

1 October 1991

General Counsel

**COOPERATION WITH THE OFFICE OF SPECIAL COUNSEL  
OF THE MERIT SYSTEMS PROTECTION BOARD**



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BY ORDER OF THE DIRECTOR

WILLIAM J. FLANAGAN, JR  
Colonel, USA  
Chief of Staff

ROSITA O. PARKES  
Director, Information Resources Management

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**AUTHORITY:** Defense Commissary Agency Directives Management Program is established in compliance with DoD Directive 5105.55, Defense Commissary Agency (DeCA), November 1990.

**HOW TO SUPPLEMENT:** Lower echelon units may not supplement this directive.

**HOW TO ORDER COPIES:** Stores needing additional copies will submit requirements on DeCA Form 30-21 to Region/IM; Region/IM will consolidate Store and Region requirements on DeCA Form 30-21 and forward to HQ DeCA/IMSP.

**SUMMARY:** This directive prescribes procedures to ensure cooperation with the Office of Special Counsel of the Merit Systems Protection Board and implements DoD Directive 5500.19.

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OFFICE OF PRIMARY RESPONSIBILITY (OPR): HQ DeCA/GC  
COORDINATORS: HQ DeCA/IR/DP/DO/IM/IG/RM/DF/PL/AM/PA/PM/CCE/LL  
DISTRIBUTION: DeCA Directorates\Staff Offices  
DeCA Regions  
DeCA Service Centers  
DeCA Commissaries

**1. PURPOSE:**

a. The Special Counsel of the Merit Systems Protection Board (MSPB) has the responsibility, under title 5, United States Code, Sections 1205, 1206, 1207, 2301, and 2302 (Civil Service Reform Act of 1978), to conduct investigations of alleged prohibited personnel practices and to ensure the investigation of other allegations of improper or illegal conduct referred to DeCA by the Office of Special Counsel (OSC) of the MSPB.

b. This DeCAD establishes policy, assigns responsibilities, and prescribes procedures to ensure cooperation with the OSC in carrying out its responsibilities under the Civil Service Reform Act of 1978.

c. This DeCAD provides internal guidance to DeCA personnel and does not establish an independent basis for any person or organization to assert a right, benefit, or privilege.

d. This DeCAD implements DoD Directive 5500.19, Cooperation with the Office of Special Counsel of the Merit System Protection Board.

e. This DeCAD is applicable to HQ DeCA and all DeCA field activities.

**2. POLICY:**

a. General

(1) DeCA supervisory and management personnel shall comply with laws and regulations implementing established merit system principles in taking, or failing to take, all civilian personnel actions.

(2) All civilian personnel actions shall be free of any prohibited personnel practices.

(3) DeCA supervisors and managers shall take vigorous corrective action when prohibited personnel practices occur. Such corrective action may include disciplinary measures when appropriate.

b. Allegations of improper or illegal conduct which are forwarded to DeCA by the OSC pursuant to 5 U.S.C. 1206(b)(2), (b)(3), or (c)(3) shall be promptly and thoroughly investigated. The investigative report, including supporting documentation shall be forwarded to the General Counsel, DeCA.

c. When the OSC conducts an investigation into allegations of prohibited personnel practices or into other matters where the responsibility to conduct an investigation has been delegated to the OSC by law, such as the Freedom of Information Act, or the Hatch Act, close coordination between DeCA and OSC personnel will facilitate an orderly investigation by the OSC, eliminate duplication of effort, and avoid unnecessary delay in initiating, when appropriate, corrective or disciplinary action. This coordination shall be conducted with full recognition of the independent statutory basis for the OSC, and of the responsibilities of DeCA.

d. DeCA personnel shall cooperate with OSC investigations by providing appropriate assistance and information to investigators and by furnishing copies of releasable documents to OSC investigators requested under the authority of Civil Service Reform Act of 1978, 5 C.F.R. 1250, the Privacy Act, or Civil Service Rule V.

e. OSC investigative requests involving classified information shall be accorded special

attention and prompt consideration under existing administrative procedures.

f. When OSC and DeCA or a DeCA employee assigned DoD counsel are engaged in litigation, the release of information shall be accomplished in accordance with MSPB rules of discovery (5 C.F.R. 1201, Subpart B.).

### 3. DEFINITIONS:

#### a. **Improper or Illegal Conduct.**

(1) A violation of any law, rule, or regulation in connection with Government misconduct.

(2) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

#### b. **Personnel Action.**

(1) An appointment.

(2) A promotion.

(3) An adverse action under 5 U.S.C. 7501 et seq. or disciplinary or corrective action.

(4) A detail, transfer, or reassignment.

(5) A reinstatement.

(6) A restoration.

(7) A reemployment.

(8) A performance evaluation under 5 U.S.C. 4301 et seq.

(9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action.

(10) Any other significant change in duties or responsibilities that is inconsistent with the employees' salary, or grade level.

c. **Prohibited Personnel Practice.** Action taken by an employee, who has the authority to take, direct others to take, recommend, or approve any personnel action:

(1) That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation.

(2) To solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests, or is under consideration for, any personnel action, unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the

individual, or an evaluation of the character, loyalty, or suitability of such individual.

(3) To coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.

(4) To deceive or willfully obstruct any person with respect to such person's right to compete for employment.

(5) To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

(6) To grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

(7) To appoint, employ, promote, advance or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in, 5 U.S.C. 3110) of the employee if the position is in the agency in which the employee is serving as a public official (as defined in 5 U.S.C. 3110) or over which the employee exercises jurisdiction or control as an official.

(8) To take or fail to take any personnel action with respect to any employee or applicant for employment as a reprisal for being a whistleblower (defined below).

(9) To take or fail to take any personnel action with respect to any employee or applicant for employment as a reprisal for the exercise of any appeal rights granted by law, rule, or regulation.

(10) To discriminate for or against any employee or applicant for employment on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others.

(11) To take or fail to take any personnel action if the taking or, or failure to take, such action violates any law, rule, or regulation implementing or directly concerning, the merit system principles contained in 5 U.S.C. 2301.

d. **Whistleblower.** A present or former Federal employee or applicant for Federal employment who discloses information he or she reasonably believes evidences:

(1) A violation of any law, rule, or regulation.

(2) Mismanagement, a gross waste of funds, or an abuse of authority.

(3) A substantial or specific danger to public safety. Such disclosure qualifies if it is not specifically prohibited by statute and if such information is not specifically required by Executive Order to be kept secret in the interest national defense or the conduct of foreign affairs. Where the information disclosed affects only the personal situation of the complainant, it is generally to be regarded as an allegation of a prohibited personnel practice or violation of other civil service law, rule or regulation, and the complainant will not be considered a whistleblower.

**4. RESPONSIBILITIES:**

a. HQ DeCA.

(1) The Director, DeCA or Deputy Director, DeCA will approve/disapprove investigative reports pertaining to allegations of improper or illegal conduct which are forwarded to DeCA by the OSC pursuant to 5 U.S.C. 1206(b)(2), (b)(3), or (c)(3).

(2) The Director, Personnel ensures that information concerning members of the Armed Forces who are found by DeCA to have committed a prohibited personnel practice or other violation of this DeCAD in the exercise of authority over civilian personnel, is referred to the appropriate Military Department.

(3) The General Counsel, DeCA will:

(a) Serve as the Senior Management Official as required by Directive 5500.19, in matters concerning allegations by the OSC of prohibited personnel practices or other illegal or improper acts in the DeCA. As the Senior Management Official, the General Counsel will:

1 Provide for the investigation, monitor ongoing investigations, receive, and review, investigative reports pertaining to allegations of improper or illegal conduct which are forwarded to DeCA by the OSC pursuant to 5 U.S.C 1206(b)(2), (b)(3), or (c)(3).

2 Serve as the DeCA point of contact in providing assistance to the OSC in conducting investigations of alleged prohibited activities prior to the designation of legal counsel.

3 Refer recommendations by the OSC for corrective action to the appropriate DeCA officials.

4 Seek OSC approval of proposed disciplinary action against a DeCA employee for an alleged prohibited personnel practice, or illegal or improper conduct under investigation by the OSC when it is determined by appropriate DeCA officials that such discipline is warranted.

5 Ensure that any corrective or disciplinary action considered appropriate because of facts disclosed during an OSC investigation is accomplished in a timely manner.

6 Determine to the extent practicable, whether an investigation is being or has been, conducted that replicates in whole or in part the proposed or incomplete investigation by the OSC, and convey that information to the OSC, whenever this might avoid redundant investigative effort.

7 Inform the Inspector General, DoD of any OSC investigation of an alleged prohibited personnel practice that is being identified as having resulted from a whistleblower complaint or involves an allegation of otherwise illegal or improper conduct.

8 Provide a copy of each allegation of improper or illegal conduct which is forwarded to DeCA by the OSC pursuant to 5 U.S.C. 1206(b)(2), (b)(3), or (c)(3) to the Inspector General, DoD.

(b) Provide legal advice and services on all issues concerning cooperation with the OSC.

(c) Ensure that appropriate HQ DeCA personnel are fully apprised of the nature and basis for an OSC investigation, as well as the rights and duties of DeCA personnel in regard to such investigations as set forth in paragraph 5b below.

(d) Assign DeCA legal counsel, or obtain legal counsel from another DoD component, to represent a DeCA employee suspected or accused by the OSC of committing a prohibited personnel practice or an illegal or improper act when the act(s) complained of was within the scope of the employee's official responsibility and such representation is in the best interests of DeCA.

(e) In unusual situations, ensure that a member of the private bar is engaged to represent a DeCA employee where the use of DeCA or DoD legal counsel would be inappropriate, provided that the conditions in subparagraph (3)(d) above are satisfied. The engagement of members of the private bar to serve as legal representatives requires the approval of the General Counsel, DoD.

(f) Assign DeCA legal counsel to seek intervention in an MSPB proceeding resulting from charges against a DeCA employee under the Civil Service Reform Act of 1978 for purposes of representing the interests of DeCA.

(g) Review, and when appropriate refer to the General Counsel, DoD requests for the assistance of the Department of Justice in representing DeCA employees or in obtaining judicial review of an order by the MSPB.

b. Regional and Service Center Directors/ Commanders will:

(1) Designate an individual at the Region or Center and where desirable, at other subordinate activities to serve as liaison officer for any OSC investigator who may initiate an investigation.

(2) Provide the names and activities of the liaison officers to the General Counsel, DeCA.

(3) Establish procedures to ensure that the General Counsel, DeCA is notified of all OSC investigations.

c. The Liaison Officer will:

(1) Assist the OSC investigator.

(2) Ensure that all OSC requests for documents are in writing.

(3) Process all OSC requests for documents as well as all requests for interviews of DeCA employees.

## **5. PROCEDURES:**

a. Obtaining Legal Representation.

(1) A DeCA employee or member of the Armed Forces assigned to DeCA asked to provide information (testimonial or documentary) to the OSC in the course of an investigation by that office may obtain legal advice from DeCA attorneys on that employee's or member's rights/obligations. This includes assistance at any interviews with OSC investigators. However, the attorney-client relationship shall not be established unless the employee is suspected or accused by the OSC of committing a prohibited personnel practice or other illegal or improper act and has been assigned legal representation.

(2) A DeCA employee who believes that he or she has been accused by the OSC of committing a prohibited personnel practice or other legal or improper act may obtain legal representation under the conditions prescribed in paragraph 4a(3) of this DeCAD, except as provided in subparagraph 7 below. The attorney assigned shall be a military member or employee from outside DeCA whenever an attorney from DeCA is likely to face a conflict between his or her ethical obligation to the employee client and that to DeCA, and in any case where the suspected or accused employee has requested representation from another DoD Component. Outside legal counsel may be retained by DeCA on behalf of the employee only under unusual circumstances and only with the approval of the General Counsel, DoD.

(3) The General Counsel, DeCA shall determine whether a conflict is likely to occur if a DeCA attorney is assigned to represent the employee and, in that case or in a case in which the suspected or accused employee has requested representation from another DoD Component, shall seek the assistance of another General Counsel in obtaining representation from outside DeCA.

(4) To obtain legal representation, the employee must:

(a) Request legal representation, in writing, together with all process and pleadings served, and explain the circumstances that justify DeCA legal representation or assistance.

(b) Indicate whether he or she has retained legal counsel from outside the Department of Defense.

(c) Obtain written certification from his or her supervisor that the employee was acting within the scope of his or her official duties, and that no adverse or disciplinary action against the employee for the conduct being investigated by the OSC has been initiated by DeCA.

(5) Employee requests for legal representation must be approved by the General Counsel, DeCA.

(6) The conditions of legal representation must be explained to the accused employee in writing and accepted in writing by that employee.

(7) DoD resources may not be used to provide legal representation for an employee with respect to a DeCA disciplinary action against the employee for committing or participating in a prohibited personnel practice or for engaging in illegal or improper conduct, regardless of whether that participation or conduct is also the basis for the disciplinary action proposed by the OSC.

(8) After approval of an employee's request, a DoD attorney shall be assigned (or, in unusual circumstances, outside counsel retained) as the employee's representative in matters pending before the OSC or MSPB. This approval may be limited to representing the employee only with respect to some of the pending matters if other specific matters of concern to the OSC or MSPB do not satisfy the requirements of this DeCAD.

(9) An Attorney-client relationship shall be established and continued between the suspected or accused employee and assigned DoD counsel.

(10) In representing a DeCA employee under this DeCAD, a DoD attorney designated counsel for the employee shall act as a vigorous advocate of the employee's individual legal interests before the OSC or MSPB; the attorney's professional responsibility to the Department of Defense and his or her employing DoD Component will be satisfied by fulfilling this responsibility to the employee. Legal representation may be terminated only with the approval of the General Counsel who authorized

representation, and normally only on the basis of information not available at the time the attorney was assigned.

(11) The attorney-client relationship may be terminated if the assigned DoD counsel for the employee determines, with the approval of the General Counsel who authorized representation, that:

- (a) The employee was acting outside the scope of his or her official duties when engaging in the conduct that is the basis for the OSC investigation or charge.
- (b) Termination of the professional representation is not in violation of the rules of professional conduct of the assigned counsel.

(12) The DoD attorney designated counsel may request relief from the duties of representation or counseling without being required to furnish explanatory information that might compromise the assurance to the client of confidentiality.

(13) This DeCAD authorizes cognizant DeCA officials to approve a represented employee's request for travel, per diem, witness appearances, or other support necessary to ensure effective legal representation of the employee by the designated counsel.

b. Employee Rights and Responsibilities.

(1) An employee's participation in OSC investigations, MSPB, hearings, and other related proceedings shall be considered official business for time and attendance requirements and similar purposes.

(2) An employee may have a representative of the recognized local union present at any initial discussions between the employee and the DeCA legal advisor for the purpose of clarifying or explaining the employee's rights and responsibilities.

(3) The following advice to employees questioned during the course of an OSC investigation may be appropriate in response to the most frequent inquiries:

(a) An employee may decline to provide a "yes" or "no" answer in favor of a more qualified answer when this is necessary to ensure accuracy in responding to an OSC interviewer's questions.

(b) Requests for clarification of both questions and answers are appropriate to avoid misinterpretation.

(c) Means to ensure verification of an interview by OSC investigators are appropriate, whether the employee is or is not accompanied by a legal representative. Tape recorders may only be used for this purpose when:

- 1 The recorder is used in full view.
- 2 All attendees are informed.
- 3 The OSC interrogator agrees to the tape recording of the proceeding.

(d) Any errors that appear in a written summary of an interview prepared by the interviewer should be corrected before the employee signs the statement. The employee is not required to sign any written summary that is not completely accurate. An employee may make a copy of the summary

for his or her own use as a condition of signing.