A GUIDE FOR LINE OF DUTY INVESTIGATING OFFICERS

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I. INTRODUCTION

A. References.

1. Army Regulation (AR) 600-8-4, 15 Apr. 04, Line of Duty Policy, Procedures and Investigations.

2. Department of the Army (DD) Form 261, Report of Investigation, Line of Duty and Misconduct Status.

3. Article 136, Uniform Code of Military Justice (UCMJ).

4. Article 31, UCMJ.

5. DA Form 2823, Sworn Statement.

6. DA Form 3881, Rights Warning and Waiver Certificate.

7. DA Form 2173, Statement of Medical Examination and Duty Status.

B. Purpose and Scope.

1. The purpose of this guide is to assist officers who have been appointed to serve as Line of Duty investigating officers under the provisions of AR 600-8-4. This guide is designed to assist the investigating officer in conducting the Line of Duty investigation and completing the report. The guide addresses only the formal Line of Duty investigation and does not address presumptive Line of Duty determinations or informal Line of Duty investigations.

2. This guide is intended to supplement, not replace, AR 600-8-4. The investigating officer should use this guide in conjunction with the regulation. If the guide conflicts with the regulation in any respect, the regulatory guidance controls.

C. Obtaining Assistance.

1. The investigating officer must seek legal advice before, and may seek counsel at any time during, the Line of Duty investigation. Investigating officers should contact the Administrative Law Division (753-3756), for an initial briefing and advice during the investigation.

2. Early coordination with a judge advocate will resolve potential problems before they are identified in the subsequent mandatory legal review. The judge advocate can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The judge advocate's role, however, is to provide advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer.

II. PRELIMINARY MATTERS

A. Background.

1. Line of Duty analysis begins with the premise that every Soldier who incurs an injury or disease while properly performing as a member of the Army is entitled to certain benefits. These benefits include pay and allowances, accrual of service and leave, and, in some cases, disability retirement. The Line of Duty system helps determine who is eligible to receive these benefits. A Soldier will receive these benefits only if the disease, injury, or death is determined to have been caused "in the line of duty - not due to own misconduct."

2. A Line of Duty investigation must be conducted whenever a Soldier contracts a disease, incurs a significant injury that incapacitates him/her from the performance of duty, or dies. Presumptive determinations and informal investigations finding "in line of duty - not due to own misconduct" may be made in limited circumstances. A formal Line of Duty investigation is required whenever the finding is "not in line of duty." A formal Line of Duty investigation is also required if the disease, injury, or death occurs under strange or doubtful circumstances or is apparently due to misconduct or willful negligence, such as those involving drug or alcohol abuse, self-inflicted injuries, and those incurred while absent without leave or while on an other than active duty status.

B. Appointing Authority.

The commander who exercises Special Court-Martial Convening Authority (BDE O6) over the Soldier involved is normally the appointing authority. If circumstances require the initiation of a Line of Duty investigation, the appointing authority will designate a disinterested commissioned or warrant officer, senior in grade to the Soldier being investigated, to serve as the investigating officer. The appointment of the investigating officer must be in writing.

C. Duties of Investigating Officer.

The primary duties of an investigating officer are to become familiar with the applicable provisions of AR 600-8-4; to collect relevant evidence concerning the incident under investigation; to be thorough and impartial; to make findings supported by exhibits; to prepare the report on DD Form 261; to conduct and complete the investigation in a timely manner; and to submit the report to the appointing authority. The investigating officer must complete the report within 50 calendar days of the occurrence of the disease, injury, or death.

D. Mission of Investigating Officer.

The mission of the investigating officer is to conduct an investigation and prepare a report documenting the dates, places, persons, and events surrounding a Soldier's disease, injury, or death. The investigation should discover the evidence necessary to resolve the underlying issues of a Line of Duty investigation and the report should concisely present and preserve that evidence. The report should answer the following questions: What was the Soldier's duty status when the disease, injury or death occurred? Did the Soldier's intentional misconduct or willful negligence cause the disease, injury, or death?

E. Line of Duty Issues.

1. There are two basic issues in line of duty determinations: 1) the duty status of the Soldier (whether the disease, illness, injury, or death occurred in the line of duty) and 2) the characterization of the Soldier's conduct (was the injury, illness, disease, or death caused by the Soldier's own misconduct).

2. As a general rule injury, disease, or death directly caused by the individual's misconduct or willful negligence is not in the line of duty, and it is due to misconduct (NLD-DOM).

a. Intentional misconduct is any wrongful or improper conduct that is intended or deliberate.

b. Willful negligence is the conscious and intentional omission of the proper degree of care under the circumstances.

F. Line of Duty Determinations.

There are only three possible line of duty determinations: In line of duty, not due to own misconduct (LD); Not in line of duty, not due to own misconduct (NLD-NDOM); and Not in line of duty, due to own misconduct (NLD-DOM).

G. Presumptions.

1. A Line of Duty investigation begins with the presumption that a Soldier's disease, injury or death was incurred "in the line of duty - not due to own misconduct." The presumption applies to both the Soldier's status and conduct. It may be rebutted only by substantial evidence that the Soldier was not in the line of duty or that the disease or injury resulted from his or her own intentional misconduct or willful negligence. The following examples describe circumstances that may rebut this presumption.

a. The injury or disease was incurred or contracted while the individual was neither on active duty nor engaged in authorized training in an active or reserve status.

b. The injury or disease was incurred or contracted during a period of unauthorized absence.

c. The injury or disease was caused by the intentional or willful negligence of the Soldier.

2. There are other presumptions in a line of duty investigation that are considered true unless rebutted with substantial evidence.

a. There is a presumption that the Soldier was in sound physical and mental condition upon entering the service.

b. There is a presumption that any disability or death that resulted from a pre-existing injury or disease was caused by service aggravation. Specific findings of natural progression of the pre-existing injury or disease, based on well-established medical principles, as distinguished from medical opinion alone, are enough to overcome the presumption of service aggravation.

c. There is a presumption that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide. Evidence which establishes merely the possibility of suicide, or raises the suspicion of death due to suicide will not overcome the aforementioned presumption. Only substantial evidence showing intentional misconduct or willful negligence, of

a greater weight than supports any other conclusion, will overcome this presumption (Refer to AR 600-8-4, paragraph 4-11 and Appendix B-10).

H. Standard of Proof.

The investigating officer's findings must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence must show that it is more likely than not that the investigating officer's findings accurately document how the disease, injury, or death occurred. This standard of proof is often referred to as a "preponderance of the evidence," and is less demanding than the "beyond a reasonable doubt" standard required in criminal proceedings.

I. Rules of Evidence.

1. Because a Line of Duty investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. The evidence that may be considered by the investigating officer is limited by only a few rules.

a. The information must be relevant and material to the matter or matters under investigation. "Relevant" means the information is related to the Line of Duty issue being investigated. "Material" means the information is important in proving or disproving a fact important to that issue.

b. The investigating officer may not consider the results of polygraph examinations without the subject's permission.

c. The investigating officer may not consider privileged communications between husband and wife, priest and penitent, or attorney and client.

d. The investigating officer may not consider an involuntary statement by a Soldier regarding the origin, incurrence, or aggravation of his or her own disease or injury.

2. The investigating officer must maintain the original copies of the documentary evidence. When it is impossible to attach the original document to the report, the investigating officer must state why the original cannot be attached and where it is located. For example, if the local civilian police are unwilling to turn over the original accident report to the investigating officer, the investigating officer may include a copy with a note that the original is in the custody of the local police.

III. CONDUCTING THE INVESTIGATION

A. Preparation.

1. The investigating officer must be personally and professionally prepared to undertake this important task. The investigation must take precedence over all normal duties. The investigating officer should ensure that his immediate commander is aware of the appointment and should make an effort to resolve all personal commitments so that he will face as little interference as possible during the investigation.

2. As soon as the investigating officer receives appointing orders, he/she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation, beginning with the date orders are received. He/she should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise.

B. Developing an Investigative Plan.

1. As previously noted, the investigating officer is responsible for conducting an investigation to ascertain dates, places, persons, and events surrounding the circumstances of the disease, injury, or death of the Soldier and to prepare a report. His/her primary duty is to gather and consider evidence, and make findings of fact supported by exhibits. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of an understanding of the facts required to reach a determination regarding line of duty and a strategy for obtaining the necessary evidence.

2. The investigating officer should see AR 600-8-4, paragraph 3-8(e)(2) while developing his investigating plan. The plan should include a list of the documents and witnesses that may provide information regarding the Soldier's disease, injury, or death. The investigating officer should review and, if necessary, modify the investigative plan as the investigation proceeds.

3. The investigating officer should begin the planning by identifying the information already available, and determining what additional information must be obtained before findings of fact and a determination of line of duty can be made. Establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation is an important part of this process. In all cases of suicide or suicide attempts, for instance, the investigating officer must obtain a statement from a mental health officer regarding the probable causes of the self-destructive behavior.

4. The investigating officer must ensure that the investigation contains enough pertinent information and data to enable later reviews to be made without additional investigation being required. Also, the failure to obtain substantial evidence during the investigation may result in a legally insufficient Line of Duty investigation.

C. Collecting Documentary Evidence.

The investigating officer will likely need to collect documentary evidence such as hospitalization or clinical reports, laboratory reports, autopsy reports, records of coroner's inquests or medical examiner's reports, pathological and toxicological studies, reports from boards of inquiry for

missing persons, existing witness statements, accident or police reports, and photographs. He can save valuable time and effort by obtaining this information at the beginning of the investigation. If civilian authorities are unwilling to release the documents, the investigating officer should request that the appropriate military authorities obtain the information. Also, the investigating officer should personally inspect any location important to the incident being investigated and take photographs, if appropriate.

D. Witness Testimony.

1. Witness testimony will be required in most cases. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically should be documented in a memorandum for record.

2. Evidence obtained from witnesses is information that will be used to prove or disprove issues of fact. Evidence gathered from witnesses can be direct (a witness stating A shot B), or indirect (a witness stating that B was alone in a room, A went into the room and closed the door, a gunshot was heard, A left the room and the witness went into the room immediately after A left and found that B had been shot).

3. Witness statements should be taken on DA Form 2823. Legible handwritten statements are ordinarily sufficient. If the witness' testimony involves technical terms that are not generally known outside the witness' field of expertise, the witness should be asked to define the terms the first time they are used. Likewise, if the investigating officer consults with a medical professional regarding the status of the Soldier's injury or disease, he should document the basis of the professional's opinions regarding the Soldier's condition.

4. Sworn statements carry more weight than unsworn statements and are the preferred form of evidence; however, persons may be sworn at the discretion of the investigating officer. Under Article 136, UCMJ, investigating officers are authorized to administer the oath required to provide a sworn statement. Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness' location.

5. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the investigating officer should discuss this matter with the Administrative Law Division (Labor Counselor), Yongsan Law Center. Commanders and supervisors, however, have the authority to order military personnel (other than the Soldier who is the subject of the investigation) and to direct Federal employees to appear and testify.

E. Rights Advisement.

1. A Soldier may not be required to make or sign a statement relating to the origin, incurrence, or aggravation of his or her own disease or injury. A document attesting that this warning was provided to the Soldier must be attached to the DA Form 2173 if the Soldier is asked to make any statement, oral or written. The investigating officer may consider a statement by the Soldier only if it was voluntarily provided after such advice was given.

2. If the Soldier is suspected or accused of any offense under the UCMJ, the investigating officer must advise the Soldier of his or her rights under Article 31, UCMJ, and of his or her right to legal counsel. The investigating officer should use the DA Form 3881 to document that these warnings were given. The investigating officer must give these warnings at the beginning of the interview unless he becomes aware of the Soldier's involvement in criminal activity only after the interview has begun. In such cases, the warnings must be provided as soon as the investigating officer suspects that the Soldier may have been involved in criminal activity. If the Soldier invokes his or her rights and requests an attorney, all questioning must cease immediately. Questioning may resume only in the presence of the Soldier's attorney, if the Soldier consents to being interviewed.

F. Scheduling Witness Interviews.

1. The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed with another. Organizing the witness interviews will save time and effort that would otherwise be spent re-interviewing prior witnesses concerning information provided by subsequent witnesses.

2. The investigating officer should identify and list the witnesses who are likely to provide the best information. Generally, the witnesses who will provide relevant background information and will frame the issues should be interviewed first. The witnesses who are most closely involved with the incident and the Soldier who is the subject of the investigation should be interviewed later, as the key issues are developed. This sequence will allow the interviews of critical witnesses to be as thorough as possible.

3. The investigating officer should concentrate his efforts on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, he should seek information that supports or refutes information already obtained. At the end of the interview, the investigating officer should ask if the witness has any other information relevant to the inquiry and if he or she knows anyone else who might have useful information.

4. At some point, there will be no more witnesses available with relevant and useful information. The investigating officer need not interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, every witness does not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer should not prematurely terminate an investigation because a few witnesses give consistent testimony. The IO should coordinate with the witness' commander or civilian supervisor, as applicable, to arrange for the interview(s).

G. Conducting Witness Interviews.

1. Prepare for the interview. Investigating officers should review the information required from the witness and prepare a list of questions or key issues to be covered. Generally, the investigating officer should begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, he should follow up with narrow,

probing questions, such as, "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored after the general sequence of events has been established.

2. Interview the witness in private. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

3. Focus on relevant information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be material and relevant to the matter being investigated.

4. Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the interview is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness' own words.

5. Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings. This precaution is recommended to eliminate possible influence on testimony of witnesses yet to be interviewed. Witnesses, however, are not precluded from discussing matters with their own legal counsel.

H. Situations to Avoid.

1. The investigating officer must not make promises that he cannot keep, such as promises of immunity, confidentiality, or promises of the type or extent of action that will or will not be taken in a particular case.

2. The investigating officer must not discuss what the findings and recommendations may or may not be with anyone except the appointing authority or a judge advocate.

3. The investigating officer must not have verbal or physical confrontations with witnesses. If problems arise, he should report the incident to the appointing authority.

4. The investigating officer must not conclude his consideration of the matter before all available evidence has been gathered. If he does so, he is likely to gather only evidence that supports his preconceived conclusion.

IV. CONCLUDING THE INVESTIGATION

A. Preparing Findings.

1. After all the evidence is collected, the investigating officer must review the evidence and make findings of fact. The investigating officer should consider the evidence thoroughly and

impartially, and make findings of fact that are supported by the documentary evidence and witness testimony.

2. Facts: To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent?

3. Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers may rely on the facts and any reasonable inferences that may be drawn from those facts. Findings (including findings of in the line of duty, or no misconduct or willful negligence) must be supported by the evidence that is included in the report. Investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Exhibits should be numbered in the order they are referenced.

a. Line of Duty Finding in Cases of Injury or Disease: When the investigating officer has completed the investigation and prepared the report, the investigating officer will mark the appropriate Line of Duty finding in DD Form 261, item 10. In every formal investigation involving injury or disease (but not death), the investigating officer will determine the duty status of the Soldier and whether or not the Soldier's own intentional misconduct or willful negligence caused his or her injuries. The investigating officer must consider the rules in AR 600-8-4, Appendix B, as he analyzes the evidence.

b. Line of Duty Finding in Death Cases: In death cases the investigating officer must ascertain all significant and relevant facts surrounding the death of the Soldier and include them in the report of investigation.

B. Completing the Report.

1. After considering all the evidence and determining the Line of Duty status, the investigating officer should complete DD Form 261. If additional space is needed, the investigating officer may continue the report on a separate sheet of paper, identifying at the top the name of the individual concerned, social security number, and date of injury, death, or onset of disease. The following information will be included in DD Form 261, item 10g, when appropriate.

a. A summary of the circumstances and basis for findings.

b. Clarification of any discrepancy in the date and place of injury or death or in the evidence as to the duty status of the member.

c. The reason for not interviewing the person whose line of duty status is being investigated or any witnesses whose testimony may be material.

d. Comments of the investigating officer on the credibility of the witnesses.

e. A list of exhibits.

f. Documentation will be lettered and attached as exhibits to DD Form 261 in the order below.

(1) Instrument that appointed the investigating officer. Officers acting with delegated authority must include a copy of the delegation document.

(2) Statement of Medical Examination and Duty Status, DA Form 2173.

(3) Documentation attesting that the statement solicited from a injured Soldier regarding the incurrence or aggravation of his disease in compliance with AR 600-8-4, paragraph 3-3b.

(4) Report of autopsy findings.

(5) Report of inquest.

(6) Statements of witnesses and persons being investigated.

(7) Photographs, maps, charts, etc., as appropriate.

(8) Copy of letter of sympathy written to next of kin in death cases.

(9) Statement from medical authorities regarding period of hospitalization because of injury or disease if the information on the DA Form 2173 is inadequate.

(10) Any other relevant information.

2. Additional instructions for completing the DD Form 261 are located AR 600-8-4.

C. Notification of Adverse Finding and Opportunity to Respond.

1. Where the investigating officer makes a finding adverse to the Soldier's interests (NLD-DOM or NLD-NDOM), the investigating officer must notify the Soldier of the proposed adverse finding and provide him or her a copy of the report and its supporting evidence. The investigating officer must advise the Soldier that he or she has the right not to make a statement and the opportunity to submit a rebuttal.

2. If the Soldier is not locally available, the notice should be sent to the Soldier by certified mail, return receipt requested. The signed receipt must be attached as an exhibit to the report to establish that the Soldier received notice of the contemplated adverse finding. If the Soldier does not respond within a reasonable time, the investigating officer may conclude the investigation and forward the report to the appointing authority. If the Soldier submits a response, the investigating officer must consider the rebuttal, amend his findings if necessary, and then forward the report to the appointing authority.

D. Appointing Authority Referral to the Office of the Staff Judge Advocate.

1. Before acting upon the investigating officer's findings, AR 600-8-4 mandates that the appointing authority refer the Line of Duty investigation to the Administrative Law Division for legal review and opinion. The judge advocate review will: determine whether legal requirements have been complied with; check for errors; determine whether any errors materially affect the Soldier's rights; determine whether the findings are supported by substantial evidence or the lack of it; and examine the investigation to see if potential affirmative claims may be involved (e.g., where medical care has been furnished and the Government may be entitled to recover third party medical claims).

2. The legal review must be forwarded with the report through the appointing authority to the approving authority. If legal objections to the report exist, the appointing authority must return the investigation to the investigating officer for correction. If the legal issues cannot be corrected, the appointing authority must ensure that the legal review is provided to the approving authority for appropriate action.

E. Appointing Authority Responsibilities.

The appointing authority may approve or disapprove the findings of the investigating officer. If the appointing authority disapproves the findings, he or she must state the reasons for disapproval and give new findings. If the new findings are adverse to the Soldier, the appointing authority must advise the Soldier of his right not to make a statement and of his opportunity to submit a rebuttal. If the Soldier does not respond within a reasonable time, the appointing authority must forward the new findings to the Administrative Law Division for legal review. If the Soldier submits a response, the appointing authority must consider the rebuttal, make changes if necessary, and then forward the report for legal review. If there are no legal objections to the new findings, the appointing authority must then submit the report and the legal review to the approving authority.

F. Approving Authority Responsibilities.

1. The approving authority will review the investigation for completeness and accuracy and then approve or disapprove the findings of the lower headquarters "By authority of the Secretary of the Army." If the approving authority disapproves the findings, he or she must state the reasons for disapproval and give new findings. If the new findings are adverse to the Soldier, the approving authority must advise the Soldier of the right not to make a statement and the opportunity to submit a rebuttal. If the Soldier submits a rebuttal, the approving authority must consider this response. Finally, the approving authority must submit the new findings for legal review before acting on the Line of Duty determination.

2. In injury or disease cases, the approving authority will inform the Soldier of the final outcome of the Line of Duty investigation. The approving authority will withdraw exhibits that contain classified information and CID reports and then mail the report to the commander of the unit where the Soldier is assigned, with a request that it be forwarded if the Soldier has been transferred. The approving authority will note the date that the copy was furnished on the DD Form 261. The Soldier's copy will include a letter informing him or her: of the right not to make a statement and the opportunity to appeal; and if certain documents have been withdrawn, why they were removed, and who may release the documents to the Soldier.

G. Opportunity to Appeal.

The Soldier has 30 days from receipt of notice of an adverse determination to appeal. Untimely appeals must include a full explanation of the reason for the delay. The Secretary of the Army, however, may change a Line of Duty determination at any time.