

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

Form #5

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: The Adjutant General's Department TITLE NUMBER: 141

CITE AUTHORITY: WV Codes §15-1E-36 and §15-1E-15

RULE TYPE: PROCEDURAL Yes INTERPRETIVE \_\_\_\_\_

EXEMPT LEGISLATIVE RULE Yes

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code §29A-1-3(c)

AMENDMENT TO AN EXISTING RULE: YES X NO \_\_\_\_\_

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 49

TITLE OF RULE BEING AMENDED: Military Justice

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS 03 November 2010



Authorized Signature

**TITLE 141  
LEGISLATIVE RULE  
ADJUTANT GENERAL**

**SERIES 49  
MILITARY JUSTICE**

**§141-49-1. General.**

1.1. Scope. -- The duty of maintaining and governing the military forces of the State not in the service of the United States rests upon the State, subject to constitutional authority. The purposes of such forces are twofold; national defense and service of the State. Their efficiency for both purposes necessarily depends upon systematic uniformity in organization, composition, arms, equipment, training and discipline with the armed forces of the United States and the military forces of other states. Accordingly, the purpose of military law is to promote justice, to maintain good order and discipline, to promote efficiency and effectiveness in the military, and to strengthen the security of the several states and of the United States. The purpose of this regulation is to implement the Uniform State Code of Military Justice, and to prescribe the policies and procedures pertaining to the administration of military justice applicable to members of the West Virginia National Guard.

1.2. Authority. --

1.2.a. West Virginia Code, Chapter 15, Article 1E, Section 1 et seq. (Uniform State Code of Military Justice)

1.2.b. Title 32, United States Code, Sections 326-333. (32 U.S.C.A. 236-333).

1.2.c. Title 10, United States Code, Sections 801-940. (10 U.S.C.A. 801-940).

1.2.d. Manual for Courts-Martial, United States, as amended

1.3. Filing Date. -- November 3, 2010.

1.4. Effective Date -- November 3, 2010.

STATE OF WEST VIRGINIA  
ADJUTANT GENERAL'S DEPARTMENT  
CHARLESTON 25311-1085

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03 November 2010  
OFFICE OF THE ATTORNEY GENERAL  
STATE OF WEST VIRGINIA  
DEPARTMENT OF STATE

WV MILITARY REGULATION (ARMY)  
NUMBER 27-10  
WV MILITARY REGULATION (AIR)  
NUMBER 111-10

MILITARY JUSTICE\*

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\* This regulation supersedes WVMR (Army) 27-10 and WVMR 111-10 (Air), dated 27 July 1987.

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## SECTION I GENERAL

### 1. Authority.

- a. West Virginia Code, Chapter 15, Article 1E, Section 1 et seq. (Uniform State Code of Military Justice)
- b. Title 32, United States Code, Sections 326-333. (32 U.S.C.A. 236-333).
- c. Title 10, United States Code, Sections 801-940. (10 U.S.C.A. 801-940).
- d. Manual for Courts-Martial, United States, as amended.

### 2. Purpose.

The duty of maintaining and governing the military forces of the State not in the service of the United States rests upon the State, subject to constitutional authority. The purposes of such forces are twofold; national defense and service of the State. Their efficiency for both purposes necessarily depends upon systematic uniformity in organization, composition, arms, equipment, training and discipline with the armed forces of the United States and the military forces of other states. Accordingly, the purpose of military law is to promote justice, to maintain good order and discipline, to promote efficiency and effectiveness in the military, and to strengthen the security of the several states and of the United States. The purpose of this regulation is to implement the Uniform State Code of Military Justice, and to prescribe the policies and procedures pertaining to the administration of military justice applicable to members of the West Virginia National Guard.

### 3. Applicability.

a. The administration of military justice in the West Virginia National Guard shall be governed by the provisions of West Virginia Code, Chapter 15, Article 1E, Section 1 et seq., known as the "Uniform State Code of Military Justice," this regulation, the West Virginia Manual for State Courts-Martial, "WVMCM," Manual for Courts-Martial, United States, as amended and supplemented from time to time, except insofar as the provisions of such manual may be inconsistent with the Uniform State Code of Military Justice or inconsistent with, or modified by these regulations, and as nearly as practicable to the laws and regulations of the United States governing the administration of military justice in the armed forces of the United States, unless the same shall be incompatible with state law or regulation.

b. All matters relating to the administration of military justice of the military forces of the State, not otherwise provided for in this regulations or the WVMCM, shall be decided by custom, usage and regulations of the armed forces of the United States.

c. The use of the masculine gender throughout this regulation shall also include the feminine gender.

4. Definitions.

For definitions, see Chapter 15, Article 1E, Section 1, Uniform State Code of Military Justice and the WVMCM.

5. Abbreviations. Abbreviations used in these regulations are interpreted as follows:

USCMJ – Uniform State Code of Military Justice, West Virginia Code, Chapter 15, Article 1E, Section 1 et seq.

MCM – Manual for Courts-Martial United States, as amended and updated

R.C.M. - Rules for Courts-Martial

M.R.E. – Military Rules of Evidence

UCMJ – Uniform Code of Military Justice.

6. West Virginia Manual for State Courts-Martial.

This regulation authorizes the implementation of the West Virginia Manual for State Courts-Martial referred to as either the “Manual” or “WVMCM.” The purpose of the WVMCM shall be to assist in securing simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay in implementing the USCMJ. That Manual will prescribe the policies and procedures pertaining to the administration of military justice and implements the applicable portions of the Uniform Code of Military Justice [hereinafter Code], and the Manual for Courts-Martial, United States, as amended [hereinafter MCM].

SECTION II – JURISDICTION

7. Jurisdiction of Courts-Martial in General.

- a. The jurisdiction of courts-martial is entirely penal or disciplinary.
- b. The jurisdiction of courts-martial does not, in general, depend on where the offense was committed. Similarly, the jurisdiction of a court-martial with respect to offenses against military law is not affected by the place where the court acts or is convened.
- c. As to persons subject to trial by courts-martial, see USCMJ. Sections 2 and 3.
- d. As to jurisdiction for contempts, see USCMJ, Section 48.
- e. Courts-martial shall have exclusive jurisdiction over purely military offenses. A person subject to the USCMJ is, as a rule, also subject to the law applicable to persons generally, and if by an act or omission he violates the USCMJ and the local criminal law, the act or

omission may be made the basis of a prosecution before a court-martial or before a proper civil tribunal, and in some cases before both. However, jurisdiction shall not be extended to crimes not included in Chapter 15, Article 1E, USCMJ.

8. Reciprocal Jurisdiction.

Commanders in one force of the state military forces are authorized to convene courts-martial for the trial of members of another force only when specifically empowered by The Adjutant General.

9. Jurisdiction of General Courts-Martial.

a. Subject to paragraph 7, general courts-martial have the power to try persons subject to the USCMJ for any offense made punishable by the USCMJ and may adjudge any punishment authorized by USCMJ, Section 18.

b. General courts-martial may be convened by:

- (1) The Governor;
- (2) The Adjutant General;
- (3) The commanding officer of a force of the state military forces;
- (4) The commanding officer of a division or a separate brigade; or
- (5) The commanding officer of a separate wing.

c. If any such commanding officer is an accuser, the court shall be convened by superior competent authority and may in any case be convened by such superior authority if considered desirable by such authority.

10. Jurisdiction of Special Courts-Martial.

a. Subject to paragraph 7, special courts-martial shall have jurisdiction to try persons subject to the USCMJ except commissioned officers and may adjudge any special courts-martial authorized by USCMJ, Section 19.

b. Special courts-martial may be convened by:

- (1) Any person who may convene a general court-martial;
- (2) The commanding officer of a garrison, fort, post, camp, station, Air National Guard base, or naval base or station;

(3) The commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) The commanding officer of a wing, group, separate squadron, or corresponding unit of the Air Force; or

(5) The commanding officer or officer in charge of any other command when empowered by The Adjutant General.

c. If any such officer is an accuser, the court shall be convened by superior competent authority and may in any case be convened by such superior authority if considered desirable by such authority.

#### 11. Jurisdiction of Summary Courts-Martial.

a. Subject to paragraph 7, summary courts-martial shall have jurisdiction to try enlisted persons subject to the USCMJ for any offense made punishable by the USCMJ and may adjudge any punishment authorized by USCMJ, Section 20.

b. Summary courts-martial may be convened:

(1) By any person who may convene a general or special court-martial;

(2) The commanding officer of a detached company or other detachment, or corresponding unit of the Army;

(3) The commanding officer of a detached squadron or other detachment, or corresponding unit of the Air Force; or

(4) The commanding officer or officer in charge of any other command when empowered by The Adjutant General.

c. When only one commissioned officer is present with a command or detachment that officer shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases. Summary courts-martial may, however, be convened in any case by superior competent authority if considered desirable by such authority.

### SECTION III – NONJUDICIAL PUNISHMENT

#### 12. Authority.

Any commander having authority pursuant to Section 15, USCMJ, may, for minor offenses without the intervention of a court-martial, impose and execute disciplinary punishments as set forth in the WVMCM and Appendix I to this regulation.

13. Minor Offenses.

Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum possible sentence imposed for the offense if tried by general court-martial. The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment. But, nonjudicial punishment for an offense believed to be minor by a commander is not a bar to a trial by court-martial for the same offense. However, the accused may show at trial that nonjudicial punishment was imposed, and if the accused does so, this fact must be considered in determining an appropriate sentence. Violations of or failures to lawfully obey orders may be minor offenses if the prohibited conduct itself is of a minor nature although prohibited by a general order or regulation.

14. Nonpunitive Measures.

Section 15, USCMJ and the provisions set forth herein do not apply to, include, or limit the use of those administrative or nonpunitive measures that a commander is authorized and expected to use to further the efficiency of his command or unit, such as administrative admonitions, reprimands, exhortations, disapprovals, criticism, censures, reproofs and rebukes, written or oral, not intended or imposed as punishment for a military offense. Section 15, USCMJ does not deprive a commander of the authority to make use of admonition and reprimand, not as a penalty but as a purely corrective measure, more analogous to instruction than to punishment, in the strict line of his duty to create and maintain efficiency.

15. Punishments.

a. Double Punishment Prohibited. When nonjudicial punishment has been imposed for an offense, nonjudicial punishment may not again be imposed for the same offense. 'Same offense' means an offense that was part of a single incident or course of conduct. Administrative action can be taken for the same offense and will not be considered double punishment under this regulation.

b. Increased Punishment Prohibited. Once nonjudicial punishment has been imposed, it may not be increased, upon appeal or otherwise unless the punishment imposed was not provided for in the Code.

c. Multiple Punishments Prohibited. When a commander determines that nonjudicial punishment is appropriate for a particular service member, all known offenses determined to be appropriate for disposition by nonjudicial punishment and ready to be considered at that time, including all such offenses arising from a single incident or course of conduct, shall ordinarily be considered together, and not made the basis for multiple punishments.

d. Statute of Limitations. Nonjudicial punishment may not be imposed for offenses which were committed more than three (3) years before the date of imposition of punishment, unless such three-year limitation is waived by the accused in writing or unless the accused has filed an appeal under the WVMCM.

e. Imposition. Nonjudicial punishment imposed under Section 15, WVCMJ will be performed by members of the state military forces in and during their duty status, such as state active duty, inactive duty training, annual training, fulltime National Guard duty or other similar duty statuses, except as to fines and forfeitures, and reductions and reprimands, which may be imposed after conclusion of a duty status. Punishment which tends to demean the grade or position of the person should not be imposed. (See Appendix I).

16. Right to Demand Trial.

An accused has the right to demand trial by court-martial only if the commander who initiated the nonjudicial punishment proceeding elects to retain the restraint of freedom punishments. Those restraints of freedom punishments are restriction and arrest in quarters. If prior to the offer of nonjudicial punishment, the commander elects not to use the restraint of freedom punishments, the accused has no right to turn down the nonjudicial punishment and demand a court-martial trial. If the commander does not include the right of the accused to turn down the nonjudicial punishment and demand a court-martial trial, on initiation, of the nonjudicial punishment action, the commander has waived the right to retain the restraint of freedom punishments.

SECTION IV – PRETRIAL PROCEDURE

17. Preparation of Charge Sheet.

a. General. In preparing charges for trial by courts-martial, the unit commander will use the current DD Form 458, Charge Sheet. Detailed instructions for completing the Charge Sheet may be found at MCM, R.C.M. 307 and DD Form 458. An example of a completed Charge Sheet is located at MCM, appendix 4. Any person subject to the USCMJ may prefer charges, but trial counsel should always draft or review charges before they are preferred. While the unit commander is responsible for the preparation of the Charge Sheet, there is no legal requirement that he do it personally. He should, however, supervise its prompt and proper preparation and forwarding. Once the charge and specification has been prepared and signed under oath, it is a public record, and other than minor administrative changes, should not be altered, except upon the advice of a judge advocate. For minor administrative or typographical corrections, the officer making same should initial in the margin the correction.

b. Timeliness. When the Unit Commander has made the decision to prefer court-martial charges and to recommend trial by courts-martial, he should promptly dispose of the matter. It is longstanding military policy, both in the active forces and in the National Guard that military justice be given priority.

c. Personal Data. Section I of the Charge Sheet is personal data concerning the accused. This information is generally found in the accused's personnel file. The unit commander should have reviewed this personnel file before making his decision on disposition of the offense during his preliminary investigation. The accused's "grade or rank" (Block 3) is his military title (such as PFC) and his "pay grade" (Block 4) is his numerical designation (such as E-3). The initial date

of the accused's current service is the date of his latest enlistment (Block 6). Paragraph 7 "Pay per Month" is the normal MUTA-4 pay which the accused would receive for one month to be inserted in the "basic" block. Members of the West Virginia National typically do not receive "sea or foreign duty pay". Block 8, entitled "nature of restraint of accused" should show all types of restraint imposed, and block 9 should show the corresponding duration (inclusive dates) of the restraint and any changes.

d. Charges and Specifications.

(1) General. Section II of the Charge Sheet is the section for charges and specifications. This is the most important part of the Charge Sheet. The instructions for drafting charges and specifications in Appendix 6, MCM, should be followed when applicable. The "charge" indicates the section of the Uniform State Code of Military Justice violated. Since DD Form 458, Charge Sheet, is a federal form, the reference in Section II to a "violation of the UCMJ, Section \_\_\_" should be changed to "violation of the Uniform State Code of Military Justice, Section \_\_\_." The "specification," which is under the charge, must be written so that it clearly advises the accused of the date, time, place and circumstances of the alleged offense against him. The specification states the facts and circumstances which constitute a violation of the particular section of the USCMJ alleged to be violated. Neither the misdesignation of a section nor the failure to designate any section is ordinarily material so long as the specification alleges an offense over which courts-martial have jurisdiction.

(2) Abbreviations. Dates and times should be written in Arabic numerals, and the designation of organization or command may include numerals. The armed force, namely "West Virginia Army National Guard" or "West Virginia Air National Guard" may be abbreviated "WVARNG" and "WVANG," respectively. Otherwise, abbreviations should not be used in specifications.

(3) Numbering of Charges and Specifications. If there is only one charge, it is not numbered. When there is more than one charge, each is numbered with a Roman numeral. [R.C.M. 307(c)(2).] When there is more than one specification under a charge, the specification under that charge should be numbered, using Arabic numerals, 1, 2, 3, etc.

(4) Designation of Charges. Except for certain offenses, all charges should be laid under the applicable sections of the USCMJ. For example, in the case of absence without leave, the charge should be: Violation of the Uniform State Code of Military Justice, Section 86.

(5) Name and Description of the Accused. The name of the accused as stated in the specification should include his rank and, if necessary, his pay grade. The name of the accused should be also accompanied by his organization and armed force. In the ordinary case of an enlisted person, for example, the specification would read, "In that Private John J. Smith, Company D 1092d Engr Bn, WVARNG, did..." etc.

(6) Time and Place of Offense. The time and place of the commission of the alleged offense should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission he is called upon to defend. It is

proper pleading to allege that a particular offense occurred "on or about" a certain day, or if it is necessary, to be more explicit as to the time, "at or about" a certain hour. For example, in the case of absence without leave, it is proper to allege that accused failed to go to his place of duty "on or about 2 May 1987 at or about 0800 hours" and remained so absent until "on or about 2 May 1987 at or about 1200 hours."

(7) Alleging Separate Offenses. Each alleged offense should be set forth in a separate specification. Thus, in case of absence without leave, each unauthorized absence should be alleged in a separate specification under one charge.

e. Specimen Charges. The following specimen charge is set forth as an example which incorporates the foregoing principals of drafting charges and specifications:

"CHARGE: Violation of the Uniform State Code of Military Justice, Section 86.  
SPECIFICATION: In that Private First Class John J. Smith, WVARNG, 1092d Engr Bn. did, on or about 2 May 1987 at or about 0800 hours, without proper authority fail to go at the time prescribed to his place of duty at which he was required to be, to wit: at unit training assembly of HSC, 1092d EN BN at Parkersburg, West Virginia."

f. Informing Accused of Charges. Prior to forwarding the charges, the immediate commander will inform the accused of the charges against him and complete and sign the certificate to that effect on the Charge sheet. When, because of the unavailability of the accused, it is impractical to comply with the requirement, a report of the circumstances will be included in the letter forwarded with the charges (MCM, R.C.M. 308)(See Attachment 3).

g. Signing and Swearing to Charges. The oath to the charges must be executed before a person authorized by section 136, USCMJ to administer oaths.

h. Action by Officer Exercising Summary Courts-Martial Jurisdiction:

(1) Date of Receipt. Immediately upon receipt of sworn charges against a member of his command, the officer exercising summary courts-martial jurisdiction will cause the hour and date of receipt to be entered in the space provided on the Charge Sheet (MCM, R.C.M. 403).

(2) Informing Accused of Charges. If, when charges are received by the officer exercising summary courts-martial jurisdiction it appears that the accused has not been advised of the charges against him, the action prescribed in paragraph 17(f) will be taken.

(3) Investigation. If the charges are so serious that it may be appropriate to forward them with a recommendation for trial by general courts-martial, the officer exercising summary courts-martial jurisdiction will appoint an officer to investigate the charges in accordance with Section 32, USCMJ.

(4) Disposition of Charges by Trial. Unless competent superior authority has directed otherwise, the officer exercising summary court-martial jurisdiction may, as a result of preliminary inquiry or formal investigation, dismiss all or part of any charges that have been preferred. If he determines that some punishment should be adjudged and that trial by summary

court-martial is appropriate, he should complete the Charge Sheet in the prescribed manner and transmit the charges and all supporting documents to the summary court-martial. If he is so empowered and determines that trial by special court martial is appropriate, he should complete the endorsement in the prescribed manner and transmit the charges and allied papers to the trial counsel of the court.

(5) Forwarding Charges. When trial by a special or general court-martial is deemed appropriate and he is not empowered to convene a court for a trial of the case, the officer who exercises summary court-martial jurisdiction will forward the charges and necessary supporting documents (ordinarily through the chain of command) to the officer exercising the appropriate kind of court-martial jurisdiction in accordance with MCM, R.C.M. 401.

(6) Service of Charges on Accused. Prior to the trial, a copy of the charge or charges must be served on the accused in accordance with MCM, R.C.M. 308, 602. The person who served the charges and the written order shall complete and sign the return of service on the bottom of the Charge Sheet.

#### 18. Service of Charges.

a. General. Service of charges referred to trial by a general or special court-martial will be made by the trial counsel in the manner set forth in Section 35, USCMJ. Service of charges referred to trial by a summary court will be made by the summary court officer by personally presenting a copy of the Charge Sheet to the accused. At the same time or at any subsequent time the trial counsel or summary court will notify the accused as to the time and place of trial and order him to be present.

b. Convening Orders. Courts-martial are created by a convening order issued by the convening authority. The convening order shall designate the kind of court, the place and time it is to meet, members of the court, and, when appropriate, the military judge and members of the prosecution and defense. The provisions of MCM, R.C.M. 504 should be followed as much as practicable. (See Attachment 4).

c. Reference for Trial. Charges shall be referred for trial by courts-martial in accordance with the provisions of MCM, R.C.M. 601 as much as practicable.

#### 19. Apprehension and Restraint.

a. Sections 8-11, USCMJ, Chapter 2, WVMCM and Chapter V, MCM will be followed as far as they are applicable.

b. Pretrial confinement in a place other than a military installation.

(1) Pretrial confinement is never required by law. It may be imposed only when it is necessary to ensure the presence of the accused at trial or to prevent foreseeable serious misconduct, including any efforts at obstructing justice, and when lesser forms of restraint are inadequate. Pretrial confinement is not authorized without the prior approval of The Adjutant

General. Facts concerning the proposed arrest of an individual will be forwarded in letter form and will include the information required in paragraph 25.

(2) A military judge of a general or a special court-martial or the president of a special court-martial without a military judge; or the summary court officer may issue a warrant (See Attachment 2), directed to the sheriff of any county or to any law enforcement officer to apprehend the accused and bring him before the court-martial for trial.

(3) The military judge of a general or a special court-martial, or the president of a special court-martial without a military judge; or the summary court officer will set the amount of bail, not to exceed four times the maximum fine which may be imposed by the particular court-martial. Bail must be furnished in the form of:

(A) A deposit by the member or by some other person for him of cash with the bonding officer who will be responsible for its safe keeping.

(B) A written undertaking by one or more persons to forfeit a sum of money equal to the amount of the bail if the defendant is in default for appearance.

(C) Such other form as may be determined, to include personal recognizance.

#### SECTION V – TRIAL PROCEDURE

##### 20. Counsel.

a. Trial Counsel. In general and special courts-martial, trial counsel shall prosecute in the name of the State of West Virginia. He will discharge the duties imposed upon him by USCMJ, WVMCM and MCM, as applicable.

b. Defense Counsel. In general and special courts-martial, defense counsel will diligently represent the accused and fully advise him of all rights, following the requirements of the USCMJ, WVMCM and MCM, as applicable.

##### 21. General Trial Procedure.

The procedure, including forms, methods of proof and rules of evidence, in cases before military courts, courts of inquiry and other military tribunals shall be governed by the provisions of the USCMJ, WVMCM, MCM, M.R.E, R.C.M., and other applicable state regulations as amended and supplemented from time to time, and regulations of the United States governing the administration of military justice in the armed forces of the United States, unless the same shall be incompatible with state law or regulation.

##### 22. Summary Court-Martial Procedure for Summary Court Officers.

a. A Summary Court Officer in the trial of cases referred to him for trial is encouraged to

refer to this regulation, USCMJ, MCM, and particularly to DA PAM 27-7, using it as a guide where applicable.

b. Pretrial Duties of Summary Court Officers.

(1) Examine the Charge Sheet for any errors in preparation and determine whether the charges are sworn and whether the endorsement is correct.

(2) Determine whether the Summary Court Officer is free of any conflict in interest which would impair a fair and impartial trial. If there is such a conflict he should notify the convening authority.

(3) If the charges have not been served, the Summary Court Officer will serve a copy of the Charge Sheet on the accused, together with a written order of the convening authority to appear before the court. He should also inform the accused as to the date, time and place of trial, at which time the accused is to be present with any witnesses he may have and retain legal counsel at his own expense, if he so desires.

(4) Familiarize yourself with the applicable law and plan an orderly proceeding.

(5) Notify all known witnesses of the date, time and place of trial and arrange for subpoena of witnesses where necessary. A review by the Staff Judge Advocate is required prior to issuing a subpoena to civilian personnel.

c. Trial Procedure.

(1) Conduct the trial with proper military customs and decorum.

(2) The accused is presumed innocent until the Summary Court Officer is convinced of his guilt beyond a reasonable doubt by legal and competent evidence received by the Summary Court Officer at the trial in the accused's presence.

(3) The procedures described in DA PAM 27-7 are recommended.

(4) The accused has the right to object to trial by summary court-martial. If the accused objects, the charges will be returned to the convening authority with the appropriate endorsement.

(5) The accused has the right to examine all government witnesses and to present evidence on his own behalf through witnesses or documents. He has the right to remain silent or to testify in his own behalf.

d. Findings. After all of the evidence has been presented, the Summary Court Officer will make separate findings of guilty or not guilty to each charge and to each specification or guilty to a lesser included offense.

e. Sentence:

(1) If a finding of guilty has been made, the Summary Court Officer will:

(a) Furnish the accused with a copy of the Charge Sheet and ask him if the personal data appearing on page 1 of the Charge sheet, including data as to restraint, are correct. If the accused alleges that any of the data is incorrect, the Summary Court Officer must determine the issue after obtaining any official verification available.

(b) Receive and consider any evidence of previous convictions, and determine from the accused and any official source if the data as to previous convictions is correct.

(c) Ask the accused whether he wishes to call any witnesses in mitigation or extenuation.

(d) Receive any documents which the accused wishes to offer in mitigation or extenuation (See R.C.M. 1001).

(e) Advise the accused again as to his right to testify or remain silent or to make an unsworn statement.

(f) If the accused elects to testify under oath, the Summary Court Officer should swear the accused or remind him that he is still under oath, if previously sworn. The summary Court Officer may cross-examine the accused after making a sworn statement. If the accused elects to make an unsworn statement, the Summary Court Officer should receive the statement.

(g) If necessary and appropriate, call rebuttal witnesses to matters in mitigation and extenuation.

(h) After receiving all of the evidence, announce an appropriate sentence within the limitations of Section 20, USCMJ.

(i) Enter the sentence in the record of trial.

f. Post-Trial Duties.

(1) Complete the record of trial. Prepare an original and at least two copies of the record of trial. Authenticate the record by signing each copy in the space provided. As soon as the record is authenticated, a copy of the record of trial is to be served on the accused and attach the accused's receipt for the copy to the record. If the accused was represented by counsel, the copy of the record may be served on counsel. The original and one copy of the record must be forwarded to the convening authority.

(2) Report the results of the trial to the convening authority, the immediate commander of the accused, the officer in command of the facility where accused was in pretrial confinement, if appropriate, and any persons required by the convening authority.

(3) Return the file to the convening authority with any recommendation in writing for clemency, if appropriate.

(4) Avoid unnecessary delay.

#### SECTION VI – TRIAL PROCEDURE

#### 23. Sentences.

a. The punishment which a court-martial may direct may not exceed the limits described in this paragraph.

b. At any time, including periods of fulltime National Guard duty, annual training and state active duty, a sentence to confinement may be carried into execution in any correctional center, regional jail, or penitentiary under the control of the West Virginia Division of Corrections.

c. To execute a sentence of confinement, the convening authority shall, after the sentence is approved by The Adjutant General, issue a warrant or order of commitment (See Attachment 5) of the person so sentenced to the commissioner, administrator or warden of the appropriate facility, who shall forthwith execute said warrant and make a proper return to the convening authority.

d. Forfeitures and fines are based on the comparable active duty pay of the accused at the grade held at the time of the offense, except when the offense was committed while the accused was on state active duty, in which case, the forfeiture or fine is based on the amount of pay the accused was entitled to for a comparable period on state active duty.

#### 24. Sentences of Confinement and forfeiture to be approved by The Adjutant General.

a. No pretrial confinement, sentence to confinement, or forfeiture of pay and allowances shall be executed until it is approved by The Adjutant General. If a sentence as approved includes imprisonment, the convening authority will forward a brief synopsis of the case together with a copy of the record of trial to The Adjutant General and include the following information concerning the sentenced individual:

- (1) Martial status.
- (2) Dependency status.
- (3) Effect of imprisonment on employment.
- (4) Comments of convening authority.

b. No sentence of confinement shall be ordered in any case where the accused was not represented by legal counsel at the trial.

c. If pretrial confinement or sentence to confinement, as applicable, is approved, the convening authority will be directed to order the sentence executed or issue an Order of Commitment.

25. Sentences of Dismissal, Dishonorable Discharge or Bad Conduct Discharge to be Approved by the Governor or The Adjutant General. No sentence of dismissal, dishonorable discharge or bad conduct discharge shall be executed until it is approved by the Governor or The Adjutant General.

26. Complete Record of Proceedings and Testimony if Bad Conduct Discharge Adjudged. A bad conduct discharge may not be adjudged by any special court-martial unless a complete written record of the proceedings and testimony before the court has been made.


27. Disposition of Fines, Penalties and Proceedings of Courts-martial.

a. Proceedings. Upon approval of the proceedings of a court-martial by the convening authority, the original copy will be returned to the unit concerned for entry of necessary information to the Service Record. When the information has been transcribed to the Service Record and the Sentence has been executed, the original copy of the complete record of the proceedings including all exhibits and testimony will be forwarded through channels to The Adjutant General by letter of transmittal, including any fines or a notation that the sentence has been executed.

b. Remittance of Fines and Penalties. Checks, drafts, money orders and other payments of fines and penalties will be drawn to the order of the State of West Virginia and will be forwarded to The Adjutant General for deposit in the Military Justice Fund. Payment plans and payment by debit or credit card will be permitted upon approval of The Adjutant General.

28. Review of Courts-martial. Review of Courts-Martial shall be as prescribed in Sections 59-76, USCMJ.

BY ORDER OF THE GOVERNOR:

  
ALLEN E. TACKETT  
Major General, WVARNG  
The Adjutant General

## APPENDIX I

### NONJUDICIAL PUNISHMENT

#### Section I, General

##### 1. Purpose and Scope.

This appendix implements Chapter 15, article 1E, Section 15 of the Code of West Virginia, 1931, as amended (hereafter referred to as the Uniform State Code of Military Justice, or the "USCMJ"). It includes the regulations promulgated pursuant to Chapter 15, Article 1E, Section 15, USCMJ and prescribes certain requirements, policies, limitations and procedures certain requirements, policies, limitations and procedures for persons having the authority to impose nonjudicial punishment; for persons who may take some action with respect to the proceedings. Accordingly, no action should be taken under the authority of Chapter 15, Article 1E, Section 15 of the USCMJ without reference to and compliance with this Appendix and the West Virginia Manual for Courts-Martial. Chapter 15, Article 1E, Section 15 of the USCMJ shall be here referred to as "Section 15".

#### Section II. Authority

##### 2. Who may impose Nonjudicial Punishment.

a. Commanders shall have authority to impose nonjudicial punishment upon military personnel of their commands. "Commander" means a commissioned or warrant officer of the state military force who by virtue of rank and assignment exercises primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a "command." The authority of a commander to impose nonjudicial punishment as to certain types of offenses, certain categories of persons, or in specific cases, to impose certain types of punishment may be limited or withheld by a superior commander.

b. Delegation of Authority. Only the Governor and general officers in command may delegate their authority under Section 15 to a principal assistant (ordinarily a Vice, Assistant, or Deputy Commander, Chief of Staff, or Executive Officer). However, a principal assistant cannot be a civilian, retired member or be appointed. This position is limited to commissioned officers. Additionally, this limitation on delegation of authority itself does not take away authority of other commanding officers authorized to impose nonjudicial punishment under the Code and Manual; but those other commanding officers may not delegate that authority. However, a commander superior to the commander with nonjudicial punishment authority may withhold that authority.

c. Only the Governor, the Adjutant General, an officer exercising general court-martial convening authority, or an officer of a general or flag rank in command may impose nonjudicial punishment upon an officer's of his command.

3. Persons upon whom nonjudicial punishment may be imposed.

a. Military personnel of his command.

(1). For the purpose of Section 15, military personnel are considered to be "of the command" of a commander if they are:

(A) Assigned to an organization commanded by that commander.

(B) Affiliated with the command (by attachment, detail, or otherwise) under conditions, either expressed or implied, that indicate that the commander of the unit to which affiliated and the commander of the unit to which they are assigned are to exercise administrative or disciplinary authority over them.

(2) Under similar circumstances, a commander may be assigned territorial command responsibility so that all or certain military personnel in the area will be considered to be of the command for the purpose of Section 15. To determine if an individual is of the command of a particular commanding officer, refer first to those written or oral orders or directives that affect the status of the individual. If orders or directives do not expressly confer authority to administer nonjudicial punishment to the commander of the unit with which the member is affiliated or present (as when, for example, they contain no provision attaching the member "for disciplinary purposes"), consider all attendant circumstances, such as:

(A) The phraseology used in the orders.

(B) Where the member slept, ate, was paid, performed duty, the duration of the status, and other similar factors.

(3) If orders or directives include such terms as "attached for administration of military justice," or simply "attached for administration," the individual so attached will be considered to be of the command, of the commander, of the unit of attachment for the purpose of Section 15.

b. Termination of status. Nonjudicial punishment may not be imposed upon an individual by a person authorized to impose nonjudicial punishment, after the individual ceases to be of his command by reason of transfer or otherwise. This is so even if Section 15 nonjudicial punishment proceedings have been instituted, so long as the proceedings have not resulted in the imposition of punishment prior to the time of the change in status. The person authorized to impose nonjudicial punishment who has instituted the proceedings may, in the case of such a change in status, forward the Record of Nonjudicial Punishment Proceedings to the gaining commander for appropriate disposition.

c. Personnel of Army National Guard and Air National Guard. A commander is not prohibited from imposing nonjudicial punishment on a military member of his or her command solely because the member is a member of another component of the West Virginia National Guard. Other provisions of this regulation notwithstanding, a commander may impose

punishment upon a member of another Service only under the circumstances, and according to the procedures, prescribed by the member's parent Service.

d. Minor Offenses. Nonjudicial punishment may be imposed for acts or omissions that are minor offenses. Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum possible sentence imposed for the offense if tried by general court-martial. The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment. But, nonjudicial punishment for an offense believed to be minor by a commander is not a bar to a trial by court-martial for the same offense. However, the accused may show at trial that nonjudicial punishment was imposed, and if the accused does so, this fact must be considered in determining an appropriate sentence. Violations of or failures to lawfully obey orders may be minor offenses if the prohibited conduct itself is of a minor nature although prohibited by a general order or regulation.

e. Double punishment prohibited. Several minor offenses arising out of substantially the same transaction or conduct will not be made the basis of separate actions under Section 15, USCMJ.

### Section III. Policies Applicable.

#### 4. Purposes of nonjudicial punishment: personal exercise in discretion in imposing nonjudicial punishment.

a. Purposes. A commander authorized by this appendix to impose nonjudicial punishment should use other nonpunitive measures to the maximum extent possible in furthering the efficiency of his command without resorting to the imposition of nonjudicial punishment. Use of Section 15, USCMJ is proper in all cases of minor offences in which administrative measure are considered inadequate or inappropriate. Nonjudicial punishment may be imposed in appropriate case to—

(1) Correct, educate, and reform offenders who have shown that they cannot benefit by less stringent measures;

(2) Preserve, in appropriate cases, an offender's record of service from unnecessary stigmatization by record of court-martial conviction; and

(3) Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.

b. Personal exercise of discretion. An officer authorized by regulation to impose Section 15, USCMJ who is considering a case for possible disposition by him will exercise his own discretion in evaluating the case, both as to whether punishment should be imposed under Section 15 at all and, subject to the limitations contained in paragraph 7 of this appendix, shall determine the nature and amount of the punishment, if any, to be imposed.

5. Relationship of nonjudicial punishment to nonpunitive measures.

a. Reduction in grade. Certain command officers in the WV Army and Air National Guard may impose reductions administratively upon enlisted personnel of their commands for inefficiency and other reasons. This authority, where it currently exists, exists apart from any authority they may have to impose a punitive reduction for misconduct under Section 15, USCMJ. These two separate and distinct kinds of authority must not be confused. Administrative reduction authority shall not be utilized for punitive purposes. (See NGR 600-200).

b. Reprimands and admonitions. An "admonition" is a warning or reminder given to an offender to deter repetition of a type of misconduct and to advise the offender of the consequences that may flow from a recurrence of that misconduct. A "reprimand" is an act of formal censure which reprovcs or rebukes the offender for his misconduct. An admonition may be included in a reprimand. Commanding officers have authority to give admonitions or reprimands as an administrative nonpunitive measure. Persons authorized by regulation to impose Section 15 nonjudicial punishment have the authority to impose admonitions or reprimands as nonjudicial punishment. If an admonition or reprimand is imposed as a punitive measure under Section 15 nonjudicial punishment, then the requirement set forth in this appendix must be followed.

(1) A written administrative admonition or reprimand should contain a statement indicating that it has been given merely as an administrative measure and not as Section 15 nonjudicial punishment.

(2) Admonitions and reprimands imposed as punishment orally or in writing should be clearly stated to have been imposed as punishment under Section 15 nonjudicial punishment.

6. Reference to superior.

Nonjudicial punishment should be administered at the lowest level of command permitted by this appendix and commensurate with the needs of discipline. However, after thoroughly considering the nature and circumstances of the offense and the age, previous record, maturity and experience of the offender, if the commander, authorized to impose Section 15, USCMJ by this appendix, determines that his authority under Section 15 nonjudicial punishment and this appendix is insufficient to impose an appropriate punishment, he may refer the case to an appropriate superior with a recommendation that the superior exercise his authority under Section 15, USCMJ and this appendix. Also, if the authority of a commanding officer to exercise Section 15 nonjudicial punishment has been limited by this appendix thus precluding him from imposing any punishment or an appropriate punishment, the case may be referred to an appropriate superior. In transmitting a case for action by a superior, no recommendation as to the nature or extent of the punishment to be imposed will be made. Transmittal will be accomplished by written correspondence on a DA Form 5109 or other appropriate service form.

Section IV. Punishments.

7. Limitations on Authorized Punishments.

a. General limitations. The Adjutant General may limit the power granted by Section 15 with respect to the kind and amount of the punishment authorized. Subject to those limitations, a commander authorized by this regulation to impose nonjudicial punishment upon military personnel of his command may do so pursuant to this regulation and the West Virginia Manual for Courts-Martial.

b. Restriction. Restriction is the least severe form of deprivation of liberty. Restriction involves moral rather than physical restraint. The severity of this type of restraint depends on its duration and the geographic limits specified when the punishment is imposed. A person undergoing restriction may be required to report to a designated place at specified times if reasonably necessary to ensure that the punishment is being properly executed. Unless otherwise specified by the nonjudicial punishment authority, a person in restriction may be required to perform any military duty.

c. Arrest in Quarters. As in the case of restriction, the restraint involved in arrest in quarters is enforced by a moral obligation rather than by physical means. This punishment may be imposed only on officers. An officer undergoing this punishment may be required to perform those duties prescribed by The Adjutant General. However, an officer so punished is required to remain within that officer's quarters during the period of punishment unless the limits of arrest are otherwise extended by appropriate authority. The quarters of an officer may consist of a military residence, whether a tent, stateroom, or other quarters assigned, or a private residence when government quarters have not been provided.

d. Reduction in Grade. Reduction in grade is one of the most severe forms of nonjudicial punishment and it should be used with discretion.

8. Rules relating to authorized punishments.

a. Restriction. The commanding officer who imposed the punishment, his successor in command, and superior authority may change the specified limits of restriction after imposition and before the term of restriction is completed, provided that the limits of restriction, as changed, are generally no more restrictive of movement than the limits imposed.

b. Extra duties. Extra duties shall be required to be performed during duty status, such as state active duty, inactive duty training, annual training, fulltime National Guard duty or other similar duty statuses and, within the duration of the punishment, for not more than two hours per day, holidays included. Extra duties may include the performance of fatigue duty or of any other military duty, such as practice march with full field equipment, but no duty may be imposed as extra duty which—

(1) Would constitute cruel or unusual punishment or a punishment not sanctioned by the customs of the service;

- (2) Is a duty normally intended as an honor, such as assignment to a guard of honor;
- (3) Is required to be performed in a ridiculous or unnecessarily degrading manner; for example, an order to clean a barracks floor with a toothbrush; or
- (4) Is a punishment involving the use of the offender as a personal servant.

c. An enlisted person serving in the Army National Guard in the grade of E4 (SP4, CPL) or above; or an enlisted person serving in the Air National Guard in the grade of Sergeant (SGT), Senior Airman or above, may not be assigned extra duties as punishment under Section 15, USCMJ, which would demean his position as a noncommissioned officer or specialist. The performance of extra duties involving labor or duties not customarily performed by personnel in these grades is an example of extra duties of a demeaning nature. The supervision of details being accomplished after normal duty hours is an example of an extra duty which would not be demeaning.

d. Withholding of Privileges. Commanders may withhold some privileges; for example, pass privileges, as punishment. However, the privileges revoked should relate directly to the act of misconduct. For example, revoking driving privileges would not be appropriate for an assault offense, but removal of post exchange (PX) privileges might be appropriate for a soldier guilty of disorderly conduct in the PX.

e. Forfeitures and fines are based on the comparable active duty pay of the accused at the grade held at the time of the offense, except when the offense was committed while the accused was on state active duty, in which case, the forfeiture or fine is based on the amount of pay the accused was entitled to for a comparable period on state active duty.

9. Reserved.

10. Effective date and execution of punishments.

a. The date of imposition of nonjudicial punishment is the date the appropriate Record of Nonjudicial Punishment Proceedings is signed by the imposing commander.

b. The punishments of reduction in grade, if unsuspended, take effect upon the issuance of the appropriate order by The Adjutant General. A commander imposing Section 15 punishment of a reduction in grade shall, if unsuspended, promptly send to The Adjutant General the completed copy of the Record of Nonjudicial Punishment Proceedings with a Request for Reduction Order, AGO Form 600-200-2. This form must be completed by the commander imposing the punishment of reduction in grade, stating the reason for the reduction is: Section 15, Nonjudicial Punishment. If the reduction in grade is pending appeal, it should be noted on AGO Form 600-200-2. A reduction under Section 15, if suspended with the suspension later vacated, becomes executed and takes effect upon the issuance of the order by the State Adjutant General.

c. If, upon imposition of a unsuspended fine and a person has reused or failed to pay their fine, the commander imposing the fine shall promptly send to The Adjutant General a completed copy of the Record of Nonjudicial Punishment Proceedings and a written notification of failure to pay fine.

d. Other punishments, if unsuspended and if no appeal is filed, will take effect and be carried into execution on the date they are imposed unless otherwise prescribed by the officer imposing the punishment or by superior authority. If, at the time punishment is imposed, the recipient appeals by marking the appropriate box on the Record of Nonjudicial Punishment Proceedings, the execution of any punishment will be stayed pending completion of such appeal, unless the recipient requests otherwise. If the recipient refuses to indicate his desires as to appeal at the time punishment is imposed, either verbally or on the Record of Nonjudicial Punishment Proceedings, punishment will not be stayed.

e. If the member to be punished is already undergoing any of the punishments involving extra duties and the commanding officer wishes to impose an additional punishment of that kind, he may prescribe that the additional punishment will begin to run on a date on or after the termination of the first punishment.

f. When an unsuspended punishment of extra duties or restriction has been imposed under Section 15 by appropriate authority, any commanding officer of the person to be punished may order the punishment to be executed in such a manner and under such supervision as he may direct. The particular extra duties to be performed may be varied from time to time within the duration of the punishment duration of the punishment, not to exceed more than two hours per day, holidays included.

#### Section V. Right to Demand Trial.

##### 11. When Section 15 proceedings instituted.

Section 15 proceedings may be instituted when a commander, having the authority to impose Section 15 nonjudicial punishment, receives a report or learns of a violation of the USCMJ by enlisted personnel of his command. The facts consisting of the violation are to be set forth in the appropriate Record of Nonjudicial Punishment Proceedings.

##### 12. Procedures.

a. The commander who intends to impose the punishment will notify the member concerned of that intent in writing on the Record of Nonjudicial Punishment Proceedings and will inform the member of his rights. If the punishment options will include restraints on freedom, the commander will also inform the member of his right to demand a trial by courts-martial.

b. The officer who intends to impose the punishment will afford the member a reasonable period of time in which to consult with a person to speak in his behalf and to decide whether or not he will demand trial, if applicable. When appropriate, the commander will direct the member to state either that he does, or does not, demand trial within that period.

(1) This period should be established after due consideration of such factors as the gravity of the offense and the time involved in physically transmitting the communication.

(2) Under ordinary circumstances, 48 hours may be considered to be a reasonable time.

c. If a new imposing commander takes command after a member has been notified of the original imposing commander's intent to impose punishment, the member will be notified of the change. The member will again be given a reasonable decision period in which to consult with counsel.

d. If the member demands trial by court-martial on any offense, no further action will be taken to impose nonjudicial punishment for that offense unless the member's demand is voluntarily withdrawn. Whether court-martial charges will be preferred against the member for the remaining offense(s) and the level of court-martial selected will be resolved by the appropriate commander. A member's demand for trial by court-martial will not bar disposition of minor offenses by nonpunitive measures by the appropriate commander.

e. If a demand for trial is not made prior to expiration of the specified interval, including any extension of time that may have been granted, or the member refuses to elect a choice, the commander may continue with Section 15 proceedings. Punishment may also be imposed where the member refuses to complete and/or sign the Record of Nonjudicial Punishment Proceedings, after having been afforded a reasonable time in which to make a decision. The member will be informed that failure to complete and sign the appropriate item may be treated as a voluntary withdrawal of any oral demand for trial. The member will also be informed that punishment can be imposed where he fails to make a timely demand for trial or refuses to complete and/or sign the Record of Nonjudicial Punishment Proceedings. If the member persists in the refusal, and punishment is imposed, in addition to recording the punishment, the following entry will be made on the form "After having been fully advised of (his) (her) rights, member (did not demand trial prior to expiration of the time specified for a decision) (refused to (complete) (sign) (complete and sign) this form."

## Section VI. Procedure: Records of Punishment

### 13. General.

a. The power to impose nonjudicial punishment charges a commanding officer, or an officer to whom that power has been delegated, with the grave responsibility of exercising his authority in a completely judicious manner. Authority under Section 15 must be administered with fairness in a formal and dignified manner at every stage of the proceedings. The right and opportunity to present matters in defense, extenuation, or mitigation, and the right fully to present his case in the presence of the officer who intends to impose punishment, will be afforded the member. The member will be afforded the right to be accompanied by a person to speak on his behalf and to call witnesses in defense, extenuation or mitigation. If the member so requests, the proceeding will be opened to the public, except where military exigencies or security interests preclude public disclosure. If the commanding officer decides to impose

punishment, he will announce the punishment in the presence of the member except under rare circumstances when this is not feasible. The commander may then explain to the member such matters as what he considered in determining the punishment, and the appellate rights and procedures which are available to the member.

b. **Announcement of Punishment.** The punishment may be announced at the next unit formation after punishment is imposed or, if appealed, after the decision on the appeal. It also may be posted on the unit bulletin board. The purpose of announcing the results of punishments is to preclude perceptions of unfairness of punishment and to deter similar misconduct by other service members. An inconsistent or arbitrary policy regarding announcement of punishments should be avoided because it could result in the appearance of vindictiveness or favoritism. In deciding whether to announce punishment of service members in the grade of E-5 or above, the imposing commander should consider the nature of the offense, the service member's military record and duty position, the deterrent effect, the impact on unit morale or mission, the impact on the victim and the impact of the leadership effectiveness of the service member.

c. **Commander's guide for notification and imposition of nonjudicial punishment.** The federal nonjudicial process is discussed in detail in Part V of the MCM. For service branch specific information, Army commanders should review Chapter 3 of AR 27-10 and Air commanders should review AFI51-202. Additionally, a suggested format for conducting the proceeding is located in Attachment 1 of this regulation. While these materials provide guidance on conducting the proceedings, strict adherence to the letter of the suggested guides is not a procedural requirement for an imposition of nonjudicial punishment. Prior to any Section 15 proceedings, the commander should have completed a preliminary inquiry and have concluded that nonjudicial punishment is appropriate for the offense and the offender.

d. **Preliminary inquiry.**

(1) The commander of an alleged offender must ensure that the matter is investigated promptly and adequately. The investigation should provide the commander with sufficient information to make an appropriate disposition of the incident. The investigation should cover:

- (A) Whether an offense was committed.
- (B) Whether the member was involved.
- (C) The character and military record of the member.

(2) Usually the preliminary investigation is informal and consists of interviews with witnesses and/or review of police or any other informative reports. If, after the preliminary inquiry, the commander determines, based on the evidence currently available, that the member probably has committed an offense and that a nonjudicial punishment procedure is appropriate, the commander should, unless the case is to be referred to a superior commander, take action as set forth in this appendix.

14. Procedural rules.

a. **Notification – Summarized Proceedings.**

(1) General. A commander, after a preliminary inquiry into an alleged offense by an enlisted member, may use summarized proceedings if it is determined that should punishment be found to be appropriate, it should not exceed:

- (A) Extra duties for 14 days.
- (B) Oral reprimand or admonition.
- (C) Any combination of the above.

(2) Notification and Explanation of Rights. If an imposing commander determines that summarized proceedings are appropriate, the service member will be notified of:

- (A) the commander's intent to initiate nonjudicial punishment;
- (B) the commander's intention to use summarized proceedings;
- (C) the service member's lack of a right to demand trial by court-martial;
- (D) the maximum punishments allowable thereunder;
- (E) the service member's right to remain silent;
- (F) the offenses that the service member has allegedly committed with reference to the sections of the law that are alleged to have been violated;
- (G) the service member's right to confront witnesses, examine the evidence and submit matters in defense, extenuation and/or mitigation; and
- (H) the service member's right to appeal.

(2) No Right to Counsel in Summarized Proceedings. The service member does not have the right to consult with counsel prior to the hearing nor does the service member have the right to counsel or a spokesperson during the hearing.

(3) Hearing. Consistent with the applicable service branch regulations of the service member, if a hearing is scheduled, notification of the date and time of the hearing will be made orally or in writing. The hearing should be scheduled no sooner than twenty-four (24) hours and no later than sixty (60) days after the service member receives notification of the commander's intent to impose nonjudicial punishment.

b. Notification – Formal Proceedings.

(1) Commander's Determination. A commander, who after preliminary inquiry determines that the punishment options will include restraint of freedoms, must notify the service member of the right to demand trial by court-martial and turn down nonjudicial punishment.

(2) Notice and Rights. If an imposing commander determines that formal proceedings are appropriate, the service member will be notified of:

- (A) the commander's intent to initiate nonjudicial punishment;
- (B) the commander's intention to use formal proceedings;

- (C) the maximum punishments allowable thereunder;
- (D) the service member's right to remain silent;
- (E) the offenses that the service member has allegedly committed with reference to the sections of the law that are alleged to have been violated;
- (F) the service member's right to confront witnesses, examine the evidence and submit matters in defense, extenuation and/or mitigation;
- (G) the service member's right to consult with a judge advocate, and the location of such counsel;
- (H) the service member's right to demand trial by court-martial at any time prior to imposition of nonjudicial punishment;
- (I) the service member's right to appeal.

(3) Decision Period. The service member will be given a reasonable time to consult with counsel, to gather matters in defense, extenuation, and/or mitigation and to decide whether to accept the nonjudicial punishment or demand a trial by court-martial.

(4) The decision period will normally be forty-eight (48) hours depending on the availability of counsel but such period may be extended at the request of the accused service member.

(5) Rules of Evidence. The imposing commander is not bound by the formal rules of evidence before courts-martial and may consider any matter, including unsworn statements, the commander reasonably believes to be relevant to the offense.

(6) Upon imposition of nonjudicial punishment the right to demand trial by court-martial is extinguished even if after appeal, the nonjudicial punishment is invalidated.

c. Action upon receipt of notification.

(1) Spokesperson. If the member is entitled to a spokesperson, the person who may accompany the member to the Section 15 proceeding and who speaks on the member's behalf need not be a lawyer. An offender has no right to legal counsel at the nonjudicial proceedings. The member may retain civilian counsel to act as the member's spokesperson at no cost to the Government. However, the commander need not grant a delay for the appearance of any spokesperson, to include civilian counsel so retained. No travel fees nor any other costs may be incurred at Government expense for the presence of the spokesperson. The spokesperson's presence is voluntary. Because the proceedings are not adversary in nature, neither the member nor spokesperson (including any attorney present on behalf of the member) may examine or cross-examine witnesses, unless permitted by the imposing commander. The member or spokesperson may, however, indicate to the imposing commander relevant issues or questions they wish to explore or ask.

(2) Open or Closed Proceedings. A Section 15 proceedings before the commander is not an adversary proceeding. The member's request that the proceedings be open to the public shall ordinarily be granted except where military exigencies or security interests preclude this procedure. It shall be within the discretion of the commander administering Section 15

proceedings to determine when such exigencies or security interests predominate over the member's request that the proceedings be open to the public.

(3) Witnesses. The member's request for witnesses in defense, extenuation, or mitigation shall be restricted to those witnesses who are reasonably available as determined within the discretion of the commander imposing Section 15 punishment. In determining whether a witness is reasonably available, the commander imposing Section 15 punishment shall take into consideration that no witness fees or transportation fees will be paid. Reasonably available witnesses will ordinarily include those military personnel present for duty at the installation concerned, or those available without the expenditure of travel funds to obtain their presence, and whose attendance will not materially delay the disposition of the proceedings.

(4) Action termination proceedings. If, after evaluation of all pertinent matters, the officer conducting the proceedings determines that nonjudicial punishment is not warranted, he should notify the member that he has terminated the proceedings.

#### 15. Records of punishment.

##### a. Forms.

(1) Air Force. The appropriate AF Form 3070 as it may be amended or replaced from time to time will be used to record the nonjudicial punishment proceedings.

##### (2) Army.

(A) Summarized Proceedings. A DA Form 2627-1 (Summarized Record of Proceedings) as it may be amended or replaced from time to time will be used to record the summarized nonjudicial punishment proceedings. However, the notification of right to demand court-martial will be stricken from the form. An illustrated example of DA Form 2627-1 is contained in AR 27-10.

(B) Formal Proceedings. A DA Form 2627 (Record of Proceedings Under Article 15, UCMJ) will be used to record formal nonjudicial punishment proceedings.

##### b. Filing and Removal.

(1) In all Section 15 proceedings in which the punishment imposed is reduction in grade, unsuspended and not appealed, the commander imposing the punishment shall forward a copy of the record of punishment and attachments (if any), along with a Request for Reduction Orders to the Military Personnel Office for processing and filing.

(2) Section 15 proceedings and records shall be filed and removed pursuant to applicable service regulations and directives.

(3) Exceptions. In all cases where a fine has been imposed upon a member, the record of punishment filed in the member's military personnel file shall not be removed from the file

after one year, unless the fine has been paid by the member or set aside by a superior on appeal or otherwise.

c. Appeals: Records of punishment.

(1) Appeals of nonjudicial punishment. If the member appeals the nonjudicial punishment, the original records of punishment and all attachments (if any) shall be forwarded to the appropriate superior. After acting on the appeal, the superior authority shall forthwith return the record of punishment and all attachments (if any) to the commander who imposed the punishment for filing in the member's military personnel file.

(2) In all cases where a reduction in grade is appealed and the superior authority approves the reduction in grade, the commander who imposed the punishment shall forward the record of punishment to The Adjutant General as set forth in paragraph 15(b).

(3) Reduction in grade; appeal. Whenever a reduction in grade is set aside by a superior on appeal or otherwise and a lesser punishment is imposed on the member, the record of punishment shall be filed in the member's military personnel file for a period of one year and upon the expiration thereof it shall be removed.

(4) Setting aside of punishment. In any case where the punishment imposed upon a member in a Section 15 proceeding is wholly set aside by a superior on appeal or otherwise and no punishment is imposed the record of punishment shall be removed.

Section VII. Suspension, Mitigation, Remission and Setting Aside.

16. General.

a. The imposing commander, a successor-in-command, or the next superior authority may, in accordance with the time prescribed-

(1) Remit or mitigate any part or amount of the unexecuted portion of the punishment imposed.

(2) Mitigate reduction in grade, whether executed or unexecuted, to forfeiture of pay.

(3) At any time, suspend probationally (for a period of time) any part or amount of the unexecuted portion of the punishment imposed.

(4) Suspend probationally (for a period of time) a reduction in grade or forfeiture, whether or not executed. An uncollected forfeiture of pay will be considered unexecuted.

b. Successor in command, defined; recording of action.

(1) As used in paragraph 6a, part V, MCM, a "successor in command" is the officer who has authority to impose the same kind and amount of punishment on a member concerned that

was initially imposed or was the result of a modification and who commands the unit to which the punished member is currently assigned or attached, is the commander succeeding to the command occupied by the imposing commander, provided the member still is of that command, or is the successor to the delegate who imposed the punishment, provided the same authority has been delegated to that successor and the member is still of that command.

(2) Recording of action. Suspensions, mitigations, remissions and setting aside shall be documented on DA Form 2627 or DA Form 2627-1 or AF Form 366 and as these may be amended or replaced from time to time, used in the imposition of the nonjudicial punishment fully indicating the actions taken and the reasons therefore. Vacations of suspension shall likewise be documented, including the notice to, appearance by and response of the service member or if the service member was not notified or did not appear, why the member was not given notice and an opportunity to respond and the reasons for the vacation.

#### 17. Suspension.

Ordinarily, punishment is suspended to grant a probational period during which a member may show that the member deserves a remission of the remaining suspended punishment. An executed punishment of reduction or forfeiture may be suspended only within a period of 4 months after the date imposed. Suspension of punishment may not be for a period longer than 6 months from the suspension date. In the case of summarized proceeding, suspensions of punishment may not be for a period longer than 3 months from the date of suspension. Further misconduct by the member, within the period of the suspension, may be grounds for vacation of the suspended portion of the punishment. Unless otherwise stated, an action suspending a punishment automatically includes a condition that the member not violate any punitive Section of the USCMJ.

#### 18. Mitigation.

Mitigation is a reduction in either the quantity or quality of a punishment, its general nature remaining the same. Mitigation is appropriate when the offender's later good conduct merits a reduction in the punishment, or when it is determined that the punishment imposed was disproportionate. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command may, at any time, mitigate any part or amount of the unexecuted portion of the punishment imposed. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command may also mitigate reduction in grade, whether executed or unexecuted, to forfeiture of pay, but the amount of the forfeiture may not be greater than the amount that could have been imposed by the officer who initially imposed the nonjudicial punishment. Reduction in grade may be mitigated to forfeiture of pay only within 4 months after the date of execution.

When mitigating:

- (1) Arrest in quarters to restriction; or

(2) Extra duties to restriction, the mitigated punishment may not be for a greater period than the punishment mitigated. As restriction is the least severe form of deprivation of liberty, it may not be mitigated to a lesser period of another form of deprivation of liberty, as that would mean an increase in the quality of the punishment.

19. Remission.

This is an action whereby any portion of the unexecuted punishment is canceled by the officer imposing the punishment or his superior. Remission is appropriate under the same circumstance as mitigation. Discharge or other separation for the service remits any unexecuted punishment under Section 15 will not be held beyond his expiration of term or service to complete any unexecuted punishment imposed.

20. Setting aside and restoration.

Setting aside is an action whereby the punishment or any part or amount thereof, whether executed or unexecuted, is set aside and any property, privileges, or rights affected by the portion of the punishment set aside are restored. The nonjudicial punishment authority who imposed punishment, the commander who imposes nonjudicial punishment, or a successor in command may set aside punishment. The power to set aside punishments and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised only when the authority considering the case believes that, under all circumstances of the case, the punishment has resulted in clear injustice. Also, the power to set aside an executed punishment should ordinarily be exercised only within a reasonable time after the punishment has been executed. In this connection, 4 months is a reasonable time in the absence of unusual circumstances. In cases where administrative error results in incorrect entries on DA Form 2627, DA Form 2627-1 or AF Form 3070, the appropriate remedy generally is an administrative correction of the form and not a setting aside of the punishment.

Section VIII. Appeals.

21. General.

Any service member on whom nonjudicial punishment has been imposed and who considers the punishment to be unjust or disproportionate to the offense, may appeal to the next superior commander.

22. Appellate Authority.

Nonjudicial punishment appeals are made to the "next superior authority," who is generally the immediate commander superior to the officer who imposed the punishment. When a principal assistant imposes punishment, the "next superior authority" is the commander superior to the commander who delegated the power.

23. Number of Appeals.

Only one appeal is permissible.

24. Time to Appeal.

The service member will be given a reasonable time within which to submit an appeal. A reasonable time shall normally be fifteen (15) days or the end of the next monthly drill following, whichever comes first.

25. Who May Act on an Appeal.

A superior authority to the commander who imposed the nonjudicial punishment, generally, the next superior commander, may act on an appeal.

26. Procedure.

Appeals shall be in writing and will be made on DA Form 2627 or DA Form 2627-1, or AF Form 3070 as applicable and shall set forth the reasons for appeal including additional documentation and evidence which supports the appeal. Normally, the superior authority shall not consider additional evidence which was not presented to the commander who imposed the nonjudicial punishment, unless, the exclusion of it would yield an unfair result.

27. Legal Review.

Before acting on an appeal, the superior authority shall refer the case to a judge advocate for consideration and advice. The judge advocate shall render an opinion as to the appropriateness of the punishment and whether the proceedings were conducted in accordance with law and regulations. When a case is so referred, the judge advocate is not limited to an examination of any written matter comprising the record of proceedings, and may make any inquiries and examine any additional matter deemed necessary.

28. Action by Superior Authority.

In acting on an appeal, the superior authority may exercise the same power with respect to punishment imposed as may be exercised by the officer who imposed the nonjudicial punishment. The superior authority may take such action even if no appeal has been filed. The superior authority will consider the record of proceedings, any matters submitted by the service member, any matters considered during legal review, and any other appropriate matters. If the superior authority sets aside nonjudicial punishment due to procedural error, such superior authority may authorize additional proceedings by the imposing commander or a successor, but the punishment shall be no more severe than that originally imposed. Upon completion of action by the superior authority, the servicemember upon whom punishment was imposed, shall be promptly notified of the result.

29. Statute of limitations.

Nonjudicial punishment may not be imposed for offenses which were committed more than three (3) years before the date of imposition of punishment, unless such three-year limitation is waived by the accused in writing or unless the accused has filed an appeal under this regulation or the WVMCM. The period of limitations does not run when the member concerned is absent without authority; fleeing from justice; outside the territory where the United States or the State of West Virginia has authority to apprehend; in the custody of civil authorities; or, in the hands of the enemy.

30. Disposition of fines.

All fines imposed under this chapter (Section 15 proceedings) shall be collected from the offender by the commander imposing punishment and forwarded to The Adjutant General who shall deposit the same in the state military fund. Fines collected must be in the form of a cashier's check, certified check or money order payable to "The Adjutant General of West Virginia". Payment plans and payment by debit or credit card will be permitted upon approval of The Adjutant General.

ATTACHMENT 1  
GUIDE FOR CONDUCT OF NONJUDICIAL  
PUNISHMENT PROCEEDINGS

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**General**

This guide is designed to ensure that the proceedings comply with all legal requirements. It contemplates a three-step process conducted in the presence of the member, consisting of the following: (1) notification, (2) hearing (that may be omitted if the member admits guilt), and (3) imposition of punishment (if the findings result in determination of guilt).

**1. Guide for Formal Proceedings**

(Note to CO: If punishment options will include restraints of freedoms, member is entitled to demand a trial by court-martial. The following formal proceedings guide assumes that restraints of freedom will be included in the punishment options).

**Notification and Hearing**

*a. Statements of CO.*

(1) As your commander, I have disciplinary powers under Section 15 of the USCMJ. I have received a report that you violated the Uniform State Code of Military Justice, and I am considering imposing nonjudicial punishment using formal proceedings. This is not a formal trial like a court-martial. As a record of these proceedings I will use \_\_\_\_\_ (Choose: DA Form 2627 or the appropriate AF Form 3070).

(2) I now hand you that form. Read the specific item that states the offense(s) you are reported to have committed and the items that list the rights you have in these proceedings. Under the provisions of Article 31 of the USCMJ, you are not required to make any statement or provide any information concerning the alleged offense(s). If you do, it may be used against you in these proceedings or in a trial by court-martial.

*Note. Wait for the member to read the appropriate form. Allow him or her to retain a photocopy of the form until the proceedings are finished and you have either imposed punishment or decided not to impose it.*

(2) Do you understand the offense(s) you are reported to have committed?

*b. Response of Member.* Yes/No. If the member does not understand the offense(s), explain the offense(s) to him/her.

*c. Statement of CO.* Do you understand your rights? Do you have any questions about your rights in these proceedings?

*d. Response of Member.* Yes/No. Note. If the member does not understand his or her rights, explain them in greater detail. If the member asks a question you cannot answer, recess the proceedings. You probably can find the answer in one of the following sources: Section 15, USCMJ; Chapter 3, WVMCM; or contact your servicing Judge Advocate office. Additional information can be found in Part V of the Manual for Courts-Martial (MCM); AR 27-10, Chapter 3; or AFI51-202.

*e. Statement of CO.* There are some decisions you have to make:

(1) It is my intent to initiate nonjudicial punishment proceedings using the formal proceedings. You have to decide whether you want to demand trial by court-martial. If you demand a court-martial, these proceedings will stop. I then will have to decide whether to initiate court-martial proceedings against you. If you were to be tried by court-martial for the offense(s) alleged against you, you could be tried by summary court-martial, special court-martial, or general court-martial. If you were to be tried by special or general court-martial you would be able to be represented by a military lawyer appointed at no expense to you or by a civilian lawyer of your choosing at no expense to the Government.

(2) If you do not demand trial by court-martial, you must then decide whether you want to present witnesses or submit other evidence in defense, extenuation, and/or mitigation. You have the right to confront witnesses, examine the evidence and submit matters in defense, extenuation and/or mitigation. Your decision not to demand trial by court-martial will not be considered as an admission that you committed the offense(s); you can still submit evidence on your behalf.

(a) Evidence in defense is facts showing that you did not commit the stated offense(s). Even if you cannot present any evidence in defense, you can still present evidence in extenuation or mitigation.

(b) Evidence in extenuation is circumstances surrounding the offense showing that the offense was not very serious.

(c) Evidence in mitigation is facts about you showing that you are a good member and that you deserve light punishment.

(3) You can make a statement and request to have a spokesperson appear with you and speak on your behalf. I will interview any available witnesses and consider any evidence you think I should examine.

(4) Finally, you must decide whether you wish to request that the proceedings be open to the public. Do you understand the decisions you have to make?

*f. Response of Member.* Yes/No.

*g. Statements of CO.*

(1) If you do not demand trial by court-martial and after you have presented your evidence, I am convinced that you committed the offense, I could then punish you. The maximum punishment I could impose on you would be (punishment). (See Chapter 3, WVMCM).

(2) You should compare this punishment with the punishment you could receive in a court-martial. (If the member requests to be informed of the maximum court-martial sentence you may state the following: The maximum sentence you could receive in a court-martial is (sentence) for the offense(s); however, under the USCMJ no punishment will exceed ten years imprisonment or the death penalty). (See Part IV and Appendix 12 of the MCM, lists punishments for each violation of the various punitive Articles).

The CO:

(a) May inform the member that referring the charges to a summary or special court-martial would reduce the maximum sentence. For example, a summary court may not impose more than 1 month of confinement. A special court may not impose more than a year of confinement.

(b) Should not inform the member of the particular punishment you may consider imposing until all evidence has been considered.

(3) As the Record of Nonjudicial Punishment Proceedings form indicates, you have a right to talk to an attorney before you make your decisions. A military lawyer whom you can talk to free of charge is located at \_\_\_\_\_. Would you like to talk to an attorney before you make your decisions?

*h. Response of Member.* Yes/No. If the member desires to talk to an attorney, arrange for the member to consult an attorney. The member should be encouraged to consult the attorney promptly. Inform the member that consultation with an attorney may be by telephone. The member should be advised that he or she is to notify you if any difficulty is encountered in consulting an attorney.

*i. Statements of CO.*

(1) You now have 48 hours to think about what you should do in this case. You may advise me of your decision at any time within the 48-hour period. If you do not make a timely demand for trial or if you refuse to sign that part of the Record of Nonjudicial Punishment Proceedings form indicating your decision on these matters, I can continue with these Section 15 proceedings even without your consent. You are dismissed.

*Note.* At this point, the proceedings should be recessed unless the member affirmatively indicates that he or she has made a decision and does not want additional time or to consult with an attorney. In the event the member does not make a decision within the specified time or refuses to complete you resume the proceedings. Member will be informed that failure to complete and sign the appropriate item may be treated as a voluntary withdrawal of any oral demand for trial. If the member persists in the refusal, and punishment is imposed, in addition to recording the punishment, the following entry will be made on the form "Advised of (his) (her) rights, the

*member (did not demand trial during the decision period) (refused to (complete) (sign) (complete and sign) this form. ")."*

(2) Do you demand trial by court-martial?

*j. Response of Member. Yes/No. (If the answer is yes, continue with next statement.)*

*k. Statements of CO.*

(1) I will now have you complete the appropriate block indicating your demand for a courts-martial. Because you have demanded trial by court-martial, these proceedings will stop. I now must decide whether to initiate court-martial proceedings against you. I will notify you when I have reached a decision. You are dismissed.

(If the answer is no, continue with next statement.)

(2) I will now have you complete the appropriate block indicating your choice to continue with these proceedings. An open hearing means that the proceeding is open to the public. If the hearing is closed, only you, I, designated members of the chain of command, available witnesses, and a spokesperson, if designated, will be present. Do you request an open hearing?

*l. Response of Member. Yes/No.*

*m. Statement of CO. Do you wish to be accompanied by a spokesperson?*

*n. Response of Member. Yes/No.*

*o. Statement of CO. Complete the appropriate block indicating your decision. Do you want to submit any evidence showing that you did not commit the offense(s), or explaining why you committed the offense(s), or any other information about yourself that you would like me to know? Do you wish to have any witnesses testify, including witnesses who would testify about your good past military record or character?*

*p. Response of Member. Yes/No.*

*q. Statement of CO. Now complete the appropriate block indicating your decision, and sign and date the form in the space provided under that item.*

*Note. The CO will:*

*(1) Wait until the member initials the blocks and signs and dates the form. If the answers to all the questions are no, you may proceed to impose punishment.*

*(2) If the answer regarding witnesses and evidence is yes and the member is prepared to present his or her evidence immediately, proceed as follows. Consider the evidence presented. If the evidence persuades you that you should not punish the member, terminate the proceedings,*

*inform the member, and destroy all copies of Record of Nonjudicial Punishment Proceedings form. If you are convinced that the member committed the offense(s) beyond a reasonable doubt and deserves to be punished, proceed to impose punishment.*

*(3) If the member needs additional time to gather his or her evidence, give the member a reasonable period of time to gather the evidence. Tell the member when the proceedings will resume and recess the proceedings.*

*(4) If someone else conducted the notification proceedings, the imposing commander should conduct the remainder of the proceedings. When you resume the proceedings, consider the member's evidence. Ensure that the member has the opportunity he or she deserves to present any evidence.*

Ask the member, "Do you have any further evidence to present?"

*Note: If the evidence persuades you that you should not punish the member, terminate the proceedings, inform the member of your decision, and destroy all copies of Record of Nonjudicial Punishment Proceedings form. If you are still convinced that the member committed the offense(s) and deserves to be punished, impose punishment.*

## **2. Imposition of punishment**

Statement of CO: I have considered all the evidence. I am convinced that you committed the offense(s). I impose the following punishments: (Announce Punishment.)

*Note.* After you have imposed punishment, complete items the appropriate items.

## **3. Appellate advice**

Main paragraphs are required to have title followed by either paragraph text or two or more subparagraphs1.

*Note.* The CO will hand the form to the member.

*a. Statement of CO.* Read the item which lists the punishment I have just imposed on you. Now read the item, which points out that you have a right to appeal this punishment to (title and organization of next superior authority). You can appeal if you believe that you should not have been punished at all, or that the punishment is too severe. Any appeal should be submitted within 15 days. An appeal submitted after that time may be rejected. Even if you appeal, the punishments are effective today, unless the imposing commander sets another date. With respect to a reduction in grade, it is effective upon issuance of the appropriate order from the Adjutant General. Once you submit your appeal, it must be acted upon by (title and organization of next superior) within 5 calendar days, excluding the day of submission. Otherwise, any punishment involving deprivation of liberty (correctional custody, restriction or extra duty), at your request, will be interrupted pending the decision on the appeal. Do you understand your right to appeal?

b. *Response of Member.* Yes/No.

c. *Statement of CO.* Do you desire to appeal?

d. *Response of Member.* Yes/No.

*Note.* If the answer is yes, go to note at e(3). If the answer is no, continue with next statement.

e. *Statements of CO.*

(1) If you do not want to appeal, complete the appropriate block.

*Note.* Now give the member detailed orders as to how you want him or her to carry out the punishments.

(2) You are dismissed.

If the answer is yes, continue with next statement.

(3) Do you want to submit any additional matters to be considered in an appeal?

f. *Response of Member.* Yes/No. (If the answer is yes, go to note at g(2). If the answer is no, continue with next statement.)

g. *Statements of CO.*

(1) Complete the appropriate block. I will notify you when I learn what action has been taken on your appeal. You are dismissed.

*Note.* If the answer is yes, continue with next statement.

(2) If you intend to appeal and do not have the additional matters with you, this form will not be completed until after you have obtained all the additional material you wish to have considered on appeal. When you have obtained this material, return with it by (specify a date 5 calendar days from the date punishment is imposed). After you complete the appropriate blocks, I will send the form and the additional matters you submit to (title and organization of next superior authority). Remember that the punishment will not be delayed (unless the imposing commander sets another date). You are dismissed.

}

## **1. Guide for Summarized Proceedings**

### **Notification and Hearing**

#### *a. Statements of CO.*

(1) As your commander, I have disciplinary powers under Section 15 of the USCMJ. I have received a report that you violated the Uniform State Code of Military Justice, and I am considering imposing nonjudicial punishment using summarized proceedings. This is not a formal trial like a court-martial. As a record of these proceedings I will use \_\_\_\_\_ (Choose: DA Form 2627-1 or the appropriate AF Form 3070).

(2) I now hand you that form. Read the specific item that states the offense(s) you are reported to have committed and the items that list the rights you have in these proceedings. Under the provisions of Article 31 of the USCMJ, you are not required to make any statement or provide any information concerning the alleged offense(s). If you do, it will be used against you in these proceedings or in a trial by court-martial.

*Note. Wait for the member to read the appropriate form. Allow him or her to retain a photocopy of the form until the proceedings are finished and you have either imposed punishment or decided not to impose it.*

(3) Do you understand the offense(s) you are reported to have committed?

*b. Response of Member.* Yes/No. If the member does not understand the offense(s), explain the offense(s) to him/her.

*c. Statement of CO.* Do you understand your rights? Do you have any questions about your rights in these proceedings?

*d. Response of Member.* Yes/No. Note. If the member does not understand his or her rights, explain them in greater detail. If the member asks a question you cannot answer, recess the proceedings. You probably can find the answer in one of the following sources: Section 15, USCMJ; WVMCM, Chapter 3, or contact your servicing Judge Advocate office. Additional information can be found in Part V of the Manual for Courts-Martial (MCM); AR 27-10, Chapter 3; or AFI51-202.

*e. Statement of CO.* There are some decisions you have to make:

(1) It is my intent to initiate nonjudicial punishment proceedings using the summarized proceedings. You have the right to confront witnesses, examine the evidence and submit matters in defense, extenuation and/or mitigation. You must decide whether you want to present witnesses or submit other evidence in defense, extenuation, and/or mitigation.

(a) Evidence in defense is facts showing that you did not commit the stated offense(s). Even if you cannot present any evidence in defense, you can still present evidence in extenuation or mitigation.

(b) Evidence in extenuation is circumstances surrounding the offense showing that the offense was not very serious.

(c) Evidence in mitigation is facts about you showing that you are a good member and that you deserve light punishment.

(3) You can make a statement and request witnesses. I will interview any available witnesses and consider any evidence you think I should examine.

(4) Finally, you must decide whether you wish to request that the proceedings be open to the public. An open hearing means that the proceeding is open to the public. If the hearing is closed, only you, I, designated members of the chain of command, and available witnesses, will be present. Do you understand the decisions you have to make?

*f. Response of Member. Yes/No.*

*g. Statements of CO.*

(1) If, after you have presented your evidence, I am convinced that you committed the offense, I could then punish you. The maximum punishment I could impose on you would be extra duties for 14 days, oral reprimand or admonition, or any combination of those punishments.

(2) In a summarized proceeding, you do not have the right to consult with counsel prior to the hearing, nor do you have the right to counsel or a spokesperson during the hearing. (Note. The notification of right to demand court-martial will be stricken from the form.)

(3) The hearing will be scheduled no sooner than twenty-four (24) hours and no later than sixty (60) days from today's date. In this case, your hearing will be scheduled for \_\_\_\_\_ (Date, time, and location). Do you have any questions?

*h. Response of Member. Yes/No*

*i. Statements of CO.*

(1) I will now give you time to prepare your case. You are dismissed.

*Note. At this point, the proceedings should be recessed until the scheduled date.*

*k. Statements of CO. Do you request an open hearing?*

*l. Response of Member. Yes/No.*

*m. Statement of CO.* Do you want to submit any evidence showing that you did not commit the offense(s), or explaining why you committed the offense(s), or any other information about yourself that you would like me to know? Do you wish to have any witnesses testify, including witnesses who would testify about your good past military record or character?

*n. Response of Member.* Yes/No.

*o. Statement of CO.* Now complete the appropriate block indicating your decision, and sign and date the form in the space provided under that item.

*Note. The CO will:*

*(1) Wait until the member initials the blocks and signs and dates the form. If the answers to all the questions are no, you may proceed to impose punishment.*

*(2) If the answer regarding witnesses and evidence is yes and the member is prepared to present his or her evidence immediately, proceed as follows. Consider the evidence presented. If the evidence persuades you that you should not punish the member, terminate the proceedings, inform the member, and destroy all copies of Record of Nonjudicial Punishment Proceedings form. If you are convinced that the member committed the offense(s) beyond a reasonable doubt and deserves to be punished, proceed to impose punishment.*

*(3) If someone else conducted the notification proceedings, the imposing commander should conduct the remainder of the proceedings. When you resume the proceedings, consider the member's evidence. Ensure that the member has the opportunity he or she deserves to present any evidence.*

Ask the member, "Do you have any further evidence to present?"

*Note: If the evidence persuades you that you should not punish the member, terminate the proceedings, inform the member of your decision, and destroy all copies of Record of Nonjudicial Punishment Proceedings form. If you are still convinced that the member committed the offense(s) and deserves to be punished, impose punishment.*

## **2. Imposition of punishment**

Statement of CO: I have considered all the evidence. I am convinced that you committed the offense(s). I impose the following punishments: (Announce Punishment.)

*Note. After you have imposed punishment, complete items the appropriate items.*

## **3. Appellate advice**

Main paragraphs are required to have title followed by either paragraph text or two or more subparagraphs<sup>1</sup>.

*Note. The CO will hand the form to the member.*

*a. Statement of CO.* Read the item which lists the punishment I have just imposed on you. Now read the item, which points out that you have a right to appeal this punishment to (title and organization of next superior authority). You can appeal if you believe that you should not have been punished at all, or that the punishment is too severe. Any appeal should be submitted within 15 days. An appeal submitted after that time may be rejected. Even if you appeal, the punishments are effective today, unless the imposing commander sets another date. Once you submit your appeal, it must be acted upon by (title and organization of next superior) within 5 calendar days, excluding the day of submission. Otherwise, any punishment involving deprivation of liberty (extra duty), at your request, will be interrupted pending the decision on the appeal. Do you understand your right to appeal?

*b. Response of Member.* Yes/No.

*c. Statement of CO.* Do you desire to appeal?

*d. Response of Member.* Yes/No.

*Note. If the answer is yes, go to note at e(3). If the answer is no, continue with next statement.*

*e. Statements of CO.*

(1) If you do not want to appeal, complete the appropriate block.

*Note. Now give the member detailed orders as to how you want him or her to carry out the punishments.*

(2) You are dismissed.

If the answer is yes, continue with next statement.

(3) Do you want to submit any additional matters to be considered in an appeal?

*f. Response of Member.* Yes/No. (If the answer is yes, go to note at g(2). If the answer is no, continue with next statement.)

*g. Statements of CO.*

(1) Complete the appropriate block. I will notify you when I learn what action has been taken on your appeal. You are dismissed.

*Note. If the answer is yes, continue with next statement.*

(2) If you intend to appeal and do not have the additional matters with you, this form will not be completed until after you have obtained all the additional material you wish to have considered

AGD-WV, dated 03 November 2010  
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on appeal. When you have obtained this material, return with it by (specify a date 5 calendar days from the date punishment is imposed). After you complete the appropriate blocks, I will send the form and the additional matters you submit to (title and organization of next superior authority). Remember that the punishment will not be delayed (unless the imposing commander sets another date). You are dismissed.

ATTACHMENT 2  
SAMPLE FORMAT FOR WARRANT FOR ARREST

WARRANT FOR ARREST

TO ALL PEACE OFFICERS OF THE STATE OF WEST VIRGINIA AND ANY OTHER PEACE OFFICER OR CIVIL OFFICER HAVING AUTHORITY TO APPREHEND OFFENDERS UNDER THE LAWS OF THE UNITED STATES OR OF A STATE, GREETINGS:

Pursuant to Sections 7 through 14 of Chapter 15, Article 1E of the West Virginia Code, and considering the attached affidavit supporting a determination that probable cause exists to believe that an offense under the Uniform State Code of Military Justice was committed by the servicemember named herein, **YOU ARE HEREBY DIRECTED TO ARREST:**

Name, Rank, Social Security Number, Address

whose description is as follows: Race:    Weight:    Height:    DOB:    Hair:    Eyes:

and bring said person either before me, the undersigned authority at Address of unit

immediately, or, alternatively, to deliver said person to Name of local Regional Jail or to the most appropriate detention facility within your jurisdiction for the purpose of answering to the State of West Virginia for an offense against the laws of said State, as follows: State USCMJ Article(s) from Charge Sheet as sworn to in writing before me. The accused may be fingerprinted and photographed if required by your agency, and while in your custody, the said individual shall be subject to the same treatment as other persons so restrained under the laws of the State of West Virginia. The accused may be released to the custody of the West Virginia National Guard or admitted to bail in the amount of **\$250.00** and given written notice to report within 24 hours to his National Guard unit at the address below. This warrant shall expire six months from the date of issuance, and authorized detention **SHALL NOT EXCEED EIGHT HOURS** from the time of arrest. Upon release the arresting authority shall deliver the attached written direct order to report to the unit before 1600 the following working day. Immediately after the accused is in custody, and again when he is released, you are required to notify the individual's National Guard unit by calling the following persons:

Name and Rank                      Daytime Phone No.                      After Hours Phone No.

- 1.
- 2.

By the authority of the Governor of the State of West Virginia and pursuant to the USCMJ (WV Code §15-1E-1, et seq.), I affix my official signature, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(Typed Name & Rank of Convening Authority ("CA") (CA's Signature)

\_\_\_\_\_  
(Military Unit and Location)

ATTACHMENT 3  
SAMPLE FORMAT FOR TRANSMITTAL OF COURT-MARTIAL CHARGES

Unit Heading

Office Symbol

11 July 2010

MEMORANDUM FOR: Commander, 77th Brigade Troop Command, WVARNG, 409 Wood Mountain Road, Glen Jean, WV 25846

SUBJECT: Referral of Charges to Court-Martial

1. Forwarded herewith are sworn court-martial charges for appropriate disposition.
2. Summaries of expected testimony and documentary evidence upon which the charges are based, if any, are enclosed.
3. The following material witnesses are expected to be available at the time of the trial:  
  
(List Rank(s), Name(s), and Address(es))
4. There is evidence of \_\_\_\_\_ (list number, if any) admissible previous court-martial conviction(s) of the accused. A duly authenticated extract copy of the accused's military records of previous convictions showing such conviction(s), if any, is enclosed.
5. The character of the accused's military service prior to the offense(s) charged has been (excellent) (good) (fair) (unsatisfactory).
6. I recommend trial by (Summary) (Special) (General) Court-Martial, and further recommend that the soldier (be) (not be) retained in the West Virginia National Guard. [If applicable: The accused was offered and declined Summary Court-Martial for the charge.]

Encls: as

HARD CHARGER  
LTC, MP, WVARNG  
Commanding

ATTACHMENT 4  
SAMPLE FORMAT FOR CONVENING ORDER

Unit Heading

SPECIAL ORDER  
92-XX

Date

1. A Special Court-Martial is hereby convened. It may proceed to try such person(s) as may be properly brought before it. WVARNG Judge Advocates are appointed with the approval of the Senior Force Judge Advocate. The Court will be constituted as follows:

MILITARY JUDGE

COL THOMAS J. KINCAID, JA, JFHQ-WV, WVARNG, certified in accordance with USCMJ Section 26(b) and previously sworn in accordance with USCMJ Section 42(a).

TRIAL COUNSEL

MAJ DAVID K. SIMMONS, JA, 111th EN BDE, WVARNG, is detailed as TRIAL COUNSEL, certified in accordance with USCMJ Section 27(b) and previously sworn in accordance with USCMJ Section 42(a).

DEFENSE COUNSEL

CPT JEROME J. BARBERA, III, JA, 77th Brigade Troop Command, WVARNG, is detailed as DEFENSE COUNSEL, certified in accordance with USCMJ Section 27(b) and previously sworn in accordance with USCMJ Section 42(a).

PANEL MEMBERS

MOORE, JAROD A., COL/O6, SF, JFHQ-WV, WVARNG.

BENNETT, JOSEPH L., LTC/O5, EN, 1092 EN BN, WVARNG.

BARNETTE, SAMUEL T., LTC/O5, AG, 151st MP BN, WVARNG.

2. The special court-martial will convene at the TAG Conference Room, JFHQ-WV, 1703 Coonskin Drive, Charleston, WV 25311-1085.

BY ORDER OF THE COMMANDER

GARY J. WHIPPLE  
Brigadier General, WVARNG  
Commanding

ATTACHMENT 5  
SAMPLE FORMAT FOR ORDER OF COMMITMENT

ORDER OF COMMITMENT PURSUANT TO COURT-MARTIAL

TO: Commissioner of the West Virginia  
Division of Corrections

The defendant, (NAME, RANK, ADDRESS, & OTHER IDENTIFYING DATA)

has been convicted of violating Uniform State Code of Military Justice (USCMJ), Section( ), by West Virginia National Guard Summary Court-Martial.

Therefore, pursuant to Uniform State Code of Military Justice Sections 11 and 58 (WV Code §15-1E-11 and §15-1E-58), the sentence of this Court-Martial and the action of convening authority in this matter: YOU ARE DIRECTED TO COMMIT TO CONFINEMENT FORTHWITH THE ABOVE NAMED MEMBER OF THE WEST VIRGINIA NATIONAL GUARD AND TO KEEP SAID PERSON IN YOUR CUSTODY FOR THE FOLLOWING PERIOD OF COMMITMENT: \_\_\_\_\_ DAYS.

**SPECIAL INSTRUCTION:** UPON COMPLETION, MEMBER IS TO BE RELEASED ON HIS OWN RECOGNIZANCE. MEMBER SHOULD BE PLACED IN STATE, NOT FEDERAL CONFINEMENT IN THE PRISON OR FACILITY.

IF THE DEFENDANT IS NOT DELIVERED INTO YOUR CUSTODY WITH THIS ORDER, YOU ARE AUTHORIZED TO EFFECT HIS ARREST FOR THE PURPOSE OF COMMITMENT.

While committed, the individual shall be subject to the same discipline treatment as other persons so confined and/or committed under the laws of the State of West Virginia.

When the above named individual has been committed to confinement, and again when he has been released, you are requested to notify the following representative of the West Virginia National Guard.

RANK, NAME, UNIT ADDRESS, DAY & NIGHT TIME PHONE NUMBER

By the authority of the Governor of the State of West Virginia and pursuant to the USCMJ (WV Code §15-1E-1, et seq.), I affix my official signature, this DATE, RANK, NAME, OFFICIAL STATUS, UNIT ADDRESS & SIGNATURE OF SUMMARY COURT-MARTIAL OFFICER OR CONVENING AUTHORITY

The prisoner was received at \_\_\_\_\_ hours.

DATE: \_\_\_\_\_

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RANK, NAME, & ORGANIZATION OF CORRECTIONAL OFFICER

REQUEST FOR REDUCTION ORDERS

DATE PREPARED \_\_\_\_\_

TAG-WV USE: AGD APPROVED \_\_\_\_\_ ORDER \_\_\_\_\_ DATED \_\_\_\_\_

NAME \_\_\_\_\_ SSN \_\_\_\_\_  
LAST FIRST MI

UNIT \_\_\_\_\_ UIC \_\_\_\_\_ PRN \_\_\_\_\_

ADDRESS \_\_\_\_\_

RANK \_\_\_\_\_ REDUCED TO \_\_\_\_\_

PMOS AWARDED \_\_\_\_\_ SMOS AWARDED \_\_\_\_\_

PMOS WITHDRAWN \_\_\_\_\_ SMOS WITHDRAWN \_\_\_\_\_

REASON FOR REDUCTION \_\_\_\_\_

EFFECTIVE DATE (AGD USE) \_\_\_\_\_

AUTHORITY: Sec 15, USCMJ

DATE OF RANK (AGD USE) \_\_\_\_\_

BONUS RECIPIENT YES/NO IF RECOUPMENT IS NECESSARY, THE APPROPRIATE DOCUMENTS ARE ATTACHED.

PRESENT PARA \_\_\_\_\_ LINE \_\_\_\_\_ DMOS \_\_\_\_\_

MOVE TO PARA \_\_\_\_\_ LINE \_\_\_\_\_ NEW DMOS \_\_\_\_\_

FORMAT: 306

\_\_\_\_\_  
COMMANDER'S SIGNATURE BLOCK

The above request for personnel action is approved/denied.

\_\_\_\_\_  
Designated MILPO Authority