

## The Preliminary Investigation

### REPORT OF OFFENSE

Anyone may report an offense by a soldier to the local civilian police, the military police, or the unit commander. If the soldier commits an offense off post, the civilian police will usually investigate. Military police normally investigate on-post offenses. If an offense is minor, such as a soldier disobeying an order or being late for unit formation, a unit NCO or officer will report it to the unit commander. As the company commander, you must conduct a preliminary investigation and make the initial decision about how the case should be handled, no matter how the command reviews the information.

You must ensure that all reported offenses are quickly and thoroughly investigated. You may conduct the preliminary inquiry yourself or direct someone else to do so. (See MCM, R.C.M. 303.) In serious or complex criminal cases, you should seek the help of law enforcement personnel. When collecting information that may prove or disprove allegations of misconduct, investigators should ask three primary questions:

- Was an offense committed?
- Was the suspect involved in the offense?
- What is the character and military record of the suspect?

Investigators must always remain impartial. A one-sided investigation may result in an injustice to the accused and an embarrassment to the command.

Preliminary investigations are usually informal, consisting of interviews with witnesses and reviews of police reports. Investigations must provide a thorough, factual foundation for determining what happened and what should be done. Preliminary investigations should not be confused with UCMJ, Article 32 investigations, which require sworn charges. Nor should they be confused with the procedures for administrative investigations addressed in AR 15-6.

Once a preliminary investigation is complete, you must do one of the following:

- Take no action.
- Take nonpunitive disciplinary action.
- Impose nonjudicial punishment under UCMJ, Article 15.
- Prefer court-martial charges against the accused and forward them up the chain of command with a recommendation for appropriate action.

### STATEMENTS OF SUSPECTS AND WITNESSES

Investigations may be complicated or simple. Not all cases will require formal statements; in simple cases, you may find sufficient facts without written statements. You must investigate the circumstances of alleged crimes and examine the facts relevant to the case. You should ensure that all witnesses and suspects are interviewed. Interviews should be fair and prompt. Before questioning, you must advise suspects of their rights under UCMJ, Article 31, and of their right to counsel.

A confession or admission by a suspect without a proper rights warning will not be admissible in a court-martial. A court, however, may still convict an accused because of other evidence of guilt that is admissible. **Failure to warn does not mean automatic acquittal; it means that the admission may not be presented to a court-martial.** (See MCM, 305, Military Rule of Evidence.)

After receiving the warning, a suspect may waive the right to remain silent and the right to consult a lawyer. He must waive these rights freely, knowingly, and intelligently. If a suspect indicates that he wishes to consult a lawyer, he should not be questioned until a lawyer is made available. The installation Trial Defense Service office will provide a military lawyer. If the

suspect indicates that he does not wish to answer questions, no questions should be asked. If he waives his rights, he may then be questioned about the offense.

In any case, your manner should not lead suspects to believe they are being threatened. Neither should it play down the importance of the warning. If you do either of these, a court-martial may determine that the suspect's agreement to answer questions was in response to coercion or improper inducement. The judge would then find the statement not admissible in the trial. You may decide not to question a suspect if other adequate evidence is available.

### **Rights Warning Statement**

You need not give a rights warning to witnesses who are not suspects. During the questioning, you may, however, begin to suspect that a witness was involved in an offense. The witness may appear to have been an accomplice or an accessory to the crime. You should then stop the questioning, inform the witness of the offense of which you now suspect him, and warn him of his rights as previously described. DA Form 3881 provides a convenient format to apprise individuals of their rights, and you should complete it before questioning a suspect.

### **Written Statement**

A sworn statement is the best way to record accurately and completely information obtained in an investigation. UCMJ, Article 136, authorizes investigating officers to administer oaths in conjunction with sworn statements taken in the course of a preliminary investigation.

No special form is required; however, the investigating officer may use DA Form 2823 for a witness's statement. He should use the language of the witness or suspect throughout the statement, even if the language is vulgar. Doing so ensures that the statement is the witness's and not the composition of the investigating officer. The statement may be narrative, questions and answers, or both.

The following is an appropriate oath for administering and completing the sworn statement:

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**Do you swear that the statements you have made are the truth, the whole truth, and nothing but the truth?**

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The witness should sign his name, and the officer administering the oath must then sign his own name.

You should request sworn statements primarily from persons who have direct, personal knowledge of the facts. For example, if Sergeant A provided the information to the witness, you should try to get a sworn statement from Sergeant A. Opinions and conclusions without supporting facts, however, reduce the reliability of sworn statements. You should try to get the facts on which opinions are based and encourage witnesses to provide facts rather than opinions. In each case, the witness should sign the written statement and initial it at the beginning and at the end of each page, at each erasure and correction, and at the places otherwise indicated on DA Form 2823. The initials are to avoid any question of tampering.

### **Oral Statement**

When a suspect waives his rights under Article 31 and his right to counsel but refuses to make a written statement, you should record his remarks. Oral statements may be admissible in a trial by court-martial. A suspect may make a statement about his part in an offense to a person not investigating the case, or he may blurt it out to you before he receives the rights warning. The information he provides may be admissible in a trial by court-martial as well.

## **LAWFUL SEARCHES AND SEIZURES**

You may lawfully seize soldiers' property in their units after a legal search, inspection, or inventory. An unlawful search may violate a soldier's rights and result in seized items being inadmissible in a court-martial.

## Searches

### PROBABLE CAUSE TO SEARCH

You may direct a search of any person or property in a place under your control only if you have probable cause. You may authorize searches in your company areas, but only post commanders may authorize searches or apprehensions in government quarters. (See MCM, 302, Military Rule of Evidence and MCM, R.C.M. 315.) Probable cause to search requires both of the following:

- You have a reasonable belief that evidence of the crime is on the person or at the place you plan to search.
- The information and its source are reliable.

You must have more than a suspicion, but you need not have absolute proof. In other words,

The following examples are situations in which you would have probable cause to search.

#### Example 1

A reliable person informs you that he saw the suspect earlier that night with hashish. You trust the informant because of his past association with you. You also know the information is accurate because the informant saw the incident himself. You authorize a search of the suspect's person.

**This search is lawful.** You knew both the informant and his information to be reliable.

#### Example 2

A person whose reliability is unknown to you informs you that the suspect is a drug pusher. The informant tells you that the accused has told him that he is going to Metropolis to make a "buy," he will return by train at 1900 or thereabouts, he will be carrying a brown suitcase, and he will go to room 213 in the barracks to make his sale. You advise the CID of these facts, and they in turn place the depot under surveillance. At 1900, the suspect steps off a train arriving from Metropolis. He is carrying a brown suitcase. He immediately takes a taxi to the barracks and goes directly to room 213. The CID advises you of these facts, and you authorize a search, which produces a large quantity of drugs.

probable cause lies between suspicion and knowledge. You must conclude on the basis of information presented to you that the contraband or evidence of a crime is at that time likely to be in the possession of the suspect or on the premises to be searched. Your determination that probable cause exists must be reasonable and based on facts. It may not be based solely on others' conclusions. A CID agent's, first sergeant's, or informant's awareness of sufficient facts to provide probable cause is unimportant unless the commander who orders or authorizes the search receives those facts. That commander must believe the person furnishing the information and the information are reliable before probable cause can exist.

**The search is lawful.** Although you had no prior knowledge of the informant's reliability, so much of the information he supplied proved to be correct, you had good reason to believe that the rest of the information was also reliable.

Military judges and magistrates may also issue warrants to search suspects and property subject to military control, also upon a showing of probable cause. (See MCM, Mil. R. Evid. 315.) When time permits, information supporting an authorization should be provided under oath or affirmation and in writing.

Since the law concerning probable cause is often difficult to apply, you should consult a judge advocate before authorizing a search. Doing so will not only help you avoid unlawful searches and protect soldiers' rights, but will also ensure that physical evidence will be admissible in a court-martial. Appendix A shows a completed affidavit requesting authorization to search. Appendix B shows a written search authorization. The military, however, has no requirement that either the request or the authorization be in writing.

### NO PROBABLE CAUSE TO SEARCH

The following paragraphs address searches that do not require probable cause to be lawful.

#### **Searches incident to lawful apprehension.**

A soldier maybe searched when and where he is legally apprehended. (See Apprehensions, page 3-14.) Such a search is to discover weapons and prevent destruction of evidence. The search is limited to the soldier's person and the area within his immediate control. For example, the area within his immediate control might include an open wall locker within reach, but it might not include the entire room. However, a complete search of the passenger compartment of an automobile is permissible, even if the apprehended soldier has been removed from the vehicle and cannot return to it.

**Searches of government property.** A search of government property does not require probable cause unless the person to whom the property is assigned or issued has a reasonable expectation of privacy. Generally, a person does not have a reasonable expectation of privacy in regard to government property that is not issued for personal use. (See MCM, Mil. R. Evid. 314(d).)

**Searches by consent.** Probable cause is not necessary when a person freely consents to the search. Because consent is a waiver of the Constitutional right of freedom from unreasonable searches, the government must be able to produce clear and convincing evidence that the consent was voluntary and not a submission to authority. You should have a witness to a soldier's consent to a search. If the consent becomes an issue at a trial, the witness can verify its nature. If the search then uncovers evidence of criminal conduct, the evidence will be admissible at a trial. (See MCM, Mil. R. Evid. 314(e).)

To establish voluntary consent, the suspect should be informed of both of the following:

- The legal right to withhold consent.
- The fact that any evidence found during the search can be used against the suspect.

The following examples are situations lacking probable cause to search.

#### **Example 1**

A CID agent calls you and states that he has apprehended one of your soldiers at the railroad station with marijuana on his person. The agent requests authority to search the suspect's living area. Based solely on this information, you authorize a search of the suspect's wall locker, where the agent finds more marijuana.

**The search is unlawful.** You had no evidence from which to reasonably conclude that the suspect had marijuana in his wall locker, which is located some distance from his place of apprehension. You must have more than mere suspicion.

#### **Example 2**

A reliable person informs you that three weeks ago he saw marijuana in the suspect's footlocker. Based solely on this information, you authorize a search of the suspect's footlocker.

**This search is also unlawful.** Since the reported possession was far removed in time, you had no valid reason to believe that the suspect still had any marijuana. Your being told that the suspect was seen with marijuana in his footlocker that same day would constitute probable cause and be a basis for a lawful search.

#### **Example 3**

A larceny occurs in the barracks, and \$500 and a dress are reported missing. Three days later, Private Smith, the victim's roommate, buys a stereo from the post exchange for \$350. The victim, suspicious of her roommate, informs you. Based solely upon this information, you authorize a search and discover \$200 and the dress in Private Smith's wall locker.

**The search is unlawful.** Suspicion alone does not constitute probable cause. You should have continued the investigation until more information was uncovered, such as a report that another soldier had seen the victim's dress in the suspect's wall locker.

## Seizures

Evidence in open view or in a public area such as a dayroom or an open field may be lawfully seized without probable cause and without consent. (See MCM, Mil. R. Evid. 314(j).)

The Fourth Amendment prohibits unreasonable seizure of the person. An unreasonable seizure may result in the evidence being inadmissible in a court-martial.

## CONTACTS AND STOPS

Every contact between an official and soldier is not a detention and therefore subject to the Fourth Amendment. Many contacts do not result from suspicion of criminal activity. Examples of lawful contacts include questioning witnesses to crimes and warning pedestrians that they are entering a dangerous neighborhood. These types of contacts are entirely reasonable, permissible, and within the normal activities of law enforcement personnel and commanders—they are not detentions in any sense.

Officers, NCOs, and MPs may initiate contact with persons in any place they are lawfully situated. It is difficult to define when a person is lawfully situated. Generally, this includes inspecting the barracks, making a walk-through of the barracks or unit area, and presence in any place for a legitimate military purpose.

An officer, NCO, or MP who reasonably suspects that a person has committed, is committing, or is about to commit a crime has the obligation to stop that person. He may stop both pedestrians and vehicle occupants. If the person stopped is a suspect to be questioned, the official should read him or her Article 31 and the counsel warnings. The stop must be based on more than a hunch. The official making the stop should be able to state specific facts to support the decision to stop an individual.

## APPREHENSIONS

Any officer, warrant officer, noncommissioned officer, or military policeman may apprehend individuals with probable cause. Probable cause

to apprehend requires the following:

- A reasonable belief that a crime is being committed or has been committed.
- A reasonable belief that the person being apprehended is guilty of a crime.

An example of probable cause to apprehend is when you or another reliable person have seen someone violate UCMJ, such as using marijuana, assaulting someone, breaking another's property, or being drunk and disorderly. Probable cause requires a common sense appraisal of all available facts and circumstances.

You may apprehend a soldier anywhere and any time; the only limitation is that you must have probable cause. To do so, you should identify yourself as an officer and show your ID card if you're not in uniform. Tell the soldier you are apprehending him and explain the reason, such as disorderly conduct, assault, or possession of marijuana. You may use help. Read the soldier his Article 31 rights, preferably from a rights warning card, as soon as practicable. If the soldier resists apprehension by running away or assaulting you, enlist others to help catch him; he may be prosecuted for resisting apprehension or disobeying an order. You may detain civilians until military or civilian police arrive.

Generally, with probable cause, no arrest warrant is required in the military. There is one important exception, however: **a warrant is required for any apprehension in a private dwelling, such as on-post family quarters, the BOQ or BEQ, or off-post quarters.** The barracks and field encampments are not considered private dwellings; therefore, no special authorization is needed to apprehend someone there.

If the person to be apprehended is in a private dwelling, the apprehending officer must get authorization from a military magistrate or the commander with authority over the private dwelling (usually the installation commander). Also, to apprehend a person at off-post quarters requires coordination with civilian authorities.

## INSPECTIONS

Search and seizure requirements do not limit your authority to conduct inspections. The primary purpose of inspections is to ensure the unit's security, military fitness, and order and discipline. Orders for urinalyses are a permissible part of a valid inspection. An inspection can include an examination to locate and confiscate unlawful weapons or contraband as long as the inspection is not a pretext for a search; that is, the primary purpose of an inspection cannot be to obtain evidence for use in a trial or other disciplinary proceeding.

An inspection for weapons or contraband may not be proper if any of the following occurs—

- The inspection immediately follows a report of a specific offense in the unit and was not scheduled before the report.
- Specific individuals are selected for inspection.
- Persons inspected are subjected to substantially different intrusions.

Such an inspection is proper only if the government presents clear and convincing evidence that the primary purpose was to ensure security, military fitness, or order and discipline and not to secure evidence for a trial or disciplinary proceeding. Evidence disclosed during a legitimate inspection may be seized and admitted at a court-martial. (See MCM, Mil. R. Evid. 313.)

## INVENTORIES

When a soldier is absent without leave, is about to be confined, or is being detained by civilian authorities, an inventory of that soldier's personal belongings is required. As with an inspection, an inventory may not be a pretext for search. Evidence obtained as a result of a lawful inventory is admissible in a court-martial. (See MCM, Mil. R. Evid. 313.)

## COOPERATION WITH POLICE INVESTIGATORS

You should coordinate with military police and CID investigators for several important reasons. The offense may be more serious than you realize. If it is complicated, sophisticated investigative techniques may be necessary.

They may include lineups, fingerprinting, expert interrogation, or laboratory analyses. Also, the offense may be one of a series of crimes currently under investigation.

ARs 190-30 and 195-2 require you to report criminal activity, known or suspected, to the military police for appropriate investigation. This requirement applies to persons subject to the UCMJ, Department of Defense civilian employees in connection with their assigned duties, government property under Army jurisdiction, or incidents occurring in areas under Army jurisdiction.

## PRESERVATION OF PHYSICAL EVIDENCE

You must preserve and safeguard in your custody any physical evidence of an offense. As few people as possible should handle it; everyone who touches it may have to appear at the trial. Physical evidence must be carefully marked, to ensure later identification, and recorded on a chain-of-custody document. (See AR 195-5.) The chain-of-custody document, such as DA Form 4137, is a record of everyone who has handled an item from when it was originally identified as evidence until the trial. Physical evidence should then be turned over to professional investigators as soon as possible.

Perishable and unstable evidence requires special attention for preservation. Sometimes professional assistance is necessary, for example, to preserve a fingerprint or a tire track. The military police can usually assist.

The first person to assume custody of the physical evidence marks it immediately. This person may mark the item itself, usually with his initials, the date, and the time. If the evidence cannot be marked, he should place it in a sealed, marked container. The container must be tamper-proof or sealed to show an absence of tampering. When physical evidence is introduced at trial, counsel must show that it is the same item found at the scene of the crime or otherwise connected with the offense and is unaltered.

## PRETRIAL CONFINEMENT

While charges are being processed, you may need to confine or restrict the suspect. Pretrial confinement is limited to persons reasonably suspected of a serious offense and in which it is necessary to ensure their presence at trial or to prevent them from committing other offenses. In determining whether confinement is appropriate, you should remember that it deprives the accused of liberty while he is presumed innocent and makes his defense preparations difficult. Your convenience is not enough to justify curtailing a soldier's freedom, and you may not use it as punishment. Also, an accused will receive day-for-day credit for his confinement against the adjudged sentence.

Grounds for pretrial confinement are the accused's foreseeable, serious criminal misconduct or risk of his absence before trial. Serious criminal misconduct includes-

- Intimidation of witnesses.
- Obstruction of justice.
- Serious injury to others.
- Serious threats to the safety of the community.

When a soldier is placed in pretrial confinement, he must be informed of-

- The nature of the offenses for which he is confined.
- His right to remain silent and that anything he says maybe used against him.
- His right to request counsel and to retain civilian counsel at no expense to the government.
- The procedures for review of pretrial confinement.

Developments in military decisional law and requirements for magisterial review have made pretrial confinement considerations increasingly complex. If you consider confinement necessary, consult with the staff judge advocate, the chief of military justice, or the trial counsel.(See MCM, AR 27-10, and AR 600-31.)

Types of confinement include—

- **Conditions on liberty.** Under this type of restraint, a soldier may be required to avoid certain activities, places, or people. A speedy trial is not gauged against the imposition of conditions on liberty.
- **Restriction.** Under this type of restraint, the accused is directed to remain within specified limits but ordinarily performs regular duties. Imposition of restriction starts the 120-day limit required for a speedy trial.
- **Arrest.** This type of restraint is much like restriction, but the soldier ordinarily does not perform his regular duties. Arrest starts the 90-day limit required for a speedy trial.
- **Confinement.** Confinement is a full, physical restraint in a confinement facility. It starts the 90-day limit for a speedy trial.

You must review any pretrial confinement within 72 hours and prepare a memorandum justifying it. This normally occurs prior to placing a soldier in confinement. Within 7 days, a neutral reviewing officer (usually a military judge or judge advocate) will review your confinement justification. The accused may present testimony to the reviewing officer and may also ask the military judge to review the confinement at trial. (See MCM, R.C.M. 305.)