LEGAL ASPECTS OF CIVILIAN PERSONNEL ADMINISTRATION

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

A survey of the law, regulations and cases pertaining to the employment of civilians by the armed services by analyzing: legal basis for employment; protections afforded employees; adverse actions; grievance and appeal procedures; and the role of the judge advocate in the disposition of personnel actions.

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CHAPTER I

INTRODUCTION

Civilian personnel,[1] an essential segment of the Department of the Army, perform worldwide duties ranging from work of a custodial nature to the highest positions in the Department.

Military forces have traditionally been placed under civilian control. Subordination of the military to civilian control is limited, however, to the hierarchy of the Department of the Army. With the exception of Headquarters, Department of the Army, the military commander of an installation is superior to all civilians who live and work there.

The presence of the civilian element relieves the military of assignments which are not military in nature. Additionally, the longer terms of civilian employment and

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[1]This thesis deals with that segment of civilian personnel who are in the competitive service of the Federal Civil Service. It is argumentative as to the number of components making up the Federal Civil Service. For most purposes civil service employment is either competitive or excepted. See 5 U.S.C. § 1302(b), (c) (Supp. III, 1968). Both components are divisible in regard to retention, transfer, and appellate rights.

permanency of assignment add experience and stability to activities supporting the fighting forces.

The installation commander is advised on civilian employee matters by a civilian personnel officer.[2] The judge advocate advises the commander on all legal matters pertaining to civilian personnel. He also makes limited legal advice available to civilian employees of the army.[3]

The purpose of this dissertation is to survey the role of the judge advocate in the practice of civilian personnel law.

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[2]"Professionally qualified career employees only will be assigned to positions of director of civilian personnel or civilian personnel officer at all levels." Army Reg. No. 10-20, para. 6 (24 July 1957).

[3]Current Army Regulations limit those civilians entitled to legal assistance to, "Civilians employed by, serving with, or accompanying the Armed Forces of the United States in oversea areas who are United States nationals." Army Reg. No. 608-50, para. 5 (28 April 1965) (emphasis added). On the other hand, Army Regulations 10-20, paragraph 6d (24 July 1967) states, "The civilian personnel program throughout the Department of the Army will be organized and staffed in the most economical manner consistent with program quality needs. Cross servicing arrangements, use of joint facilities and centralized operations within installations and localities will be utilized to the maximum feasible extent." The Army Regulation governing reports of surveys for loss or damage to government property states, "The letter [notifying the employee that he has been held liable] will serve to inform the individual(s) of his right to ... legal advice from the office of the staff judge advocate ...." Army Reg. No. 735-10, para 6d (26 April 1967).

CHAPTER II

SOURCES OF CIVILIAN PERSONNEL LAW

Chief among the judge advocate's sources of Civilian Personnel Law are:

A. U. S. Constitution

The Constitution authorizes the President to appoint, with the advice and consent of the Senate, all officers of the United States whose appointments are not provided for elsewhere in the constitution.[4] Civilians holding office[5] in the Department of the Army are within the sphere of appointments contemplated by this constitutional provision. The "necessary and proper" clause[6] of the constitution grants the legislature authority to

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[4] U.S. CONST. art. II, § 2.

[5] "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties." United States v. Hartwell, 73 U.S. 385 (1868). "A person not appointed in the manner prescribed by this clause" [U.S. CONST. art. II, § 2] "is not an 'officer' but an agent or employee of the government." McGrath v. United States, 275 F. 294 (C.C.A.N.Y. 1921).

[6] U.S. CONST. art. I, § 8.

make laws which execute the President's power of appointment and the Supreme Court has held that congressional and executive actions of creating and abolishing office are constitutional.[7]

B. Legislation

Congress has delegated authority for the employment of personnel by charging the heads of executive military departments with the responsibility of prescribing regulations to govern their departments and the conduct of their employees.[8] The United States Civil Service Commission[9] is responsible for transforming legislative intent into workable regulations which act as guidelines to department heads in drafting their own regulations.

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[7]"Congress may change the name of office." Crenshaw v. United States, 134 U.S. 99 (1889). "Congress may ratify the act of the U.S. military government in abolishing an office." Sanchez v. United States, 216 U.S. 167 (1909). An order restoring a dismissed employee in the civil service of the U.S. by creating a place for him for the purpose of affording a hearing of the charges against him affords no basis for recovery of compensation, where the office was legally abolished immediately after the hearing. Norris v. United States, 257 U.S. 77 (1921).

[8]5 U.S.C. § 301 (Supp. III, 1968).

[9]Federal civil service is headed by three men who make up the United States Civil Service Commission. See 5 U.S.C. § 1101 (Supp. III, 1968). The purpose of the commission is to assist the President in maintaining an efficient body of public servants.

C. Executive Orders

By Executive Order, the President directs the heads of departments and the United States Civil Service Commission[10] to implement policies which he deems imperative to a viable civil service system.

D. Regulations[11]

Of more concern to the civilian employee of the Army are the regulations that implement the above mentioned legislation and directives. These regulations are:

1. The Federal Personnel Manual.—The United States Civil Service Commission's primary method of implementing legislation is through publication of rules[12] and regulations found in the Federal Personnel Manual. Title 5, Code of Federal Regulations, also contains United States Civil

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[10]Exec. Order No. 11,228, 3 C.F.R., 1964-1965 Comp., p. 317.

[11]Regulations were first considered to be Executive Orders of a type in which the President could keep control of his agencies on penalty of removal, but were not sufficient to give rise to a cause of action. Morgan v. Nunn, 84 F. 553 (C.C. Tenn. 1898). Today, regulations are deemed sufficient to give rise to a cause of action. Daub v. United States, 292 F.2d 897 (1961).

[12]Civil Service rules have the force and effect of law. Nadelhaft v. United States, 131 F. Supp. 930 (1955). The rules are the expression of the will of the President and do not give employees of the competitive service such tenure as to confer on them a property right in the office or place. Morgan v. Nunn, 84 F. 553 (C.C. Tenn. 1898).

Service regulations.[13]

2. Civilian Personnel Regulations.—The Department of the Army publishes Civilian Personnel Regulations in implementation of United States Civil Service policies and rules.[14]

3. Army Regulations.—Army regulations are published either under the authority of statute[15] or by the President as Commander-in-Chief.[16]

E. Court Decisions and Agency Publications

Court of Claims decisions and Army publications,[17] geared for civilian personnel administration, afford the

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[13]The manual, however, is loose leaf and therefore more current.

[14]Most newly issued Civilian Personnel Regulations are published on blue colored paper pages which are filed in the Federal Personnel Manual in accordance with the directions contained thereon. Eventually one single body of regulations, governing employees of the Department of the Army, will result. Not all Civilian Personnel Regulations are so published. Therefore, the researcher must consult the predecessor set of regulations. For a detailed explanation of the new system, see Civilian Personnel Regulation 272 (20 Sept. 1964) [hereinafter Civilian Personnel Regulation cited as CPR], which is filed as a complete entity following Federal Personnel Manual ch. 271 (15 Aug. 1968) [hereinafter Federal Personnel Manual cited as FPM].

[15]5 U.S.C. § 301 (Supp. III, 1968).

[16]U.S. CONST. art. II, § 2.

[17]Department of the Army publications are: Civilian Personnel Pamphlet, Headquarters, Department of the

judge advocate sufficient information to keep abreast of current trends and problem areas.

Army, containing lesson plans, textual matter and case studies on various matters of civilian personnel administration; and, Army Staff Civilian Personnel Bulletin, published by Staff Civilian Personnel Division for the civilian employee and his military supervisor.

CHAPTER III

PROBLEM AREAS OF CIVILIAN PERSONNEL ADMINISTRATION

A. Pre-Employment

The earliest potential problem area for the judge advocate is in the sphere of the civil service examination. No action based on a federal civil service examination has ever been lodged against the United States Civil Service Commission.[18] The State of New York, however, has entertained two such suits.

One case alleged that an objective type test could not measure qualities not measurable by such testing.[19] The other case objected to the indefiniteness and ambiguity of a question making a best answer impossible.[20] The absence of similar actions against the United States can be attributed to the existence of an administrative

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[18] Cheating or impersonating an examinee subjects the wrongdoer to criminal prosecution. Curley v. United States, 130 F. 1 (1st Cir. 1904).

[19] Fink v. Finegan, 270 N.Y. 356, 1 N.E.2d 462 (1936).

[20] Gruner v. McNamara, 298 N.Y. 395, 83 N.E.2d 850 (1949).

remedy within the United States Civil Service.

It is not likely that a commander would be faced with a complaint that an examination, composed and administered by a separate entity, is unfair. It is possible, however, that the judge advocate would be called upon in his legal assistance capacity to render advice to a serviceman parent of a disgruntled examinee. What the judge advocate must keep in mind is that the United States Civil Service Commission is charged with directing and supervising examinations for the competitive service[21] and that a system for the appeal of examination ratings has been established.[22]

B. Probation

In the federal government a probationary period before granting full civil service status is supported by statute and regulation.[23] Regulations of the United States Civil Service Commission which govern probationers[24] are binding on the executive agencies.[25] This

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[21] 5 U.S.C. § 1302 (Supp. III, 1968).

[22] Curley v. United States, 130 F. 1 (1st Cir. 1904).

[23] 5 U.S.C. § 3321 (Supp. III, 1968); 5 C.F.R. § 315.803 (1968).

[24] See, e.g., 5 C.F.R. §§ 801-807 (1968).

[25] Bennett v. United States, 356 F.2d 525 (1966).

result is a logical outgrowth of the Service v. Dulles[26] and Vitarelli v. Seaton[27] decisions which bind an executive agency to its own regulations. It is during the probationary period that the judge advocate is likely to be faced with problems arising from investigation of the probationer.[28]

C. Creditable Service

Once placed in office, the civil servant begins to enjoy a status for which he shall receive compensation,[29] and credit for sick leave,[30] annual leave,[31] and retirement.[32] These benefits result from having compiled creditable service.

Creditable service not only qualifies a person for benefits but also provides job protection against adverse

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[26] 354 U.S. 363 (1957).

[27] 359 U.S. 535 (1959).

[28] Employment of two or more members of the same family [see FPM ch. 338, subch. 2-1a (7 Nov. 1963)], and political activities and derogatory information concerning the loyalty of the probationer [see 5 U.S.C. §§ 7324-7327 (Supp. III, 1968)] are examples of such problems.

[29] FPM ch. 530 (11 Feb. 1964).

[30] FPM ch. 630, subch. 4 (30 Sept. 1963).

[31] FPM ch. 630, subch. 3 (30 June 1964).

[32] 5 U.S.C. § 8332 (Supp. III, 1968); FPM ch. 831 (24 Feb. 1967).

effects of reduction in force[33] and transfer actions.[34]

The meaning of creditable service depends on the purpose to which it is being applied. Generally, and for present purposes, creditable service is the standard by which one measures qualification for, and the extent of participation in, a favorable personnel program. Being the basis of nearly all benefits, creditable service must be understood by the judge advocate so that he will be competent to fully advise the civilian personnel officer on adverse as well as beneficial personnel actions.

Examination of creditable service in its broadest sense reveals the following incidents or characteristics of employment which are likely to come before the judge advocate:

1. Ratings.—An employee's performance during tenure is rated periodically as either (1) satisfactory, (2) unsatisfactory, or (3) outstanding.[35] Congress has directed executive agencies to devise plans which contain detailed instructions geared to keeping the employee

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[33] FPM ch. 351, subch. 5 (16 Aug. 1968).

[34] FPM ch. 315, subch. 5 (1 Oct. 1965).

[35] 5 U.S.C. § 4304 (Supp. III, 1968). Implemented by FPM ch. 430, subch. 2-1 (30 March 1966); CPR 400 (30 March 1966) (also cited as FPM ch. 430, Appendix C).

informed of his duty performance.[36] Where the employee is not performing satisfactorily, the plan allows him to improve himself before the rating is entered on his records. That is, Congress has directed that where a rating of unsatisfactory is contemplated, the employee is to receive a 90 day warning.[37] This requirement guarantees that the employee is placed on notice and has sufficient time in which to improve himself.

A rating of "outstanding" provides an individual with additional job security in that he is not subject to separation for inefficiency so long as his last rating was above "satisfactory."[38] The esteem attached to a rating of "outstanding" is so great that an appeal from a rating of "satisfactory" may be made.

2. Unions.—Collective bargaining organizations for federal employees is a new development of civilian personnel law. Subject to the provisions of federal law,[39] prohibiting an individual from holding an office in the

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[36] 5 U.S.C. 4303 (Supp. III, 1968).

[37] 5 U.S.C. 4304 (b) (Supp. III, 1968). Implemented by FPM ch. 430, subch. 2-4f (30 March 1966); CPR 400 (30 March 1966) (also cited as FPM ch. 430, Appendix C.3).

[38] CPR S1.3-4 (16 Feb. 1961).

[39] 5 U.S.C. § 7311(4) (Supp. III, 1968).

Government of the United States if he is a member of an organization which he knows asserts the right to strike against the Government, Executive Order 10988[40] permits federal employees to be members of a collective bargaining organization. Although the influence of the collective bargaining organization is unproven at this date, cautious optimism leads this author to treat membership in such an organization as a favorable incident of employment.

3. Grievances.—An employee's grievance and management's adverse action are alike in that each represents a way in which complaints are levied at the other. Each procedure provides for a system of appeal in which the judge advocate is almost certain to become involved.

The Federal Personnel Manual describes grievances as problem areas which, when resolved, make for a more binding employer-employee relationship.[41] The Commission directs that agencies make their own grievance proceedings, to suit their own specific requirements. The Commission invites the agencies "to experiment and devise techniques most suited to their needs."[42]

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[40] 27 C.F.R. § 551 (1962).

[41] FPM ch. 771 (21 July 1967).

[42] FPM ch. 771, subch. 1-2a (21 July 1967).

Are not the federal agencies really being told, "Keep your own house in order"? It is understandable that a parent organization would prefer to have a family squabble settled at home rather than in the courts. So desirous of noninvolvement is the Commission that it has given carte blanche authority to agencies to experiment.

During the course of an employee's tenure, matters ranging from the location of the water fountain to allegations of mismanagement may arise. Since complaints are indicative of morale, management should have a keen interest in making its employees as comfortable as possible. The procedure used to solve one problem may not necessarily be adequate to solve another. The Department of the Army has classified all grievances as being one of 3 types for purposes of applying an appropriate remedy. All types are subject to Civil Service Commission guidelines.[43]

See Appendix 1 for a summarization of Department of the Army grievance procedures.

4. Adverse Actions.—The largest segment of the judge advocate's endeavors in civilian personnel law is

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[43]FPM ch. 771, subch. 1-7 (21 July 1967) guidelines are: statement of jurisdiction; description of matters employees may and may not take up as grievances; written grievances when informal talks fail; simplicity; right to representation; arbitration procedures; grievance files; and, publication of grievance procedures.

in the area of adverse actions. Adverse action is management's way of maintaining discipline within the ranks of its civilian employees. Statute defines adverse action as "a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay."[44]

a. Types. Removal, the most drastic type of action that may be taken against an employee, is recognized as co-existent with the power of appointment.[45] It follows therefore that the less serious type adverse actions have also received legal sanction. Procedural safeguards among adverse actions vary in proportion to their severity.[46]

Determining the type of adverse action to be taken is like determining an appropriate punishment in a criminal proceeding. Guidelines in the form of a table[47] of recommended punishments are found in the Federal Personnel

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[44] 5 U.S.C. § 7511(2) (Supp. III, 1968).

[45] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950).

[46] Compare subch. 2 with subch. 3, FPM ch. 752 (6 May 1968).

[47] FPM ch. 751.A (11 Jan. 1967). Note, this is a Department of the Army appendix to the FPM.

Manual.[48] In absence of exceptional circumstances, the decision of the civil service as to the type of punishment imposed will not be overturned.[49]

b. Grounds. Grounds for adverse action vary from matters which are exceptionally personal to areas where conduct has adverse national political overtones. In either event, "An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service."[50] Gossiping,[51] insubordination,[52] and inefficiency are grounds which have resulted in dismissals.

Infidelity or disloyalty to the Government has been cause for removal since the start of civil service legislation.[53] In one recent case it is suggested that loyalty

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[48]The Court of Claims has warned that the table of punishments has "a spirit as well as a body," and the spirit, in absence of an extraordinary case, does not authorize an officer to substitute a harsh remedy (discharge) for a recommended reprimand. Daub v. United States, 292 F. 2d 897 (1961).

[49]Bishop v. McKee, 400 F.2d 87 (10th Cir. 1968).

[50]5 U.S.C. § 7501(a) (Supp. III, 1968).

[51]Bishop, 400 F.2d at 88.

[52]Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968).

[53]22 Stat. 404 (1883), as amended, 5 U.S.C. § 633(2) (Supp. III, 1968).

to the government includes following prescribed channels and methods in disagreeing with superiors.[54] Staying within one's own agency with a complaint is not only consistent with the United States Civil Service Commission's apparent philosophy, but also creates evidence of good faith which may tip the balance in one's favor.[55]

c. Notice. Warnings, mentioned earlier as a method by which employees may improve themselves before a supervisor makes an unsatisfactory performance rating, serve somewhat the same purpose when contemplating an adverse personnel action for inefficiency. If the employee does not take corrective action, the supervisor must then consider an adverse action. The civilian personnel officer, or the supervisor, will look at several sources to determine the degree and nature of the adverse action to be taken. These sources are:

(1) Total work record of the employee.[56]
(2) Additional investigation.[57]
(3) Employee's reply to advance notice.[58]

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[54]Meehan, 392 F.2d at 834.

[55]Swaaley v. United States, 376 F.2d 857 (1967).

[56]CPR S 1.3-2b(2) (18 Oct. 1962). Contra: Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968).

[57]CPR S 1.3-2b(2) (18 Oct. 1962).

[58]CPR S 1.2-4 (16 Feb. 1961).

Adverse action is initiated by a 30 day advance notice. The notice contains the reasons for the adverse action and the specific action contemplated.[59] These reasons must relate to the employee's action and not to a conclusionary development. For example, the utterance of a disloyal statement rather than the resulting revocation of security clearance must support an adverse action. If there is a defect in the notice, a new notice should be issued and served on the employee. Service of the notice may be accomplished by mail or in person. It is preferable to deliver the notice in person and have the receipt of the notice acknowledged in writing.

The purposes of the Lloyd-LaFollette Act[60] in setting forth essential guidelines for the taking of an adverse action were: to give notice as to all of the charges; to give an opportunity to reply; and to have a hearing before someone empowered to act in the matter. The act, in its modern form, provides that where removal or suspension without pay is concerned, the employee is entitled to additional safeguards of receiving notice of the action sought and a written decision on the answer or

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[59] FPM ch. 752, subch. 2-2a (5 May 1968).

[60] 37 Stat. 555 (1912) as amended, 5 U.S.C. § 7501 (Supp. III, 1968).

reply to the charges.[61]

If possible the employee should be kept on duty. But when

> ... circumstances are such that the retention of the employee in an active duty status in his position may result in damage to Government property or may be detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public, the employee may be temporarily assigned to duties in which these conditions will not exist or he may be placed in annual leave with his consent.[62]

The employee may also be suspended. The suspension, however, whether coupled with another adverse action or not, still remains a separate adverse action and entitles the employee to notice, either separately or in conjunction with the other adverse action, and a right to reply to it.[63]

d. Reply. The reply may be oral or written. It must be broad in scope and not limited to the matter of innocence or guilt. The employee may present an oral reply to an intermediate superior who makes recommendations to the person who has authority to take final action.

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[61] 5 U.S.C. § 7501(b) (Supp. III, 1968).

[62] FPM 752, subch. 2-4a (6 May 1968).

[63] FPM 752 subch. 2-4b, 2-5b (6 May 1968).

The intermediary is not bound by his original recommendation to the final authority.[64]

The officer taking action may take less severe action but cannot change the reasons for the action or give a more severe action without beginning anew. If some reasons for the adverse action are eliminated and an adverse action remains, the employee must be informed as to what was stricken and what remains to support the charge.

e. Assistance to Employee on Appeal. When the adverse action or grievance complaint is started, the agency must be prepared to render assistance to the employee. If the employee is not suspended immediately, such assistance goes so far as to allowing him to use official time to secure a representative and advice and assistance in preparing documents necessary to prosecute the grievance or appeal.[65]

In selecting a representative or spokesman, the employee may select anyone from within or without the government so long as such person is not a member of the civilian personnel officer's office, or a Grievance

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[64] FPM 752 subch. 2-5b (6 May 1968).

[65] CPR E 2.1-5a (22 June 1962).

Examiner, and where classified information is concerned, has the necessary security clearance.[66] Representatives employed by the government are also entitled to a reasonable amount of official time off to prepare the employee's case.

The allowance of official time off without charge to leave or pay provides a very suitable remedy to the otherwise awkward situation of adversaries working in the same office. There are no guidelines for the amount of time to be allowed to these people but it would appear that as long as the essential aspects of the employee's work are performed as usual, the supervisor should allow as much time off as is consistent with the mission of the organization.

The Federal Personnel Manual and the Civilian Personnel Regulations are in agreement insofar as they direct that grievances are reviewable only within the agency concerned while adverse actions are appealable outside the agency involved. They do not agree in spirit as to the nature of the entity on which an appellate authority will rely for findings of fact and recommendations.

The Federal Personnel Manual declares that, as a

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[66] CPR E 2.11-5b(1)-(3) (22 June 1962).

general rule, an employee appealing an adverse action is entitled to a hearing before a committee.[67] The manual also describes the selection and duties of a hearing committee.

The Civilian Personnel Regulations make a Grievance Examiner the sole fact finder and maker of recommendations.[68] The general tenor of the Federal Personnel Manual is that a multiple party hearing committee is an entitlement of appeal whereas the Civilian Personnel Regulations state, "The inquiry will include a hearing if requested by the employee or when considered necessary by the Grievance Examiner."[69] Otherwise the Grievance Examiner handles the entire matter of fact finding.

It appears that an employee is entitled to a hearing committee because of the emphasis placed on the role of the hearing committee in the Federal Personnel Manual. Although there is some language which would appear to permit noncompliance with the "hearing committee" provision, the spirit of the Federal Personnel Manual is strongly in favor of a hearing committee and is consistent

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[67] FPM ch. 771, subch. 2-9a (3 March 1969).

[68] CPR E 2.5-2c (22 June 1962).

[69] CPR E 2.5-3a (22 June 1962).

with Army policy of convening a board to find facts and make recommendations on elimination of commissioned officers.[70]

Regardless of the composition of the agency fact finding body, the employee has, depending on the nature of the adverse action, a choice as to whether to appeal within the agency and eventually to the Civil Service Commission,[71] or to go directly to the Civil Service Commission and thereby forfeit agency consideration.[72]

The person directing the removal or suspension without pay may, in his discretion, order a hearing for the examination of witnesses.[73] In the Department of the Army, the government cannot secure witnesses unless they are employed by the Department and are within reasonable proximity of the hearing. As to all other witnesses, depositions or affidavits are used. Expenses for employee requested witnesses not employed by the Department of the Army or not within a reasonable commuting distance of the

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[70] Army Reg. No. 635-105 (17 June 1968).

[71] FPM ch. 752, subch. 2-10b(3)(c) (6 May 1968).

[72] CPR E 2.5-5b, 5-6b(4) (22 June 1962). In regard to hearings before the United States Civil Service Commission, no power of subpoena exists unless the case involves unauthorized political activity. 5 C.F.R. § 151.114 (1968).

[73] 5 U.S.C. § 7501(b) (Supp. III, 1968).

hearing are the responsibility of the employee.[74]

The accused employee must not only seek out his own witnesses but also those witnesses he wishes to cross examine. He should presume that the hearing will be informal and that the evidence against him will consist of affidavits. There is no federal legislation or Civil Service regulation which compels the government to take the initiative in giving evidence to the employee. The employee must demand all evidence against himself.

The last area of assistance expected from the civilian personnel office is the furnishing of "information regarding personnel laws and regulations and the rights, privileges, and obligations of supervisors and employees."[75] This information is furnished only after request of the employee because the civilian personnel office is prohibited from otherwise assisting the employee. The foregoing is subject to modification if the employee is a member of a union having an exclusive recognition agreement.

Striking in protest of an adverse action or for any other reason is prohibited by law.[76] The way in which

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[74]Detailed instructions for securing witnesses are contained in FPM ch. 771, Appendix A (21 July 1967).

[75]CPR E 2.1-5d(2) (22 June 1962).

[76]5 U.S.C. § 7311(3)(4) (Supp. III, 1968).

an employee seeks to set aside an adverse action is usually through the administrative process discussed under adverse actions. There are two reasons for the administrative resolution to the employee's contentions. First, is the desire to keep the problem close to home. The practical effects of this are that if the decision becomes favorable to the employee the path to reinstatement is direct; and the system of appeal is well defined in agency regulations. The second and more important reason, particularly in the event of a judicial review, is to exhaust administrative remedies before seeking a judicial remedy.[77]

f. Action by the United States Civil Service Commission. The Civil Service Commission may instruct an agency to take specific action as to discipline, dismissal, or other corrective action when: a position is being held in violation of the Civil Service Act, rules or regulations; an employee violates laws, rules or regulations administered by the Commission; an officer or employee in the executive branch has failed to adhere to established policies, regulations, and standards relating to personnel

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[77]Denial of judicial relief based on failure to exhaust administrative remedies is a persuasive argument but not a rule of law. See Ray v. United States, 144 Ct. Cl. 188, 191 (1958).

management; regulations prescribing procedures to be followed by agencies in connection with adverse actions for disciplinary reasons have not been followed; an adverse action has been taken for political reasons not required by law; and, an intentional false statement or deception or fraud in examination or appointment.

> If the appointing officer fails to carry out the instructions of the Commission ... the Commission shall certify the facts to the head of the agency concerned. If the head of the agency fails to carry out the instructions ... within 10 days ... the Commission shall certify the facts to the Comptroller General of the United States ...; and thereafter no payment shall be made of the salary or wages accruing to the employee concerned.[78]

g. Judicial Review. When the employee's appeal to the Civil Service Commission does not result in a favorable decision, he[79] or his attorney may present the case to a court.[80]

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[78] 5 C.F.R. § 5.4(e) (1968).

[79] See Bishop v. McKee, 400 F.2d 87 (10th Cir. 1968) for court's comments on per se representation.

[80] Suits against the United States Civil Service Commission are generally brought against the individual commissioners. Blackman v. Guerre, 342 U.S. 512 (1952). Most actions are for the wrongful deprivation of pay resulting from an unlawful removal or suspension and may be based on either the Lloyd La-Follette Act or the Veterans Preference Act. Daub v. United States, 292 F.2d 895 (1961). See also 5 U.S.C. § 702 (Supp. III, 1968). Actions of injunction, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), and mandamus, United States

The courts[81] are very hesitant to review matters which they consider to be executive discretion[82] and unless the administrative decision was arbitrary, capricious, or involved procedural error, success before a judicial tribunal is unlikely.

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ex rel. Crow v. Mitchell, 89 F.2d 805 (D.C. Cir. 1937), are two additional but seldom used methods of causing review of executive discretion.

[81]The United States District Court and the Court of Claims are the proper courts for suit. The District Courts have jurisdiction over contract claims up to $10,000. Tucker Act, 28 U.S.C. § 1346a(2) (1964). The Court of Claims has jurisdiction over all claims founded in contract or regulation or an executive department regardless of the amount involved. 28 U.S.C. § 1491 (1964).

[82]Taylor v. United States Civil Service Commission, 374 F.2d 466 (C.A. Cal., 1967).

CHAPTER IV

ROLE OF THE JUDGE ADVOCATE

The judge advocate is an adviser to his commander and an administrator of his own office. Unless the contrary appears, mention of the judge advocate is intended to depict him in both capacities. His role in each is governed both by regulation and his office's capabilities.

A. Regulation

As mentioned earlier, at least one regulation does not authorize a civilian to receive legal assistance if stationed in the United States, but does authorize such assistance if stationed abroad.[83] Exception is granted, however, with respect to reports of survey holding the civilian employee pecuniarily liable regardless of where stationed.[84] In normal office procedure at least one

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[83] Army Reg. No. 608-50, para. 5 (28 April 1965). When rendering legal assistance to the civil service employee the FPM provides helpful guidelines in areas troublesome to attorneys, e.g. FPM ch. 338, subch. 3, gives particular guidelines in the area of legal residence for employment qualification which could also be used to determine legal residence for voting and taxation purposes.

[84] Army Reg. No. 735-10, para. 6d (26 April 1967); Army Reg. No. 735-11, para. 5-11 (11 July 1967).

judge advocate will review the report of survey to determine if the report is legally sufficient to support a finding of liability. Additionally, another provision of the report of survey regulation directs that when a finding of pecuniary liability is approved, "the installation claims officer will make demand for payment on the civilian employee."[85] In all probability a judge advocate will be designated as installations claims officer and the legal assistance officer will become an advocate for the employee.

The foregoing illustrates how judge advocates function under present regulations and how they would function if legal advice, particularly where adverse actions are concerned, is made available to civilian employees of the Department of the Army in the United States.

There is little difference between the proceedings of a report of survey and the proceedings of an adverse action. Both proceedings are adversary in nature and are eventually approved or disapproved by the installation or post commander. In both cases the judge advocate advises the commander as to the legal sufficiency of the file and the propriety of the action taken. Under present

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[85]Army Reg. No. 735-11, paras. 6-9 (11 July 1967).

regulations, however, the judge advocate may not provide assistance to the employee who faces an adverse action in the United States.

B. Office Capability

Office capabilities are influenced by the necessity for assistance from that office. The judge advocate cannot advise a civilian employee facing an adverse action when he must also be prepared to advise the civilian personnel officer and the commander in regard to the problem. The judge advocate must avoid a conflict of interests. It is obvious that a practical solution is to have the advice come from additional legal counsel in the judge advocate's office.

Of course, if a judge advocate is made available to a union[86] member employee and union counsel is an entitlement under the terms of the union contract, or even if a nonunion employee hires individual counsel, there should be no entitlement to the free services of a judge

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[86]One of the more recent developments in civilian personnel law has been collective bargaining or unionism. The necessity for such an organization is unclear, but perhaps it is an outgrowth of making adversaries out of employer and employee. Unionism of the civil service worker detracts from absolute loyalty expected of a federal employee and stymies the air of professionalism which otherwise prevails in the civil service system.

advocate.

What then is the nature of the role played by the judge advocate? The responsibility of the judge advocate in regard to the law governing civilian personnel is best demonstrated by examining a situation where, for example, a civil servant is consistently tardy in reporting for work in an office supervised by a military officer, and action more severe than oral reprimand or admonition is considered. The appropriate military officer consults with the civilian personnel officer and then takes positive action against the employee. An appeal from the adverse action can be expected. The civilian personnel office will manage the appeal procedure while military personnel make the substantive remarks supporting the action. Later the file appears before the military commander for his decision as to whether the appeal should be granted. The civilian personnel officer will be responsible for the procedure used while the judge advocate will be called upon for his opinion as to the legal sufficiency of the evidence supporting the charge and action. Since procedural error has been used as a grounds for reversal of cases, the judge advocate must also double check the work of the civilian personnel officer if the commander is to be fully informed. The role of the judge

advocate then is similar to his review authority over inferior court-martials.

It is also possible that during the course of the review and prior to advising the major commander, the judge advocate will review the advice given by a judge advocate at a subordinate command. The judge advocate's concern is twofold under these circumstances. He must give accurate advice to the commander and he is interested in maintaining good relations in technical channels.

Insofar as grievances are concerned, failure to do as much as possible to resolve a grievance on a local level may embarrass the legal advisor or his commander. Treatment of a complaint from a habitual complainer as just another "sour grapes" letter demonstrates a lack of objective review which is necessary in personnel law. Objective review should not be discontinued merely because some allegations are baseless. It is incumbent that where the complaint raises questions, answers must be sought even at the expense of calling an independent investigation.

C. Conclusion

In this thesis the author has presented: a background of the law which is the foundation of the vast areas of civilian personnel law existing today;

problem areas in which judge advocates and courts have found themselves in recent years; protection afforded the employee in grievance procedures, adverse actions, and appeals; and the role of the judge advocate in relation to all of the foregoing. The judge advocate is responsible to the commander for legal advice on all of these matters.

The author believes that in order for the judge advocate to truly be the Army's lawyer, the restraints imposed upon the judge advocate in regard to advising the civil servant stationed in the United States must be removed so as to permit the extension of group legal service to civil servants, and thereby, provide the prospective civil servant with additional incentive to join governmental ranks, and to renew in employed civil servants a confidence in administrative remedies.

APPENDIX

GRIEVANCE PROCEDURES

The first step in all three types of grievances directs the employee to go to his immediate supervisor with his complaint. Where the employee feels that his immediate supervisor will not act fairly he may go to a superior authority.[87]

A type I grievance, which normally involves a minor problem such as entitlement to leave, is first presented to the immediate supervisor for resolution. If the grievance persists, there is a meeting of the employee, his representative, and supervisor, and an official who is familiar with the law or policy relating to the grievance. This second step is informal except that a memorandum for record is prepared by the employee's supervisor for distribution to all parties.

If there is still no agreement, and as a third step, the employee may submit a written grievance to the activity commander. Before the written grievance is reviewed it is

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[87]CPR E 2.2-2 (22 June 1962).

sent to the activity official who considered the grievance during the second step. The activity official reviews

> the matter again and determines whether the facts warrant any change in the decision which resulted from the previous discussion. If no change is warranted, the responsible official will state his views and forward the grievance through the local command to the appropriate headquarters for further consideration.[88]

Intermediate command levels review the file and may dispose of the complaint. If the matter relates to a regulation or policy of a command, the command concerned will make a decision and inform the employee of both the decision and the fact that the decision is final. Where Headquarters, Department of the Army, considers the regulation, policy, or procedure, the staff office having cognizance over the matter reviews the case, makes a final decision, and replies to the employee through channels.

Type II grievances "usually involve attitudes and opinions rather than regulatory or policy questions per se."[89] An involuntary assignment is an example of a type

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[88]CPR E 2.2-4 (22 June 1962).

[89]CPR E 2.3 (22 June 1962).

II grievance.

The more serious nature of this type grievance necessitates additional safeguards. These safeguards are: the employee's option to have a representative from the civilian personnel office at his side during the first step of the grievance procedure; and, a requirement that the supervisor make a memorandum for record for all concerned in the initial confrontation.

The requirement for a copy of the memorandum for record to be provided the employee raises the possibility of a collateral issue over what the contents of the memorandum should contain. The apparent remedy is to either start a second grievance based on the memorandum or ask the employee to submit his own version of what happened. The latter of the two alternatives seems the most economical. Regardless of method, however, the official at the second step of the procedure will have to make his own determination as to what the initial problem was and what remedy, if any, exists for its solution.

The second step calls for the grievance to be reduced to writing and submitted to the commanding officer. The writing must give the exact nature of the grievance, the corrective action sought, and the names of any witnesses the petitioner wants interviewed. It

must also state "that there was informal consideration of the grievance."[90] The later requirement has the earmarks of being an administrative requirement to have exhausted administrative remedies up to the point in time concerned. Such a requirement serves at least to assure that employees with problems soluble at low echelons do not place an unnecessary burden on higher officials.

The grievance goes through a chain of command and if at any level a supervisor feels that the decision of the supervisor at the first step was unjust or unwarranted, he may return the case to the appropriate office and inform the employee of the action. If there is an investigation, the investigating official may have an informal meeting with the employee, his representative, and management officials involved. The investigating official prepares a summary memorandum report of his inquiry, his findings, and conclusions, and submits it to the commanding officer with a copy to the employee.

If the grievance remains unresolved after the commanding officer has acted on the summary report of the investigating official, the grievance enters the third

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[90] CPR E 2-3a(1) (22 June 1962).

and final step of review by the major commander. The employee may not appear in person but must affirmatively assert that the decision is not satisfactory, the reasons therefor, and what action would be satisfactory. The grievance is forwarded through intermediate commanders for responsive comments before reaching the major commander. Since the employee must be specific in his grievance demands the comments of the intermediate commanders should also be responsive to the issues raised. Inability to make a responsive comment should be considered as one symptom of a need for further investigation. The major commander informs the employee of his decision, his reasons for the decision and that the decision is final within the Department of the Army.

The final type of grievance, type III,[91] contemplates the normal day-to-day situations which reflect purely local situations. However, "When a grievance of this type alleges actual mismanagement on the part of supervisory personnel, consideration should be given to treating it as a matter appropriate for investigation by an inspector general or a board of officers rather than

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[91]CPR E 2.4 (22 June 1962).

as a grievance."[92]

The first step of the procedure, as in Types I and II, again requires that the employee present the grievance to the supervisor to at least clarify the problem.

> When a request for reconsideration of a withheld step increase or request for review of an admonition ... is received, it should be processed beginning with the Third Step of this procedure.[93]

In the second step, the supervisor makes prompt arrangements for a discussion on the matter between employee, his representative, if any, the supervisors and the officials at the activity normally having authority to make decisions on the matter involved in the grievance.

Failing to reach accord, the third step becomes operative and the employee must submit his grievances in writing to the commander of the activity. The grievance must specify the issue involved, and the corrective or remedial action sought. The employee is advised that, if he requests, a grievance examiner or other impartial person will be designated to conduct an investigation. The investigating official's report goes through those

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[92]CPR E 2.4-1B(2) (22 June 1962).

[93]CPR E 2.4-2b (22 June 1962).

persons who considered the grievance during the second step to the commander of the activity. If the persons who participated in the second step are of the same disposition after reconsideration of the report, they will state their views and forward the grievance to the commander of the activity for a final decision. The commander reviews the file and may request such additional information or investigation as appears necessary. The commander's decision is transmitted to the employee and if an investigation has been conducted, a copy of the investigating official's report will be attached.

If the grievance was a request for reconsideration of a withheld step increase and the decision is not acceptable to the employee, he will be advised of his right to further appeal to the Board of Appeals and Review, United States Civil Service Commission. In other cases, the decision of the activity commander's decision is final.

An employee has an absolute right to have a representative at any stage of grievance proceedings. He has absolute discretion as to who his representative will be and as to how he desires his case to be handled. Where an employee organization having exclusive recognition is concerned, the organization has a right to have their own agent present at the discussions between management and

the employee. The employee acts independently of the union unless otherwise agreed to by the employee.[94] It is apparent therefore that the union acts as an observer and has no standing as to that particular employee and his particular problem.

Whether the employee is represented or not, it is imperative that a full accounting of all facts be made. Witnesses and the representative must be free from intimidation. An atmosphere conducive for unemotional testimony promotes a free exchange of conversation and diminishes the chance of making irrelevant and damaging remarks.

The grievance could be arbitrated where the employee organization agreement contains such a provision and the organization is recognized as the exclusive representative but arbitration decisions are advisory only.

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[94] FPM ch. 771, subch. 1-7e (21 July 1967).

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