - b. Selected for release within 6 months by a Department of the Army (DA) Elimination Board or an Active Guard/Reserve (AGR) Continuation Board.
    - c. Recommended for elimination within 6 months. This also applies to officers who have applied for and have been denied Voluntary Indefinite category.

2. Second priority. Appeals pertaining to officers who:
    - a. Have not been selected for promotion at least once but who do not have a mandatory release date within 6 months as a result.
    - b. Are on a pending promotion list removal as stated in AR 600-8-29.
  3. Third priority. Appeals not eligible for higher priority.
- For Noncommissioned Officer Evaluation Reports.
    1. First priority. Appeals pertaining to noncommissioned officers (NCOs) who have been:
      - a. Twice non-selected for promotion in the primary zone of consideration and are within 6 months of discharge, release (ETS), or mandatory retirement date.
      - b. Selected for release under the DA Qualitative Management Program/Army National Guard of the United States or United States Army Reserve Qualitative Retention Program.
      - c. Selected for release from Active Guard/Reserve (AGR) by an AGR Continuation Board.
      - d. Identified for referral within 6 months to an AGR Continuation Board.
    2. Second priority. Appeals pertaining to NCOs who have been non-selected for promotion in the primary zone of consideration at least once, but who do not have a mandatory release date within 6 months.
    3. Third priority. Appeals not eligible for higher priority but, if favorably considered, might result in a material change in an NCO's records.

**Q: WHAT HAPPENS AFTER I SUBMIT AN APPEAL?**

The receipt of an appeal will be acknowledged directly to the originator. The time required to process an appeal varies greatly depending on the complexity of the issues involved and the age of the evaluation report being appealed. Appeals are processed by priority of date of receipt. Once received, reviewing officials screen appeals to separate claims of administrative error from claims of substantive inaccuracy or injustice. USA HRC, HRC—St Louis, United States Army Enlisted Records and Evaluation Center (USAEREC), or the NGB resolve claims of administrative error. Claims of substantive inaccuracy or injustice will be sent through the rated individual's career management division for adjudication by the appropriate Special Review Board (SRB). An appeal may be approved in whole or in part, or may be denied, depending upon the merits of the case. The result of a partially approved appeal may not be the result requested by the appellant. For example, the board may decide that the evidence justifies removal of the rater's evaluation, but that the senior rater's evaluation should remain, as it was not proven inaccurate or unjust. The board will not usually take action that might worsen an appealed evaluation report. When the board grants an appeal, either in whole or in part, resulting in the removal or substantive alteration of an evaluation report that has already been seen by one or more promotion boards that previously failed to select the appellant, the SRB will make a determination whether promotion reconsideration by one or more special boards is justified. The reviewing agency notifies each appellant by memorandum of the decision on his or her appeal and promotion reconsideration eligibility, if applicable. When an appeal is denied, a copy of the memorandum of notification is filed in the performance portion of the OMPF next to the contested evaluation report. The appeal correspondence is placed in the restricted portion of the OMPF. When a substantive appeal is denied but administrative corrections/amendments are made, a copy of the memorandum of notification to the appellant and a memorandum for record are placed in the performance portion of the OMPF. In the case of an invalidated report, a memorandum will be placed in the performance portion of the OMPF declaring the period as nonrated time. Documents that apply to appeals that are returned without action because of a lack of usable evidence are not filed in the OMPF. In the case where a portion of a report is removed or corrected, the report will be corrected and placed in the performance portion of the OMPF with a notation at the bottom of the corrected report indicating the report is a —corrected copy. For ARNGUS (including AGR), this correspondence will be filed in a state file at the state records center.

**Q: WHAT IS A SPECIAL REVIEW BOARD (SRB)?**

The Deputy Chief of Staff (DCS), G-1 Special Review Board is established under the provisions of Department of the Army (DA) Memorandum 600-1 and operates within the guidelines established in this regulation. It is composed of senior officers, warrant officers, and noncommissioned officers on duty at Headquarters, Department of the Army (HQDA). At least three members of the board constitute a quorum for voting on each case. Board recommendations are based on a majority vote. No member will vote on a case in which he or she was personally involved, or knowingly has any bias for or against the parties involved. To the extent possible, voting members will be senior to the appellant. Board proceedings are administrative and non-adversary; the provisions of AR 15-6 do not apply. Although not bound by the rules of evidence for trials by courts-martial or other court proceedings, the board does keep within the reasonable bounds of evidence that is competent, material, and relevant. The appellant or his or her agent is not authorized to appear before the board. However, the board may obtain more information from the appellant, the rating officials, persons in the chain of command, or anyone thought to have firsthand knowledge of the case. The appellant will generally be contacted by official correspondence if deemed necessary. Normally, the board will not contact those who provided a third party statement of support unless there is a need for clarification.

**Q: WHAT ARE MY OPTIONS IF THE APPEAL IS DENIED?**

If the appeal is denied, an appellant may seek new additional evidence and submit a new appeal, or may submit an appeal to the next agency in the Army's redress system, the Army Board for Correction of Military Records (ABCMR) governed by AR 15-185. If the case was initially decided by the SRB, a case summary of the board's consideration is available under the Freedom of Information Act/Privacy Act (FOIA/PA). A request based on AR 25-55 and AR 340-21 for a case summary under the FOIA/PA should be sent to HQDA (DAPE-ZXI-SP), Washington, DC 20310-0300.