

# How the Brigade Judge Advocate Can Improve the Personnel Readiness Reporting Process for Flagged Soldiers

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## I. Introduction

It used to be that the expression “close enough for government work” meant that the work was precise and could meet the highest standards. Over time, this phrase has become a punchline to describe work that is not up to exacting standards.<sup>1</sup> Some aspects of routine brigade legal office operations only require adherence to the lower standard. For example, Army Regulation (AR) 25-50 states the lower standard by noting that it is not necessary to rewrite a memorandum to correct simple nonsubstantive errors.<sup>2</sup> However, failure to adhere to the higher standard in other brigade legal functions can negatively impact information the brigade commander and other leaders rely on to make decisions.

In an ideal world, where the work that needs to be done is equal to the time and other resources available to complete it, the brigade judge advocate (BJA) could simply demand that the legal office complete all work to the highest standard. In the real world, the BJA must balance a considerable number of competing requirements that are important, but have little to do with the office’s core functions.<sup>3</sup> As a lawyer and a leader, the BJA must distinguish between those tasks that can be completed to a “good enough” standard, and those that require completion to more exacting standards.

A recent Department of the Army Inspector General report confirms that personnel readiness reporting—including the reporting of which Soldiers are not deployable because they are flagged for legal actions—is one of those areas in which adherence to the standards has slipped dramatically over the last ten years.<sup>4</sup> This is due to the

necessary focus on tasks related to deployment, at the expense of more garrison-focused tasks such as personnel administration.<sup>5</sup> This decline in standards is particularly relevant now, because the Army is facing significant personnel reductions.<sup>6</sup>

Personnel readiness reporting is not the BJA’s primary duty.<sup>7</sup> However, the brigade legal office prepares many routine legal actions that are tracked by the personnel readiness reporting system.<sup>8</sup> A BJA who understands the importance of adhering to the right processes is uniquely positioned on the brigade staff to assist the brigade’s command teams and personnel sections.<sup>9</sup> A BJA who merely supervises the preparation of legal actions meets the “close enough” standard. The BJA who makes sure that the Army’s personnel reporting system accurately reflects those legal actions meets the higher standard. By aspiring to this higher standard, the BJA becomes a force multiplier, easing the “crush of requirements from higher headquarters” on commanders so that they can spend more time leading their Soldiers.<sup>10</sup> This is not an insignificant consideration. While the pen may in fact be mightier than the sword, a BJA’s job is to support those who wield the swords by lifting some of the administrative burdens experienced by these leaders.<sup>11</sup>

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<sup>1</sup> James F. Nagle, *The Twenty-Second Major Frank B. Creekmore, Jr. Lecture*, 213 MIL. L. R. 165, 172 (2012). This expression is sometimes rendered as “good enough for government work.” See *Close Enough for Government Work*, WIKTIONARY, [http://en.wiktionary.org/wiki/close\\_enough\\_for\\_government\\_work](http://en.wiktionary.org/wiki/close_enough_for_government_work) (last visited Feb. 24, 2013).

<sup>2</sup> U.S. DEP’T OF ARMY, REG. 25-50, PREPARING AND MANAGING CORRESPONDENCE para. 1-11b (3 June 2002).

<sup>3</sup> Some of these other requirements are as follows: the required training from Army Regulation (AR) 350-1; the requirements to support the headquarters company or battery with various taskings; sergeant’s time training; Office of the Staff Judge Advocate requirements; and many others that are not directly related to producing work in the legal office.

<sup>4</sup> Memorandum from the Inspector Gen., U.S. Army, to the Sec’y of the Army, subject: Report of the Disciplined Leadership and Company Administrative Requirements Inspection (n.d.) [hereinafter IG Report Memo].

<sup>5</sup> *Id.*

<sup>6</sup> FORSCOM VTC on Improving the Percentage of Deployable Soldiers, ARMY PROFESSIONAL FORUMS, <https://forums.army.mil/SECURE/CommunityBrowser.aspx?id=1898724&lang=en-US> (last visited Feb. 22, 2013) [hereinafter FORSCOM VTC]. Two of the six top challenges identified during the VTC, which involved ten Forces Command (FORSCOM) units, were data accuracy in eMILPO and a growing number of legal cases, not all of which make the Soldier nondeployable.

<sup>7</sup> See U.S. DEP’T OF ARMY, FIELD MANUAL 1-0, HUMAN RESOURCES SUPPORT para. 3-17 (6 Apr. 2010) (listing the brigade S1’s duties vis-à-vis personnel readiness reporting).

<sup>8</sup> These include, but are not limited to, administrative separations, investigations, and nonjudicial punishment.

<sup>9</sup> Message, 181732Z Oct 12, Dep’t. of the Army, subject: ALARACT 293/2012, HQDA EXORD 10-13 ISO the HQDA FY13-15 Active Component Manning Guidance [hereinafter ALARACT 293/2012]. Increasing precision in personnel reporting is a “key task” in the Army’s most recent manning guidance. *Id.* para. 3.B.5.

<sup>10</sup> *The Crush of Requirements from Higher Headquarters*, ARMY MAG., Aug. 2012, available at [http://cc.army.mil/pubs/armymagazine/docs/2012/CC\\_ARMY\\_\(Aug2012\)\\_Crush-from-Higher.pdf](http://cc.army.mil/pubs/armymagazine/docs/2012/CC_ARMY_(Aug2012)_Crush-from-Higher.pdf) [hereinafter *Crush of Requirements*]. The number one challenge facing company commanders is “managing the overwhelming onslaught of [training and administrative] requirements posed by higher headquarters.” *Id.* Brigade judge advocates are responsible for advising as many as two dozen company commanders in a typical brigade.

<sup>11</sup> As one company commander put it, “During my first command, I felt like I was drowning in the tidal wave of on-the-job training that comes in the wake of things like congressional letters, DUIs, testing hot on a urinalysis, arrests, suicide ideation, etc.” *Id.* at 55.

For nearly every administrative problem a company commander faces, the BJA can be the commander's lifeline.<sup>12</sup>

The purpose of this article is two-fold: to increase the awareness of a problem every BJA will face, and to offer suggestions to solve it. Part II contains an overview of the Army's personnel reporting system. It will impress upon the reader the significance of certain routine legal actions and how they affect a unit's personnel readiness reporting. Part II will also explain in detail the personnel codes that must be placed on a Soldier's record when a Soldier faces certain legal actions. Part III describes the problems that result when this is not done correctly, and offers suggestions the BJA can use to ensure it is.

Accuracy in personnel readiness reporting is a key concern of any commander.<sup>13</sup> The commander's staff, including the BJA, should make every effort to provide the commander with the most accurate personnel data possible.

## II. Personnel Reporting

The Army's Electronic Military Personnel Office, commonly called "eMILPO," "provides the U.S. Army with a reliable, timely, and efficient mechanism for performing Army personnel actions and managing strength accountability."<sup>14</sup> This article will focus on the strength accountability reporting features of eMILPO, in particular that relatively narrow category of personnel status in eMILPO known as legal processing.<sup>15</sup>

The data fed into eMILPO—the data that commanders rely on to make personnel and other decisions—is too often untimely, inaccurate, or both.<sup>16</sup> This is a significant issue for brigades within combat divisions, where the goal is to maintain a high state of readiness (deployability).<sup>17</sup> Often the data in eMILPO will erroneously indicate that a unit is over the nondeployability threshold. This is due to a failure to keep the data current.<sup>18</sup> This failure results in time-consuming scrutiny of the data on a by-name basis by the brigade commander. A BJA can help avoid this problem by knowing how legal actions affect eMILPO personnel readiness data, and by intervening where necessary to make sure the processes are working properly.

### A. Legal Processing in eMILPO

eMILPO uses the term "legal processing" to describe those certain legal situations that make a Soldier nondeployable.<sup>19</sup> Nondeployable Soldiers reduce a unit's readiness rating, which must be reported monthly in a commander's unit status report.<sup>20</sup> If enough Soldiers are categorized as nonavailable for deployment, the unit may be declared combat ineffective.<sup>21</sup> Soldiers undergoing legal processing make up the third largest category of nondeployable Soldiers.<sup>22</sup>

There are four administrative subcategories of legal processing in eMILPO, each described by a unique two-letter code: "LI" for Soldiers who are under investigation by military or civilian authorities; "LR" for Soldiers who are

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<sup>12</sup> Burdensome administrative regulations are as old as the Army itself. Immediately after the Second Continental Congress appointed George Washington "Commander in Chief of the American armies," he "devoted the evening to a committee impaneled to draw up army regulations." RON CHERNOW, WASHINGTON: A LIFE 187 (2010). For the purposes of this article, the relevant regulations are cited throughout.

<sup>13</sup> Message, 011411Z Nov 11, U.S. Army, subject: ALARACT 396/2011, Automated Rear Detachment Report and Reporting Requirements para. 2.B [hereinafter ALARACT 396/2011]. "Commanders are responsible to establish procedures to ensure authoritative systems of record, i.e., eMILPO and MEDPROS, are an accurate reflection of unit readiness . . ." *Id.*

<sup>14</sup> U.S. DEP'T OF ARMY, EMILPO USER'S MANUAL (14 July 2011) [hereinafter EMILPO MANUAL].

<sup>15</sup> U.S. DEP'T OF ARMY, REG. AR 220-1, ARMY UNIT STATUS REPORTING AND FORCE REGISTRATION—CONSOLIDATED POLICIES para. 5-2 (15 Apr. 2010) [hereinafter AR 220-1]. This regulation describes personnel reporting concepts generally. For legal processing specifically, see U.S. DEP'T OF ARMY, PAM. 220-1, DEFENSE READINESS REPORTING SYSTEM—ARMY PROCEDURES tbl. 5-1 (16 Nov. 2011) [hereinafter DA PAM. 220-1].

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<sup>16</sup> FORSCOM VTC, *supra* note 6.

<sup>17</sup> ALARACT 293/2012, *supra* note 9, para. 3.E.3.D.6, "The goal is no more than 10% of a unit's population is non-available [for deployment]." The Army does not use a standard term to refer to a Soldier who is not able to deploy with a unit for some reason. Throughout this article the terms nonavailable and nondeployable are used interchangeably to refer to Soldiers who are not available for deployment with their assigned unit.

<sup>18</sup> See FORSCOM VTC, *supra* note 6.

<sup>19</sup> EMILPO MANUAL, *supra* note 14, at 598. There are many different reasons why a Soldier might be declared nondeployable. This article covers only those Soldiers who are nondeployable due to some legal action.

<sup>20</sup> See AR 220-1, *supra* note 15, tbl.4-1. This reference contains frequency of reporting requirements for most units.

<sup>21</sup> Memorandum from Deputy Chief of Staff G1, U.S. Army to Principal Officials of Headquarters et al., subject: HQDA Active Component (AC) Manning Guidance for Fiscal Year (FY) 2011, para. 3.c.(2) (17 Dec. 2010) [hereinafter Manning Guidance Memo]. The Army has defined combat effectiveness as a minimum deployed strength of 95% of authorized personnel.

<sup>22</sup> U.S. ARMY WAR COLLEGE, STRATEGIC RESEARCH PROJECT, NON-DEPLOYABLE SOLDIERS: UNDERSTANDING THE ARMY'S CHALLENGE 22 (7 May 2011) [hereinafter USAWC REPORT]. Soldiers with medical conditions make up the largest category of nondeployers. Soldiers who have not completed theater-specific individual readiness training make up the second largest number of nondeployers. *Id.* at 3.

under arrest or in confinement; “LZ” for Soldiers who are pending military or civilian criminal court action; and “LD” for Soldiers who are pending administrative separation.<sup>23</sup> Significantly, Soldiers assigned one or more of these four eMILPO codes are reported in eMILPO as temporarily nonavailable for deployment.<sup>24</sup> In other words, many administrative separations and all Article 15s, pre-trial confinements, and courts-martial create nondeployable Soldiers.

Personnel readiness information captured by these eMILPO codes is usually the subject of bi-weekly command and staff meetings at the brigade level. Higher headquarters often request related information from eMILPO for purposes other than personnel readiness reporting. For example, the division commander may want to know how many Soldiers are being involuntarily separated, or how many are AWOL.<sup>25</sup> While maintaining such data is an S1 staff function, the BJA must be ready to explain any discrepancies in the legal processing portions of this data.

## B. Suspension of Favorable Personnel Actions

When a Soldier’s status changes from favorable to unfavorable, the Army flags that Soldier’s personnel record.<sup>26</sup> The term “flagged” is Army shorthand to indicate that a Soldier’s commander has suspended favorable personnel actions for that Soldier for some authorized reason.<sup>27</sup>

The two categories of flags, determined by the specific action or investigation on the Soldier, are nontransferable and transferable.<sup>28</sup> A nontransferable flag on a Soldier’s record prevents that Soldier from being transferred to another unit except in limited circumstances.<sup>29</sup> Nontransferable flags are the type the BJA will deal with most often. They include flags for investigation, confinement, adverse action, and involuntary separation or discharge.<sup>30</sup> Transferable flags include flags for Soldiers in the punishment phase (ordered by a military or civil criminal court or from nonjudicial punishment), flags for Soldiers who fail the Army Physical Fitness Test, and flags for those Soldiers who are not in compliance with the Army Weight Control Program.<sup>31</sup> A unit may transfer a Soldier with a transferable flag to another unit by following the procedures in AR 600-8-2.<sup>32</sup>

Commanders are responsible for flagging Soldiers whose status is unfavorable for some reason.<sup>33</sup> Commanders are likewise responsible for making sure that their subordinate commanders comply with the provisions of the regulation governing flags.<sup>34</sup>

Placing a flag on a Soldier’s personnel record is a simple process. The Soldier’s commander completes and signs a one-page form and forwards it to the battalion personnel section to note the flag in eMILPO.<sup>35</sup> The time limit is three days from the Soldier’s change of status from favorable to unfavorable.<sup>36</sup> A commander uses the same form to remove the flag within three days after the Soldier’s status changes back to favorable.<sup>37</sup> The process sounds simple, and it is.

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<sup>23</sup> DA PAM. 220-1, *supra* note 15, at 34.

<sup>24</sup> See EMILPO MANUAL, *supra* note 14, at 122.

<sup>25</sup> During the spring and early summer of 2012, the brigades of the 82d Airborne Division were required to report the status of pending administrative separations, by name, on a weekly basis. The XVIII Airborne Corps placed a similar, monthly briefing requirement on these brigades. Without accurate information in eMILPO, this required preparing PowerPoint slides by hand, in two different (division and corps) formats. This effort consumed a considerable amount of additional time. If those charged with doing so were properly feeding accurate data into eMILPO, the Division and Corps staffs could have simply queried the eMILPO system for the information their commanders required at any time. This assertion is based on the author’s recent professional experiences as a BJA from 1 August 2010 to 8 July 2012.

<sup>26</sup> U.S. DEP’T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) para. 2-1e (23 Oct. 2012) [hereinafter AR 600-8-2] (note: the most recent edition of this regulation involved a considerable rewrite, and older versions will not match up with the citations in this article). An unfavorable status generally refers to an investigation of the Soldier by military or civilian criminal authorities for some offense that may result in disciplinary action or loss of pay or privileges.

<sup>27</sup> *Id.* para. 2-1. Some of these favorable personnel actions are: reenlistment, reassignment, promotion, recommendation and receipt of awards, attendance at military and civilian schools, unqualified resignation, retirement or discharge, and advance or excess leave. Importantly, ordinary leave is not prohibited by a flag.

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<sup>28</sup> *Id.* para. 2-1g.

<sup>29</sup> *Id.* para. 2-1g(1). Human Resources Command (HRC) may direct the transfer of a Soldier with a nontransferable flag, but the Soldier’s unit may not.

<sup>30</sup> *Id.* para. 2-2. The adverse action category is very broad. It covers initiation of proceedings under Article 15 of the Uniform Code of Military Justice (UCMJ), court-martial proceedings (preferral or pretrial confinement), civilian criminal charges, restraint or confinement, initiation of administrative reduction proceedings, initiation of memorandum of reprimand, and absent without leave. A flag for nonjudicial punishment remains in effect throughout any period of suspension, so a Soldier whose punishment is suspended for six months will be flagged for six months.

<sup>31</sup> *Id.* para. 2-3.

<sup>32</sup> *Id.* para. 2-8.

<sup>33</sup> *Id.* para. 1-4j.

<sup>34</sup> *Id.*

<sup>35</sup> U.S. Dep’t of Army, DA Form 268, Report to Suspend Favorable Personnel Actions (FLAG) (Oct. 2012).

<sup>36</sup> AR 600-8-2, *supra* note 26, para. 1-9.

<sup>37</sup> *Id.* para. 1-9c. The three-day standard applies to placing and removing flags. Note that for initiation of a flag, the regulation also requires human resources (eMILPO) system input within the same three-day standard. *Id.* para. 1-9a.

The problem is that the simple process is often not followed, or is not completed in a timely fashion. This is the main reason why legal processing data in eMILPO is almost invariably inaccurate and unreliable.<sup>38</sup>

As a judge advocate might guess, there is a counseling requirement associated with flagging. Here also the BJA can assist the commander, and thereby avoid problems associated with the failure to comply with a regulation. The commander or first-line supervisor must counsel the flagged Soldier, in writing, within two working days of the initiation of the flag, unless notification would compromise an ongoing investigation.<sup>39</sup> Failure to counsel a Soldier regarding a flag often leads to a misunderstanding by the Soldier as to the reason for the flag, and what the requirements are to have the flag removed. This failure in communication can cause morale problems and be the subject of inspector general complaints.<sup>40</sup>

Appreciating the nature of the problem and the impact that routine legal actions have on personnel readiness reporting is a large step toward solving the problem. The next few paragraphs describe the more common types of flag and the issues a BJA may face with each.

### 1. Legal Processing Flags

For the BJA, legal processing flags are the most common types of flags imposed on Soldiers. This section describes the four types of legal processing flag.

Different regulations refer to the same flag in different ways.<sup>41</sup> For example, under AR 600-8-2, a Soldier being

investigated by a commander receives a flag code of “L.”<sup>42</sup> Department of the Army Pamphlet 220-1 refers to this same flag as “LI.”<sup>43</sup> This article will reference the “reason codes” from DA PAM 220-1 (LI, LR, LZ and LD) because that is how the commanders and staff will see them in unit status reports or when viewing accountability reports from eMILPO.<sup>44</sup>

#### a. Under Investigation by a Military/Civil/Criminal Investigation Activity (LI)

The nondeployability code LI is the most common legal processing code in eMILPO. This code covers Soldiers facing nonjudicial punishment as well as those under investigation.<sup>45</sup> Within eMILPO, this means that a Soldier may be flagged once for being the subject of an investigation under AR 15-6 (a relatively rare occurrence), and a second time when the Soldier receives an Article 15 (a relatively common occurrence).

A typical brigade of over 3,000 Soldiers may show well over 100 of these Soldiers as “nondeployable” due to processing code LI. Just 100 Soldiers with this one legal processing code (LI) would put a brigade’s nondeployable percentage over three percent. The Army’s goal for nondeployables due to legal processing is no more than one percent of a unit’s total nondeployables.<sup>46</sup>

Fortunately, the commander has discretion to determine which Soldiers with an LI code are in fact deployable, after consulting with the servicing judge advocate.<sup>47</sup> However, the situation would be simpler if there was a fifth legal processing code for Soldiers facing nonjudicial punishment, who are in almost every case deployable.<sup>48</sup> Part III of this article contains suggestions for addressing this issue.

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<sup>38</sup> See Message, 201345Z Jun 11, Dep’t. of the Army, subject: Suspension of Favorable Personnel Actions (FLAGS) [hereinafter FLAGS Message I] and Message, 191831Z Oct 11, Dep’t. of the Army, subject: Suspension of Favorable Personnel Actions (FLAGS) [hereinafter FLAGS Message II]. Both of these messages direct commanders to immediately initiate or remove flags when a Soldier’s status changes, actions that are already required by regulation. While the process for placing and removing a flag is simple, these messages and the IG Report Memo, *supra* note 4, indicate that the failure to follow this simple process is widespread in the Army. This failure is causing serious problems with the legal processing data in eMILPO.

<sup>39</sup> AR 600-8-2, *supra* note 26, para. 2-6.

<sup>40</sup> In two relatively recent messages on this topic the Army reinforced the point that “[p]oor flag management is detrimental to the Army’s morale and negatively impacts our collective ability to manage the force by making timely and informed decisions.” See FLAGS Message I, *supra* note 38; FLAGS Message II, *supra* note 38.

<sup>41</sup> For example, AR 600-8-2 refers to adverse action flags that include Soldiers under investigation and in confinement, both under flag code “A.” AR 600-8-2, *supra* note 26, para. 2-2c. Department of the Army, Pamphlet (DA Pam.) 220-1 refers to a nonavailability code of arrest and confinement as LR, and a Soldier under investigation is noted by a code of LI. DA PAM. 220-1, *supra* note 15, tbl.5-1. Soldiers who are flagged with code LI are not necessarily nondeployable. This is an eMILPO issue that the HRC must fix in order to improve the data accuracy in that system. Perhaps the LI code

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should be divided into two separate codes, one for Soldiers under investigation who will not deploy (pending serious charges, for example), and one for Soldiers under investigation for minor offenses that do not make them nondeployable. Until the HRC addresses this problem, the BJA must assist company commanders and S1s with the coding of those Soldiers in category LI based on the facts of each particular case. See also *infra* note 48.

<sup>42</sup> AR 600-8-2, *supra* note 26, para. 2-2a.

<sup>43</sup> DA PAM. 220-1, *supra* note 15, tbl.5-1, pt. II, at 35.

<sup>44</sup> A “reason code” refers to the reason a Soldier is not deployable, though the term is not specifically defined. See AR 600-8-2, *supra* note 26, tbl. 2-1; DA PAM 220-1, *supra* note 18, tbl. 5-1 and *passim*.

<sup>45</sup> AR 600-8-2, *supra* note 26, para. 2-2c.

<sup>46</sup> The overall goal is a ten percent nondeployable rate just before deployment. Medical (four percent) and legal processing (one percent) make up half of this number. *Id.*

<sup>47</sup> See DA PAM. 220-1, *supra* note 15, tbl. 5-1 n.5, at 35.

<sup>48</sup> “Future enhancements in eMILPO will allow commanders the flexibility to remove non-availability reason “LI” . . . for situations in which a Soldier

*b. Arrest and Confinement (LR)*

If a Soldier has committed some misconduct that warrants immediate confinement, the initial focus is on what happened, and who needs to know about it.<sup>49</sup> If military pretrial confinement is warranted, the offender's commander and the trial counsel are focused on meeting the requirements of Rule for Court-Martial 305, not on flagging the Soldier. Yet the commander must flag a Soldier placed in pretrial confinement.<sup>50</sup> The three-day standard for placing and removing the flag is particularly important here because pretrial confinement often happens very quickly and may be very short.<sup>51</sup> It is also important to note that the effective date of the flag is the date of the circumstances that prompted the flag, not the date the flag was initiated (unless they are the same date).<sup>52</sup> The flag date may be used by commanders for other reasons, such as a measure of the time required to process an administrative separation. Accurate flag data will provide the commander with a reliable snapshot of legal action processing times.

The flag for confinement is in addition to any other flag on the Soldier, such as the flag for investigation.<sup>53</sup> The regulation specifically calls for multiple flags in this common situation.<sup>54</sup>

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will deploy while a SFPA 'AA' is open." ALARACT 396/2011, *supra* note 13, para. 3.D. This single modification to eMILPO would solve one of the top challenges identified during the FORSCOM VTC referenced in note 6, "a growing number of legal cases, not all of which make the Soldier nondeployable."

<sup>49</sup> As an important aside, the first administrative task a commander must complete after learning of Soldier misconduct, whether that misconduct is an assault in the barracks or driving while impaired, or any number of less common ways Soldiers get into trouble, is a report of the misconduct through the chain of command, usually in the form of a serious incident report (SIR). Some brigade executive officers, who are usually responsible for forwarding the SIR to division headquarters, will ask for assistance in drafting the SIR, particularly if it involves a complex case. It is important to fully understand the facts associated with the misconduct, because the brigade commander will likely ask the BJA about it at physical training on Monday morning, or at the dining facility, or at some other time when the BJA may not otherwise expect it. The BJA should plan to follow up with the offending Soldier's commander or first sergeant soon after being notified of the misconduct.

<sup>50</sup> AR 600-8-2, *supra* note 26, para 2-2c.

<sup>51</sup> *Id.* para. 1-9.

<sup>52</sup> *Id.* para. 2-4.

<sup>53</sup> *Id.* paras. 2-2a and 2-2b. Adverse action refers both to actions taken against a Soldier generally, and a specific type of flag code under AR 600-8-2.

<sup>54</sup> *Id.* para. 2-2c(1).

*c. Pending Military or Civil Court Action (LZ)*<sup>55</sup>

Soldiers facing military or civilian criminal charges receive the non-deployable legal processing code LZ. The trigger for "pending military court action" is preferral of charges.<sup>56</sup> The BJA should consider having the trial counsel or a paralegal add this adverse action flag requirement to the preferral checklist, and then follow up with the brigade S1 to make sure that the flag is processed properly.<sup>57</sup> A similar rule applies for Soldiers charged or confined by civilian authorities.<sup>58</sup>

By the time a Soldier is flagged for a pending military court action, that Soldier may have as many as three flag codes in eMILPO: one for the investigation of the misconduct (LI), another for being placed in pretrial confinement (LR), and a third for being formally accused (LZ).

*d. Pending Administrative/Legal Discharge or Separation (LD)*

The second most common legal processing code is for those Soldiers pending involuntary administrative separation or discharge. The effective date of this flag is the date the Soldier's commander signs the intent to separate memorandum.<sup>59</sup>

As with the LI legal processing code, a commander has discretion to determine which Soldiers flagged for separation are nevertheless available for deployment.<sup>60</sup> However, it is not advisable to use this "loophole" to reduce the number of nondeployables. If a brigade commander indicates that a

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<sup>55</sup> This is how DA Pam. 220-1 describes the LZ code. The more accurate description is from the flag regulation (AR 600-8-2), which refers to civilian *criminal* charges rather than civil court action.

<sup>56</sup> *Id.* para. 2-2c(1). Preferral of court-martial charges in the military justice system initiates the court-martial process. Preferral refers to the formal notification to the accused that he has been accused of a crime under the UCMJ.

<sup>57</sup> For the purposes of this article, and for the BJA running a legal office, it is sufficient to spot-check these flags to make sure that after the commanders fill out the forms, the commanders take the next step and have the battalion S1s properly input the flags in eMILPO. The eMILPO Manual suggests coordination with the legal office on flags, "The S1/Unit eMILPO clerk should check different sources such as the training NCO, legal clerk/section, ISG, etc. to advise Commander of SFPAs [suspension of favorable personnel actions] requiring updates that they may not know." EMILPO MANUAL, *supra* note 14, at page 22.

<sup>58</sup> See AR 600-8-2, *supra* note 26, para. 2-2c(1) (commander must flag the Soldier for adverse actions for "civilian criminal charges, restraint, or confinement").

<sup>59</sup> *Id.* para. 2-2d. There is an example of this memorandum in U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS 32, fig. 2-1 (6 Jun. 2005) [hereinafter AR 635-200].

<sup>60</sup> See DA PAM. 220-1, *supra* note 15, at 35, tbl. 5-1, note 5.

Soldier flagged for separation is fit for deployment, that considerably weakens the case for separation. The number of Soldiers in a brigade pending separation is usually small when compared to the number of Soldiers facing nonjudicial punishment. A commander should use the grant of discretion sparingly for this code, and only for Soldiers with low-density military occupational specialties.

## 2. Other Flags

The BJA may see briefings and reports from division and corps staff that contain other less common nonavailability codes along with the four legal processing codes. For example, briefing slides may include the number of Soldiers who are absent without leave (AWOL). The legal processing category of nondeployables should include only Soldiers with nondeployability codes LI, LD, LR or LZ. The BJA must recognize that AWOL is not a legal processing category of nonavailable Soldiers (this rule is designed to avoid double-counting of those AWOL Soldiers who also have been assigned legal processing nonavailability codes). The BJA will also want to make sure that the brigade does not compare unfavorably with other brigades in the division due to confusion over how many Soldiers are properly reported as nondeployable in the “legal processing” category.

## III. Improving the Process

Most BJAs have more than enough to do without taking on new obligations that may not even be “in their lane.”<sup>61</sup> This article is not advocating new duties for the BJA, or the assumption of the duties of the personnel section. However, BJAs should always attempt to identify areas where some additional training or assistance rendered up front can pay big dividends later, in the forms of time saved, much less confusion, and a greater impression that the legal office can be counted on for reliable data. The rest of this section contains simple suggestions on how the BJA can improve the personnel reporting process, essentially by becoming a better, more process-oriented staff officer.

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<sup>61</sup> “The Flag function is the responsibility of commanding officers at all levels and the functional responsibility of the brigade (BDE) adjutant (S1), battalion (BN) S1, and MPD.” AR 600-8-2, *supra* note 26, para. 1-6. Though the functional responsibility for flags is with the unit S1s, the majority of the administrative flags are associated with legal actions. The battalion S1 section will not necessarily know when a Soldier is under investigation, or when a Soldier is placed in pretrial confinement. The BJA is the advisor to the “commanding officers at all levels” of the brigade who have primary responsibility for properly flagging Soldiers. The BJA must be actively involved in the flagging process to make sure it is done properly.

## A. Creating Awareness

It may be enough to informally and tactfully raise the issue of proper flagging of legal actions with the brigade S-1 to make sure the personnel section is following the appropriate procedures. The problem with improper flagging is widespread and serious.<sup>62</sup> At the very least, the BJA should make it a priority to assess the level of compliance with proper flagging procedures as soon as possible after assuming the duties as brigade legal advisor. If time permits, this issue should be high on the list of any discussion topics during the incoming BJA’s transition with the outgoing BJA. Even if flag processing in a brigade looks good at first, it is still necessary to remain vigilant. Personnel turnover in the brigade’s command teams and personnel sections can lead to inconsistent compliance with proper flagging procedures.

## B. Training

Lack of knowledge of the proper procedures is one of the main causes of inaccurate personnel reporting information.<sup>63</sup> The Army requires training on proper flagging procedures for new commanders and first sergeants as part of the standardized Company Commander/First Sergeant Courses (CCFSC).<sup>64</sup> The CCFSC “will train/educate company level commanders and first sergeants on their administrative, property accountability . . . and Army regulatory (program/policy) responsibilities to enable them to be effective leaders in garrison.”<sup>65</sup> The Judge Advocate General has been tasked with supporting the development of portions of the CCFSC.<sup>66</sup> Thus, there are plenty of opportunities to

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<sup>62</sup> *See, e.g.*, IG Report Memo, *supra* note 4.

<sup>63</sup> *Id.*

<sup>64</sup> Message, 281934Z Feb 12, subject: ALARACT 041-2012, HQDA EXORD 093-12 Standardized Company Commander/First Sergeant Course (CCFSC) [hereinafter ALARACT 041-2012]. This message seems to suggest, by referencing the U.S. ARMY HEALTH PROMOTION, RISK REDUCTION, SUICIDE PREVENTION REPORT 2010 [hereinafter HP/RR/SP REPORT 2010] that failure to enforce good order and discipline, by, among other things, flagging and separating Soldiers who need to be separated, is having a negative impact on rates of attempted suicide and suicide. A quote from that report suggests as much, “Leaders are consciously and admittedly taking risk by not enforcing good order and discipline. Systems established to ensure a healthy force are not being used to their full extent.” HP/RR/SP REPORT 2010, *supra* at 4.

<sup>65</sup> ALARACT 041-2012, *supra* note 64, para 3.a.1. Though this article addresses proper flagging procedures and the consequences of failing to follow them, any current BJA will likely recognize that a similar problem exists with property accountability procedures. The BJA will recognize this issue during financial liability investigations before and after changes of command, and during 15-6 investigations into the more egregious violations of AR 710-2 and other property accountability regulations.

<sup>66</sup> *Id.* para. 3.c.4. This block of instruction is Task 2 of the CCFSC, which includes, among other things, training on administrative separations. The message also tasks the JAG School to work with The Adjutant General School on Task 10, which includes more training on administrative separations as well as flags and other administrative topics. *Id.* para. 3.c.7.A.1.

present training on flagging and other processes, preferably in concert with the brigade personnel section.

It may be worthwhile to coordinate focused training on flags with the noncommissioned officers in charge (NCOICs) of the battalion and brigade personnel sections and the brigade legal section. The Army recently created an exportable training package for just this purpose.<sup>67</sup> The primary target audience is all S1s at the battalion and brigade levels, and every company commander and first sergeant.<sup>68</sup> In practice, it is most efficient to have an initial training session with the section chiefs from each personnel section and the legal section. This creates an opportunity for the personnel and legal sections to become subject matter experts in this area and to iron out any problems with internal brigade reporting processes before training the command teams. The battalion S1s can, in turn, work with each of their battalions' company command teams on an as-needed basis to train them on the specific procedures for processing flags. This is much easier on the command teams, for whom flagging procedures are just one of a nearly inexhaustible list of required administrative tasks.<sup>69</sup> The exportable training package could also be used to present a focused, relevant class to the rest of the paralegals in the legal office during sergeant's time training. The instructor should emphasize how paralegals can help improve the flagging process in the brigade, and highlight the issues related to flags that are unique to the legal office. Those issues are discussed below.

Leadership professional development (LPD) sessions are good forums for joint presentations by the BJA and S1 on the impact flags have on readiness reporting, and the best practices to improve the flagging processes within the brigade.<sup>70</sup> Engaging the command teams on this subject as a group can help ensure consistent enforcement of existing

flagging and personnel readiness reporting standards within the brigade.<sup>71</sup> These opportunities come up regularly, particularly in Forces Command units, and the BJA would be wise to take advantage of these opportunities to speak to a captive audience.<sup>72</sup>

Brigade commanders usually hold command and staff meetings at least once per month to review the brigade's status in a number of administrative areas, including awards, evaluation reports, and reenlistments. Command and staff meetings are an excellent opportunity, after coordination with the brigade executive officer and S1, to explain or highlight the importance of proper flagging and the impact improper flagging can have on unit readiness reporting. It takes only a minute or two to tactfully make the point, and a courteous reminder goes a long way with the brigade commander at the head of the table. After a full presentation on this topic at an LPD, command and staff meetings are good forums in which to reinforce the importance of the flagging process until the BJA and S1 see progress in this area.

### C. Screening and Periodic Checks

The BJA should designate a member of the brigade legal team to work with the brigade S1 section to screen eMILPO for erroneous legal processing flags. This is an effective threshold measure to determine compliance with the flagging process. Take, for example, the LI flag, for Soldiers who are under investigation or who have received Article 15s. A simple screen of eMILPO for every LI flag older than six months will reveal many names of Soldiers with completed investigations, or who have completed their punishment after an Article 15, or both. It is good practice for commanders, after consultation with the brigade legal office, to override the LI nonavailable reason code in eMILPO for all Soldiers with no pending investigation who are only facing nonjudicial punishment.<sup>73</sup> The legal office can confirm this information and recommend that the Soldiers' commanders remove the adverse action flags and replace them with punishment phase flags where necessary. The punishment phase flag (flag code H) is also an adverse

<sup>67</sup> Message, 281721Z Mar 12, Dep't. of Army, subject: ALARACT 082/2012, Suspension of Favorable Actions (Flags)—Exportable Training Package para. 4. The training package can be found at this link: [http://www.ssi.army.mil/courses/flags\\_final.pptx](http://www.ssi.army.mil/courses/flags_final.pptx). As an indication of how relevant this package is for the legal office, and the overlap between the S1 and legal sections, consider this example from the speaker notes on slide 1 of this 25-slide presentation: "Motivator: You over heard [sic] one of your former Soldier's [sic] talking to another Soldier about his promotion party that took place on Saturday. It suddenly dawned on you that the Soldier should have been flagged, pending charges for DUI."

<sup>68</sup> *Id.* para. 5.

<sup>69</sup> See *Crush of Requirements*, *supra* note 10.

<sup>70</sup> The exportable training package described in ALARACT 082/2012 refers to S1/legal office staff coordination on the Unit Flag Management slide. Slideshow: Adjutant General School, Administer Suspension of Favorable Personnel Actions (2012), available at [http://www.ssi.army.mil/COURSES/FLAGS\\_FINAL.PPTX](http://www.ssi.army.mil/COURSES/FLAGS_FINAL.PPTX). Many brigade commanders hold monthly leadership professional development (LPD) sessions with their subordinate command teams. The brigade commander or brigade executive officer often ask the BJA for subjects that need additional emphasis in the brigade. An LPD presentation on the flagging process would be an appropriate and relevant topic for an LPD session.

<sup>71</sup> "[I]nconsistent enforcement of existing standards [has] been [one of] the most significant" factors contributing to an increase in non-deployable Soldiers. Message, 221734Z Apr 11, U.S. Dep't of Army, subject: HQDA EXORD 185-11: Reduction of Non-Deployables, para. 1.A.1 [hereinafter EXORD 185-55].

<sup>72</sup> The BJA should actively seek out these teaching opportunities, on this or any other relevant subject. When the brigade's command teams know that the BJA's priorities are the brigade commander's priorities, the BJA's job becomes a lot easier, and the whole brigade benefits from better adherence to the regulations.

<sup>73</sup> See EMILPO MANUAL, *supra* note 14, at 439. Recall that DA Pam. 220-1, gives a commander the discretion to not report a Soldier with a legal processing code of LI as unavailable for readiness reporting purposes. DA PAM. 220-1, *supra* note 18, tbl. 5-1 n.5.

action flag.<sup>74</sup> But unlike a Soldier with the common adverse action flag (flag code A), a Soldier with a punishment flag may be transferred, and, more important, is not automatically reported as nonavailable for deployment.

Most legal offices require a completed adverse action flag before processing an Article 15 for a commander.<sup>75</sup> For personnel reporting purposes, it is more important that the commander remove the adverse action flag and replace it with a punishment phase flag upon imposition of punishment.<sup>76</sup> The punishment phase flag prohibits all of the same favorable actions the adverse action flag does, but the Soldier's status in eMILPO will now be shown as available, rather than nonavailable. If a BJA does nothing more than work with the brigade S1 to ensure accuracy in reporting on legal processing code LI, that BJA will have solved the most common problem with Soldiers reported as nonavailable due to legal processing.<sup>77</sup>

Similar scrutiny is necessary for the less common flag code LD for Soldiers pending administrative separation from the Army. Nearly all separations are completed within fifty working days (the processing goal set by AR 635-200 when board procedures are used<sup>78</sup>), so a simple screen for all LD flags older than the fifty days may reveal erroneous separation flags. Screening eMILPO in this way will be most useful as a starting point in units that have not taken any steps to address problems with personnel readiness reporting. The flag regulation requires that this staff work be done; battalion-level commanders are responsible for reviewing and validating all flags over six months old at least monthly.<sup>79</sup>

To further improve the quality of personnel reporting data in eMILPO, the BJA (or more likely a paralegal) can assist the brigade S1 with a name-by-name reconciliation of the AAA-095 Suspension of Favorable Personnel Actions

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<sup>74</sup> See AR 600-8-2, *supra* note 26, para. 2-3a.

<sup>75</sup> A valid adverse action flag is a required allied document when filing an Article 15. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-37a (3 Oct. 2011) [hereinafter AR 27-10].

<sup>76</sup> AR 600-8-2, *supra* note 26, para. 2-3a. "Commanders will initiate a 'Punishment Phase' Flag when the punishment period is 1 month or longer and will remove the 'Adverse Action' Flag the same day unless additional adverse action is pending. Remove Flag upon completion of punishment." It is good practice for the battalion paralegal to check for the punishment flag when completing the Article 15-Reconciliation Log, DA Form 5110. See AR 27-10 *supra* note 75, para. 3-39.

<sup>77</sup> This issue was raised in the FORSCOM VTC referenced earlier in note 6.

<sup>78</sup> AR 635-200, *supra* note 59, para. 1-7. The administrative separation processing goals are fifteen working days if the Soldier is not entitled to or waives an administrative separation board hearing, and fifty working days with a board. Most separations are completed without a board, so it may be worthwhile to conduct an additional screen for separations pending for more than 15 working days to identify potential problem areas.

<sup>79</sup> AR 600-8-2, *supra* note 26, para. 1-9b.

(SFPA) Management Report.<sup>80</sup> Company-level commanders are responsible for reviewing and validating this SFPA report on a monthly basis.<sup>81</sup> The problem, however, is that this report is only one of dozens of other reports like it, and many commanders simply assume the risk of not validating this report because, at least until recently, nobody was checking it.<sup>82</sup> The legal office staff should compare the information in its own internal legal action trackers against the SFPA Report. The paralegals and personnel clerks conducting this reconciliation should agree on a plan of action to correct any erroneous information, including identification of who will conduct any follow-up investigation to resolve erroneous information in eMILPO. Once the paralegals and personnel clerks have completed these steps, the commanders will be able to review and validate the SFPA reports very easily.

#### D. Flags and the Legal Office

Brigade legal offices require units to submit valid flags with routine legal actions, such as Article 15s and administrative separations. However, just checking for the presence of a flag in an Article 15 or administrative separation packet is not enough. It is good practice to also check the flag date in block 10 of DA Form 268 against the date shown on the Enlisted Record Brief (ERB). The flag code section is in the lower left-hand corner of the ERB. When checking the date of the flag, the paralegal should check the supporting documentation with the Article 15 to make sure that the effective date of the flag is the date that the circumstances requiring the flag (e.g., the misconduct) occurred.<sup>83</sup> Flag dates on the ERB that match the flag dates on the DA Form 268 are a good indication that the commanders and battalion S1 sections are following the proper flagging procedures. The BJA should have the paralegal NCOIC make sure that the paralegals promptly report any perceived problems with flagging, such as failure to flag Soldiers in a timely fashion, so that the problems can be addressed.

Checking for the presence of a valid flag at the initiation of a legal action is important, but the bigger benefits come from making sure that flags are removed in a timely fashion.<sup>84</sup> One common problem is the failure to remove a

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<sup>80</sup> For more on this particular report, see the EMILPO MANUAL, *supra* note 14, at 230. There are many other personnel reports, including the commonly used AAA-162, Unit Personnel Accountability Report, but the AAA-095 is more specific for the task of reviewing flags.

<sup>81</sup> AR 600-8-2, *supra* note 26, para. 1-9b.

<sup>82</sup> See *Crush of Requirements*, *supra* note 10 (providing more discussion on how company commanders will accept the risk of not completing certain actions under the crush of requirements from higher headquarters).

<sup>83</sup> AR 600-8-2, *supra* note 26, para. 2-4.

<sup>84</sup> Checking for a flag at the initiation of an administrative separation is always good practice.

flag for a separating Soldier after that Soldier reports to the transition office.<sup>85</sup> It is good practice to request a copy of the separating Soldier's transition orders from the unit so that the responsible paralegal can close the administrative separation file. The paralegal can then check with the battalion personnel section to make sure that the flag has been removed from eMILPO. Checking for a copy of the transition orders within ten days after the separation authority directs the discharge may also prevent Soldiers from remaining at the unit too long after separation, and committing additional misconduct.<sup>86</sup>

When the legal office is processing an action involving senior servicemember misconduct, the BJA should be particularly careful to ensure that the senior person is properly flagged. There is a tendency to avoid flagging senior noncommissioned officers and officers, but the regulation applies equally to all Soldiers. It is also important to coordinate closely with the S1 section on senior servicemember misconduct investigations and actions so that the flags can be transmitted to Human Resources Command when necessary.<sup>87</sup>

#### IV. Conclusion

Routine legal actions can negatively impact personnel readiness reporting if the actions are not processed properly. A good BJA recognizes which processes are important and ensures compliance with them. By doing so, the BJA will significantly improve the quality of data commanders rely on to make personnel readiness decisions. This is true even if the particular process is not uniquely the province of the legal office. Though this article is focused on personnel readiness reporting, its simple recommendations—understand the process, know why it is important, train key personnel, screen for compliance, reinforce the process—can be applied to nearly any key task.<sup>88</sup> These simple recommendations, applied with healthy doses of tact and persuasion, will significantly improve the personnel readiness reporting process in a brigade, resulting in more reliable data for the brigade commander. In a nutshell, a good BJA will know when “close enough for government work” is just not close enough.

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<sup>85</sup> AR 600-8-2, *supra* note 26, para. 2-9b(5).

<sup>86</sup> Most units move as quickly as possible to get orders for a separated Soldier, but this process regularly takes up to ten working days. Soldiers remaining at the unit after the separation authority has directed discharge can be a problem, particularly in rear detachments. This often happens when the discharged Soldiers are waiting for organizational clothing and equipment that was not shipped back to the rear detachment with them when they were redeployed for separation purposes. If the rear detachment is not familiar with proper clearing procedures at the Central Issue Facility, this can delay separation for two months or more. This assertion is based on the author's recent professional experiences as a BJA from 1 August 2010 to 8 July 2012.

<sup>87</sup> For example, if a first lieutenant is flagged for driving while impaired and receives a memorandum of reprimand while that officer was on a promotion list to captain, the flag may only be removed by Commander, HRC, so the unit must notify HRC when the memorandum is filed or rescinded. See AR 600-8-2, *supra* note 26, para. 2-9b(4).

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<sup>88</sup> For example, the BJA can (and should) apply the same principles that improve readiness reporting to the Commander's Report of Disciplinary or Administrative Action, DA Form 4833. As with personnel readiness reporting, failure to follow simple processes for reporting disciplinary actions can cause outsized problems for the legal office, the brigade commander, and the Army in general. For a surprising look at the impact of delinquent DA Form 4833s on the force, which is not unlike the impact of poor personnel reporting data on the commander's ability to make informed decisions, see HP/RR/SP REPORT 2010, *supra* note 64.