

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

The average pretrial and post-trial processing times for general, special, and summary courts-martial for fiscal years 1993 through 1997 are shown below.

General Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997
Records received by Clerk of Court	1035	789	827	793	712
Days from charges or restraint to sentence	54	53	58	62	67
Days from sentence to action	66	70	78	86	90
Days from action to dispatch	7	8	7	9	10
Days en route to Clerk of Court	8	9	8	9	10

BCD Special Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997
Records received by Clerk of Court	174	150	161	167	156
Days from charges or restraint to sentence	38	37	35	45	44
Days from sentence to action	59	58	63	85	75
Days from action to dispatch	7	7	6	6	10
Days en route to Clerk of Court	7	9	8	8	9

Non BCD Special Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997
Records reviewed by SJA	65	53	46	57	32
Days from charges or restraint to sentence	35	33	44	50	46
Days from sentence to action	25	28	32	44	56

Summary Courts-Martial

	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997
Records reviewed by SJA	353	335	297	226	390
Days from charges or restraint to sentence	14	14	16	22	16
Days from sentence to action	8	8	8	7	8

Courts-Martial and Nonjudicial Punishment Rates

Courts-martial and nonjudicial punishment rates for the first quarter of fiscal year 1998 are shown below. The figures in parentheses are the annualized rates per thousand. The rates are based on an average strength of 484,710.

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.33 (1.32)	0.33 (1.32)	0.41 (1.62)	0.35 (1.42)	0.46 (1.83)
BCDSPCM	0.10 (0.39)	0.11 (0.43)	0.11 (0.44)	0.04 (0.18)	0.00 (0.00)
SPCM	0.01 (0.02)	0.01 (0.03)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.22 (0.88)	0.27 (1.07)	0.07 (0.30)	0.11 (0.44)	0.00 (0.00)
NJP	19.47 (77.89)	20.49 (81.95)	17.96 (71.84)	20.99 (83.94)	10.52 (42.10)

Five-Year Military Justice Statistics, FY 1993-1997

General Courts-Martial

FY	Cases	Conviction Rate	Discharge Rate	Guilty Pleas	Judge Alone	Courts w/Enlisted	Drug Cases	Rate/1000
1993	915	93.6%	84.8%	56.2%	65.3%	23.6%	20.7%	1.56
1994	843	92.8%	87.9%	60.1%	64.5%	26.0%	20.2%	1.51
1995	825	92.9%	83.5%	58.1%	66.0%	28.1%	20.7%	1.57
1996	789	93.5%	85.5%	56.6%	65.3%	26.4%	24.4%	1.60
1997	741	94.6%	84.8%	58.0%	67.3%	27.2%	25.1%	1.52

Bad-Conduct Discharge Special Courts-Martial

FY	Cases	Conviction Rate	Discharge Rate	Guilty Pleas	Judge Alone	Courts w/Enlisted	Drug Cases	Rate/1000
1993	327	85.3%	54.1%	51.3%	63.3%	28.7%	16.5%	.58
1994	345	89.8%	54.1%	57.1%	58.2%	34.2%	24.3%	.62
1995	333	87.3%	55.6%	56.4%	64.5%	28.8%	19.5%	.64
1996	329	87.2%	60.9%	51.6%	62.6%	33.1%	21.8%	.67
1997	312	86.8%	57.9%	57.0%	67.6%	29.4%	26.9%	.64

Other Special Courts-Martial

FY	Cases	Conviction Rate	Discharge Rate	Guilty Pleas	Judge Alone	Courts w/Enlisted	Drug Cases	Rate/ 1000
1993	45	51.1%	NA	20.0%	48.8%	33.3%	0.0%	.08
1994	32	62.5%	NA	18.7%	50.0%	37.5%	9.3%	.06
1995	20	80.0%	NA	40.0%	60.0%	35.0%	5.0%	.04
1996	28	71.4%	NA	21.4%	50.0%	42.8%	10.7%	.06
1997	13	61.5%	NA	7.6%	46.1%	53.8%	7.6%	.03

Summary Courts-Martial

FY	Cases	Conviction Rate	Guilty Pleas	Drug Cases	Rate/ 1000
1993	364	86.3%	36.3%	10.2%	0.62
1994	349	92.0%	35.2%	11.2%	0.63
1995	304	93.1%	34.5%	11.8%	0.58
1996	238	89.9%	37.8%	17.2%	0.48
1997	396	96.2%	40.9%	25.5%	0.81

Nonjudicial Punishment

FY	Total	Formal	Summarized	Drug Cases	Rate/ 1000
1993	44,207	77.5%	22.5%	6.4%	75.42
1994	41,753	78.3%	21.7%	6.6%	74.89
1995	38,591	79.3%	20.7%	8.4%	73.72
1996	36,622	78.3%	21.7%	7.8%	74.18
1997	39,907	77.05%	22.95	8.23%	82.00

Average strength for rates per 1000: FY 1993, 586,149; FY 1994, 556,684; FY 1995, 524,043; FY 1996, 493,700; FY 1997, 486,668.

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)* to inform 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. The latest issue, volume 5, number 5, is reproduced in part below.

EPA's New Standards for Mercury-Bearing Wastes

The Environmental Protection Agency (EPA) is in the process of rewriting treatment standards for mercury-bearing wastes¹ under the Resource Conservation and Recovery Act.² Of primary interest to the Department of Defense (DOD) is how mercury-containing lamps will be managed. The EPA has not announced whether these lamps will be excluded from regulation as a hazardous waste or whether they will be regulated under the EPA's universal waste rule.³ The EPA proposed these two options in a 1994 rulemaking to modify the management of waste mercury-containing lamps.⁴

If the EPA includes the mercury-containing lamps under the universal waste rule, the lamps would be classified as hazardous waste but would be managed under a streamlined procedure.⁵ A conditional exclusion from regulation as a hazardous waste would allow the lamps to be disposed of in permitted landfills.⁶ There has been some industry opposition to the EPA's consideration of the exclusion option. The Association of State and Territorial Solid Waste Management Officials and the Solid Waste Association of North America have expressed

concern that the exclusion would not provide standards to protect human health and the environment for transportation, storage, or disposal of lamps.⁷ These organizations believe that the EPA should manage mercury lamps outside the solid waste stream until the EPA can show that there is no hazard when mercury-containing lamps are disposed in solid waste landfills.

The Institute of Scrap Recycling Industries supports the application of a conditional exclusion for recyclable materials.⁸ Some trade groups believe that the current regulations are protective of human health and the environment and cite the lack of conclusive studies on the hazard presented by mercury in landfills.⁹ They believe that the EPA should reduce the number of lamps that are disposed in solid waste landfills by encouraging the development of spent lamp recycling centers.

An advance notice of proposed rulemaking for mercury-bearing wastes is not likely to be issued before the end of 1998 or the beginning of 1999. Major Anderson-Lloyd.

EPA Issues Proposed Rule for Drinking Water Consumer Confidence Reports

On 13 February 1998, the Environmental Protection Agency (EPA) issued its proposed rule for consumer confidence reports,¹⁰ as required by the 1996 amendments to the Safe Drinking Water Act¹¹ (SDWA). The amendments impose a 6 August 1998 deadline for the EPA to develop and to issue regulations that address consumer confidence reports.¹²

In the preamble to the proposed rule, the EPA states that consumer confidence reports are "the centerpiece of public right-to-know in [the Safe Drinking Water Act]."¹³ This view is reflected in the proposed rule's broad interpretations of the statutory disclosure and discussion requirements.¹⁴

1. *RCRA Regulations*, ENVTL POL'Y ALERT (Inside EPA), Jan. 14, 1998, at 15.

2. 42 U.S.C.A. §§ 6901-6991 (West 1997).

3. 40 C.F.R. pt. 273 (1995).

4. 59 Fed. Reg. 38,288 (1994).

5. 40 C.F.R. pt. 273.33.

6. 59 Fed. Reg. 38,288.

7. *Management of Mercury-Containing Lamps to be Decided by the Summer*, HAZARDOUS WASTE NEWS, Jan. 12, 1998, at 13.

8. *Id.*

9. *Id.*

10. National Primary Drinking Water Regulations: Consumer Confidence Reports, 63 Fed. Reg. 7606 (1998) (to be codified at 40 C.F.R. pts. 141, 142).

11. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (codified as amended in scattered sections of 16 U.S.C., 33 U.S.C., and 42 U.S.C.).

12. 42 U.S.C.A. § 1414(c)(4)(A) (West 1997).

The proposed rule applies to community water systems (those public water systems with at least fifteen service connections used by year-round residents or that regularly supply at least twenty-five year-round residents). It will require these systems to provide consumer confidence reports to customers within thirteen months of the effective date of the proposed regulations and at least every twelve months thereafter.¹⁵

Source Water

The reports must identify sources of the drinking water that the water system delivers to customers—ground water, surface water, or a combination thereof—as well as the common name and location of the water source.¹⁶ The proposed rule encourages system operators to use maps to further communicate this information, but this is not a mandatory requirement.¹⁷ If a source water assessment has been completed for the particular community water system, the report must advise customers of that fact and how to obtain a copy.¹⁸

Definitions

The amendments require the reports to define four terms pertaining to the nation's primary drinking water regulations—"maximum contaminant level goal," "maximum contaminant level," "variances," and "exemptions."¹⁹ In the proposed rule, the EPA suggests definitions for these terms, as well as for two other terms that are not required by the amendments ("treatment technique" and "action level").²⁰

Levels of Contaminants

The EPA is proposing that community water systems advise their customers, in separate sections of the reports, about the results of monitoring that is required by regulations for regulated and unregulated contaminants, as well as the results of voluntary monitoring that show the presence of radon, *Cryptosporidium*, or the presence of any additional contaminant that a system chooses to reference in the report.²¹ The information provided must be sufficient to show customers an "accurate picture of the level of contaminants they may have been exposed to during the year," although these reporting requirements do not apply to contaminants that occur at levels below the minimum detection limits (as defined in 40 C.F.R. 141, subpart C).²² In several provisions, the proposed rule also mandates how the data is to be presented to customers in the reports.²³

National Primary Drinking Water (NPDW) Regulation Compliance

The SDWA Amendments also require that consumer confidence reports contain information on the NPDW regulation compliance.²⁴ In the proposed rule, the EPA interprets "compliance" as going beyond merely certifying "compliance/noncompliance." Under the EPA's interpretation, "compliance" includes reporting any violation of the NPDW standards in clear and readily understandable language, as well as providing a description of the health significance of the violation.²⁵

Variances and Exemptions

The amendments also require a community water system to provide its customers with notice if the system is "operating under variance or exemption" and to identify in the notice "the basis on which the variance or exemption is granted."²⁶ The

13. National Primary Drinking Water Regulations: Consumer Confidence Reports, 63 Fed. Reg. at 7606.

14. *See generally id.*

15. *Id.* Community water systems that begin delivering water to customers after the effective date of the regulations will have 18 months. *Id.*

16. *Id.* at 7609.

17. *Id.* at 7610.

18. *Id.*

19. 42 U.S.C.A. § 1414(c)(4)(A) (West 1997).

20. National Primary Drinking Water Regulations: Consumer Confidence Reports, 63 Fed. Reg. at 7610-11.

21. *Id.* at 7611.

22. *Id.* at 7623.

23. *Id.* at 7611.

24. 42 U.S.C.A. § 1414(c)(4)(B)(iv).

25. National Primary Drinking Water Regulations: Consumer Confidence Reports, 63 Fed. Reg. at 7613.

proposed rule also requires community water systems to advise customers of the dates when the variances or exemptions were issued; when they are due for renewal; and the steps the system is taking to “install treatment, find alternative sources of water, or . . . comply with the . . . variance or exemption.”²⁷

Additional Information

The proposed rule requires community water systems to include in their reports an explanation regarding contaminants that may reasonably be expected to be present in drinking water, including bottled water.²⁸ The rule contains minimal language concerning this requirement.

The SDWA Amendments require consumer confidence reports to be mailed at least once annually to customers of a system.²⁹ In the preamble to the proposed rule, the EPA recognizes that “customers” may not include all “consumers” of a system’s water. Thus, the proposed rule requires systems to mail copies to customers and to “make a ‘good faith’ effort to reach consumers who do not receive water bills”³⁰ The EPA defers to the directors of state drinking water programs in determining what means are appropriate for this “good faith” effort, although the agency did suggest methods such as Internet publishing, publication in subdivision newsletters, or having apartment landlords or managers post the report in conspicuous places.³¹

Finally, under the amendments, states with primary enforcement responsibility may establish alternative requirements regarding the form and substance of consumer confidence reports. However, the EPA maintains that any state alternative must be no less stringent than the proposed regulations. The EPA interprets stringency as equivalent to the type and amount of information provided.³²

As noted above, the EPA is seeking comments on the proposed rule and has provided a breakdown of the proposed costs of providing the reports. Environmental law specialists are encouraged to review the proposed rule, including the cost breakdown, and to contact the Environmental Law Division prior to 30 March 1998 if they have significant comments. Major DeRoma.

Ashoff v. City of Ukiah

In *Ashoff v. City of Ukiah*,³³ the U.S. Court of Appeals for the Ninth Circuit explained whether a citizen could bring an action pursuant to a federal environmental statute where the implementation of the program has been adopted by the state. This decision should provide adequate fodder for both sides of the debate over the extent to which claims of this nature might be brought.

The Resource Conservation and Recovery Act³⁴ (RCRA) directs the Environmental Protection Agency (EPA) to classify waste as hazardous or nonhazardous and to establish regulatory controls over the disposition of the two categories of waste pursuant to subtitles C and D of the RCRA.³⁵ Upon promulgation of criteria for classification, each state must adopt and implement a permit program or other system that ensures compliance with the federal criteria.³⁶ The RCRA authorizes citizens’ suits in approved states. The citizens’ suit provision states that “any person may commence a civil action on his behalf . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter.”³⁷

In 1993, pursuant to the procedures of subtitle D of the RCRA, the EPA approved California’s permit program for sanitary landfills. The California program was more stringent than the EPA’s codified criteria.³⁸ Gilbert Ashoff and others sued the

26. 42 U.S.C. A. § 1414(c)(4)(B)(iv).

27. National Primary Drinking Water Regulations: Consumer Confidence Reports, 63 Fed. Reg. at 7613.

28. *Id.*

29. The amendments allow state governors to exempt from the mailing requirement those systems that serve less than 10,000 people. 42 U.S.C. A. § 1414(c)(4)(C).

30. National Primary Drinking Water Regulations: Consumer Confidence Reports, 63 Fed. Reg. at 7614-15.

31. *Id.* at 7615.

32. *Id.*

33. 130 F.3d 409 (1997).

34. 42 U.S.C.A. §§ 6901-6992k (West 1997).

35. *Id.* § 6921(a).

36. *Id.* § 6945(c)(1)(b).

37. *Id.* § 6972(a)(1)(A).

City of Ukiah under the RCRA citizens' suit provision, but the suit claimed violations only of the state standards that exceeded the federal criteria. The Ninth Circuit held that the citizens' suit provision of the RCRA is available to challenge state standards only to the extent that the state standards mirror the federal criteria.³⁹ The court stated that the underlying federal criteria provide legal effect to the state standards under federal law, and standards that exceed any of those criteria are without legal effect in federal court.⁴⁰

Ashoff provides solace for the plaintiff's bar because it affirmatively answers any lingering doubts about the availability of the RCRA citizens' suit provision for states with approved programs.⁴¹ In fact, the 17 December 1997 issue of the *Environmental Policy Alert* cites an unnamed source close to the case who holds open the possibility that this ruling may create "a new avenue for environmentalists to challenge state solid waste activities."⁴²

Although this holding may provide a new avenue for litigation, the defense bar should be quick to point out that this avenue does not provide unimpeded access. A citizens' suit can only prevail to the degree that the plaintiffs can prove a violation of federal criteria. The attorney who is tasked to defend a citizens' suit of this nature would be well advised to scrutinize carefully the specifics of the allegations to determine whether the complaint addresses a federal standard. Major Egan.

Litigation Division Note

Ex-Soldier Pays Twice For Crime

Introduction

In *Graham v. United States*,⁴³ the United States Court of Federal Claims adds a twist to the old saying that crime doesn't

pay. The court's decision demonstrates that a criminal can pay more than once for the same offense because people who are convicted by courts-martial for fraud-related crimes could face harsh civil penalties under the False Claims Act,⁴⁴ in addition to stiff criminal sentences.

Background⁴⁵

On 4 August 1989, the plaintiff enlisted in the United States Army Reserve for three years. On 6 December 1990, his reserve unit, 420th Military Police Company, received orders to mobilize to active duty in support of Operation Desert Shield. After approximately four months, Mr. Graham returned early from Saudi Arabia to have his knee examined by physicians at Fort Lewis. After minor knee surgery, Mr. Graham was placed on seven days convalescent leave. Instead of reporting for duty upon expiration of his convalescent leave on 28 May 1991, Mr. Graham altered his leave form to reflect sixty days convalescent leave and departed Fort Lewis for Vermont. When the time designated on his first false leave form expired, he falsified another form to reflect 120 days of convalescent leave.

Mr. Graham wrongfully collected \$5769.67 in pay, housing benefits, and other allowances by sending copies of the falsified leave forms and false rental receipts to his servicing finance office.⁴⁶ When Mr. Graham's scheme was eventually discovered, he was reported as a deserter, and the finance office stopped his pay and allowances. Civilian authorities apprehended Mr. Graham on 9 October 1991 and returned him to military control the next day.

On 5 and 6 December 1991, Mr. Graham was tried by a general court-martial for desertion, making a false official statement, larceny of \$5769.67 from the government, and falsifying two separate passes. Mr. Graham was found guilty of all charges and was sentenced to reduction to the grade of E-1,⁴⁷ forfeiture of all pay and allowances, confinement for seven

38. See 40 C.F.R. pt. 258 (1997).

39. *Ashoff v. City of Ukiah*, 130 F.3d 409, 412 (1997).

40. *Id.*

41. The EPA has endorsed this position numerous times. See 61 Fed. Reg. 2584, 2593 (1996) ("The Subtitle D federal revised criteria are applicable to all Subtitle D regulated entities, regardless of whether EPA has approved the state/tribal permit program. Violation of [these] criteria may subject the violator to a citizen suit in federal court."); 49 Fed. Reg. 48,300, 48,304 (1984) ("It is EPA's position that the citizen suit provision of RCRA is available to all citizens whether or not a state is authorized."); 45 Fed. Reg. 85,016, 85,021 (1980) (stating that "any person, whether in an authorized or unauthorized State, may sue to enforce compliance with statutory and regulatory standards").

42. Litigation Note, *Gilbert Ashoff et al. v. City of Ukiah, CA*, ENVTL. POL'Y ALERT (Inside EPA), Dec. 17, 1997, at 15.

43. 36 Fed. Cl. 430 (1996).

44. 31 U.S.C.A. § 3729 (West 1997).

45. The facts were taken from the opinions in this case. See *Graham*, 36 Fed. Cl. 430; *Graham v. United States*, 37 M.J. 603 (A.C.M.R. 1993).

46. Mr. Graham was not entitled to these benefits because a service member who is absent without leave forfeits *all* pay and allowances for the period of the absence. 37 U.S.C.A. § 503 (West 1997).

years, and a fine of \$5769.67. Mr. Graham's sentence to confinement could be extended for a period of two years if the fine was not paid. Finally, the court-martial sentenced him to be discharged from the service with a dishonorable discharge. On 3 April 1992, after reviewing Mr. Graham's request for clemency, the convening authority approved the sentence as adjudged and, except for that part extending to the dishonorable discharge, ordered it to be executed. On appeal, the U.S. Army Court of Military Review affirmed in part the findings and sentence.⁴⁸

The Civil Law Suit

While in confinement, Mr. Graham filed a lawsuit in the United States Court of Federal Claims asserting entitlement to approximately \$5000.00 in military pay and allowances. He argued that he was owed this money because he was returned to full active duty status at the time he was apprehended and returned to military control. He argued that he therefore should have been paid from the time of his arrest until the convening authority approved his court-martial sentence.⁴⁹ In response to Mr. Graham's complaint, the Army filed a counterclaim based on Mr. Graham's conviction for larceny of currency and the fact that Mr. Graham was otherwise indebted to the United States as a result of several overpayments of military active duty pay that Mr. Graham obtained by fraud.

The Army's counterclaim alleged that the plaintiff had engaged in at least three specific fraudulent acts in order to receive the sum of \$5769.67. The first act occurred when Mr.

Graham knowingly made and used false rental receipts to obtain Basic Allowance for Quarters and Variable Housing Allowance. The second and third acts occurred when he submitted the two falsified leave forms. The Army sought \$10,000 in civil penalties for each fraudulent act, treble damages, and recovery of the government's investigative and litigation costs.⁵⁰ Additionally, the Army maintained that Mr. Graham's fraud operated to forfeit any claim he might have for military pay and allowances to which he may otherwise be entitled.⁵¹

On 20 January 1998, the United States Court of Federal Claims granted the Army's motion for summary judgment and awarded the United States \$47,309.01 and costs on its counterclaim. The court's award reflected \$30,000 in False Claims Act civil penalties and treble damages on \$5769.67.

Conclusion

This case illustrates the effective use of the False Claims Act not only in defending a suit for back pay, but also in affirmatively recovering amounts that a party has fraudulently obtained. Former soldiers who seek to profit from their confinement need to be aware that the False Claims Act is available for use against them in a civil trial. As Mr. Graham discovered, a suit seeking \$5000 in disputed pay can end up costing a plaintiff. In Mr. Graham's case, it was close to \$50,000.00. Lieutenant Colonel Elling and Major Mickle.

47. Mr. Graham held the rank of Sergeant (E-5) before his trial and sentence to a reduction in grade.

48. Specifically, the court found the evidence insufficient to support a finding of guilty as to desertion and approved a finding of guilty to absent without leave; the court affirmed the remaining findings of guilty. On reassessing Mr. Graham's sentence, the court reduced the original period of confinement to six years and affirmed the remaining elements of the sentence. *See Graham*, 37 M.J. at 603.

49. Mr. Graham's pay and allowances were reinitiated upon his return to military control in early October 1991 and stopped upon his scheduled ETS on 1 December 1991. By an order issued on 23 August 1997, the court denied the Army's motion for summary judgment. The court concluded that the *Department of Defense Pay Manual*, sections 10316-10317; Rule for Courts-Martial 1107; and *Army Regulation 635-200*, paragraph 1-24, appeared to indicate that Mr. Graham should have continued to receive pay and allowances through 3 April 1992, the date of the convening authority's action. *Graham*, 36 Fed. Cl. 430.

50. The False Claims Act mandates that any person who violates 31 U.S.C. §§ 3729(a)(1), (a)(2), or (a)(7) shall be "liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000 . . ." 31 U.S.C.A. § 3729(a) (West 1997). In addition to the civil penalties above, anyone who violates the False Claims Act also shall be "liable to the United States Government for . . . 3 times the amount of damages which the Government sustains because of the act of that person . . ." *Id.* "A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages." *Id.* § 3729.

51. The Army's counterclaim in this regard was based on 28 U.S.C. § 2514, which provides in pertinent part: "A claim against the United States shall be forfeited . . . by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof." 28 U.S.C.A. § 2514 (West 1997).