



STATE OF ARIZONA  
OFFICE OF THE GOVERNOR

DOUGLAS A. DUCEY  
GOVERNOR

EXECUTIVE OFFICE

June 10, 2015

Adjutant General Major General Michael T. McGuire  
Arizona Department of Emergency and Military Affairs  
5636 East McDowell Road  
Phoenix, Arizona 85008-3433

Dear General McGuire:

I have reviewed the proposed draft of the Discharge of Officers Rules of Procedure (“Rules”) from the Arizona National Guard (AZNG) pursuant to A.R.S. § 26-162(3) (“Separation of Officers Statute”) that was submitted for my approval in accordance with A.R.S. § 26-115(A).

The existing Separation of Officers Statute does not contain specific procedures or instructions for the discharging of officers from the AZNG. As a result, the current process relies upon federal regulations and requires federal approval to remove officers from the AZNG. The proposed Rules will establish a formal implementation process that the AZNG will use for discharging its officers, it will preserve due process rights, and it will not conflict with federal regulation. Consequently, the State of Arizona and the AZNG will greatly benefit from a more efficient localized process.

By virtue of the authority vested in me by the Arizona Code of Military Justice, A.R.S. §§ 26-115(A) and 26-162(3), I hereby approve the June 2015 Discharge of Officers Rules of Procedure attached to this document (Attachment A), effective upon my signature.

**IN WITNESS WHEREOF**, I have hereunto set my hand on this tenth day of June in the year Two Thousand Fifteen and of the Independence of the United State of America the Two Hundred and Thirty-Eighth.



*Douglas A. Ducey*  
GOVERNOR

ATTEST:

*Michelle Reagan*

SECRETARY OF STATE

## **Rules of Procedure for Discharge of Officers Pursuant to A.R.S. § 26-162(3)**

### **1. Purpose.**

- a.* The following rules apply to officer discharge boards convened under A.R.S. § 26-162(3).
- b.* The board of officers shall be appointed by The Adjutant General, and shall consist of officers of equal or senior rank to the officer to be discharged. If a board member is of equal rank to the officer to be discharged, the board member shall be senior to the officer by time in grade.
- c.* Initiation of discharge proceedings pursuant to these Rules does not preclude commanders from also utilizing other types of administrative action or nonjudicial punishment in the appropriate case prior to discharge.

### **2. Notice to the officer to be discharged.**

*a.* The officer will be notified in writing of the matters set forth in this section:

- (1) The basis of the proposed discharge, including the circumstances upon which the action is based.
- (2) The right to obtain copies of documents that will be sent to the Governor supporting the basis of the proposed discharge. Classified documents may be summarized.
- (3) The officer's right to a hearing before a board of officers.
- (4) The officer's right to representation at the board of officers by military counsel, who must be a Judge Advocate qualified under Article 27(b)(1) of the UCMJ.
- (5) The officer's right to representation at the board of officers by civilian counsel at the officer's own expense.
- (6) Non-lawyer counsel may not represent an officer before a board of officers unless the officer expressly declines appointment *in writing* of counsel qualified under Article 27(b)(1) of the UCMJ and requests a specific non-lawyer counsel.
- (8) The officer's right, at any time, to submit any statements or documents to be considered in disposition of the case.
- (9) An explanation that the officer may affirmatively waive the rights set forth in paragraph 2(a) as well as the right to an administrative board hearing, after having the opportunity to consult with counsel.
- (10) Failure to appear at a scheduled administrative discharge board hearing, after the officer has indicated intention to make a personal appearance at such hearing, will result in the case being heard by the administrative board in the absence of the respondent.

*b.* Reasonable effort should be made to furnish copies of the notification memorandum to the officer through personal contact by a representative of the command. In such a case, a written acknowledgment of receipt of the notification will be obtained. If the officer cannot be contacted or refuses to acknowledge receipt of the notification, the notification memorandum will be sent by registered or certified mail, return receipt requested, to the most recent address furnished by the officer as an address for receipt or forwarding of official mail. The individual who mails the notification will prepare an affidavit of service by mail. This affidavit will be included in the discharge packet. The notification memorandum will also be sent by first class mail when attempts to deliver the notification by registered or certified mail are unsuccessful. An equivalent form of notice may be used if such service by U.S. Mail is not available for delivery to an address outside the U.S. If available, the command will additionally contact the officer via a known e-mail address, social media contact, or cellular phone number.

c. If discharge processing is initiated on the basis of more than one reason, the officer will be notified of the basis of each reason, including the circumstances on which the action is based.

### **3. Response.**

The officer will be provided a reasonable period of time (not fewer than 30 calendar days) to respond by endorsement to the notification memorandum. An extension may be granted by the commander initiating the discharge proceedings or the discharge authority on a timely showing of good cause by the officer.

### **4. The initiating commander's report to The Adjutant General.**

The commander initiating the discharge proceedings will forward a full report of the recommended proceedings through intermediate commanders, if any, to The Adjutant General.

### **5. Action by intermediate commanders.**

Intermediate commanders may take the following actions:

a. Note their non-concurrence with the recommendation and forward the report to the Adjutant General. Intermediate commanders shall not prevent the report from being transmitted through intermediate commanders to The Adjutant General. However, intermediate commanders may attach a memorandum to the report noting their reasons for non-concurring with the recommendation.

b. Note their concurrence with the recommendation and forward the report to The Adjutant General.

### **6. Waiver.**

The officer to be discharged may affirmatively waive his or her right to a hearing before a board of officers through failure to submit a timely response to the notification memorandum. An officer who fails to attend a board meeting for which he or she received proper notification may have his or her case adjudicated in his or her absence. As used in this paragraph "proper notification" does not require actual notification; notice pursuant to Paragraph 2 of these rules is sufficient.

### **7. Action by The Adjutant General on commander's recommendation.**

Upon receipt of the commander's report, The Adjutant General may take one of the following actions:

a. Disapprove the recommendation and return the case to the commander.

b. Disapprove the recommendation relating to reason for discharge and direct the officer be processed for discharge under another reason for discharge. This may be done when The Adjutant General determines that an alternative basis for discharge is more appropriate than the originating command's reason for discharge. In this case the officer must be so advised and new proceedings must be initiated, with the Officer to be given the opportunity to respond pursuant to Para. 3.

c. Convene a board of officers to conduct a hearing and provide a recommendation to the Governor as to whether the officer to be discharged is inefficient or incapable of discharging the duties of a National Guard officer in any assignment commensurate with his or her rank and experience.

## **8. Oaths.**

*a. Requirement.* Board members, reporters, interpreters, and witnesses appearing before a board shall be sworn.

*b. Administering oaths.* The recorder (or assistant recorder), or board member is authorized to administer oaths in the performance of such duties, under A.R.S. 26-160.

## **9. Presence of the public and recording of proceedings.**

*The public.* Proceedings of a board are normally open to the public. However, it may be appropriate to exclude the public from at least some of the proceedings if the subject matter is classified, inflammatory, or otherwise exceptionally sensitive. In any case, The Adjutant General may specify whether the proceedings will be open or closed. If The Adjutant General does not specify, the proceeding will be open to the public.

## **10. Rules of evidence and proof of facts.**

*a. General.* Proceedings under this regulation are administrative, not judicial. Therefore, an investigating officer or board of officers is not bound by the rules of evidence for trials by courts-martial or for court proceedings generally. Accordingly, subject only to the provisions of *c* below, anything that in the minds of reasonable persons is relevant and material to an issue may be accepted as evidence. For example, medical records, counseling statements, police reports, and other records may be considered regardless of whether the preparer of the record is available to give a statement or testify in person. All evidence will be given such weight as circumstances warrant. (See para 3–5 as to who decides whether to accept evidence.)

*b. Official notice.* Some facts are of such common knowledge that they need no specific evidence to prove them (for example, general facts and laws of nature, general facts of history, location of major elements of the Army, and organization of the Department of Defense (DOD) and its components), including matters of which judicial notice may be taken. (See Military Rules of Evidence (MRE) 201, sec II, part III, Manual for Courts-Martial, United States (MCM).)

*c. Limitations.* Administrative proceedings governed by this regulation generally are not subject to exclusionary or other evidentiary rules precluding the use of evidence. The following limitations, however, do apply:

(1) *Privileged communications.* MRE, section V, part III, MCM, concerning privileged communications between lawyer and client (MRE 502), privileged communications with clergy (MRE 503), and husband-wife privilege (MRE 504) apply. Present or former inspector general personnel will not be required to testify or provide evidence regarding information that they obtained while acting as inspectors general. They will not be required to disclose the contents of Inspector General reports of investigations, inspections, Inspector General action requests, or other memoranda, except as disclosure has been approved by the appropriate directing authority (an official authorized to direct that an Inspector General investigation or inspection be conducted) or higher authority.

(2) *Polygraph tests.* No evidence of the results, taking, or refusal of a polygraph (lie detector) test will be considered without the consent of the person involved in such tests. In a formal board proceeding with a respondent, the agreement of the recorder and of any respondent affected is required before such evidence can be accepted.

(3) *“Off the record” statements.* Findings and recommendations of the investigating officer or board must be supported by evidence contained in the report. Accordingly, witnesses will not make statements “off the record” to board members in formal proceedings. Even in informal

proceedings, such statements will not be considered for their substance, but only as help in finding additional evidence.

(4) *Statements regarding disease or injury.* A member of the Armed Forces will not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he or she has suffered. Any such statement against his or her interest is invalid (10 USC 1219) and may not be considered on the issue of the origin, incurrence, or aggravation of a disease or injury that the member concerned has suffered. A statement made and signed voluntarily by a soldier is not a statement that the soldier was “required to sign” within the meaning of this paragraph.

(5) *Ordering witnesses to testify.*

(a) No military witnesses or military respondents will be compelled to incriminate themselves, to answer any question the answer to which could incriminate them, or to make a statement or produce evidence that is not material to the issue and that might tend to degrade them (see UCMJ, Art. 31 and A.R.S. 26-1031).

(b) No witnesses or respondents subject to the UCMJ or the Arizona Code of Military Justice will be required to make a statement or produce evidence that would deprive them of rights against self-incrimination under the Fifth Amendment of the U.S. Constitution.

(c) A person refusing to provide information under (a) or (b) above must state specifically that the refusal is based on the protection afforded by A.R.S. 26-1031, UCMJ, Art. 31, or the Fifth Amendment. The investigating officer or board will, after consultation with the legal advisor or, if none has been appointed, the servicing Judge Advocate, unless impractical to do so, decide whether the reason for refusal is well taken. If it is not, the witness may be ordered to answer.

(d) Whenever it appears appropriate and advisable, an investigating officer or board will explain their rights to witnesses or respondents. A soldier, for example, who is suspected of an offense under the UCMJ, such as dereliction of duty, will be advised of his or her rights under UCMJ, Art. 31, before being asked any questions concerning the suspected offense. The soldier will be given a reasonable amount of time to consult an attorney, if requested, before answering any such questions. No adverse inference will be drawn against soldiers who invoke that right under UCMJ, Art. 31 or A.R.S. 26-1031. It is recommended that the procedure for explaining rights set forth on DA Form 3881 (Rights Warning Procedure/Waiver Certificate) or AF Form 1168 (Statement of Suspect) be used.

(e) The right to invoke A.R.S. 26-1031, UCMJ, Art. 31, or the Fifth Amendment is personal. No one may assert the right for another person, and no one may assert it to protect anyone other than himself or herself. An answer tends to incriminate a person if it would make it appear that person is guilty of a crime.

(f) In certain cases the appropriate authority may provide a witness or respondent a grant of testimonial immunity and require testimony notwithstanding A.R.S. 26-1031, UCMJ, Art. 31, or the Fifth Amendment. Grants of immunity will be made under the provisions of AR 27-10, chapter 2 or AFI 51-201, Section 6C.

(6) *Involuntary admissions.* A confession or admission obtained by unlawful coercion or inducement likely to affect its truthfulness will not be accepted as evidence. The fact that a respondent was not advised of his or her rights under A.R.S. 26-1031, UCMJ, Art. 31, or the Fifth Amendment, or of his or her right to a lawyer does not, of itself, prevent acceptance of a confession or admission as evidence.

(7) *Bad faith unlawful searches.* If members of the Armed Forces acting in their official capacity (such as military police acting in furtherance of their official duties) conduct or direct a search that they know is unlawful under the Fourth Amendment of the U.S. Constitution, as applied to

the military community, evidence obtained as a result of that search may not be accepted or considered against any respondent whose personal rights were violated by the search. Such evidence is acceptable only if it can reasonably be determined by the legal advisor or, if none, by the investigating officer or president that the evidence would inevitably have been discovered. In all other cases, evidence obtained as a result of any search or inspection may be accepted, even if it has been or would be ruled inadmissible in a criminal proceeding.

### **11. Composition of board of officers.**

- a.* The Adjutant General will appoint to the board of officers of at least three experienced commissioned officers in the grade of O-6 or above and senior in grade to the respondent. A majority of the voting commissioned officers must be current members of the Arizona National Guard. The board shall have an odd number of voting members.
- b.* The officers appointed to the board need not be from the same branch (Army or Air) as the respondent, unless the board has also been empowered to consider withdrawal of federal recognition of an Air officer pursuant to paragraph 24, below.
- c.* The senior member will be the president of the board.
- d.* The Adjutant General shall appoint to the board a non-voting recorder.
- e.* A non-voting legal advisor shall be appointed to assist the board.
- f.* The Adjutant General will ensure that the opportunity to serve on the board of officers is given to women and minorities. The mere appointment or failure to appoint a member of such a group to the board, however, does not provide a basis for challenging the proceeding.
- g.* The officer to be discharged may challenge a voting member of the board or the legal advisor for cause only.
- h.* The president will preside and rule on all matters of procedure, but the rulings of the president may be overruled by a majority of the board. The legal advisor will rule finally on all matters of evidence and challenges except challenges to the legal advisor.

### **12. Witnesses**

#### *a. General.*

(1) Boards generally do not have authority to subpoena witnesses to appear and testify. An appropriate commander or supervisor may, however, order military personnel and Federal civilian employees to appear and testify. The board president, assisted by the recorder and the legal advisor, if any, will protect every witness from improper questions, unnecessarily harsh or insulting treatment, and unnecessary inquiry into his or her private affairs.

(2) If requested by the civilian employee, the exclusive representative of an appropriate bargaining unit has the right to be present whenever a civilian employee of the unit is a witness during the proceedings and if the employee reasonably believes that the inquiry could lead to disciplinary action against him or her. Unless required by the collective bargaining agreement, there is no requirement to advise the employee of this right. If the employee requests the presence of the exclusive representative, a reasonable amount of time will be allowed to obtain his or her attendance. The servicing civilian personnel office and labor counselor will be consulted before denying such a request.

*b. Attendance as spectators.* Witnesses other than the respondent normally will not be present at the board proceedings except when they are testifying. In some cases, however, it is necessary to allow expert witnesses to hear evidence presented by other witnesses in order that they may be sufficiently advised of the facts to give informed testimony as to the technical aspects of the

case. In such instances, the report of proceedings will indicate that the expert witnesses were present during the testimony of the other witnesses.

*c. Taking testimony or statements.*

(1) Witnesses' statements will be elicited by questions and answers. However, narrative testimony may be used.

(2) Although the direct testimony of witnesses is preferable, the board may use any previous statements of a witness as evidence on factual issues, whether or not the witness is determined to be unavailable, and whether or not the prior statements were sworn or unsworn.

*d. Discussion of evidence.* A board may direct witnesses who are subject to Army authority, and request other witnesses, not to discuss their statements or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is appropriate to eliminate possible influence on the testimony of witnesses still to be heard. Witnesses may not be precluded from discussing any relevant matter with the recorder, an officer, or counsel for an officer.

**13. Notification and production of witnesses.**

*a.* The officer to be discharged will be notified of the names and addresses of witnesses expected to be called at the board hearing at least five (5) working days prior to the convening of the board. The recorder of the board will, on written request of the officer or counsel, endeavor to arrange for the presence of any available witness the officer desires to call.

*b.* The officer to be discharged may submit a written request for temporary duty or invitational travel orders for witnesses. Such a request will contain the following matter:

(1) A synopsis of the testimony that the witness is expected to give.

(2) An explanation of the relevance of such testimony.

(3) An explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination.

**14. Record of proceedings.**

The proceedings of the board will be summarized as fairly and accurately as possible. The proceedings will contain a verbatim record of the findings and recommendations. All open sessions of the board will be audio-recorded, with the recording to be included in the record of proceedings. A verbatim written transcript of the proceedings is not required.

**15. Rights of the officer to be discharged.**

*a.* The officer to be discharged may testify on his or her own behalf. The provisions of A.R.S. 26-1031 and Article 31(a), UCMJ, will apply, as appropriate.

*b.* At any time before the board convenes and during the proceedings, the officer to be discharged or counsel may submit written or recorded matter for consideration by the board. This includes submission of any answer, deposition, sworn or unsworn statement, affidavit, certificate, or stipulation, or depositions of witnesses not reasonably available or witnesses unwilling to appear voluntarily. The legal advisor shall make final determinations of admissibility of such written or recorded matter.

*c.* The officer to be discharged or counsel may call witnesses in his or her own behalf.

*d.* The officer to be discharged or counsel may question any witness who appears before the board.

- e. The officer to be discharged or counsel may present argument before the board closes for deliberation on findings and recommendations.
- f. The officer to be discharged may appear in person with or without counsel at all open proceedings of the board. When an officer appears before a board without counsel, the record will show that the president of the board counseled the officer to be discharged that he or she may request counsel. The record of the proceedings will reflect the officer's response.
- g. The officer to be discharged or counsel may challenge any voting member of the board or the legal advisor for cause only.

#### **16. Communications with The Adjutant General.**

If in the course of the board something happens that could cause The Adjutant General to consider enlarging, restricting, or terminating the proceedings, altering the composition of the fact-finding body or otherwise modifying any instruction in the original appointment, the president of the board will report this situation to The Adjutant General with recommendations.

#### **17. Findings.**

- a. *General.* A finding is a clear and concise statement of a fact that can be readily deduced from evidence in the record. It is directly established by evidence in the record or is a conclusion of fact by the board. Negative findings (for example, that the evidence does not establish a fact) are often appropriate. The number and nature of the findings required depend on the purpose of the investigation or board and on the instructions of The Adjutant General. The board will normally not exceed the scope of findings indicated by The Adjutant General. The findings will be necessary and sufficient to support each recommendation.
- b. *Standard of proof.* Unless another directive or an instruction of The Adjutant General establishes a different standard, the findings of boards governed by these rules must be supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion. The weight of the evidence is not determined by the number of witnesses or volume of exhibits, but by considering all the evidence and evaluating such factors as the witness's demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indications of veracity.
- c. *Form.* Findings will be stated to reflect clearly the relevant facts established by the evidence and the conclusions thereon of the board. If findings are required on only one subject, normally they will be stated in chronological order. If findings are required on several distinct subjects, they normally will be stated separately for each subject and chronologically within each one.

#### **18. Recommendations.**

The nature and extent of recommendations required also depend on the purpose of the board and on the instructions of The Adjutant General. Each recommendation, even a negative one (for example, that no further action be taken) must be consistent with the findings. Boards will make their recommendations according to their understanding of the rules, regulations, policies, and customs of the service, guided by their concept of fairness both to the Government and to individuals.

### **19. Deliberation.**

After all the evidence has been received, and arguments heard, the board members will consider it carefully in light of any instructions contained in the original appointment and any supplemental instructions. These deliberations shall be in closed session, that is, with only voting members present. The legal advisor does not participate in the board's deliberations but may be consulted. The board may request the legal advisor to assist in putting findings and recommendations in proper form after their substance has been adopted by the board. An officer and counsel are not entitled to be present during such assistance.

### **20. Voting.**

A board arrives at its findings and recommendations by voting. All voting members present must vote. After thoroughly considering and discussing all the evidence, the board will propose and vote on findings of fact. The board will next propose and vote on recommendations. If additional findings are necessary to support a proposed recommendation, the board will vote on such findings before voting on the related recommendation. A majority vote of the voting members present determines questions before the board. In case of a tie vote, the president's vote is the determination of the board. Any member who does not agree with the findings or recommendations of the board may include a minority report in the report of proceedings, stating explicitly what part of the report he or she disagrees with and why. The minority report may include its own findings and/or recommendations.

### **21. Findings and recommendations.**

Pursuant to the voting procedures described in Paragraph 20, the board will—

- a.* Determine whether each allegation in the notice of proposed discharge is supported by a preponderance of the evidence.
- b.* Determine whether the findings warrant discharge. If more than one reason was contained in the notice, there will be a separate determination for each reason. The officer shall not be recommended for discharge unless the board determines that the officer to be discharged is inefficient or incapable of discharging the duties of a National Guard officer in any assignment commensurate with his or her rank and experience.

### **22. Report of proceedings.**

A complete report of proceedings will be forwarded to The Adjutant General. Upon receipt of the report, The Adjutant General shall take one of the following actions:

- a.* If the board directs retention of the officer, the officer shall be retained, and no further action is required.
- b.* If the board directs discharge, The Adjutant General may disapprove the recommendation of the board and retain the officer.
- c.* If the board directs discharge, The Adjutant General may forward the report, along with his or her recommendation as to disposition, to the Governor for final determination and disposition.

### **23. Directing a New Administrative Discharge Board.**

*a.* The Adjutant General may set aside the findings and recommendations of a board and direct that a new board be appointed to consider a case only if The Adjutant General makes either of these recommendations:

- (1) Finds legal prejudice to a substantial right of the respondent.

- (2) Determines that the board arrived at its findings by fraud or collusion.
- b.* No member of the new board may have served on a prior board that considered the case.
- c.* The successor board may read the record of the proceedings of the earlier board, minus the findings, recommendations, and matters prejudicial to the respondent's rights.
- d.* The Adjutant General may not approve findings and recommendations less favorable to the respondent than those of the previous board unless The Adjutant General also finds fraud or collusion in the previous board proceedings.

**24. Actions by the Governor upon Receipt of the Case from The Adjutant General.**

- a.* Upon receipt of the board's findings and recommendations and the recommendations of The Adjutant General, the Governor may:
  - (1) Approve the findings and recommendations.
  - (2) Disapprove the findings and recommendations and return the case to The Adjutant General.
- b.* In no case may the Governor direct discharge where the board has recommended retention.

**26. Dual-Purpose Discharge Boards for Air Guard Officers.**

For federally recognized officers of the Arizona Air National Guard, upon notification and approval of the Air Force Personnel Council, in accordance with Air Force Instruction 36-3209, the discharge board may also satisfy the withdrawal of federal recognition process in Title 32 U.S.C., Section 323. Withdrawal of federal recognition pursuant to this section automatically results in discharge from Reserve and the Air Force appointment.