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WHAT THE WORLD NEEDS NOW: DEPARTMENT OF DEFENSE IMPLEMENTATION OF THE DOD INTERNAL REVIEW TEAM'S RECOMMENDATIONS FROM ITS REPORT ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEMS

Philadelphia, Pennsylvania, June 22, 2023 – On June 8, 2023, the Department of Defense released its August 2022 Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems (the “IRT Report”) report to the Deputy Secretary of Defense. Our affiliate company, MNB Meridian Defense proudly supported the research and writing of the report alongside Deloitte LP and SAIC.

The IRT Report makes several important findings. First and importantly, the IRT acknowledges and confirms that “[s]ignificant racial disparities exist across the investigative and military justice systems.” The report correctly, we believe, acknowledges “[t]he greatest disparities exist along the continuum where there is significant discretion and limited oversight or procedural protections.” In other words, in more instances than not, racial inequities enter the military justice and investigative processes much earlier than the initiation of military justice proceedings, and *most often* with first- and second-line supervisors. Specifically, the IRT noted:

“First-line supervisors, senior enlisted leaders, and junior officers—all of whom are subordinate to their commanding officers—encounter the new Service member as he or she first enters the Service, teach the Service member about the norms and culture of the Service, and exercise significant discretion in how to respond to misconduct and performance deficiencies exhibited by young and inexperienced enlisted members who are still adapting to the expectations of military service. These leaders determine whether or not a Service member attends schools, whether or not they are included in unit activities, and ultimately whether they are put on a path to inclusion or separation. These first-line supervisors, senior enlisted leaders, and junior officers also help shape how a commanding officer receives information and recommendations for action. It is often these early discretionary decisions made by these junior leaders that move a young Service member from the training and development phase of military service into the investigative and military justice systems.”

The IRT’s findings also identify, as most military personnel and military justice practitioners innately know, junior leaders in the ranks of E-3 to E-6 and O-1 to O-3 lack comprehensive leadership and training to effectively execute their roles in the military justice and investigative processes. The IRT noted a fundamental truth: *“Junior leaders told the IRT that, while they were trained on the mechanics of filling out counseling paperwork, they lacked a deeper understanding of when and how to use performance counseling to leverage a Service member’s talents. As well, these leaders expressed a need for training and guidance in how to think more holistically about whether proceeding down a disciplinary path is necessary and appropriate.”*

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We are especially encouraged the IRT recognized that due process is the key to reducing racial inequities, calling attention to the lack of administrative due process in adverse administrative and non-judicial punishment actions: *“It is where there are fewer process protections and a lack of consistency in protections accorded across the Services, such as in command investigations, adverse administrative actions, and even nonjudicial punishment, that disparities are more prevalent.”*

We certainly agree with the IRT that *“Commanding officers, unit leaders, law enforcement, legal professionals, and other key stakeholders, simply do not have the money, personnel, training, or time to focus on the matters that most impact disparities in the investigative and military justice systems. With so many other competing interests, addressing racial disparities, and the contributory circumstances and practices, just has not been treated as a priority.”*

With these findings, and importantly for MNB Meridian Law clients, the IRT recommended the Department of Defense:

- a) adopt and train cultural core competencies include understanding the different viewpoints of Service members from different cultures, regions, races, and generations.
- b) institute training for leaders at all levels to enhance their talent management skills, with a particular focus on how performance counseling differs from misconduct counseling ... *“it is far better to spend leadership time growing and developing Service members, as opposed to assembling a paper trail to administratively punish or separate them.”*
- c) tailor legal training and education for Service members who make discretionary decisions, with a priority on junior leaders, whose decisions early in the process have a significant cascading effect that can set the Service member on an irreversible path, either towards improvement and inclusion, or discipline and discharge.
- d) improve and standardize the training and education provided to command and administrative investigators because these individuals generally lack background in the standards and procedures for conducting fair and impartial investigations.
- e) adopt modern policing practices, such as the use of body-worn cameras, recording suspect interviews, and instituting duty to intervene standards, to include the duty to intervene when officers and agents observe possibly disparate or other improper treatment.
- f) provide Service members with the right to truly consult with legal counsel when facing non-judicial punishment.
- g) restrict to “vessel exception” so that it does not apply to ships that are in “dry dock” or long-term overhaul.
- h) provide Service members with legal representation in summary courts-martial.

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Most importantly, as it supports our continuing “opposition” to many administrative punishment policies, particularly as it is related to DoD Titling, MNB Meridian Law wholly supports the IRT’s recommendation to the Secretary to implement Section 545 of the FY 2021 National Defense Authorization Act (116 Pub. L. 283). We are particularly pleased the IRT went further in recommending that:

“... titling/indexing records are used only for their intended purposes, DoD should submit a legislative proposal to restrict the use of information filed in the DCII in promotion, assignment, and other personnel decisions, particularly for titling entries more than 5 years old in which allegations were not substantiated or no action was taken. ... The Department should also implement automatic expungement from the DCII after 5 years if the allegations at issue were not substantiated, no action was taken, and no additional indexing or titling determinations were made against the subject in the intervening period.”

We are also exceptionally pleased the IRT recognized that certain Service members facing administrative separation with an Honorable or general discharge recommendation need enhanced due process protections. “[E]nhanced due process could take the form of additional notifications regarding the Service member’s right to consult with counsel prior to making a decision to waive his or her already limited rights under the notification process and additional information regarding the detrimental effects of a General Discharge.”

The Military Services should, as the Army and Air Force have acknowledged in their review of racial disparities in military justice and investigations, use this report as a call to action to give Service members the resources they need to combat racial inequities in military justice and investigations. Congress must provide the Department guidance through statute and resources, but more importantly – enforcement of those statutes to enact the IRT’s recommendations. As the IRT concluded:

“DoD cannot implement these recommendations without the necessary resources. Few of these procedural, policy, or data changes will come cheaply or easily. Commanding officers, unit leaders, law enforcement, legal professionals, and other key stakeholders require additional resources to focus on the areas that create the greatest disparities in the investigative and military justice systems. Necessary resources are not limited to fiscal resources, but also include the personnel, training, and temporal resources needed to implement actions that will directly impact disparities in these systems ... DoD and the Services must publicly acknowledge the existence of these disparities, and continually tell the force, other key stakeholders, and the public what they plan to do about disparities, and why.”

MNB Meridian Law will be watching the Department’s movements closely and working with them and Congress where we can identify areas for improvement. We will also work with our clients who face these racial inequities to ensure their stories are told and to hold the Department accountable for their disparate treatment.

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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 2nd and 3rd 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.

