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Military Justice at the Unit Level Policy

Context and purpose

The coming into force of the remaining provisions of *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts* (Bill C-77) introduced important changes to the *National Defence Act* (NDA) and to how the CAF addresses misconduct and administers discipline within the Military Justice System (MJS). A critical part of these changes involves the repeal of the Summary Trial process and the introduction of the Summary Hearing (SH) process.

The SH process is a non-penal and non-criminal process designed to address minor breaches of military discipline at the unit level. Essential aspects of the SH process such as: the identification of service infractions that relate to these minor breaches of military discipline; how charges are laid and dealt with at SH; and how findings and sanctions can be reviewed, are largely prescribed in the NDA and the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). However, in order to assist the CAF in the operationalization of these new legislative and regulatory changes to the MJS, this Military Justice at the Unit Level Policy (Policy) provides supplementary and supporting details.

This policy has been written to supplement the existing NDA and QR&O provisions and is not meant to be used as a standalone instrument. The contents of this policy must be read along with the applicable NDA and QR&O provisions to ensure a complete and accurate understanding of the direction and guidance given.

This policy is in five chapters. Chapter 1 concerns the pre-charge phase, including investigations. Chapter 2 concerns the pre-hearing phase, including making the determination as to whether to proceed with an SH. Chapter 3 concerns the hearing phase. Chapter 4 details the review of an SH result and Chapter 5 concerns the post-hearing administration phase.

Chapter 1 – Pre-charge

Context

This chapter of the Policy is meant to provide guidance about the process to be followed from the moment a complaint of an alleged service offence¹ or service infraction² is made, until a charge is laid. This chapter applies to all alleged disciplinary matters, regardless whether the alleged misconduct results in a charge being laid for an alleged service infraction or service offence or results in no charge being laid. This chapter is to be read in conjunction with the relevant provisions in Division 5 of the NDA (Summary Hearings) and Chapter 102 of the QR&O (Investigation and laying of charges).

1.1 Complaint

1.1.1 When an authority within the military justice system receives a complaint or has other reasons to believe that a service offence or a service infraction has been committed, that authority must cause an investigation to be conducted as soon as circumstances permit to determine whether there are sufficient grounds to lay a charge.³ The requirement to investigate, however, does not apply to complaints that are frivolous or vexatious.⁴

1.2 Investigation

1.2.1 The investigation conducted must, as a minimum, collect all reasonably available evidence relevant to determining whether a service offence or a service infraction has been committed.⁵

1.2.2 Before causing an investigation to be conducted, the military justice authority that receives a complaint must confirm whether, in the circumstances, there is a requirement to seek pre-investigation legal advice and must determine which investigative body would be the most appropriate to conduct the investigation.

¹ A service offence means an offence listed at NDA sections (ss) 73-129 and an offence punishable under the *Criminal Code* or any other Act of Parliament that can be charged through NDA s 130 (Offences punishable by ordinary law).

² A service infraction means a service infraction listed at QR&O articles (arts) 120.02 (Infractions in relation to property and information), 120.03 (Infractions in relation to military service) and 120.04 (Infractions in relation to drugs and alcohol).

³ QR&O paragraph (para) 102.02(1).

⁴ QR&O para 102.03(2). A frivolous or vexatious complaint is a complaint that clearly has no merit. A frivolous complaint may be one that lacks a reasonable basis for the allegation; is not serious; or is not reasonably purposeful (*Currie v Halton Regional Police Services Board*, 179 OAC 67, 233 DLR (4th) 657 (ONCA); *Love v Canada (Privacy Commissioner)*, 2015 FCA 198). A vexatious complaint may be one that is brought for an improper purpose (*Canada v Olumide*, 2017 FCA 42).

⁵ QR&O para 102.03(1).

Pre-investigation legal advice

1.2.3 Pre-investigation legal advice is required when a military justice authority believes:

- a.** That any alleged service offence or service infraction was committed against a person; or
- b.** That a person may have suffered physical or emotional harm, property damage or economic loss as a result of any alleged commission of a service offence or service infraction.⁶

1.2.4 The requirement to obtain legal advice before causing an investigation to be conducted provides the military justice authority the opportunity to receive advice relevant to identifying the appropriate investigative body as well as the application of the Declaration of Victims Rights (DVR) in the circumstances.

1.2.5 In cases when pre-investigation legal advice is required, and concurrent with seeking and receiving that advice, the relevant military justice authority will undertake the relevant lawful pre-investigative actions appropriate in the circumstances, such as:

- a.** Responding to an emergency;
- b.** Taking measures to ensure the safety and security of any person, information or property;
- c.** Securing or preserving evidence;
- d.** Establishing the identity of the person alleged to have committed the service offence or service infraction when time is of the essence; and
- e.** Affording DVR rights when applicable.

Choice of investigative body

1.2.6 The choice of investigative body must be made carefully and with due consideration of the relevant circumstances to best ensure that the matter is appropriately investigated. The choices of investigative body include: the civilian police; the military police (MP), including the Canadian Forces National Investigation Service (CFNIS); and unit-level investigators. The key factors to be considered when determining the most appropriate investigative body in the circumstances include the following:

- a.** The seriousness and sensitivity of any alleged service offence or service infraction and of the situation itself:

⁶ QR&O para 102.02(2).

- (1) Whether any allegation may amount to an offence punishable under the *Criminal Code* or any other Act of Parliament that can be charged through NDA section (s) 130 (Offences punishable by ordinary law);
 - (2) Whether any allegation falls within the jurisdiction of the military justice system;
 - (3) Whether any alleged service offence or service infraction represents a repeat of a similar service offence or service infraction committed or allegedly committed previously by the same individual;
 - (4) Whether the person alleged to have committed any service offence or service infraction was in a position of trust or authority at the relevant time,⁷ and in particular:
 - (a) Whether any alleged service offence or service infraction involved a violation of that position of trust or authority; and
 - (b) Whether any alleged service offence or service infraction was committed against a person in a position of subordination or vulnerability and, whether that person alleges to have suffered physical or emotional harm, property damage or economic loss as a result.
 - (5) Whether there exists any significant mitigating or aggravating circumstances, including any operational impact;
 - (6) Whether any alleged service offence or service infraction was committed against a person, or that a person may have suffered physical or emotional harm, property damage or economic loss as a result of the commission of any service offence or service infraction; and
 - (7) Whether there was an impact of any alleged service offence or service infraction on the CAF or the wider local community.
- b.** The complexity of any alleged service offence or service infraction and of the situation itself:
- (1) Whether the circumstances surrounding any alleged service offence or service infraction implicates multiple units, formations or commands;
 - (2) Whether any alleged service offence or service infraction implicates different geographical locations and/or the local community;

⁷ For example: A service offence or service infraction alleged to have been committed by a person in a position of authority may in some circumstances be considered more serious than if a service offence or service infraction was alleged to have been committed by a person who does not hold a position of authority.

- (3) Whether technical investigative expertise may be required;⁸
- (4) Whether any alleged service offence or service infraction involves more than one suspect;
- (5) Whether any alleged service offence or service infraction may have been committed against one or more individuals or may have caused one or more individuals to suffer physical or emotional harm, property damage or economic loss as a result;
- (6) Whether any alleged service offence or service infraction involves a complainant or witness who is not a member of the CAF; and
- (7) The experience and capacity of the potential investigative bodies to investigate any alleged service offence or service infraction in light of the circumstances.

1.2.7 When selecting the most appropriate body to conduct the investigation the military justice authority must consider all of the circumstances of the situation and may consult their legal advisor as well as the relevant policing and unit authorities as appropriate.

Conduct of the investigation

1.2.8 While an investigation is being conducted, it is not yet known whether a charge will be laid and, if so, whether the charge will be for a service offence or a service infraction. As a result, all investigations will follow the same general practice. This practice includes, for example: administering a caution about the right to remain silent to the person alleged to have committed any service offence or service infraction; providing the right to counsel to the person alleged to have committed any service offence or service infraction; and, using search warrants when appropriate. The appropriate military justice authority should consult their legal advisor with respect to any questions concerning the appropriate investigative practice.

1.2.9 As set out at paragraph (para) 1.2.3, pre-investigation legal advice is required when a military justice authority believes that any service offence or a service infraction was committed against a person or that a person may have suffered physical or emotional harm, property damage or economic loss as the result of any alleged service offence or service infraction.⁹ One of the principal purposes of this legal advice is to ensure the appropriate military justice authority has all the information and advice they require to assess whether, in those particular circumstances, the rights enshrined in the DVR apply. If the DVR does not apply, the person may be entitled through QR&O, policy or other instrument to receive information, protection or the opportunity to participate in an SH.

⁸ For example specific expertise may be required with respect to the execution of certain search warrants, the collection and preservation of evidence, firearm examination, use of breath testing equipment, use of radar, computer crimes, etc.

⁹ QR&O para 102.02(2).

1.2.10 When assessing the application of the DVR in the pre-charge phase, the factors that the appropriate military justice authority should consider, among other potential matters, include the following:

- a. Whether any allegation may meet one of the descriptions of a service infraction at QR&O articles (arts) 120.02 (Infractions in relation to property and information), 120.03 (Infractions in relation to military service) or 120.04 (Infractions in relation to drugs and alcohol);
- b. Whether any allegation may meet the elements of a service offence at NDA ss 73-129 (Service offences), or may amount to an offence punishable under the *Criminal Code* or any other Act of Parliament, that can be charged through NDA s 130;
- c. Whether the person alleged to have committed any service offence or service infraction was in a position of trust or authority at the relevant time,¹⁰ and in particular:
 - (1) Whether any alleged service offence or service infraction involved a violation of that position of trust or authority; and
 - (2) Whether any alleged service offence or service infraction was committed against a person in a position of subordination or vulnerability and, whether that person alleges to have suffered physical or emotional harm, property damage or economic loss as a result.
- d. The wishes, with respect to accessing the rights enshrined in the DVR, of any person alleged to have had a service offence or a service infraction committed against them or who allege to have suffered physical or emotional harm, property damage or economic loss as a result of the commission of any service offence or service infraction;
- e. The impact on the military or wider community; and
- f. Significant mitigating or aggravating circumstances, including any operational impact.

Investigating sexual misconduct

1.2.11 Further to the requirement to seek pre-investigation legal advice when a matter involves any person who may have had a service offence or service infraction committed against them or

¹⁰ For example: A service offence or service infraction alleged to have been committed by a person in a position of authority may in some circumstances be considered more serious than if a service offence or service infraction was alleged to have been committed by a person who does not hold a position of authority.

who is alleged to have suffered harm, property damage or economic loss,¹¹ legal advice should be sought in any circumstance involving alleged sexual misconduct, no matter how serious.

1.2.12 When an appropriate military justice authority determines that an investigation is required with respect to an allegation of sexual misconduct,¹² the matter must be referred to the MP or CFNIS for a decision on investigatory jurisdiction, including whether the matter should be referred to civilian authorities. A unit disciplinary investigation may only be conducted once an investigation is determined to be within CAF jurisdiction and the MP or CFNIS have declined to investigate. Except in the most minor cases and absent exceptional circumstances, sexual misconduct investigations should be conducted by the MP and not by units.

1.2.13 If, during the course of any other investigation, misconduct that may constitute sexual misconduct is uncovered, legal advice should be sought to, among other things, determine the most appropriate investigative body and application of the DVR.

1.3 Laying a Charge

Service infraction or service offence

1.3.1 In order to lay a charge, a person authorized to lay a charge¹³ (the charge layer) must have an actual belief that the person to be charged has committed the alleged service offence or service infraction, and that belief must be reasonable. A “reasonable belief” is a belief that would lead an ordinary prudent and cautious person to the conclusion that the person is probably guilty of the alleged service offence or service infraction. This reasonable belief will be based on the evidence gathered or identified through or during the investigation.

1.3.2 The charge layer must obtain pre-charge legal advice if:

- a.** The charge concerns a person against whom a service offence or a service infraction is alleged to have been committed or who is alleged to have suffered physical or emotional harm, property damage or economic loss as a result of the alleged commission of the offence or infraction; or
- b.** The charge alleges the commission of a service offence.¹⁴

1.3.3 The charge layer may seek legal advice at any time, including in the pre-charge phase, should any questions or concerns arise.

1.3.4 Before a charge can be laid, the charge layer must determine whether a service offence or a service infraction would be appropriate in the circumstances. This determination begins with

¹¹ QR&O para 102.02(2).

¹² QR&O para 102.02(1).

¹³ QR&O art 102.04.

¹⁴ QR&O subparagraphs (subpara) 102.07(2)(a) and (b).

the charge layer confirming whether the evidence gathered during the investigation indicates the commission of a service offence or a service infraction.

1.3.5 An allegation of a commission of a service offence means the matter concerns a service offence as set out in the NDA ss 73-129 (Service offences), or an offence punishable under the *Criminal Code* or any other Act of Parliament that can be charged through NDA s 130 (Offences punishable by ordinary law).

1.3.6 An allegation of a service infraction means the matter concerns a service infraction as set out at QR&O arts 120.02 (Infractions in relation to property and information), 120.03 (Infractions in relation to military service) and 120.04 (Infractions in relation to drugs and alcohol).

1.3.7 In some instances, the alleged misconduct will clearly concern a service offence because there is no service infraction that applies to the matter. In other instances, the matter may be less clear if both a service infraction and a service offence could apply. In these circumstances the charge layer would then determine whether the misconduct is most appropriately considered and dealt with as a service offence or service infraction. The key factors that the charge layer should consider when making this determination include the following:

- a. The seriousness and sensitivity of the alleged service offence or service infraction and of the situation itself:
 - (1) The impact on any person alleged to have had a service offence or service infraction committed against them or alleged to have suffered physical or emotional harm, property damage or economic loss as a result;
 - (2) The impact on the military or wider community; and
 - (3) Significant mitigating or aggravating circumstances, including any operational impact.
- b. The circumstances surrounding the allegation:
 - (1) The complexity of the case, including the involvement of multiple suspects and/or multiple persons alleged to have had a service offence or service infraction committed against them or who have alleged to have suffered physical or emotional harm, property damage or economic loss (see the list concerning the complexity of the case at para 1.2.6 (Choice of investigative body));
 - (2) The wishes, with respect to accessing the rights enshrined in the DVR, of any person alleged to have had a service offence or a service infraction committed against them or who alleged to have suffered physical or emotional harm, property damage or economic loss as a result the commission of the service offence or service infraction;

- (3) Whether the person alleged to have committed the service offence or service infraction was in a position of trust or authority at the relevant time,¹⁵ and in particular:
 - (a) Whether the alleged service offence or service infraction involved a violation of that position of trust or authority; and
 - (b) Whether the alleged service offence or service infraction was committed against a person in a position of subordination or vulnerability and, whether that person alleges to have suffered physical or emotional harm, property damage or economic loss as a result;
- (4) The circumstances of the person alleged to have committed the service offence or the service infraction;¹⁶
- (5) The objectives of sanctioning compared to the purposes of and principles of sentencing;
- (6) The prevalence of the allegation in the unit or wider military community;
- (7) The prevalence of the alleged misconduct in the history of the person alleged to have committed the service offence or service infraction; and
- (8) Whether the evidence alleges more than one charge, and these charges allege both a service infraction and a service offence.¹⁷

1.3.8 Before laying a charge, the charge layer must also determine whether it is in the public interest to proceed with laying a charge. The following factors, in addition to any of the above factors set out at para 1.3.7, may assist in determining whether it is in the public interest to proceed with laying a charge:

- a. Whether in the circumstances, it would be in the best interest of the administration of military justice;
- b. Whether in the circumstances, the laying of the charge would be disproportionately harsh;

¹⁵ For example: A service offence or service infraction alleged to have been committed by a person in a position of authority may in some circumstances be considered more serious than if the service offence or service infraction was alleged to have been committed by a person who does not hold a position of authority.

¹⁶ This consideration may include the rank, years of service and the experience the person has had in their position.

¹⁷ In such a circumstance, a consideration must be made in respect of the impact a multiplicity of proceedings may have on the person facing more than one charge and on the administration of justice.

- c. The availability and appropriateness of alternative courses of action to laying a charge;
- d. The likely effect of laying or not laying the charge on public confidence in the military justice system; and
- e. The likely effect of laying or not laying the charge on discipline, efficiency and morale.

1.3.9 A charge is laid when the charge layer completes the relevant sections of the charge report.¹⁸ The post charge procedure to be followed depends on whether a charge is laid for a service offence or a service infraction.

1.3.10 With regard to a service offence charge, the charge layer must refer the charge directly to the Director of Military Prosecutions (DMP)¹⁹ by providing the DMP with the charge report and the complete report of investigation.²⁰

1.3.11 With regard to a service infraction charge, the charge layer must refer the charge to the commanding officer (CO) of the person alleged to have committed the infraction²¹ by providing the CO with the charge report and the investigation file.²² In the event the charge layer contemplates laying both a service offence charge and a service infraction charge against a person in relation to the same set of facts, it is recommended that they contact their legal advisor.

1.4 Mental health supports

1.4.1 Authorities in the military justice system, including the person who received the complaint and the charge layer, should recognize the impact that the investigation and the laying of a charge may have on the mental health of those involved. Mental health supports should be made available throughout the investigation phase and beyond to those who are involved, including those alleged to have suffered harm, loss or damage and those who are alleged to have committed a service infraction or a service offence. Authorities in the military justice system should make it known that if any such individual wishes to seek out mental health supports, such supports are available, and they should provide relevant mental health support contact information.

¹⁸ See QR&O para 102.07(1) with respect to the procedure for the laying of the charge. The charge report for service offences is DND 4814 and the charge report for service infractions is CF 78.

¹⁹ NDA subs 161.1(1).

²⁰ QR&O art 107.09.

²¹ QR&O para 161.1(2).

²² QR&O art 121.01.

Chapter 2 - Pre-hearing

Context

This chapter of the Policy is meant to provide guidance about the military justice system processes from the moment a charge is laid through to the decision to: conduct a summary hearing; not proceed with the charge; or refer the charge to another officer. This chapter is to be read in conjunction with the provisions contained in Division 5 of the NDA (Summary Hearings) and QR&O Chapter 121 (Referral of Charges and Post Charge Procedure) and Chapter 122 (Summary Hearings).

2.1 Provision of information to person charged with having committed a service infraction

2.1.1 Any proceeding that carries the possibility that a decision will be made that could be adverse to a person's interests must be conducted in a fair manner.²³ There is no one definition for procedural fairness. However, it is generally accepted that in order to be fair in a legal sense, the common law rules of natural justice, freedom from bias on the part of the decision maker and meaningful and informed participation by the person in the proceedings must be followed throughout the process. The CO of a person charged with having committed a service infraction (person charged) has the responsibility to ensure the person charged is provided with a copy of, or access to, any information that is to be relied upon as evidence at the SH or that tends to show the person charged did not commit the service infraction.²⁴ This provision of information facilitates the informed participation in the proceeding by the person charged.

2.1.2 The requirement to provide information to the person charged is continuous. Any additional information that comes to light that will be relied upon as evidence at an SH or that tends to show the person charged did not commit the service infraction, must be provided. There is no corresponding duty on the part of the person charged to provide information pertaining to the subject matter of the charge.

2.1.3 The following are examples of the types of information relating to a service infraction charge that would need to be provided to a person charged:

- a. A copy of any written statement made by the person charged;
- b. A copy of any documentary evidence;
- c. A copy of any written statement made by a witness;
- d. A copy of any photographs, videos, sound clips, screenshots;

²³ Sara Blake, *Administrative Law in Canada*, 2nd ed. (Toronto: Butterworths, 1997) at 9.

²⁴ QR&O para 121.03(1).

- e. A copy of any investigation report made; and
- f. Where physical evidence exists, access to the evidence.

2.1.4 When providing copies of documents to the person charged, those documents must be handled appropriately in light of their security classification or designation. Similarly, should those documents contain the personal information of individuals other than the person charged, that personal information will need to be handled in a manner consistent with the requirements of the *Privacy Act*. The CO of the person charged is required to maintain a written record of the following: copies of all documents and other evidence the person charged was provided with or was given access to; who provided the copy or access; and when the copy or access was provided. This written record must be appended to the charge report.

2.1.5 Questions with respect to the provision of information to the person charged should be directed to the unit legal advisor.

2.2 Assisting Member

2.2.1 Every person charged has the opportunity to have an officer, or in exceptional circumstances, a non-commissioned member (NCM) above the rank of sergeant, appointed to assist them.²⁵ Exceptional circumstances may include when there is no eligible officer that could act due to the exigencies of the service.²⁶ The assisting member (AM) who is appointed has the responsibility to assist, advise and make representations on behalf of the person charged to the extent the person charged wishes.²⁷

2.2.2 After laying a charge for a service infraction, the charge layer must confirm with the person charged whether they want to have an AM appointed and, if so, whether they want to have a particular officer or NCM appointed.²⁸ When posing these questions, the charge layer will explain the role of the AM to the person charged. The explanation should provide enough information for the person charged to make a reasonably informed decision with respect to the appointment of the AM.

2.2.3 The officer or NCM requested by the person charged to act as an AM should be granted sufficient time to complete the Military Justice - Unit Level course before performing the duties of an AM. However, not having taken the course will not prevent a person from acting as an AM.

2.2.4 If an AM is requested, the charge layer must indicate this in the appropriate space on the charge report. If a specific person is requested to act as the AM, the charge layer must also

²⁵ QR&O para 121.02(1).

²⁶ For example, the exigencies of the service may include where no officers are available because they are absent from the unit on duty, or all officers are unavailable due to other essential duties.

²⁷ QR&O para 121.02(4).

²⁸ QR&O subpara 102.10(2)(b).

indicate this in the appropriate space on the charge report. It is the responsibility of the CO to appoint the person requested as the AM provided the conditions set out at QR&O subparas 121.02(2)(a) and (b) are met. Once appointed, the name and rank of the AM must be recorded by the CO in the appropriate space on the charge report. In the event the person requested to act as an AM does not have the same CO as the person charged, the CO of the person charged must transfer the request to the requested person's CO.

2.2.5 In the event a person requested does not wish to act as an AM, or an AM no longer wishes to act, they may decline or withdraw, as the case may be, without an obligation to provide reasons. If the person charged wants a different AM, the CO of the person charged will consider granting the request. While the QR&O do not provide the person charged with an explicit ability to request to have their AM replaced, should the opportunity to make such a request arise, the CO of the person charged, in accordance with QR&O art 101.04 and in the interests of fairness, will consider the request and, if appropriate in the circumstances, approve the appointment of a new AM.

General responsibilities

2.2.6 An AM is not legal counsel and does not act as a defending officer for the person charged. The role of the AM is to assist, advise and make representations throughout the proceedings and during any review to the extent that the person charged desires. This involvement by the AM may include assisting with preliminary matters such as the identification of relevant witnesses and evidence and arranging to have such witnesses and evidence available at the SH. Also, the AM may help the person charged prepare for the SH, and may assist them by speaking for or making representations on their behalf both at the SH as well as in relation to a review.²⁹

2.2.7 The AM should inform the person charged that should the person charged require or wish to seek out mental health support, such support is available, and the AM should provide the person charged with relevant mental health support contact information.

Confidentiality of communication

2.2.8 The professional duties and responsibilities that legal advisors have to protect the information that their clients share with them in confidence, do not apply to AMs. However, given the harm that can be caused to the integrity of the AM's role and in turn the effectiveness of the SH process, the communications between an AM and the person charged should be kept confidential. A legal advisor should be consulted in any case where consideration is being given to requiring an AM to disclose these communications.

2.3 Legal counsel

2.3.1 A person charged with a service infraction is not entitled to be represented by legal counsel appointed by the Director of Defence Counsel Services (DDCS), but they are entitled to

²⁹ QR&O para 121.02(4).

legal advice of a general nature to assist on matters relating to summary hearings.³⁰ The officer conducting a summary hearing (OCSH) has the discretion to permit a person charged with a service infraction, upon request, to be represented by legal counsel at their own expense. After laying a charge for a service offence, the charge layer, in accordance with QR&O subpara 102.10(2)(c) (Notice of decision to lay charges), must confirm with the person charged whether they want to be represented by legal counsel who is either appointed by DDCS or retained at the person's own expense.

2.4 Preliminary determinations (QR&O article 121.07)

2.4.1 The officer to whom a charge is referred, before complying with the obligations under NDA s 162.95 (Commanding officer's obligation) concerning the decision to: conduct an SH; not proceed; or refer the charge, must make a determination with respect to the following three matters: the official language of the proceeding; the limitation period; and whether legal advice is mandatory.

Official language

2.4.2 After laying a charge for a service offence or a service infraction, the charge layer must ask the person charged whether they would like the proceeding to be conducted in either English or French.³¹ The charge layer must mark the official language selection in the appropriate space on the charge report. An OCSH must be able to understand the official language in which the hearing is to be conducted without the assistance of an interpreter.³²

2.4.3 If the officer to whom a charge is referred determines that they do not have the required language ability, the officer must refer the charge to another CO, superior commander or delegated officer who holds the necessary language ability.

2.4.4 Witnesses may testify in their preferred official language, and if it is not the official language chosen for the hearing, an interpreter must be provided. The OCSH must ensure that the interpreter is competent to translate the witness' testimony into the language chosen for the proceedings. The person charged, however, may consent to dispense with the interpreter if they understand the language the witness will be using. The OCSH is not required to dispense with the interpreter in such circumstances, and should not do so despite the consent of the person charged, where it is considered to not be in the interest of justice to do so.

Limitation period

2.4.5 An SH must be commenced within six months after the day on which the service infraction is alleged to have been committed.³³

³⁰ QR&O subpara 101.11(1)(d).

³¹ QR&O subpara 102.10(2)(a).

³² QR&O subpara 121.07(a)(i).

³³ NDA s 163.4.

2.4.6 In the event a limitation period has passed, there is no jurisdiction to hear the matter, and as a result, the charge cannot be proceeded with. If the charge cannot be proceeded with by reason of the limitation period, the officer to whom the charge was referred must communicate this to the persons listed at QR&O art 121.09 (Decision not to proceed).

Legal advice

2.4.7 Legal advice must be sought by the officer to whom a charge is referred if the charge laid concerns a person against whom a service infraction is alleged to have been committed or who is alleged to have suffered physical or emotional harm, property damage or economic loss as a result of the alleged commission of the service infraction.³⁴

2.4.8 Should the officer who receives the legal advice required under QR&O para 121.07(b) decide to not act on that advice, the officer must provide their decision and reasons in writing to both the next superior officer to whom they are responsible in matters of discipline and to the legal officer who provided the advice.

2.5 Decisions upon referral of a service infraction

2.5.1 Subject to the completion of the preliminary determinations required under QR&O art 121.07 (Preliminary determinations), as set out above at s 2.4 and taking into account the jurisdictional considerations set out at s 2.6, the officer to whom a service infraction charge is referred must, take one of the following actions specified at NDA s 162.95 (Commanding officer's obligation): conduct an SH in relation to the charge; decide to not proceed with the charge; or, refer the charge.

Decision to conduct a summary hearing - NDA ss 162.95(a)

2.5.2 Upon a decision to conduct an SH, the OCSH must choose a date, time and location for the hearing. A person charged may be dealt with either inside or outside Canada. The determination of the location of the hearing will depend on a number of factors, including:

- a. The circumstances, including availability and location of the person charged, the witnesses and any person against whom a service infraction is alleged to have been committed or who is alleged to have suffered physical or emotional harm, property damage or economic loss as a result of the alleged commission of the infraction;
- b. Location of the incident that gave rise to the charge; and
- c. The operational posture of the unit.

³⁴ QR&O para 121.07(b).

2.5.3 The discretion to choose a location will be exercised based upon a balancing of convenience and the disciplinary interests of the unit, bearing in mind the principles of fairness, and the six month limitation period.

Decision not to proceed with charge - NDA ss 162.95(b)

2.5.4 A decision not to proceed is a discretionary one. It is based on the opinion of the officer to whom the charge was referred as to whether the charge should be proceeded with.³⁵ If a decision is made to not proceed, no SH is held. A decision not to proceed and the reasons for that decision must be provided, in writing, as soon as the circumstances permit to the persons listed at QR&O art 121.09 (Decision not to proceed).³⁶

2.5.5 An officer to whom the charge was referred must consider the particular circumstances of the case when considering whether or not to proceed. Such circumstances may include but are not limited to:

- a. Whether the matter should proceed by way of a service offence;³⁷ or
- b. Whether or not in the interest of discipline, efficiency and morale of the CAF, to conduct the hearing.³⁸

2.5.6 A decision to not proceed does not preclude the hearing of the matter at a later date, as long as the six month limitation period is respected.

2.5.7 A decision to not proceed is distinct from the determination that the officer to whom a charge is referred should or must not be the OCSH. In those cases, referring the charge is appropriate.

2.5.8 Should the officer to whom the charge was referred have any questions on whether to proceed with the charge, a legal advisor should be consulted.

Decision to refer the charge to another officer - NDA ss 162.95(c)

2.5.9 Should the officer to whom a charge has been referred determine that while an SH should be held in respect of the matter, they will not conduct the SH, NDA subs 162.95(c) obliges them to make a subsequent referral of the charge to another commanding officer, superior commander or delegated officer.

³⁵ NDA subs 162.95(b).

³⁶ QR&O art 121.09.

³⁷ For instance, in the event the officer to whom the charge was referred has reasonable grounds to believe the person charged was suffering from a mental disorder at the time of the infraction. In such circumstances the officer to whom the charge was referred should seek legal advice and consult the local CAF medical clinic.

³⁸ NDA para 163(1)(d).

2.6 Jurisdiction/ability to conduct a summary hearing

2.6.1 Within the context of an SH, the term “jurisdiction” refers to the legal authority to hear and determine the issues relating to the SH of the person charged.

2.6.2 The officer to whom the charge was referred must determine whether they have the jurisdiction to proceed with an SH before taking one of the actions specified at NDA s 162.95 (Commanding officer’s obligation): conduct an SH in relation to the charge; decide to not proceed with the charge; or, refer the charge. In the event they do not have the legal authority to proceed, either no SH is held or the charge is referred.

2.6.3 A person charged may, at any point after they receive notice of the decision to conduct the hearing, including during the SH itself, request that the OCSH withdraw from the proceeding due to a lack of jurisdiction.³⁹ When considering this request, the OCSH must consider any representations from the person charged and provide the person with reasons for the decision reached.⁴⁰ Prior to receiving any evidence, the OCSH must ask whether the person charged wishes to make representations with respect to the officer’s lack of ability to conduct the SH, including any lack of jurisdiction.⁴¹

2.6.4 An officer’s lack of ability to conduct the SH, including a lack of jurisdiction, may result from, but is not limited to the following:

- a.** The expiration of the six month limitation period;⁴²
- b.** The inability of the officer to whom the charge was referred to understand the language in which the hearing is to be conducted;⁴³
- c.** The failure to meet a condition set out at NDA subs 163(1) (Jurisdiction);⁴⁴
- d.** The existence of a prohibition set out at NDA subs 163(2) (Prohibition on conducting hearing);
- e.** Partiality/bias or the appearance thereof;
- f.** The officer to whom the charge was referred does not have valid certification of qualification from the Judge Advocate General, pursuant to QR&O art 101.07 (Certification of qualification to administer the code of service discipline);⁴⁵ and

³⁹ QR&O para 121.13(1).

⁴⁰ QR&O para 121.13(2).

⁴¹ QR&O para 122.07(b).

⁴² NDA s 163.4; see also QR&O subpara 121.07(a)(ii).

⁴³ QR&O subpara 121.07(a)(i).

⁴⁴ In the event the officer to whom the charge was referred or the OCSH has reasonable grounds to believe that the person charged is unable on account of mental disorder to understand the nature, object or possible consequences of the proceedings as set out at NDA 163(1)(c), jurisdiction to hear the matter has been lost. In such circumstances legal advice should be sought and health services should be consulted.

⁴⁵ QR&O art 101.07.

- g.** The person charged has been previously tried for a service offence arising from the same facts on which the charged service infraction is based.⁴⁶

2.6.5 The officer to whom the charge was referred or the OCSH is encouraged to contact their unit legal advisor at any time if a lack of ability to conduct an SH, including a lack of jurisdiction, is either raised by the person charged, or by the OCSH on their own initiative. In the event the OCSH chooses to withdraw, they should contact their unit legal advisor.

2.7 Adjournments

2.7.1 Either the person charged, or the AM on their behalf, can request an adjournment of an SH at any time. The OCSH has the obligation to grant any reasonable adjournment requested.⁴⁷ When considering what would be a reasonable adjournment, the following factors will be considered:

- a.** The amount of time that has passed since the person charged received a copy of the charge report;⁴⁸
- b.** The amount of time that has passed since the person charged received a copy of, or was given access to, all the information referred to in QR&O art 121.03 (Provision of information);
- c.** The number of charges;
- d.** The number of witnesses being called;
- e.** The availability of the witnesses being called for the person charged;
- f.** The amount of evidence to be considered;
- g.** Whether the adjournment would cause unreasonable delay of the proceedings; and
- h.** Whether the request for the adjournment was made in good faith.

2.8 Attendance of witnesses

2.8.1 The OCSH must ensure the attendance of the witnesses. This includes ensuring the attendance of the witnesses requested by the person charged. In light of the requirement to

⁴⁶ NDA subs 162.6(1).

⁴⁷ QR&O para 122.07(a).

⁴⁸ Pursuant to QR&O subpara 102.10(1)(a) the charge layer, as soon as the circumstances permit, must provide a copy of the charge report referred to at QR&O 102.07(1) to the person charged with having committed a service infraction.

conduct a fair hearing, all efforts should be made to accommodate the request of the person charged. However, the OCSH is not obliged to arrange for the attendance of witnesses where the officer believes the request is frivolous or vexatious,⁴⁹ or where their attendance cannot be reasonably effected.

2.8.2 Witnesses may give evidence at the hearing by telephone or other electronic means so long as the identity of the witness can reasonably be confirmed and the witness may be properly heard and questioned by the OCSH and the person charged or their AM.

2.8.3 Questions with respect to witnesses, including arranging their attendance and testimony, should be directed to the unit legal advisor.

2.9 Attendance of the person charged

2.9.1 The person charged must attend their SH, but they may do so by any means permitting simultaneous visual and oral communication. The attendance of the person charged is an essential element of procedural fairness. It allows for meaningful participation or awareness as well as the opportunity to make representations.

2.10 Bias

2.10.1 It is essential for ensuring procedural fairness that the SH be conducted in an impartial manner by an impartial officer. The OCSH must be impartial and must be seen to be impartial. Impartiality in the context of an SH means the OCSH is not only unbiased but there is also no reasonable apprehension of bias. When confirming that they are not precluded from acting on the ground of bias, the officer to whom the charge was referred or the OCSH will consider the following test:

“What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would [they] think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.”⁵⁰

2.10.2 The test for bias is not only whether an actual bias exists, but whether a reasonably well informed person, viewing the situation, would think that the decision-maker is likely to make a decision that is not entirely based on the admissible evidence. In other words, would “... a reasonably well-informed person, ... conclude that there is a reasonable apprehension of bias”.⁵¹

⁴⁹ A frivolous or vexatious request is a request that clearly has no merit. A frivolous request may be one that lacks a reasonable basis; is not serious; or is not reasonably purposeful (*Currie v Halton Regional Police Services Board*, 179 OAC 67, 233 DLR (4th) 657 (ONCA); *Love v Canada (Privacy Commissioner)*, 2015 FCA 198). A vexatious request may be one that is brought for an improper purpose (*Canada v Olumide*, 2017 FCA 42).

⁵⁰ *National Energy Board*, [1978] 1 SCR 369.

⁵¹ *Pelletier v Canada (Attorney General) and Gomery*, 2008 FC 803.

2.10.3 An apprehension of bias on the part of the officer to whom the charge was referred or the OCSH could arise from a number of circumstances, including when the officer to whom the charge was referred or the OCSH has:

- a.** A close relationship with the person charged or with a witness who is to give evidence at the hearing;
- b.** Unfavorable feelings towards the person charged or a witness who is to give evidence at the hearing;
- c.** A direct personal interest in the outcome; or
- d.** Expressed a preference towards a certain outcome.

2.10.4 Should the officer to whom the charge was referred or the OCSH have any questions regarding their impartiality or whether their circumstances could raise an apprehension of bias, they are strongly encouraged to obtain legal advice.

Chapter 3 – Hearing

Context

This chapter of the Policy is intended to provide guidance on the summary hearing process during the hearing stage. This chapter includes guidance on matters including hearing attendance, taking oaths, pronouncing a decision and imposing a sanction, if applicable. This chapter is to be read in conjunction with the provisions contained in Division 5 of the NDA (Summary Hearings) and Chapters 120 (Service Infractions) and 122 (Summary Hearings) of the QR&O.

3.1 Conduct of the hearing

3.1.1 The conduct of a SH is the sole responsibility of the OCSH, and no superior authority may interfere in the proceedings. The OCSH may seek legal advice at any time with respect to the SH.

3.1.2 By default, an SH will be open to the public. However, the OCSH may order all or part of the SH to be held in private when they are of the opinion that any of the circumstances set out at QR&O subparas 122.02(1)(a) to (c) have been met. Reasons must be provided when a decision is made to hold all or part of an SH in private.⁵²

3.1.3 Before commencing the SH, the OCSH must ensure that the person charged with having committed a service infraction (person charged) and the AM, if one has been requested by the person charged, are present and that all witnesses to be called to give evidence are available in person or by telephone or electronic means.⁵³

3.2 Oath or solemn affirmation

3.2.1 Once the person charged is present, the next step is for the OCSH to take an oath or solemn affirmation. The language of the OCSH oath or solemn affirmation is set out at QR&O art 122.06 (Oath or Solemn Affirmation). After taking the oath or solemn affirmation, the OCSH will next cause the charges as they appear on Part 1 of the charge report⁵⁴ to be read aloud.

3.3 Preliminary questions

3.3.1 Prior to receiving any evidence, the OCSH must ask the preliminary questions set out at QR&O art 122.07 (Preliminary questions) to the person charged. For more information relating

⁵² QR&O para 122.02(2).

⁵³ See para 2.8.2 (Chapter 2 – Pre-hearing) on witness attendance by telephone or electronic means.

⁵⁴ CF 78: Charge Report – Service Infraction.

to the preliminary question set out at QR&O para 122.07(a) concerning reasonable adjournments, see s 2.7 in Chapter 2 (Pre-Hearing). For more information on the preliminary question set out at QR&O para 122.07(b) concerning the OCSH's lack of ability to conduct the SH, see s 2.6 in Chapter 2 (Pre-Hearing).

3.3.2 When the OCSH asks the person charged whether they wish to admit any of the details of the charge⁵⁵ or admit to any of the charges laid, the response must be recorded in writing and appended to the charge report. The admission of any of the details of a charge or of a whole charge means that evidence does not need to be presented at the SH to prove that particular detail or charge. A written record of the admitted details and charges is important for the purpose of informing the finding, the reasons and any potential review.

3.4 Hearing evidence and representations

3.4.1 Once the steps detailed in ss 3.1 through 3.3 have been completed, the OCSH can begin to receive the evidence relating to the charge.

3.4.2 An SH is an inquisitorial process. This means that the OCSH conducts the hearing as a fact finding activity. The OCSH is responsible for calling and questioning witnesses and receiving any evidence that may assist them in deciding whether or not the person charged committed the alleged service infraction. The evidence to be considered may be introduced in different ways, such as through the questioning of witnesses or the acceptance of documentary or physical evidence.

3.4.3 The person charged must be given a reasonable opportunity to engage during the SH—to speak about the evidence as it is introduced, to introduce their own evidence, to question witnesses and to make representations during all phases of the hearing.⁵⁶ Once all the evidence has been introduced, the person charged must also have the opportunity to make representations on whether the evidence shows that the service infraction was committed or whether their conduct can be otherwise excused. The person charged has the option of engaging and making representations personally or having their AM do so on their behalf.

3.4.4 During the SH, the person charged must request permission from the OCSH if they wish to question any person against whom a charged service infraction is alleged to have been committed or any person who is alleged to have suffered physical or emotional harm, property damage or economic loss as a result of the alleged service infraction. This request must include a general description of each question the person charged wishes to ask.

3.4.5 In response, the OCSH must, after consultation with the person to be questioned, decide what questions may be asked and whether the person charged may question that person directly themselves, or indirectly (such as through their AM or the OCSH). The OCSH should give reasons for their decision, including reasons for refusing to allow certain questions to be put to the person to be questioned.

⁵⁵ QR&O para 122.07(c).

⁵⁶ QR&O art 122.08 and para 121.02(4).

3.4.6 Before giving evidence, a witness, including the person charged, must take an oath or solemn affirmation in accordance with QR&O paras 122.06(3)-(4) (Oath or Solemn Affirmation).

3.4.7 Witnesses who will be giving evidence during the SH, other than the person charged, must be excluded from the hearing room until they are called in to give their evidence. Additionally, the OCSH should inform those witnesses that until they are called to give their evidence, they must not:

- a. Discuss what they may say during the SH with any other witness, or
- b. Receive any information on what other witnesses may say, or have said, during the SH.

3.4.8 The OCSH is required to maintain a list of all evidence that was received during the SH, which includes the names of all witnesses and all documentary and physical evidence presented. This list must be attached to the charge report at the end of the SH.

3.5 Findings

3.5.1 Once the OCSH has received and heard all the evidence and representations, the OSCH must next make a finding as to whether or not the person charged committed the alleged service infraction.⁵⁷ When making such a finding, it is essential for the OCSH to consider the following:

- a. First, whether there is clear and convincing evidence⁵⁸ which shows, on a balance of probabilities, that the person charged committed the service infraction. In other words, in order to make a finding that a person committed a service infraction, there must be clear and convincing evidence that it is more likely than not that the person charged committed the service infraction. It is not relevant to this determination whether the person charged knew they were committing the service infraction or intended to commit it.⁵⁹
- b. Second, whether on the balance of probabilities the evidence establishes that in the course of their conduct the person charged had either:
 - (1) Taken reasonable care to avoid committing the service infraction and not acted negligently; or
 - (2) Made an honest and reasonable mistake of fact.⁶⁰

⁵⁷ QR&O para 122.09(1).

⁵⁸ See *F.H. v McDougall*, 2008 SCC 53 at para 46.

⁵⁹ A service infraction is not criminal in nature. Proof of a service infraction only requires proof of the act, and does not require proof of a mental element such as intent, wilfulness or knowledge.

⁶⁰ *R v Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299.

3.5.2 To demonstrate that they had taken reasonable care, the person charged must show that they had taken the steps that a reasonable person would have taken in similar circumstances to avoid committing the service infraction.⁶¹

3.5.3 The factors relevant when determining whether reasonable care had been taken include:

- a. Whether the situation was beyond the person's control;
- b. The skill level expected of a member belonging to that occupation and holding that rank; and
- c. The complexities involved.⁶²

3.5.4 To demonstrate an honest and reasonable mistake of fact, the person charged must show that they had made an honest mistake in their understanding of a fact related to the commission of the service infraction, and that a reasonable person could have made a similar mistake in similar circumstances.⁶³ However, such misunderstandings do not include a failure to understand that the act or conduct in question gives rise to a service infraction. This concept is illustrated by the phrase "ignorance of the law is no excuse."⁶⁴

3.5.5 The OCSH must find that the person charged committed a service infraction when, after hearing all of the evidence, the OCSH concludes there is clear and convincing evidence that shows on a balance of probabilities that the person charged committed the service infraction; and that the person did not take all reasonable care or did not make an honest and reasonable mistake of fact.

3.5.6 Conversely, the OCSH must find that the person charged did not commit a service infraction when, after hearing all of the evidence, the OCSH concludes that the evidence shows on a balance of probabilities either that: the person charged did not commit the service infraction; or took all reasonable care, or made an honest and reasonable mistake of fact.

3.5.7 Having heard the evidence with respect to the charges, the OCSH may adjourn the hearing to consider the evidence in accordance with the two matters set out above, and determine the finding they believe is supported by the available evidence. Having made the finding, the OCSH may resume the SH, if adjourned, and pronounce the finding, with reasons.

⁶¹ *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299 at 1326; *La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers*, 2013 SCC 63 at para 56.

⁶² *Criminal Law*, 7th ed, Kent Roach, Irwin Law Inc, 2018, Ont, Chapter 6 at 253: see note 55 for a discussion of different factors.

⁶³ *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299 at 1326; *La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers*, 2013 SCC 63 at para 56.

⁶⁴ *Lévis (City) v Tétreault; Lévis (City) v 2629-4470 Québec inc*, 2006 SCC 12 at para 22; *La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers*, 2013 SCC 63 at para 57.

3.5.8 The reasons, which are given orally at the SH and subsequently in writing,⁶⁵ must explain how and why the OCSH has arrived at the particular finding they are announcing. The reasons must demonstrate that the OCSH considered the evidence and the representations relevant to the service infraction before them and considered the two matters set out above at para 3.5.1.

3.5.9 Where the person charged is found to have committed the service infraction, the hearing proceeds to the sanction stage and the OCSH must notify them of their right to make an application for a review of the finding or sanction and of the process and deadline for requesting a review.⁶⁶ If the person charged is found to have not committed the service infraction, the OCSH will close the SH and dismiss the participants and any other persons in attendance.

3.6 Sanction

3.6.1 At the beginning of the sanction phase of the SH, the OCSH must ask the person found to have committed a service infraction whether they are ready to proceed. If the person is not ready to proceed, the OCSH must grant a reasonable adjournment in order for them to prepare.

3.6.2 When a service infraction is found to have been committed against a person or is found to have caused a person to have suffered physical or emotional harm, property damage or economic loss, the OCSH will inform that person that they are invited, but not required, to make a statement during the sanction phase. The person found to have committed the service infraction may not ask any questions of the person making this statement.

3.6.3 In determining a sanction, the OCSH must consider all of the circumstances surrounding the commission of the service infraction. The OCSH may impose one or more sanctions⁶⁷ in respect of a service infraction found to have been committed. If more than one service infraction is found to have been committed and more than one sanction is imposed, the sanctions must be imposed for the totality of the service infractions found to have been committed, and not in respect of each particular service infraction. For example, a member found to have been both late and intoxicated upon reporting for duty may receive a single sanction, which accounts for both their lateness and their intoxication.

3.6.4 Having considered the circumstances of the service infraction, including any statement from a person described at para 3.6.2, the OCSH will pronounce the sanction, with oral reasons. The reasons for the sanction(s) must, like the reasons for the finding(s), show that the OCSH considered the evidence and representations relevant to the service infraction(s).

3.6.5 In respect of the imposition and subsequent implementation of minor sanctions,⁶⁸ Commanding Officers should ensure that rules governing persons undergoing minor sanctions are issued, that the rules are made known to those persons and that they are enforced. In cases

⁶⁵ QR&O para 122.09(4).

⁶⁶ QR&O subpara 122.09(2)(b).

⁶⁷ QR&O para 122.09(3).

⁶⁸ QR&O art 123.02 - 123.03.

where no such rules have been issued, the OCSH should, upon giving reasons for the sanction, provide the administrative details necessary for the appropriate implementation of the sanction.

3.7 Written reasons

3.7.1 Written reasons with respect to the findings (and sanctions if applicable) must be attached to the charge report, and provided to the person who committed the service infraction and to the person's Commanding Officer within three days following the pronouncement of the decision.⁶⁹ A copy of the written reasons will also be provided to any person against whom a service infraction is alleged to have been committed or who is alleged to have suffered physical or emotional harm, property damage or economic loss as a result of the alleged commission of the infraction, if they so desire. The written reasons should be similar in content to the oral reasons.

3.7.2 Giving reasons helps the person charged to understand the basis for the finding, and permits a review authority to scrutinize the finding if requested.⁷⁰

3.8 Mental health supports

3.8.1 When needed, mental health supports should also be made available during the hearing phase to those who are involved, including the person charged with having committed a service infraction and any person alleged to have suffered physical or emotional harm, property damage or economic loss as a result of the alleged commission of the infraction. Military justice authorities should make it known that if any such individual wishes to seek out mental health supports, such supports are available, and those authorities should provide relevant mental health support contact information.

⁶⁹ QR&O para 122.09(4).

⁷⁰ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16.

Chapter 4 – Review

Context

An essential aspect of ensuring procedural fairness in the summary hearing process is the opportunity to have a military justice authority other than the officer who conducted the summary hearing review the results of that summary hearing when the person charged was found to have committed a service infraction.

This chapter of the Policy is to be read in conjunction with the provisions contained in Division 5 of the NDA (Summary Hearings) and Chapter 124 of the QR&O (Review), which provide a framework for reviewing the findings made and the sanctions imposed at a summary hearing. This chapter addresses how a review can be requested, who can act as a review authority, how the review is to be conducted and the review authority's powers.

4.1 Initiation of review

4.1.1 There are two ways by which a review can be initiated.

4.1.2 Firstly, a person found to have committed a service infraction has the right to submit an application for review.⁷¹ The OCSH must inform them of this right upon finding that the person committed a service infraction.⁷² The person found to have committed a service infraction must submit their application for review to a review authority (RA), which is an officer superior in matters of discipline to the officer who conducted their SH.⁷³

4.1.3 Secondly, an RA may also initiate a review on their own initiative.⁷⁴

4.2 Referral of review

4.2.1 An RA who is of the opinion that it would be inappropriate to act as an RA in a particular case having regard to the interests of military justice and discipline⁷⁵ must:

- a. Refrain from making any determination in respect of the application for review; and
- b. Refer the application for review to another officer who is superior in matters of discipline to the officer who conducted the SH.

⁷¹ QR&O para 124.03(1).

⁷² QR&O subpara 122.09(2)(b).

⁷³ QR&O para 124.02(1).

⁷⁴ NDA subs 163.6(2).

⁷⁵ For example, in cases where there might be reasonable apprehension of bias. See s 2.10 in Chapter 2 (Pre-Hearing) on bias.

4.3 Powers of review authorities

4.3.1 The powers and limitations of RAs in respect of reviewing a finding and any sanction imposed are set out below.

Reviewing a finding

4.3.2 When reviewing a finding, the RA may:

- a. Leave the finding as it is and make no change;
- b. Quash the finding; or
- c. Quash the finding and substitute a new finding.

4.3.3 The review of a finding may be based on one or both of the following grounds: (1) the finding was invalidly made or (2) the finding cannot be supported by the evidence, including any new information as described in s 4.5.

4.3.4 An invalidly made finding is one that: arises from a hearing that did not conform to the applicable legal requirements, including those set out in the NDA, QR&O and those pertaining to procedural fairness; or one that is based on faulty legal analysis. A faulty legal analysis is one that does not accord with para 3.5.1; for example, if the officer who conducted the SH in determining whether or not a person charged committed a service infraction failed to consider whether the person charged took reasonable care and did not act negligently, or made an honest and reasonable mistake of fact. If an RA determines that a finding was not validly made or cannot be supported by the evidence, the finding must be quashed.

4.3.5 A finding that cannot be supported by the evidence is one that is made without an adequate factual foundation. An RA is to consider whether there are facts proved at the hearing sufficient to support the finding. The RA must not re-consider the interpretation of the facts found by the officer who conducted the SH.

4.3.6 If an RA determines that a finding was not validly made or cannot be supported by the evidence, the finding must be quashed. On the other hand, the RA has no authority to quash a finding that was validly made and is supported by the evidence. In other words, the RA may not quash a finding simply because they would not have proceeded with the charge if they had been the officer who conducted the SH.

The outcome of a quashed finding

4.3.7 When a finding is quashed, it is rendered void and treated as if never made.

4.3.8 A new finding may be substituted in place of the quashed finding only if, in accordance with NDA subs 163.8(1) (Substitution of invalid or unsubstantiated findings), the new finding

could validly have been made on the charge; and the new finding can be based on the facts the officer who conducted the SH was satisfied with at the hearing.⁷⁶ In other words, the new finding must not be based on factual findings made by the RA separately from the facts the officer who conducted the SH was satisfied with. When a finding is substituted, in accordance with NDA subs 163.8(2) (Effect on sanction) the sanction may also need to be substituted.

4.3.9 When a finding is quashed but not substituted and no other findings remain, the sanction is also automatically quashed. A new SH may be held in relation to that service infraction as if the original hearing had not occurred.⁷⁷ When a finding is quashed and there are other findings that remain, the sanction may need to be substituted in accordance with NDA subs 163.7(3) (Effect of partial quashing).

Reviewing a sanction

4.3.10 The review of a sanction is based on the grounds that it is either invalid or too severe. An invalid sanction is one that did not conform to the applicable legal requirements, including those set out in the NDA, QR&O and those pertaining to procedural fairness; or one that is based on faulty legal analysis. A sanction is invalid when, for example, the sanction imposed was not within the sanctioning powers of the officer who conducted the SH, or when the person charged was not given appropriate procedural fairness.

4.3.11 If a sanction is found to be invalid, it may be substituted by any other sanction that the RA considers appropriate, as long as the new sanction is not higher in the scale of sanctions than the one that was originally imposed.⁷⁸

4.3.12 A sanction may also be reviewed on the ground that it is too severe. A sanction may be considered too severe if it is of a much greater severity than the range of sanctions that would normally or reasonably be given for the same infraction in similar circumstances. The RA should exercise restraint in reviewing a sanction on the ground that it is too severe, as the RA may not be in a better position to assess the sanction than the officer who conducted the SH. Therefore, as a general rule, RAs should avoid disturbing a sanction on the ground that it is too severe unless it is clearly unreasonable.

4.3.13 In the event the RA determines the sanction was too severe, the RA may commute, mitigate or remit any or all of the sanctions imposed by an OCSH.⁷⁹

4.3.14 Aside from when the RA determines that a sanction is invalid or too severe, the RA may not change a sanction unless the finding for which it was imposed has changed. In such cases, see paragraphs (paras) 4.4.6 - 4.4.7 and NDA sections (ss) 163.7 - 163.8.

Conclusion of review

⁷⁶ NDA subs 163.8(1).

⁷⁷ NDA subs 163.7(2).

⁷⁸ NDA subs 163.9(1) - (2).

⁷⁹ NDA subs 163.91(1).

4.3.15 Once the review has been completed, the RA must produce written reasons for their decision and provide a copy to the person found to have committed the infraction, their CO and the officer who conducted the SH. The written reasons must:

- a. Address all issues identified in the application for review or in the reasons for initiating a review;
- b. Identify any evidence relied upon by the RA in the conduct of the review; and
- c. Explain the basis for the decisions made.

4.3.16 The RA must cause the written reasons and copies of their correspondence with the officer who conducted the SH and the person found to have committed the service infraction to be appended to the charge report.

4.4 Process

Information requirements

4.4.1 In the circumstances where the person charged is found to have committed a service infraction against a person or has caused a person to suffer physical or emotional harm, property damage or economic loss, the RA must ensure that person is informed that a review is to be conducted and then informed of the outcome of the review.

Assisting Member

4.4.2 An assisting member may assist, advise and make representations on behalf of the person found to have committed a service infraction throughout the review process.⁸⁰

Review requested by the person found to have committed a service infraction

4.4.3 If the person found to have committed a service infraction seeks to exercise their right to a review of the finding and any sanction imposed at SH, the application for review must be submitted in writing to the RA within 14 days of receiving the written reasons in respect of the finding and any sanction imposed.⁸¹ The application must state the grounds for the review and describe the evidence that supports those grounds.⁸²

4.4.4 Upon receiving an application for review and having determined they are an appropriate authority to proceed with the review, the RA must forward the application to the officer who conducted the SH as soon as practicable and inform the applicant of the date when the application was forwarded.

⁸⁰ QR&O para 121.02(4).

⁸¹ QR&O para 124.03(1). Note QR&O para 124.03(2) where it is provided that the RA may extend the 14 day application period.

⁸² QR&O paras 124.03(1) and 124.03(3).

Review initiated by review authority

4.4.5 An RA has the authority to undertake a review of a finding that a person committed a service infraction and any sanction imposed on their own initiative.⁸³ This may occur, for example, when a legal officer upon review of the documents placed on the Unit Registry of Disciplinary Proceedings advises of errors on the face of the charge report or of potential non-compliance with procedural requirements during the SH process.

4.4.6 Upon deciding to initiate a review and confirming that they are an appropriate authority to conduct the review, the RA must provide the officer who conducted the SH and the person found to have committed the service infraction written reasons for initiating the review and the timelines relevant to the review.

Responses and representations

4.4.7 The officer who conducted the SH may provide any response they may have concerning the reasons for initiating the review. Any response must be provided to both the RA and to the person found to have committed a service infraction within 7 days of receiving the reasons for initiating the review.

4.4.8 The person found to have committed a service infraction may respond to the response of the officer who conducted the SH, as described at para 4.3.11, and/or provide representations. Any response and/or representations must be provided to the RA within 7 days of receiving the response of the officer who conducted the SH, or within 14 days of receiving the reasons for initiating the review should no response be provided.

4.4.9 If the officer who conducted the SH or the person found to have committed a service infraction requires more time to prepare their response or representations, the RA may grant a reasonable extension.

4.4.10 Within 14 days of receiving the response and/or representations from the person found to have committed a service infraction or upon expiry of the appropriate time limit for their response or representations to have been submitted, the RA must determine the review.

4.4.11 In accordance with QR&O para 124.02(2) (Review authorities), the RA must obtain legal advice prior to conducting a review. When determining a review, the RA must consider only the following:

- a. The reasons for initiating the review;
- b. The charge report and anything appended to the charge report in accordance with this policy;

⁸³ NDA subs 163.6(2).

- c. The reasons furnished in accordance with QR&O para 122.09(4) (Decision and sanction); and
- d. Any response provided by the officer who conducted the SH and any response or representations by the person found to have committed the service infraction, or the assisting member on their behalf.

4.5 New information

4.5.1 When an application for review contains information that was unknown at the time of the SH, the RA must determine whether the information is relevant. If the information is relevant, the RA must assess its impact upon the finding(s) in order to determine whether one or more findings must be quashed as a result. Once the review has been completed, the RA must explain in their decision any impact the new information has had on their decision, including any conclusion that the new information was not relevant and therefore had no impact.

4.5.2 When the RA determines that new information is relevant, the RA must then determine whether that information is relevant to the interests of any person in relation to whom a service infraction is found to have been committed or who has suffered physical or emotional harm, property damage or economic loss as a result of a service infraction. If the information is deemed relevant to them, the RA must give them a reasonable opportunity to provide representations, and in accordance with the principles of procedural fairness, the RA must also give the person found to have committed a service infraction a reasonable opportunity to provide further representations in response. If the new information is not relevant to the interests of any such person, the RA must follow the process for a review requested by the person found to have committed a service infraction as set out at paras 4.3.2 - 4.3.8 and 4.5.1.

4.6 Mental health supports

4.6.1 When needed, mental health supports should also be made available throughout the review to those who are involved, including the person found to have committed a service infraction and any person against whom a service infraction was committed or who is alleged to have suffered physical or emotional harm, property damage or economic loss as a result of the commission of the infraction. Military justice authorities should make it known that if any such individual wishes to seek out mental health supports, such supports are available, and those authorities should provide relevant mental health support contact information.

4.7 Review authority's administrative duties

4.7.1 Upon completion of the review, the RA must cause the charge report to be updated and cause it to be forwarded to the CO of the person found to have committed a service infraction along with the following documents

- a. The written reasons for the decision; and

- b.** The order concerning any decision made to quash, substitute, commute, mitigate or remit any finding, sanction, or part thereof under NDA ss 163.7 (Quashing of Findings), 163.8 (Substitution of Findings), 163.9 (Substitution of Sanctions) and 163.91 (Commutation, Mitigation and Remission of Sanctions).

4.7.2 The CO of the person found to have committed a service infraction must place the documents listed above on the Unit Registry of Disciplinary Proceedings and take any necessary action to give effect to the determination.

4.7.3 Should the RA quash or substitute a sanction of reduction in rank with another sanction, the National Defence Headquarters (Director General Military Careers) must be notified.

4.7.4 Should the sanction of deprivation of pay and allowances be substituted, commuted or remitted, any amount constituting an excessive deprivation from the pay account of the person found to have committed the service infraction as a result of the RA's decision, must be restored.⁸⁴

⁸⁴ QR&O art 208.35.

Chapter 5 – Post-hearing

Context

This chapter of the Policy is meant to provide guidance about the post-hearing process, including administrative duties. This chapter stands alone as there are no companion provisions in the QR&O that address this subject.

5.1 Application of post-hearing policy

Meaning of final disposition

5.1.1 In this policy, there is a “final disposition” when the OCSH makes one of the following decisions:

- a. To not proceed with a charge following referral;
- b. To discontinue a SH before making a finding;
- c. That the service infraction charged was not committed; or
- d. That the service infraction charged was committed, resulting in the imposition of a sanction.

5.2 Post-hearing administration

5.2.1 An OCSH who makes a final disposition must complete the relevant sections in Part 6 of the charge report. If there is not an appropriate section in the charge report to indicate the details of the final disposition, the OCSH must prepare written reasons and append a copy to the charge report.

5.2.2 An OCSH who makes a final disposition, but is not the CO of the person charged, must cause a copy of the updated charge report, any appended documents including the reasons, and the investigation file to be forwarded to the CO of the person charged. The CO must place these documents on the Unit Registry of Disciplinary Proceedings.

5.2.3 If a sanction is imposed, the CO of the person who received the sanction must cause the appropriate entries to be made on the conduct sheet of that person in accordance with DAOD 7006-1 (Preparation and Maintenance of Conduct Sheets).

Sanction implementation

5.2.4 The CO of the person sanctioned is responsible for ensuring that the sanction is implemented.

Return of physical or documentary evidence

5.2.5 After the final disposition of an SH at which physical or documentary evidence was submitted, the CO of the unit where this evidence is held must ensure that, to the extent possible, the evidence is returned to the person who is apparently entitled to it unless:

- a. The person charged was found to have committed a service infraction, and the period for requesting a review of the finding or sanction has not expired;⁸⁵
- b. The person found to have committed a service infraction has requested a review of the finding or sanction after the expiry of the application period, and the review authority has not yet decided whether to conduct the requested review; or
- c. The evidence is required for the purposes of an investigation or another proceeding.

5.2.6 In the circumstances set out at a. and b. where the evidence is not returned, the person apparently entitled to it will be informed and provided with the reasons for its retention along with a general time estimate for when it may be returned.

Communicating findings and sanctions

5.2.7 By the seventh day of each month, every CO must cause copies of any documents that were placed on the Unit Registry of Disciplinary Proceedings during the preceding month except for the investigation file to be forwarded to the most appropriate representative of the Office of the Judge Advocate General. The forwarding of these documents aids in the reviews conducted by legal officers in furtherance of the Judge Advocate General's statutory responsibility to superintend the administration of military justice in the CAF.

5.2.8 If a review of an SH finding and/or sanction has been initiated but not yet concluded, these facts must be communicated when complying with the document forwarding responsibility set out in paragraph 5.2.7.

5.2.9 The CO of the person against whom the sanction of reduction in rank has been imposed, must, as soon as practicable, notify the National Defence Headquarters (Director General Military Careers).

⁸⁵ Pursuant to QR&O para 124.03(1) a person found to have committed a service infraction may apply for a review of the finding and any sanction imposed within 14 days of the receipt of the written reasons with respect to the findings and any sanction imposed.

5.3 Disposition of summary hearing records

5.3.1 Documents held in the Unit Registry of Disciplinary Proceedings must be maintained in accordance with the Defence Subject Classification and Disposition System.⁸⁶

5.4 Public access to copies of summary hearing records

5.4.1 Public access to SH records is governed by the *Access to Information Act*, the *Privacy Act* and DAOD 1002-6 (Disclosure of Personal Information).

⁸⁶ Additional instructions applicable to the retention and disposal of documents held in the Unit Registry of Disciplinary Proceedings may be found at Annex A to the Records Scheduling and Disposal Manual, A-AD-D11-001/AG-001.