

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial whose records of trial were received by the Army Judiciary during the third quarter of Fiscal Year 1997 are shown below. For comparison, the times for the two previous quarters and Fiscal Year 1996 are also shown below.

General Courts-Martial

	FY 96	1Q, FY 97	2Q, FY 97	3Q, FY 97
Records received by Clerk of Court	793	169	192	174
Days from charges or restraint to sentence	62	66	63	71
Days from sentence to action	86	86	94	93
Days from action to dispatch	9	7	11	9
Days en route to Clerk of Court	9	11	9	9

BCD Special Courts-Martial

	FY 96	1Q, FY 97	2Q, FY 97	3Q, FY 97
Records received by Clerk of Court	167	42	35	34
Days from charges or restraint to sentence	45	56	38	43
Days from sentence to action	85	83	82	69
Days from action to dispatch	6	5	15	6
Days en route to Clerk of Court	8	11	8	7

Courts-Martial and Nonjudicial Punishment Rates

Courts-martial rates for the third quarter of fiscal year 1997, April-June 1997, are shown below. The figures in parentheses are the annualized rates per thousand.

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.41 (1.64)	0.40 (1.59)	0.65 (2.60)	0.44 (1.74)	0.00 (0.00)
BCDSPCM	0.15 (0.62)	0.15 (0.61)	0.25 (1.01)	0.11 (0.44)	0.39 (1.58)
SPCM	0.00 (0.02)	0.01 (0.02)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.23 (0.91)	0.28 (1.11)	0.13 (0.51)	0.09 (0.35)	0.00 (0.00)
NJP	21.44 (85.75)	22.62 (90.48)	18.86 (75.43)	25.96 (103.85)	15.39 (61.57)

Note: Based on average strength of 478,524.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin (Bulletin), which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the Bulletin electronically in the Environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service.

Underground Storage Tank Upgrade Compliance and the Environmental Protection Agency's Enforcement Policy

By 22 December 1998, all existing underground storage tank (UST) systems that do not meet the new UST performance standards of 40 C.F.R. § 280.20 must be upgraded in accordance with the technical requirements of 40 C.F.R. § 280.21 or be permanently closed. These Resource Conservation and Recovery Act (RCRA) regulations require various forms of corrosion protection, interior lining, and/or cathodic protection, depending on the type of UST. In addition, spill and overflow protection must be installed on all existing USTs, and all metal pipes that contain regulated substances and are in contact with the ground must be cathodically protected.

Data collection by the Department of the Army in 1996 provided inconsistent information, but indicated that a number of Army USTs may not meet the upgrade deadline. An audit is underway to determine the status of UST upgrade compliance for Army installations that have not already been audited by the Army Audit Agency or the DOD Inspector General. Tiger teams organized by the Army Environmental Center will perform on-site audits at thirty-eight priority installations, while self-audits will be carried out at all remaining installations.

The possibility of noncompliance with upgrade requirements raises the question as to whether the Environmental Protection Agency (EPA) can assess punitive fines against federal facilities for violating UST regulations.¹ The Federal Facility Compliance Act (FFCA) of 1992² amended the RCRA § 6961 to permit the assessment of punitive fines and penalties against federal facilities; however, this waiver of sovereign immunity applies only to the management of solid and hazardous waste and does not extend to UST operations. A separate RCRA section³ addresses USTs and requires federal facilities to comply with federal, state, interstate, and local requirements. The FFCA did not amend the provisions of that section of the statute to allow the assessment of fines and penalties against federal facilities. The UST section has language similar to the pre-FFCA language of § 6961 that the United States Supreme Court found insufficient to allow the enforcement of punitive penalties.⁴

1. Under the Resource Compensation and Recovery Act (RCRA), 42 U.S.C.A. § 6961(a) (West 1995), federal facilities are subject to federal, state, interstate, and local solid and hazardous waste disposal and management requirements.

2. Pub. L. No. 102-386 (1992).

3. 42 U.S.C.A. § 6991f(a) (West 1995).

4. U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992).

In a February 1997 memorandum to Regional Division Directors, the EPA asserted its authority under the RCRA Subtitle I and the FFCA to assess penalties against federal facilities for violations of UST regulations. This guidance allows EPA inspectors to issue field citations under a streamlined process, without consulting with the EPA's Federal Facilities Enforcement Office. Since this guidance was issued, EPA Regions have assessed UST penalties against the Army in Hawaii and against the Air Force in Louisiana. The Department of Defense (DOD) Hazardous Waste Subcommittee of the Defense Environmental Security Compliance Committee has created a tri-service panel to study the EPA field citation policy and to recommend a DOD position and response. Major Anderson-Lloyd.

Standing Under the National Environmental Policy Act: Beware the Plaintiff Alleging Procedural Harm

The National Environmental Policy Act (NEPA)⁵ is primarily a statute of procedure, and plaintiffs often attack agency actions by alleging a lack of compliance with the procedural requirements of the NEPA. Indeed, courts have granted substantial consideration to those who assert procedural rights. As the Supreme Court stated in *Lujan v. Defenders of Wildlife*,⁶ "[t]here is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."⁷

In *Florida Audubon Society v. Bentsen*,⁸ the United States Court of Appeals for the D.C. Circuit considered the issue of standing under the NEPA in the context of procedural rights. The court found that an interest in procedure, without more, is not enough to establish standing.⁹ Instead, procedural rights confer standing only when the right in question is designed to protect a threatened concrete interest of the plaintiff.¹⁰ The court concluded:

In this type of case, which includes suits demanding preparation of an EIS, in order to show that the interest asserted is more than a mere "general interest [in the alleged procedural violation] common to all members of the public" . . . the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff. The mere violation of a procedural requirement thus does not permit any and all persons to sue to enforce the requirement.¹¹

Under the *Florida Audubon* decision, therefore, procedural rights still retain their "special" status; however, in the D.C. Circuit, a general interest in procedural compliance is not enough to confer standing to challenge a federal action under the NEPA. Major Romans.

Useful Product Defense Upheld

The United States District Court for the Eastern District of Arkansas recently upheld the "useful product defense."¹² The court held that Standard Chlorine of Delaware's sale of chlorinated benzene compound to Vertac was the sale of a useful product, not an arrangement for disposal under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹³ The court looked into the nature of the transaction and found that this transaction was a sale of a technical grade chemical product for use as a raw material. Standard Chlorine of Delaware avoided the contribution claims brought by Hercules Chemical Corp, Vertac's successor, by arguing that the plaintiff must first establish liability under section 107 of the CERCLA before it can prevail under contribution claims brought under section 113 of the CERCLA.¹⁴ Ms. Greco.

5. 42 U.S.C.A. §§ 4321-47 (West 1997).

6. 504 U.S. 555 (1992).

7. *Id.* at 572 n.7.

8. 94 F.3d 658 (D.C. Cir. 1996).

9. *Id.* at 664.

10. *Id.*

11. *Id.*, citing *Ex parte Levitt*, 302 U.S. 633, 634 (1937).

12. *United States v. Vertac*, No. LR-C-80-109 (E.D. Ark. May 21, 1997).

13. Pub. L. No. 96-510, 94 Stat. 2767 (1980).

14. *Vertac*, No. LR-C-80-109.

Sikes Act Reauthorization Update

The Sikes Act is expected to be revised and updated this year after two consecutive years of failed reform attempts.¹⁵ The latest draft of the revised Sikes Act¹⁶ details the following required elements for an installation Integrated Natural Resource Management Plan (INRMP):

Consistent with the use of military installations to ensure the preparedness of the Armed Forces, each integrated natural resources management plan . . . shall, where appropriate and applicable, provide for

- (a) fish and wildlife management, land management, forest management, and fish and wildlife oriented recreation;
- (b) fish and wildlife habitat enhancement or modifications;
- (c) wetland protection, enhancement, and recreation, where necessary for support of fish, wildlife, or plants;
- (d) integration of, and consistency among, the various activities conducted under the plan;
- (e) establishment of specific natural resources management goals and objectives and time frames for proposed actions;
- (f) sustainable use by the public of natural resources to the extent such use is not inconsistent with the needs of fish and wildlife resources;
- (g) public access to the military installations that is necessary or appropriate . . . subject to requirements necessary to ensure safety and military security;
- (h) enforcement of natural resource laws and regulations;
- (i) no net loss in the capability of military installation lands to support the military mission of the installation; and
- (j) other such activities as the Secretary of the military department considers appropriate¹⁷

Major Ayres.

Department of Justice Decides Field Citation Dispute Against the Department of Defense

On 16 July 1997, the Department of Justice (DOJ) issued a memorandum which resolved an ongoing dispute between the Environmental Protection Agency (EPA) and the Department of Defense (DOD) about the Clean Air Act's (CAA) field citation authority.¹⁸ The EPA had asserted that it could issue field citations to federal agencies for violations of the CAA, and the DOD had opposed the EPA's jurisdiction. The DOJ decided the issue in favor of the EPA.

The 1990 CAA amendments gave the EPA the authority to issue on-the-spot administrative penalties against any person for minor violations of the CAA and its implementing regulations.¹⁹ This authority allows the EPA to promulgate regulations to identify those minor violations that could result in civil penalties that do not exceed \$5,000 per day of violation. When the EPA proposed a field citation rule,²⁰ the DOD provided comments which opposed the EPA's authority to apply the rule to federal agencies. This prompted the EPA to seek an opinion from the DOJ.

The DOD argued that this interpretation would raise serious separation of power concerns because resorting to federal judicial review is part of the statutory recourse for field citations. The DOD also disputed the EPA's assertion that including federal agencies in the CAA's general definition of "person" necessarily means that federal agencies are subject to field citation enforcement.

The DOJ agreed with the EPA that the CAA provides a "clear statement" that its enforcement provisions allow the EPA to assess administrative penalties against other federal agencies. Although the CAA's enforcement section has no definition of the term "person," the DOJ rested its conclusion primarily on the CAA's general definition of "person," which includes "any agency, department, or instrumentality of the United States."²¹ The DOJ also used the CAA's legislative history to support its decision. Finally, the DOJ concluded that the EPA's exercise of this authority did not violate Articles II and III of the United States Constitution.

Since the EPA must finish making its field citation rule, the DOJ's decision will not have an immediate impact on the DOD.

15. *Managing Wildlife on Military Lands*, ENV'T AND ENERGY WKLY BULL., (Env't and Energy Study Conf., Wash. D.C.) Aug. 5, 1997, at 5.

16. The revised Sikes Act will likely be included in the Fiscal Year 1998 Defense Authorization Act. *Id.*

17. Unpublished draft, *Amendment to H.R. 1119 as Reported Offered by Mr. Saxton of New Jersey, Title XXIX, Sikes Act Improvement* (on file with author).

18. 42 U.S.C.A. § 7413d(3) (West 1997).

19. *Id.*

20. 59 Fed. Reg. 22,776 (1994).

21. 42 U.S.C.A. § 7602e.

The DOD will have an opportunity to comment on any procedures the EPA proposes that grant federal agencies a right of administrative review. The DOJ's opinion did not address the enforcement provisions of any media statute besides the CAA. Lieutenant Colonel Jaynes and Major DeRoma.

Update on E-mail Ethics

Environmental attorneys who are licensed to practice in Illinois can use e-mail to communicate confidential client matters. The Illinois State Bar Association recently issued an opinion that attorneys who use e-mail to communicate with their clients have an expectation of privacy similar to those who use the telephone.²² In reviewing whether the use of e-mail violated the attorney's duty to maintain the confidentiality of client information, the Illinois State Bar Association Committee on Professional Conduct identified three methods of e-mail (internal, commercial, and Internet) and decided that, because interception is difficult and illegal, e-mail communication provides a reasonable assurance that the message is kept confidential.²³ In a 1990 opinion, the committee determined that attorneys should not communicate confidential client matters over cordless or mobile telephones because of the ease with which one may intercept the conversation.²⁴ Ms. Greco.

Military Munitions Rule Effective 12 August 1997—Now What?

The EPA's long-awaited Military Munitions Rule (MR) became effective on 12 August 1997.²⁵ The MR identifies when military munitions become a hazardous waste and are therefore subject to the Resource Conservation and Recovery Act (RCRA).²⁶ The MR also provides for the safe storage and transportation of munitions and explicitly exempts military training, materials recovery, and emergency response activities from the RCRA's requirements.

Representatives of the military services have met several times over the past six months to discuss how the DOD proposes to implement the MR and to determine how individual states plan to implement the MR. During those discussions,

most states indicated that they support the MR, but most were unable to complete the administrative process for adopting the MR by its effective date. In fact, only Oregon has adopted the MR as of this writing. It appears, therefore, that the provisions of the MR will be effective in only four states—Alaska, Hawaii, Iowa (all of which do not have authorized RCRA programs), and Oregon—until more states are able to complete their state rulemakings.

Until these other states adopt the MR, military installations should maintain the status quo regarding munitions operations. In particular, military installations should continue to manage any items previously designated as waste munitions in accordance with appropriate RCRA regulations. The services have encouraged states to adopt an interim approach to implementation,²⁷ but each state is free to determine for itself the allowable degree of latitude.

Regional environmental coordinators are keeping tabs on the issues, monitoring the progress of state rulemakings, and serving as a source of information concerning the intentions of various states. Whether the MR is adopted in a particular state or not, environmental law attorneys should still coordinate with state and federal regulators. Lieutenant Colonel Bell.

Litigation Division Notes

Litigation Reports: An All Important First Step in the Litigation Process

There are two ways for an installation labor counselor to stand out in the mind of a litigation attorney: the first is to submit a good litigation report; the second is to submit a bad one. To assist labor counselors in improving their litigation reports, the Civilian Personnel Branch of the Litigation Division addressed the subject in the January 1995 issue of *The Army Lawyer*.²⁸ The routine reassignment of labor counsel, however, makes reiteration of some of the points contained in that article worthy of repeating to ensure an understanding by novices and experts alike.

The form and substance of litigation reports is set out in *Army Regulation 27-40* (AR 27-40).²⁹ Preparing a litigation

22. Illinois State Bar Association Committee on Professional Conduct, Op. No. 96-10 (May 16, 1997).

23. *Id.*

24. Illinois State Bar Association Committee on Professional Conduct, Op. No. 90-7 (Nov. 26, 1990).

25. 62 Fed. Reg. 6621 (1997).

26. 42 U.S.C. A. §§ 6901-6981.

27. For example, a state could adopt those provisions which the EPA has characterized as "interpretations" of existing law and regulations.

28. Litigation Div. Note, *Litigation Reports: The Foundation of Civilian Personnel Litigation Case Preparation*, ARMY LAW., Jan. 1995, at 33 [hereinafter Litigation Div. Note].

report that perfectly complies with the regulation, however, might require more time than some installation attorneys are able to devote to the task. So how does a busy attorney prepare a professional litigation report in a reasonable amount of time? The simple answer is: by timely submitting a report which thoroughly reviews the facts and provides a short assessment of whether the plaintiff has timely exhausted administrative remedies and has established a prima facie case.

The Time Deadline

In federal court, the Army has only sixty days to respond to a plaintiff's complaint.³⁰ While this may initially seem like a lot of time, the litigation attorney is typically left with less than two weeks to prepare the response to the complaint. The limited response period results from the time-consuming coordination between the installation, the Civilian Personnel Branch, the Department of Justice, and the Office of the Secretary of the Army. When the labor counselor submits a late litigation report, the litigation attorney is forced to submit either a hastily prepared response or a late response. By sending the litigation report to the Civilian Personnel Branch by the suspense specified in the litigation report request letter,³¹ the labor counselor can improve the quality of representation provided to the installation. Additionally, he can establish a good relationship with the litigation attorney and the Assistant United States Attorney assigned to the case.

The Facts

Attorneys from the Litigation Division often comment that what they need most from labor counselors is the facts. If the installation counsel has limited time to prepare the report and must choose between a brilliant legal analysis and a thorough recitation of the facts, he should choose the latter. The Litigation Division attorney is hundreds of miles away, might never have set foot on the installation, and is not as familiar with the case as local counsel may be. The litigation attorney can look to other sources for the relevant law, but the labor counselor is the only source for the facts.

The clearest and easiest way to prepare the facts is in chronological order, identifying each relevant event, stating the date

the event occurred, and specifically citing to the documents³² which relate to each event.³³ Good litigation reports have numerous tabs with documentary support for all relevant details and a comprehensive table of contents for the enclosures.

The Law

Before writing the memorandum of law³⁴ portion of the litigation report, installation counsel should call the Civilian Personnel Branch. In many cases, the litigation attorney will be able to waive the requirement for a memorandum of law after a brief discussion of the underlying facts. Sometimes, it is appropriate for installation counsel to suggest legal issues without a comprehensive review of applicable statutes and case law.

Many of the cases that come to the Civilian Personnel Branch have procedural or factual defects which warrant dismissal of the case. These defects exist at the time the judicial complaint is filed, and the installation counsel is in the best position to detect and to report these defects. The factual summary of the case should be prepared in a way that sets out the legal defects of the case. The two most obvious legal questions that every litigation report should attempt to answer are: (1) has the plaintiff timely exhausted administrative remedies? and (2) has the plaintiff set out a prima facie case?

Determining whether the plaintiff timely exhausted administrative remedies is largely a factual inquiry. The installation counsel should set out a time line which lists the dates of key events, such as: the alleged incident, first contact with an EEO counselor, receipt of notice of the right to file a formal complaint, and the filing of the formal complaint. If the plaintiff has skipped any portion of the administrative process, the installation counsel should specifically identify that portion.

To analyze the plaintiff's prima facie case, a recitation of the law is not necessary. The installation counsel should simply list the elements of the prima facie case and, for each element, use a sentence or two to explain which facts establish whether the plaintiff has satisfied that element.

Conclusion

29. U.S. DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION (19 Sept. 1994) [hereinafter AR 27-40].

30. The litigation attorney at the Army's Litigation Division usually provides the Assistant United States Attorney with either a dispositive motion (such as a motion to dismiss) or an answer which addresses each paragraph of the plaintiff's complaint.

31. Immediately after the case is received by the Litigation Division, the Civilian Personnel Branch sends to the installation a letter which sets out the date on which the litigation report is due. This suspense date is generally set for a date 21 to 30 days in the future.

32. Citations to documents in the litigation report should be as specific as possible, including the page and paragraph in the document that proves the proffered fact.

33. For an example of how to set out and to cite the facts in a litigation report, see Litigation Div. Note, *supra* note 28, at 34.

34. AR 27-40, *supra* note 29, para. 3-9(d).

A good litigation report is the first and most vital part of a process that will ensure the best defense for the installation and the Army. Labor counselors who take the time to prepare a thorough litigation report and submit it on time can greatly assist in the preparation of the defense. Major Corneilson.

Offers of Full Relief

While the advent of compensatory damages under the Civil Rights Act of 1991 may have made offers of full relief more complicated,³⁵ labor counselors still may be able to resolve some complaints of discrimination by making such offers in accordance with federal regulations.³⁶ By offering a certified offer of full relief, the agency puts the complainant on notice that it is willing to resolve the complaint. While complainants should respond to such an offer, some will simply ignore it entirely, at their peril. Complainants are required to cooperate in good faith during administrative proceedings, and failure to respond to an offer of full relief violates this duty with significant results.

In *Francis v. Brown*,³⁷ the plaintiff rejected an agency offer of full relief without giving any reason. After the agency dismissed the complaint, the employee filed a complaint in federal district court. The court held that a "federal employee fails to exhaust his administrative remedies when he rejects a settlement offer for full relief on the specific claims he asserts."³⁸

A proper offer of full relief may resolve a complaint early in the dispute process, and it could create a dispositive issue in subsequent litigation.³⁹ Labor counselors should ensure that the offer of relief specifies in detail the relief proposed and how the agency offer is in full satisfaction of the complaint. Major Hokenson.

Review of Proposal and Decision Letters

The Litigation Division has a clearly meritless case pending due to an apparent lackadaisical attitude in the preparation of the proposal letter and a decision letter that failed to correct the problem. Specifically, the proposal letter provided that a specified employee should be suspended for five days for fighting

on 12 December 1994. When the employee was presented with the proposal, the supervisor allegedly noticed that the date listed for the altercation was incorrect and should have been 12 January 1995. The supervisor asserts that he drew the employee's attention to the error and orally informed him of the date of the offense, but the supervisor did not make any changes in ink. During his oral reply, the employee steadfastly maintained his innocence of the written charge. The decision letter, which amounted to nothing more than three short paragraphs that reiterated the charge and directed implementation of the suspension, did not note the error or the fact that it had been brought to the employee's attention.

The employee followed the EEO process and filed a complaint which alleged that the suspension was imposed because of his race. The employee's position was that he did not and could not have committed the offense alleged because, as the office time cards showed, he was on leave on the day the offense was alleged to have been committed. The Department of Defense Office of Complaints Investigations (OCI) found this position meritorious, noting that management's articulated reasons for the suspension in the proposal and decision were proven to be false because the employee was, in fact, on leave on 12 December. Fortunately for the installation, the Army's Equal Employment Opportunity Compliance and Complaints Review Agency did not adopt the OCI's recommended findings. The employee then filed suit, seeking all possible relief, including backpay and \$300,000 in compensatory damages.

While the Litigation Division was able successfully to defend this lawsuit in federal court,⁴⁰ all of the effort expended in this suit probably would not have been necessary if a little more attention had been paid to the proposal and/or decision letter. The employee in this instance never denied that the fight took place *ever*; rather, he asserted that he was not guilty of the offense on the date charged. Greater care in proofreading the proposal letter, or a detailed recitation in the decision letter of what occurred, might have saved this installation quite a few tense moments and hundreds of hours of work. Mr. Meisel.

Negotiated Settlement Agreements

35. For an example of how the Civil Rights Act of 1991 has made the issuance of offers of full relief more complicated see *Jackson v. Postal Service*, EEOC No. 01923399, 93 FEOR 3062, *request to reopen denied*, EEOC No. 05930306, 93 FEOR 3133 (1993).

36. 29 C.F.R. § 1614.107(h) (1997).

37. 58 F.3d 191 (5th Cir. 1995).

38. *Id.* at 193. See also *Wrenn v. Secretary, Dep't of Veterans Affairs*, 918 F.2d 1073, 1078 (2d Cir. 1990), *cert. denied*, 499 U.S. 977 (1991) ("A claimant who is offered full relief in the administrative process must either accept the relief offered or abandon the claim.").

39. In a recent case, the labor counselor at Corpus Christi Army Depot timely raised an offer of full relief during the administrative processing of a complaint; the complainant rejected the offer and filed suit. A motion to dismiss was filed in the case based substantially on the plaintiff's failure to cooperate in good faith.

40. Since this was a Title VII suit, the plaintiff had to show not only that management's articulated reasons were admittedly false, but also that the stated reasons were a pretext for discrimination.

Negotiated settlement agreements must not only solve the immediate dispute but also avoid causing or complicating future disputes. The agreement can accomplish these goals by providing specific relief for the actual dispute. General redress for future problems should be avoided, and labor counselors must consider factors such as the effect of the agreement on future Equal Employment Opportunity complaints and potential federal litigation.

Negotiated settlement agreements can cause problems when they broadly state that the agency will not discriminate against the complainant and that the Army will provide a work environment that is free of disparate treatment. That is the law; the Army must provide such an environment. Restating the proposition as a provision of a settlement agreement provides the complainant with two causes of action for every allegation of discrimination in the future: one cause of action for the new alleged discrimination and another for a breach of the settlement agreement. In addition, a jury sitting on a civilian personnel case could construe the clause as an admission of past discrimination, despite other clauses to the contrary.

The provisions of settlement agreements should address the current matter in explicit terms and should not attempt to create future avenues of redress for a single employee. For example, one current lawsuit involves a settlement agreement which provides for discussions “should conflict in employment matters surface” and provides for an “unbiased third party” to examine issues of conflict.⁴¹ The labor counselor’s interpretation of “conflict in employment matters” may be very different from that of the employee who files EEO complaints. Furthermore, the definition of an “unbiased third person” has the potential to become an issue in this litigation.

Concise, well thought-out settlement agreements can greatly assist the Army in its personnel management mission. The provisions of settlement agreements should, however, prevent rather than complicate future litigation. Major Martin.

41. The specific provision of the settlement agreement in question reads:

In settlement of this complaint, the Army agrees . . . to require the [employee’s] immediate and higher supervisors, should conflict in employment matters surface, to enter into open and frank discussion with the complainant on the issues involved in such conflict prior to consideration of any proposal of, or initiation of, any unfavorable action against the complainant. Where resolution of conflict cannot be realized between the supervisors and the complainant, the Army agrees to provide an unbiased third person to examine and discuss the issues of conflict jointly with the parties involved before the proposal of, or initiation of, any unfavorable action against the complainant.

This provision could be interpreted to include almost any action involving the employee, not just disciplinary actions. For instance, the propriety of work assignments or even an installation-wide reduction-in-force could arguably fall within the parameters of this agreement to mediate. (A copy of the settlement agreement is on file with the author.)