

USALSA Report

United States Army Legal Services Agency

Litigation Division Note

The Military Personnel Review Act of 1997

Section 551 of the National Defense Authorization Act for Fiscal Year 1996¹ directed the Secretary of Defense to establish an advisory committee to consider issues relating to the appropriate forum for judicial review of administrative military personnel actions. On 29 March 1996, the Secretary of Defense appointed a five member Advisory Committee on Judicial Review of Administrative Military Personnel Actions (Advisory Committee). The committee's objective was to make findings and provide recommendations as to (1) whether the current scheme of review of administrative military personnel actions in the United States federal district courts was appropriate and adequate; and (2) whether review of military personnel actions should be centralized in a single court and, if so, in which court that jurisdiction should be vested. The Advisory Committee was directed to respond to Congress with its findings and recommendations by 15 December 1996.²

After holding monthly meetings and soliciting information from correction board representatives and the various services' litigation attorneys and senior enlisted advisors, the Committee concluded that "[t]he present system serves no one well."³ They found "that the complex, confusing, and, at times, inconsistent procedural and substantive rules in the various United

States district courts and United States Court of Federal Claims do not appropriately or adequately serve our nation's military personnel, its veterans, or the military services",⁴ and that the present system of judicial review "requires improvement."⁵ The Committee concluded that "it [was] essential to change the current system into one that is straightforward"⁶ so as to have a "more equitable and efficient system."⁷ To accomplish that, the Committee recommended that Congress adopt their legislative proposal, known as the Military Personnel Review Act of 1997. A number of provisions of this new legislation are noteworthy.

First, the Act would incorporate a jurisdictional requirement for exhaustion of administrative remedies before judicial review;⁸ a claimant would be required to pursue his available administrative remedies before the service's Board for Correction of Records⁹ prior to seeking relief in federal court.¹⁰ The service Secretary would then be required to provide a concise rationale for decisions failing to grant complete relief in such detail that would be satisfactory for purposes of judicial review.

Second, the Committee recommended that Congress adopt strict time limitations within which a claimant could seek relief from the appropriate Correction Board. A claimant would have three years from the date of discovery of an error or injustice to file his application.¹¹ The Board could excuse a failure to file within three years if it found it in the interest of justice to do so,

1. Pub. L. No. 104-106, § 551, 110 Stat. 318 (1996).

2. The subject of judicial review of military personnel decisions has been under considerable scrutiny the last few years. A proposed *Military Personnel Review Act of 1995*, never considered by Congress, was the subject of an *Army Lawyer* article in December, 1995. It was an excellent summary of the Act's history and of other proposals to reform this area of law. See Major Michael E. Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix for Darby v. Cisneros*, ARMY LAW., Feb. 1997, at 3.

3. Report of the Committee on Judicial Review of Administrative Military Personnel Actions of the Department of Defense at 10.

4. *Id.* at 1.

5. *Id.* at 10.

6. *Id.* at 9.

7. *Id.*

8. Currently, the majority of federal circuits require a plaintiff to exhaust his administrative remedies before bringing an action in federal court. See, e.g., *Duffy v. United States*, 966 F.2d 307 (7th Cir. 1992); *Hodges v. Callaway*, 499 F.2d 417 (5th Cir. 1974).

9. The Army Board for Correction of Military Records is convened on behalf of the Secretary of the Army pursuant to 10 U.S.C. § 1552 (1992).

10. With this provision the Committee specifically intended to satisfy the requirements of *Darby v. Cisneros*, 509 U.S. 137 (1993). In that case, the Supreme Court held that courts do not have authority to require exhaustion of administrative remedies as a prerequisite to judicial review unless mandated by statute or agency rules.

11. With this provision, the Committee intended to nullify the District of Columbia Circuit's opinion in *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994). The *Detweiler* court held that the tolling provision of Section 205 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, suspended the ABCMR's three-year statute of limitations during a soldier's period of active service.

but its decision to decline the review of an untimely application would not be subject to judicial review.

Finally, jurisdiction to hear appeals of the Correction Board's final decision would lie exclusively with the Court of Appeals for the Federal Circuit.¹² That Court would hold unlawful and set aside any action it found arbitrary, capricious, or otherwise not in accordance with law.

If adopted, the Military Personnel Review Act would establish a uniform, efficient method of reviewing military personnel decisions. Lieutenant Colonel Chapman.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)* which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically which appears in the environmental files area of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 4, number 6, is reproduced below.

Clean Air Act Credible Evidence Rule

On 13 February 1997, the United States Environmental Protection Agency (USEPA) issued its "credible evidence" rule that allows any "credible" data, such as continuous emissions monitoring data, parametric data, engineering analysis, witness testimony or other information, to be used as evidence to determine whether a facility is violating emission standards under the Clean Air Act.¹³ The rule does not alter current emission standards, create any new monitoring or reporting requirements, or change the compliance obligations for the regulated community. Previously, the Agency usually used reference test methods--specific procedures for measuring emissions from facility stacks--to determine compliance. The rule makes it explicit that regulated sources, the EPA, States and citizens all can use non-reference test data to certify compliance or allege non-compliance with the CAA permits. In some instances, the use of non-reference test data to prove compliance will be less expensive than using reference tests. The rule will be published in the Federal Register soon. This rule, while heavily criticized by industry, should not have a major impact on enforcement

actions against federal facilities. Lieutenant Colonel Olmscheid.

Did you know? . . . Making cans from recycled aluminum cuts related air pollution (e.g., sulfur dioxides, which create acid rain) by 95%.

Ethics, the Internet, and the Environmental Attorney

You are the new attorney for environmental matters on your installation. You are excited as you receive your first project: assist Environmental Law Division (ELD) counsel in drafting a response to a Comprehensive Environmental Response, Compensation, and Liability Act section 104(e) request from EPA. You turn to your computer to use your e-mail and Internet systems to request assistance from other personnel in the investigation for your response. You then decide to e-mail your draft response to the ELD counsel for review. After all, e-mail is cheaper and faster than the fax or overnight or regular mail. Your other work picks up at the office, the due date for EPA's request is approaching fast, and you find yourself unable to find the time to finish the response. You decide that you will finish the response at home this Saturday and send it to ELD through the Internet from your new home computer. What a great idea . . . or is it?

Army environmental attorneys are finding the Internet and e-mail indispensable tools for effective and efficient communication. But with little guidance from the courts and the legal profession on the ethical ramifications, the attorney who uses the Internet could find himself or herself in the middle of a number of ethical problems, including the breach of attorney-client privilege. Here are some important points to consider before jumping onto the Internet.

Identify what form of technology you are utilizing and your potential audience. While e-mail within your office may maintain the attorney-client privilege and confidentiality, the same is not true for e-mail sent over the Internet, especially if you are going to use the Internet from outside sources, such as your home computer. Check with your Information Management Office (IMO) to assess the different modes of technology you are utilizing. Ask your IMO how many people have access to your information before it gets to its destination. You will be surprised at the answer.

Define whether the information you plan to send over the Internet is classified or privileged. If the information is classi-

12. Currently, plaintiffs obtain judicial review of military personnel actions in all district courts and in the United States Court of Federal Claims. Appeals of those decisions go to the federal circuit courts of appeals. The proposed legislation requires that an applicant bring his claim in the Federal Circuit within 180 days of the ABCMR's final decision. The legislation would leave unaffected, however, the district court's jurisdiction in cases over which the Correction Boards lack authority, such as review of court-martial convictions.

13. 42 U.S.C. §§ 7401-7671q (1996).

fied or privileged, then you should not send that information over the Internet unless you are using a protective device known as encryption. If the new environmental lawyer in the above scenario submits his or her draft response or other sensitive information unencrypted through the Internet to ELD from a home computer, he or she could be facing an ethics violation. The ethical and evidentiary issues involving the transmission of an unencrypted, yet classified or privileged, message over the Internet have not been addressed by many states. The states of Iowa and Arizona, however, have stated that attorneys should encrypt their messages before sending them through the Internet to avoid a breach of confidentiality.¹⁴ You should check with your local bar for recent opinions on the issue.

Consider whether the missent or intercepted unencrypted e-mail is a waiver of privilege or confidential communications. The answer may depend on your local state bar. As with any waiver of privilege or waiver of confidentiality, you should look to whether your State uses either the traditional rules, in other words, finds it a waiver, or a more recent trend that bases the answer on the facts of the situation. If your State follows the latter, your answer may depend on whether the disclosure was intentional or inadvertent, and, if inadvertent, on the impact of disclosure.

To protect yourself, talk to your IMO about the security of your e-mail and the Internet. Ask whether you can obtain the encryption software to protect your sensitive e-mail. This is a costly method of protection and may not be readily available to many personnel.

Discuss this issue with your client. Explain to your client and support personnel the risks of the Internet and the potential for unconfidential communications. Make an informed decision and establish a policy on whether or when to use the Internet. Remember it is necessary to obtain your client's consent before you disclose any confidential information through the unsecured Internet.

Consider placing the following warning on your Internet e-mail:

This Internet e-mail contains confidential, privileged information intended only for the addressee. Do not read, copy or disseminate it unless you are the addressee. If you have received this e-mail in error, please call us immediately at _____ and ask to speak to the message sender. Also, please e-mail the message back to the sender at _____ by replying to it and then

deleting it. We appreciate your assistance in correcting this error.

This warning will communicate your intent that this information is considered confidential, and places a duty on the receiver to avoid reviewing the contents and abide by the instructions. Some, however, feel warnings are not effective and argue that encryption is the best protection.

When you consider using e-mail or the Internet to assist you on your next project, think again. Do not send information through the Internet that you would not want published in the local paper. Consider obtaining a software package that encrypts your messages so you can handle those urgent situations by using the Internet. Also, consider obtaining encryption software on your home computer for those occasions when you want to e-mail your work from home. Ms. Greco.

Did you know? . . . The wood pallet and container industry is the largest user of hardwood lumber in the United States.

Considering NAFTA

Even though you may not be located near the borders of Mexico or Canada, a side agreement to the North American Free Trade Agreement (NAFTA)¹⁵ regarding environmental cooperation may soon warrant your attention. The North American Agreement on Environmental Cooperation (NAAEC),¹⁶ signed by Canada, Mexico and the United States, came into force on 1 January 1994, at the same time as NAFTA. Under the NAAEC, the signatories sought to protect, conserve, and improve the environment in North America. Environmental law specialists (ELs) should be aware of the following two specific provisions within the NAAEC.

Under Article 10.7 of the NAAEC, the United States, Canada, and Mexico agreed to develop a process to consider and analyze, and provide advance notice of, actions that may have transboundary environmental impacts. The deadline for the development of a recommendation on this process is early 1997. Accordingly, the U.S. State Department and the U.S. Environmental Protection Agency initiated negotiations with Canada and Mexico to develop such a process, and are now seeking input from the Department of Defense and other federal agencies on a preliminary draft process. Issues of discussion include: notification to neighbor countries for certain categories of actions conducted within 100 kilometers of the border, notification and opportunity to comment on actions that will

14. See, e.g., Iowa Ethics Opinion 95-30.

15. Pub. L. No. 103-182, 107 Stat. 2057 (1993).

16. 59 Fed. Reg. 25,775 (1994).

likely have significant transboundary environmental impacts, and timing and detail of notifications. This office will provide further information on the details of this process as they become final or available.

As opposed to Article 10.7, Articles 14 and 15 already are in force under the NAAEC. Under Article 14 of the NAAEC, any non-governmental organization or person residing in a signatory country may file a petition asserting that a Party to the Agreement (U.S., Mexico, or Canada) failed to effectively enforce its environmental laws. The Commission for Environmental Cooperation (CEC) then determines if the petition meets the criteria in Article 14, and determines whether the petition merits a response from the concerned country. In light of the signatory nation's response, the CEC may then request the preparation of a factual record, in essence a fact-finding hearing, under Article 15 of the NAAEC. A final factual record may be made publicly available upon a two-thirds vote of the CEC's governing body. For the United States, response to petitions are submitted by the EPA, after coordination with interested federal agencies.

While several Article 14 petitions have already been filed with the NAAEC, the NAAEC recently ruled for the first time that the United States must respond to a submission by a non-governmental organization alleging ineffective enforcement of environmental laws by the United States. The petition centers upon the Army's compliance with the National Environmental Policy Act at a specific Army installation. The U.S. response to the petition was closely coordinated between the installation, this office, the Department of Justice, the Department of State, and the U.S. Environmental Protection Agency. Major Ayres.

Did you know? . . . Yard waste is the second largest component (by weight) of the municipal solid waste stream.

EPA Rethinks Hazardous Waste Identification Rules

The United States Environmental Protection Agency (USEPA) is rethinking both of the proposed Hazardous Waste Identification Rules (HWIR) that address standards for managing industrial process waste and contaminated media. The proposed HWIR-media applies only to wastes and contaminated media generated during remediation activities. Proposed in April 1996, one approach under the rule would delegate cleanup control to the States for wastes that fall below a risk-based "bright line." Industry opponents to this approach favor a "unitary" method that would exempt wastes from the Resource Conservation and Recovery Act,¹⁷ as long as they are managed under an approved State or the USEPA cleanup plan.

17. 42 U.S.C. §§ 6901-6992k (1988).

18. See 61 Fed. Reg. 65,874 (1997) (to be codified at 33 C.F.R. § 330).

While the USEPA considers other options, legislative proposals to relax remediation standards and speed cleanups are priorities for industry groups, the Senate Environment and Public Works Committee, and the House Commerce Committee. The USEPA has pushed the rule's promulgation back to Spring 1998.

The USEPA was required to finalize the HWIR-waste rule by February 1997 under a consent agreement with the Environmental Technology Council and the Edison Electric Institute. The USEPA is negotiating the rulemaking schedule with the petitioners and has received an extension of the deadline to 28 March 1997 from the court. Exit levels for hazardous constituents set in the proposed rule were based on a pathway risk assessment model which has been severely criticized. The USEPA is now negotiating for time to overhaul the risk assessment. The USEPA's Science Advisory Board made numerous recommendations for incorporating the "best available science" in a revised multi-pathway analysis. As with HWIR-media, there are legislative initiatives aimed at Congress enacting exemption standards rather than waiting for the revised risk assessment. The reworking of the risk assessment and rule could take the USEPA from two to four years; however, the litigants could push for a much shorter time frame. Major Anderson-Lloyd.

Did you know? . . . Every ton of new glass produced contributes 27.8 pounds of air pollution, but recycling glass reduces that pollution by 14-20%.

Army Corps of Engineers Revises Wetlands Permitting

On 11 February 1997, the Army Corps of Engineers (Corps) gave final notice of issuance, reissuance, and modification of the Nationwide Permits (NWP) in the Corps NWP Program.¹⁸ The original thirty-seven NWPs expired on 21 January 1997, and the new permits took effect on 11 February 1997. The changes included NWP 26, which addresses discharges of dredged and fill materials into headwaters and isolated waters of the United States--typically recognized as wetlands areas. The changes to NWP 26 reflect a Corps effort to regionalize the NWP program, especially NWP 26. During the transition to regionalized, activity-specific permits, the Corps has reissued NWP 26 as an interim permit for a period of two years. Following this period, the interim permit will be replaced by industry specific permits. The Corps expects that this change will allow for clear and effective evaluation of potential impacts to the aquatic environment, while also allowing the Corps to effectively address specific group needs.

The former NWP 26 allowed discharges of dredged or fill materials into waters of the United States provided the discharge did not cause the loss of more than ten acres of wetlands. If such activity would cause the destruction of more than one acre of wetlands, the Corps required preconstruction notice (PCN) in writing as early as possible prior to commencing the activity. Unless informed otherwise by the Corps, within thirty days of providing notice the permittee could proceed with the planned activity.

The revised NWP 26 reflects substantial changes imposed to ensure only minimal adverse effects from the use of the NWP and to provide greater protection of the aquatic environment. Most notably, the new NWP 26 only allows discharges of dredged or fill materials provided the discharge will not cause either the loss of greater than three acres of wetlands or the loss of waters of the United States for a distance greater than 500 linear feet of a stream bed. Discharges that will cause a loss of greater than one-third acre of wetlands are now required to follow the notification procedure. The PCN review period, however, has been extended to forty-five days. After this time, unless the Corps has stated otherwise, activities may proceed. Finally, all discharges causing a loss of less than one-third of an acre require filing a report with the Corps within thirty days of completing construction. The report must contain the following information:

1. The name, address, and telephone number of the permittee;
2. The location of the work;
3. A description of the work, and;
4. The type and acreage (or square feet) of the loss of waters of the United States.

The Corps is presently accepting comments regarding the proposed industry specific NWPs, and expects to publish a list of proposed permits in May 1998. Although the Corps recognizes that these changes will result in an increased workload, the Corps does not expect a delay in publishing the replacement permits. At a recent panel discussion where Deputy Assistant Secretary (Policy and Legislation) Michael Davis, of the Office of the Assistant Secretary of the Army (Civil Works), outlined the interim NWPs, one panelist representing regulated entities predicted that changing the allowable level of wetlands impact to three acres from ten would result in the Corps receiving between 500 and 1000 new applications for individual permits in wetlands areas. As a result of the increased impact, the Corps anticipates a request for increased funding to meet these demands. At the time of the discussion, there was no indication that such a request would not be approved. Captain DeRoma.

Did you know? . . . the ELD Bulletin is now available via the ELD Environmental Law Links Page (http://160.147.194.12/eld/eldlinks.htm).

ELS Update

The ELD is updating the Army ELS list. Please provide a current listing of your ELS staff to Staff Sergeant Stannard via e-mail (stannard@otjag.army.mil). Include the following information: Name of all ELSs; mailing address; telephone number; FAX number; and e-mail address. The ELD will distribute the updated list via the Internet in early April. In order to meet the April distribution date, please forward your updates no later than 1 April 1997. Lieutenant Colonel Bell.