

The Art of Trial Advocacy

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To Advocate and Educate: The Twin Peaks of Litigating Administrative Separation Boards

In many, if not most staff judge advocate offices, young trial and defense counsel cut their advocacy teeth in administrative separation boards as recorders and counsel for respondents. While supervisors may think that sending rookie advocates into battle at administrative separation boards makes sense because there is less at stake than at a court-martial, counsel assigned such duties should not be misled into thinking they've been relegated to riding the bus in the "minor leagues" of trial advocacy. In fact, the relatively unrestricted and unsupervised nature of administrative separation boards presents additional advocacy challenges for young litigators to overcome. In administrative separation boards, counsel are required to do more than just advocate the facts of their case; they must educate the board members on the substantive law,¹ and persuade the board president to follow certain procedures.

Military judges preside over courts-martial. These learned criminal law practitioners serve two important functions. First, by ruling on motions and objections, they ensure that counsel stay within well-defined boundaries during the trial. Second, they provide the members general and specific instructions regarding their role in the proceedings and the law they are to apply in a particular case.²

Administrative separation boards, on the other hand, do not have such "parental supervision." In contrast to courts-martial, far fewer evidentiary and procedural rules apply to administrative separation boards.³ Moreover, administrative separation boards do not have an experienced military judge to enforce or interpret the few rules that do exist.⁴ Rather, these proceedings have a board president, who is typically a line officer with little or no experience in legal proceedings. Board presidents may not only be ill-equipped to control the orderly proceedings of an

administrative board, they may also be ill-prepared to instruct the board members on the laws they are to apply in a particular board. While legal advisors are sometimes appointed to administrative separation boards, they are rarely present during the board. Consequently, the burden of preventing an administrative board from degenerating into an advocacy "free-for-all" falls upon the counsel who are present at the board. Counsel must not only advocate their case, but also educate the board on the procedural rules and substantive laws and regulations applicable to the proceeding.

Extra Preparation

The absence of an experienced presiding official imposes two additional preparatory steps upon counsel planning for an upcoming administrative separation board. First, they must gather the laws, regulations, and field manuals relevant to their case. Second, they must prepare themselves to advocate to the board president the specific administrative procedures they want the board to follow.

Substantive Law for Administrative Separation Boards

Gathering the relevant law is not a complicated task. For instance, in a board involving a pattern of minor military misconduct,⁵ (for example, failures to repair, short absences without leave (AWOL)) the recorder should come to the proceedings with a copy of Uniform Code of Military Justice, Article 86,⁶ and prepared to educate the panel on the elements of failure to repair and AWOL. If the respondent intends to raise the defense of impossibility to report, respondent's counsel must be prepared to teach the board members the definition of impossibility set forth in the *Military Judge's Benchbook*.⁷ If the basis for a Chapter 14 separation board for serious miscon-

1. For purposes of this article, the law means more than simply case law and the *Manual for Courts-Martial*. In administrative separation proceedings, the law may include military regulations, field manuals, training circulars, and other published documents. For example, in a separation action for two consecutive failures to pass the Army Physical Fitness Test, the defense may refer the board to pertinent provisions of *Army Regulation 635-200, Enlisted Separations*, as well as to the provisions of *FM 21-20, Physical Fitness Training*, that require commanders to have remedial physical training programs.

2. In a trial before military judge alone, there are no members for the judge to instruct on the law. Nevertheless, judges must follow applicable law themselves during the trial and in their deliberations.

3. See generally U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988) (C1, 30 Oct. 1996) [hereinafter AR 15-6].

4. Although the appointment of a legal advisor is required, many board presidents fail to consult their legal advisor for help on routine evidentiary and procedural issues. Many, if not most legal advisors are not nearly as experienced as their military judge counterparts.

5. U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED SEPARATIONS, ch. 14-12b (17 Sept. 1990) (C1, 6 Aug. 1996).

6. UCMJ art. 86 (1998).

duct is a positive urinalysis, counsel for both sides must be equipped to educate the members about the detailed requirements for conducting a proper unit urinalysis, among other things. This may involve education on not only the provisions found in appendix E of *Army Regulation (AR) 600-85*, but also relevant local policies and procedures for conducting a unit urinalysis. When defending a soldier pending separation for two consecutive failures of the Army physical fitness test (APFT), respondent's counsel must be well-versed on the unit's duties under chapter 9 of *AR 350-41* regarding the proper method for conducting the APFT.⁸ These are but a few examples of the substantive laws and regulations about which counsel must educate board members. There are countless others, depending on the basis and circumstances of the administrative separation proceeding.

The most fundamental, yet often overlooked, educational duty of counsel is to inform members about the three-part findings and recommendation the board must ultimately provide. Counsel must inform the members of their duty to determine: (1) whether the factual basis for separation exists (for example, respondent committed an act of serious misconduct, respondent's performance was unsatisfactory, or respondent failed to meet Army weight standards); (2) whether such conduct warrants separation; and (3) if separation is warranted, the character of discharge to be awarded (honorable, general under honorable conditions, other than honorable).

Once gathered, counsel must determine the most effective means of communicating this law to the members. The simple direct approach usually works best with line officers. One effective way to educate board members of applicable laws or regulations is through the testimony of a live witness, for example: "Sergeant Snorkel, are you aware of the requirement in *AR 600-85*, that the observer is to place his initials on the white label next to those of the soldier submitting the urine sample"; or "Sergeant Snorkel, are you familiar with the requirements of *AR 600-85*, Appendix E? Please tell the board members what the observer is required to do." Counsel might also simply ask the witness to read a specific provision of the regulation to the members.

Another efficient method is simply to offer the provision of the regulation as an enclosure to the record without benefit of a witness.⁹ Rather than offering the entire regulation as an enclosure for the board, copy only the relevant portions of the regulation, and highlight the exact portion you want the board to pay

attention to (for example, paragraph 1-18 regarding rehabilitative transfer requirements). If you intend to have the board members read a lengthy portion of the regulation (or any other document for that matter), make sufficient copies for each member (and opposing counsel) to read and take into deliberations.¹⁰ Counsel might also consider having such information blown-up and pasted on poster board, or presented on an overhead projector, or through computer-generated slides to "liven up" otherwise dry regulatory material. Finally, when referring to the applicable laws and regulations during argument, counsel would do well to pick up the actual regulation and quote the precise language. Such deliberate reference to the regulation lends an air of authenticity to your argument that a mere general reference does not provide.

Procedural Rules for Administrative Separation Boards

The educational process involves more than simply informing the members of applicable substantive regulations. Counsel must also be prepared to educate the members on the basic procedural rules governing the process. While the military rules of evidence generally do not apply to administrative separation boards,¹¹ counsel can still object, and should do so whenever appropriate. Unlike courts-martial, however, where all they have to say to the military judge is "objection—hearsay," or "objection—leading," counsel in administrative boards must be prepared to go one step further when their opponent responds to the board president and says the rules of evidence do not apply. At that point, counsel must once again assume the role of teacher and explain to the president the underlying basis for such rules. While acknowledging that the rules do not automatically apply, counsel should explain to the president the underlying common sense rationale for our evidentiary rules, for example, that leading questions result in excessive coaching of witnesses, that hearsay evidence is inherently unreliable, and that the opportunity to cross-examine this particular witness is necessary for this board to make a fair decision. By convincing the president of the logic behind the evidentiary rules, and the fundamental concepts and application of due process, counsel can ensure the administrative process is fair to both the government and respondent.

Demanding the production of witnesses presents counsel with another advocacy opportunity. Even though the convening authority may have previously denied a request to produce a key witness for the respondent, no rule prohibits respondent's

7. U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES, MILITARY JUDGE'S BENCHBOOK 216 (30 Sept. 1996).

8. See U.S. DEP'T OF ARMY, REG. 350-41, TRAINING IN UNITS, ch. 9 (19 Mar. 1993).

9. Note that such un-authenticated documents and methods of offering evidence would not necessarily work in a court-martial. This is a good example of how counsel must be prepared to educate and advocate the admissibility or inadmissibility of such evidence to the board president.

10. This may also ingratiate counsel to the panel for taking a small step to expedite the board proceedings.

11. See *AR 15-6*, *supra* note 3, para. 3-6. Although the rules of evidence generally do not apply, paragraph 3-6c of *AR 15-6* does establish some evidentiary restrictions.

counsel from educating the board president on the Sixth Amendment right to compulsory process of witnesses. Though not applicable to administrative proceedings, an effective advocate can convince the board president of the underlying principle of Sixth Amendment constitutional rights: that it would be unfair to separate, for example, an eighteen-year veteran for a positive urinalysis without first hearing the live testimony of the unit alcohol and drug coordinator who supervised the unit urinalysis. The government recorder, conversely, must do his best to convince the president that if the Army intended for the Sixth Amendment's compulsory process clause apply to such proceedings it would have included a provision in the regulations governing such proceedings. The recorder may also try to persuade the board president that alternate means of testifying are available and satisfy fundamental due process (for example, videotaped testimony, telephonic testimony, live video teleconferencing, affidavits).

Counsel litigating administrative separation boards need to understand that the success of their efforts at administrative separation boards is directly related to their ability to *educate* the board members on the substantive law, and to *persuade* them of the overall fairness and common sense of the procedures they should follow. At courts-martial, an experienced military judge enforces clear rules and procedures. In stark contrast, the advocacy skills of competing counsel in administrative separation boards play much larger roles in determining the ultimate law and procedure to be applied. While the stakes at an administrative separation board may not be as significant as a "major league" court-martial," the additional challenges presented by such proceedings require "major league" advocacy skills. Play ball! Lieutenant Colonel Lovejoy.