



## WHAT THE WORLD NEEDS NOW: A REFRESHER ON ADMINISTRATIVE DUE PROCESS FOR MILITARY SERVICE MEMBERS

*Philadelphia, Pennsylvania, May 8, 2023* – There was once an extraordinary publication, the Army’s Administrative and Civil Law Handbook, DA Pamphlet (DA PAM) 27-21) produced by the United States Army Judge Advocate General’s Corps that provided a detailed and highly nuanced recitation of military administrative law. It covered such topics as military installations, military personnel, installations, line of duty investigations, military assistance to civil authorities, and many other relevant topics. It was, and still is though dated, an exceptional legal review of the history of how our military came to operate. Unfortunately, the Army JAG Corps has not published it since the early 1990s. The history it provides is as necessary today as it ever was. This article is a summary of that DA Pam as it relates to Administrative due process. The topic is far more complex than most practitioners realize and the broad authorities granted to and exercised by the government can have lifelong implications for Service members long after the completion of their military service obligations.

**What is due process?** Due process is comprised of the three processes detailed in the fifth amendment of the United States Constitution: procedural due process, substantive due process, and equal protections. Military administrative due process is based on procedural due process. Under procedural due process, the government need only provide “a” process when life, liberty, or property is at risk. The Department of Defense must provide a process for Service members when a liberty is at stake. In the military administrative due process context, a Service member’s liberty is at risk when the administrative action may restrict the Service member’s right to enter contracts, acquire knowledge, participate in the workforce, go into academia and a myriad of other activities. And, importantly in a military personnel context, a stigma is attached, which absolutely infringes on a Service member’s liberty.

The Department of Defense has determined that administrative due process is required when a Service member is recommended to be separated with a discharge less than Honorable, such a general discharge under honorable conditions or an under other than honorable characterization. In recommending a general under honorable conditions characterization, military commanders are required to only notify the Soldier of the impending discharge and offer an opportunity to request the discharge not be approved. An other than honorable characterization, given the loss of substantial post-service benefits, triggers the need to convene a Board of Officers. This administrative separation

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board is authorized to review the facts and recommend to the separating commander whether the Service member should be discharged (or not) and the characterization of that discharge.

**When is due process given?** A stigma infringes upon a Service member's liberty when the proposed action, e.g., an involuntary separation with something less than an Honorable discharge, hinders a Service member's freedom to take advantage of other employment opportunities. The stigma must be such that it is disseminated by the agency (the DoD) outside the agency and then to the public. In other words, if a Service member is given general discharge with an honorable characterization, and that characterization is published on the Service member's DD Form 214 – a document that is required to be released to members of the public to verify their military service, the information is stigmatizing. Furthermore, a liberty interest can force the need for administrative due process when the military service imposes a substantive condition on an adverse action such as a mobilized reservist early release from active duty, relief for cause, or being barred from an installation or reenlistment, among others. As a general rule, a "hearing" either in writing or before a Board of Officers is required before the Government can deprive a Service member of liberty interest.

**What is the standard of proof in an administrative due process hearing?** The standard is a preponderance of the evidence. This means the finder of fact (the commander) determines there is a greater than 50-percent chance the Service member did or did not commit the misconduct for which they are facing administrative due process. Practically and constructively, when a single commander is the sole finder of fact, that standard is extraordinarily subjective. In effect, the standard is akin to saying, "I think you did, so you're guilty." In an administrative separation where a general discharge with an honorable characterization is recommended, Service members, more often than not, are unable to challenge the facts of the investigation, the witnesses, or the proposed discharge because they are not entitled to a Board. As a result, they face lifetime consequences that have 2nd and 3rd order effects over which they have no control. Furthermore, discharges are swift. Service members frequently are discharged within 10 days of the date they are informed of the recommendation. While the commander is "considering" the Service member's mitigating matters and request to remain on active duty, the Service member is out processing with medical and dental exams, turning in equipment, and processing their "final out" paperwork. In other words, the commander has already made up their mind, and beginning the out processing prior to the decision only facilitates the earlier discharge date.

**Why is Administrative Due Process important?** Administrative due process is extraordinarily relevant today as commanders are increasingly using and relying more heavily on adverse administrative actions as a way to bypass the judicial process and the higher criminal evidentiary standard of "beyond a reasonable doubt". Adverse administrative actions allows for a far lower burden of proof for the commander which permits faster "discipline," and quicker discharges. Because these "administrative" proceedings are not criminal, the DoD uses lesser administrative due process to essentially rid themselves quickly of "problems", the 10% of the command that takes 90%

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of the commander's time. It is the fastest way to “get people off my ship so they don't become the next whistleblower, or other “criminal” before they do something that ends up on the front page of every newspaper, news program, and blog.

**What is the practical effect of administrative due process on the Service member?** A Service member administratively separated due to a misconduct allegation – not a criminal conviction, with a general (under honorable conditions) discharge, loses their GI Bill benefits at a minimum. This amounts to a loss of tens of thousands of dollars. Other than honorable characterizations remove all post-service benefits but for requested medical treatment for service-connected illnesses, diseases, or injuries. The loss of these benefits can amount to hundreds of thousands of dollars. More sweeping are the post-service civilian life implications. Most misconduct in the military is investigated by military criminal investigative organizations (MCIOs). If the MCIO determines credible evidence (a very low burden of proof standard) to believe the Service member committed the offense, the Service member is “titled”. This “titling” is reported to the Department of Justice National Criminal Information Center (NCIC) and is annotated in the NCIC as an “arrest.” That “arrest” (despite an administrative note attached to the titling information stating it is not a judicial decision ) is almost always immediately understood by civilian law enforcement, and almost always prohibits the Veteran from qualifying for professional licenses or any other number of things for which a background check is required. Until recently, and even now due to DoD inaction despite a statutory requirement to do so in a broader context, it is nearly impossible to expunge a DoD titling decision. Solely with allegations – not guilt or a conviction – Service members cannot move on with their lives.

**Conclusion.** In the past 20 or so years, greater protections, better trained attorneys, and implementing separate command structures over government and defense judge advocates have strengthened Service members' judicial due process in UCMJ proceedings. Commanders are continually frustrated by the high number of Service members who are “escaping justice” (in their opinions) when the government is unable to prove their case beyond a reasonable doubt. The removal of jurisdiction from military commanders over military sex related prosecutions is evidence of this conundrum. These frustrations have led commanders to decide to forego criminal charges and proceed with adverse administrative separations. In doing so, commanders have greater discretion in making the discharge decision, recommending, or imposing the characterization of discharge, and as a result, determine the speed by which the Service member is discharged. Ironically, because of administrative due process, Service members, individuals who volunteer, are being severely punished with lifelong consequences without the benefits provided in an actual criminal proceeding (e.g., a higher burden of proof, representation by counsel, a jury of their peers, etc.).

All military administrative legal practitioners should closely examine the regulations to understand the long-term effects on currently serving members and as Veterans. We highly recommend those not familiar with military administrative law consult with specialists to appreciate the full spectrum of issues.

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With more than 100 years of combined experience, the attorneys of MNB Meridian Law, Ltd. are the Nation's foremost experts on military administrative law and the effects of administrative punishment on current Service members, as well as the life-long 2<sup>nd</sup> and 3<sup>rd</sup> order effects these issues will have on their post service lives. There is no reason to face an investigation, reprimand, relief from duty, administrative separation, ADSEP board, or other adverse action alone. MNB Meridian Law was purpose built to stand with you as you navigate the issues and defend your career, pay, benefits, entitlements, and reputation.

