

Outline – AGR/TPU Officer Separation Board Training

A. **Purpose.** To provide training to recorders and paralegals on how to prepare for and litigate AGR/TPU officer separation boards.

B. **Objective.** Recorders and paralegals will know what they need to do to present the Government's best case to the board while ensuring the respondent receives a fair and impartial hearing.

C. **BLUF. You're in Charge!** As recorders, you are responsible for everything that happens or fails to happen at the board. Always adhere to the three P's: Prepared, punctual, professional. Use every board as an opportunity to hone your litigation skills.

D. Pre-Board Rules/Principles/Best Practices:

1. Know the Rules Cold.

a. Read and understand the applicable board procedures: AR 600-8-24, Officer Transfers and Discharges, 13 September 2011, AR 135-175, Separation of Officers, 20 November 2017, and AR 15-6, Procedures for Administrative Investigations and Boards of Officers, 1 April 2016.

b. Print a copy of the relevant portions of each regulation.

c. Highlight, tab, and/or dog ear key rules.

2. Pre-Board Case Investigation Is Critical.

a. Ensure a thorough command or law enforcement investigation is conducted before you determine the "reasons for elimination" under AR 600-8-24, para. 4-2 or AR 135-175, para. 2-11 through 2-15.

b. If possible, coordinate investigative efforts with investigators and/or Admin Law legal advisors.

c. You will often need to supplement the law enforcement or command investigation with your own informal inquiries.

d. But note: your case investigation should not stop, as you will inevitably seek and/or discover new facts (good and bad) up until the board.

3. Determine the Reasons for Elimination.

a. Develop a theme and theory of the case.

(1) Theme – the label(s) or catch-phrase that reflects what the case is all about.

(2) Theory – your description of the officer's underlying misconduct, substandard performance, and/or derogatory information. Your theory should be persuasive and factually based.

b. Identify allegations that are essential to your theory of the case.

c. Identify allegations you can prove by a preponderance of the evidence.

d. Eliminate non-germane, unprovable, petty, or weak allegations.

4. Draft Allegations of Misconduct, Substandard Performance, and/or Derogatory Information (Commander's Initiation of Separation).

a. For each allegation, identify the reason for separation in AR 600-8-24, para. 4-2 or AR 135-175, para. 2-11 through 2-15 and provide a pinpoint cite to the applicable regulation(s).

b. At a minimum, each allegation must include the 4Ws (who, what, when, where) for each allegation, but not the why.

c. Each allegation should reflect all legal, factual, &/or regulatory elements of the reason for separation.

d. To the extent possible, your allegations should mirror the precision in sample specification in the Manual for Courts-Martial or Military Judges' Benchbook.

e. But note: if necessary, allegations can be amended before findings as long as they do not create new reasons for elimination (which is a due process issue). See AR 600-8-4, para. 4-15(b)(2).

5. War Game the Respondent's Anticipated Case.

a. What are the weakest points in the Government's case?

b. What will the Respondent contest (facts, characterization of service, or both)?

c. What will the Respondent's theory of the case be?

d. How will you rebut the Respondent's anticipated case in your opening, direct and cross examinations, rebuttal evidence, closing?

6. Witnesses Identification, Preparation, and Interviews.

a. Identify Government and Defense Witnesses ASAP.

(1) Ensure the Board President's notice to appear includes a NLT date (preferably 10 business days before the board) for submission of both Government and Respondent witness lists.

(2) The notice should include requirements that the Respondent identify whether each witness is telephonic or in person, and provide a synopsis of expected testimony.

(3) The Government should be prepared to similarly articulate a synopsis of expected testimony, if requested by the President.

b. Interview all potential witnesses that bear on your theory of the case.

(1) Create template interview worksheets (e.g. military character witnesses).

(2) Record and maintain contact information (unit/employer, address, e-mail, phone numbers).

(3) Prepare questions in advance of key interviews

i. Ask questions that develop/support your theory of the case.

ii. Ask questions that your opponent would ask on cross or direct.

(4) Bring a witness (e.g. a paralegal) to interviews, especially of Respondent's key fact witnesses.

(5) Take good notes.

c. Prepare direct examinations of Government witnesses

(1) Generally, use non-leading questions only.

(2) Develop questions that support your theory of the case.

(3) Use the chapter method.

i. Each chapter makes a key point.

- ii. Each question is designed to elicit answers in support of the chapter.
- (4) Make use of questions that establish negative facts,
- (5) Insert chapters/questions that will preempt Defense attacks that will undermine your theory of the case or hurt your witness' credibility.
- (6) Incorporate command representatives as witnesses, if helpful.
- d. Prepare cross examinations of Respondents witnesses.
 - (1) An effective cross requires rigorous preparation. Observe the only three rules of cross-examination¹:
 - i. Leading questions only (a declarative statement of fact with no tag lines!)
 - ii. One fact per question
 - iii. Cross-examine in a logical progression to a specific goal (AKA the point of your chapter).
 - (2) Insert anticipated or optional impeachment chapters with point reference to the witness' prior sworn testimony or other documentary evidence, if available.
 - (3) Always assume the Respondent will take the stand and prepare accordingly!

7. Build a Well-Organized Litigation File.

- a. Paralegals are indispensable here.
- b. Ensure all documentary evidence/discovery (e.g. witness statements, investigations, documentary evidence) is readily available.
- c. Create a folder for each witness with a copy of your examination, any past statements by the witness, and any other relevant documentary evidence.
- d. Include all procedural documents, e.g., board member appointment memos, board initiation memo, notice to appear memo, witness lists, e-mail correspondence with the President and Defense Counsel.

8. Murder Board (Rehearse) Your Case Before the Board.

- a. Drill how to swear in live and telephonic witnesses. Always stand!
- b. Drill how to direct witnesses where you want them to go.
- c. Prepare (but don't coach) your witnesses.
- d. Drill voir dire, opening, closing, and witness examinations.
- e. Drill how you're going to handle technology or exhibits.

9. Final Preparations.

- a. Draft the findings worksheet and confirm that the legal advisor and Respondent have no objections.
- b. Obtain agreement from the Defense Counsel on admission of consolidated exhibits and projected order of Respondent witnesses.
- c. Ensure all board members, witnesses, respondent, and Defense Counsel understand right place, time, and uniform.

10. Present the Government's Case at the Board.

- a. Take care of any housekeeping matters before you begin.

¹ Cross-Examination: Science and Techniques, Larry Pozner and Roger J. Dodd, 297-323 (1993 Edition).

- b. Voir dire – consider a few questions to establish your credibility and to validate that the board members will provide the Respondent a fair and impartial hearing.
- c. Opening Statement – tell the board members what happened (your theory of the case) and give them a road map for how you will prove it. This should be persuasive but not argument.
- d. Closing Statement – tell the board members how you proved your case, explain why any Defense Counsel points should not change the outcome, and hammer home why the board should deliver your requested outcome. This is evidence-based argument.
- e. Protect the record.
 - i. Avoid issues that may lead to future challenges to the board proceedings.
 - ii. Steer clear of irrelevant matters / evidence.
 - iii. When issues arise, resolve them with Defense buy in, if possible, and/or seek an unambiguous waiver of objections from the Defense Counsel and/or Respondent.
 - iv. Protect the Respondent's rights if the Defense Counsel fails to do so.
 - v. Keep the President on script.
- f. Make sure the members have copies of relevant law or regulations.
- g. When helpful, coordinate with the legal advisor to incorporate and read instructions on the legal and factual elements of an allegation or reason for separation.
- h. Be reasonable – don't oversell your case!
- i. Be efficient litigators – don't waste the time of the members, witnesses, or command representatives.
- j. Closely scrutinize the findings worksheet.
- k. AAR the board and provide honest feedback/assessment to the command.