

## INTRODUCTION

Presiding over a disciplinary case can be a daunting task for an elected leader at any level of the Auxiliary. The purpose of this article is to provide guidance for elected leaders in the First Southern Region. Your basic reference should be the Auxiliary Manual, COMDTINST M16790.1F, Chapter 3, Sections F through J (hereafter referred to as AuxMan 1F or simply Manual) with a secondary source being the Administrative Investigations Manual, COMDTINST M5830.1 (series) also referred to by me as AIM 1A.

Your objective in handling a disciplinary case should always be to assure that all parties to the case receive fundamental due process. Whenever you are tasked with a disciplinary matter think of how you would like to be treated if you were the subject of an investigation. AuxMan 1F Section F.1 states that the membership should be provided "minimal due process" as provided for in the Manual. Having membership in the Auxiliary is not to be considered as a "constitutionally protected liberty". What is meant by the term due process? There are numerous opinions, however, the basic one appears to be defined as "to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, the opportunity to be heard, and to assert before the appropriate decision-making body the reasons for such choice." "Aside from all else, 'due process' means fundamental fairness and substantial justice." With this object in mind, this essay seeks to place in prospective the requirements that AuxMan1F requires that one must adhere to.

But before one goes further it is important to understand the term "discipline". Black's Law Dictionary 6<sup>th</sup> Ed defines the term as: "Instruction, comprehending the communication of knowledge and training to observe and act in accordance with rules and orders." A secondary definition states "Correction, chastisement, punishment, penalty. To bring order upon or bring under control." Thus, the term may include advising a member how to correctly wear the uniform or when to salute all the way to disenrollment of a member for theft of Auxiliary property or the commission of a felony. The former is achieved with a quiet word with the member while the latter involves an extensive, perhaps adversarial procedure.

Letter of Advisement: There may be instances where more than a private word is needed. A situation may occur which requires a serious conversation between the Elected Leader and an Auxiliarist concerning certain unacceptable behavior by the Auxiliarist. The Auxiliary Manual does not make any express provision to address unacceptable conduct short of a disciplinary proceeding. I suggest that the Elected Leader may want to prepare a memorandum which summarizes for the benefit of the Leader and the Auxiliarist for future reference the substance of the conversation between them. This can be done by through a non-punitive "Letter of Advisement" addressed to the Auxiliarist which can remain in the files of the Elected Leader to be used in the event that the Auxiliarist persists in engaging in unacceptable conduct of the nature for which counseling was held or engages in other forms of unacceptable conduct which may warrant a disciplinary proceeding. This Letter or Letters can be provided to the

investigator to support the fact that the Auxiliarist has been counseled in respect to unacceptable, non-conforming or offensive behavior.

I - The Complaint: Any action must be begun by a member of the Coast Guard Forces (active duty, Reserve, Auxiliary or civilian employee) making or receiving an allegation that a member of the Auxiliary has violated a policy prescribed by the Commandant of the Coast Guard as may be contained in AuxMan 1F or any other instruction, manual or directive that may apply to a member of the Auxiliary. Thus, a complaint cannot be made by an outsider unless it is made to a member of the Coast Guard Forces and entertained by the recipient of the complaint.

It is important at the outset to differentiate whether the Complainant is expressing an annoyance with the actions of an Auxiliarist or whether the Complainant is expressing a serious allegation. This should be determined by the elected leader upon the receipt of the complaint.

(a) Form of a Complaint: Many complaints are made orally.

(i) If the complaint against a member is made orally from a person outside the Auxiliary it should be reduced to writing in memorandum form by the person receiving it. Complaints may be made to Coast Guard stations which are required to record the communication in a log book. The elected leader who receives the oral complaint should obtain from the Complainant all of the pertinent facts surrounding the alleged activity being complained of. In order to assure accuracy of the information received by the elected leader, the Complainant should be requested to sign the memorandum prepared by the elected leader or provide a written statement setting forth specifically the allegations of the complaint.

(ii) If the complaint against a member is made from a person within the Auxiliary, it is preferable that the elected leader obtain the complaint in writing. An exception may be where the complaint involves a simple request to the elected leader to counsel another Auxiliarist to refrain from continuing some minor annoyance. For example: if a member is not wearing a uniform correctly or frequently interrupts at a meeting, a quiet word from an elected leader would be appropriate. Here the elected leader may contact the object of the complaint and informally request information in response to the allegation of the Complainant. However, where the complaint is more serious, the elected leader receiving the complaint should request that the Complainant reduce the allegations to a writing, setting forth specifically and in detail the essential facts of the complaint and the Auxiliary or Coast Guard policy alleged to be violated.

(b) (i) The use of a written complaint is preferable to an oral complaint. It provides clarity of the accusation and commits the Complainant to signing a statement. If the Complainant is not willing to commit the allegation(s) to writing, perhaps the allegation should be considered to be grousing on the part of the

Complainant. Written complaints can be submitted in the conventional form or by electronic means. The written complaint should contain, at a minimum, the following information:

- The name of object of the complaint;
- Statement setting forth the policy alleged to have been violated;
- Statement of when the alleged violation(s) took place;
- Statement of where the alleged violation(s) took place;
- Statement of names of person or persons, if any, who allegedly witnessed the violation being complained of;
- Statement of particular facts supporting the alleged complaint.
- Statement of the remedy sought

(ii) If the complaint is not complete when received, the elected leader receiving the complaint should, before acting on the complaint, request that the Complainant provide further facts or enlarge upon facts already provided. This information should be received before any investigation is begun.

(c) The recipient of the Complaint: Only certain elected leaders or elevated appointed leaders of the Auxiliary are eligible to receive a complaint and commence an investigation. These are:

- Flotilla Commander;
- Division Commander;
- District Commodore;
- National Area Rear Commodore;
- National Directorate Commodore;
- National Vice Commodore;
- National Commodore

Where there is a question of the appropriate elected/appointed Auxiliary leader to address the complaint advice should be obtained from the Director or Chief Director of Auxiliary.

(d) In ascertaining the appropriate elected/appointed officer to entertain the complaint it is important that this individual not be personally involved in the subject matter of the complaint. **It is also important that the elected/appointed Auxiliary leader not be tainted and be free of the appearance of impropriety in order to inspire confidence in the disciplinary system.**

(e) If the complaint involves an aviation related matter, due to the fact that aviation activities may require a certain level of knowledge and expertise not possessed by individuals involved in surface operations, communications or in operations program at all, the following guideline should be complied with by the appointing elected officer:

When, in the opinion of the FC, DCDR or DCO, a complaint involves a subject matter which requires a level of knowledge and expertise greater than that possessed by most auxiliaries, the appointing officer should select at least one individual with particular subject matter expertise. In doing so, assistance by the appointing officer should be elicited from the DSO-AV provided that the DSO-AV is not a subject matter of the investigation or a potential witness. If such is the case, advice should be obtained from the DC. If more than one investigator is appointed, then the individual having subject matter expertise should be named as the presiding investigator.

(f) Except for offering procedural advice to a lower level elected officer, the senior elected officer having potential involvement in the review process should scrupulously refrain from personal involvement with the case in order to not become tainted and not remain free of the appearance of impropriety. Where procedural advice is needed, the DSO-L should be involved in the process as early as possible in order to avoid procedural or substantive errors being made. While AIM 1A does not pertain to the Auxiliary, it does require consultation with the legal department of the Coast Guard at the outset of an investigation. I suggest that the Auxiliary should adopt the procedure found in AIM 1A.

## II – The Preliminary Investigation:

(a) Upon receiving a complaint, the elected leader at the appropriate level of leadership may (i) request, preferably in writing, of the Complainant additional information or (ii) appoint an Auxiliary or committee to gather and determine the facts by conducting a preliminary investigation.

(b) If an investigator or an investigating committee is appointed, the elected leader **MUST** inform the Auxiliary who is the subject of the complaint that a complaint has been made and that a preliminary investigation is being commenced. In doing so, fundamental fairness requires that the accused Auxiliary should receive a written specification of the substance of the complaint and the pertinent facts surrounding the occurrence being complained of together with the names of the individual or individuals appointed to investigate the complaint. [See form of letter in the forms segment] The name of the Complainant may be withheld if it appears that discord in the organization will result. Since this is an administrative proceeding, an Auxiliary does not enjoy the same due process safeguards as accorded to a person in a criminal proceeding.

(c) The Auxiliary who is the subject of the complaint must be given, if desired, the right to address, in writing, the appointed investigator or investigating committee **PRIOR TO ANY REPORT BEING MADE** to the elected leader. A respectable period of time should be allowed for response. I suggest fifteen (15) calendar

days is a fair length of time. If more time is needed the subject of the complaint should request such additional time of the investigator.

(d) The appointed investigator or investigating committee should, in order to assure due process:

(i) Speak to all witness identified by the Complainant, by the subject of the complaint, or who may become evident as a result of the investigation;

(ii) Interview the Auxiliarist who is the subject of the Complaint if that AUXILIARIST DESIRES TO BE INTERVIEWED;

(iii) Make voice, video, or written record of all statements taken from all witnesses. All testimony must be preserved until the entire proceeding is concluded and all appeal rights have been exhausted.

(iv) Catalogue all documents received and preserve any physical evidence to the extent possible or make photographs of physical evidence, places, objects or documents.

(e) Upon having completed the preliminary investigation as outlined above, the investigator or investigating committee must prepare a written report addressed to the appointing elected leader summarizing the facts of the investigation and the documents received and considered by the investigator(s). The investigator may provide the elected leader with observations made as a result of the investigation. [ See the prototype of a report in the forms section.]

(f) Upon receipt of the investigatory report and documents, the elected leader, in consultation with the DSO-L has **fifteen calendar (15) days** to make an initial determination of whether there has been a violation of Auxiliary policy or the guidelines as set forth in the AuxMan 1F.

(g) In review of the investigatory report and documents at any level in the chain of management, the following criteria should apply:

(i) Determine whether the report complies with the Auxiliary Manual and otherwise adequately addresses the needs of the Auxiliary. If it does not the reviewer should return the report with comments for further investigation.

(ii) Determine whether the report sufficiently addresses the allegations of the complaint.

(iii) Determine whether the report is 'legally sufficient' that is, that the findings are supported by evidence, that all relevant issues have been adequately addressed, and that no inappropriate material or statements have been included.

(h) After having reviewed the investigatory report the elected leader has two courses of action:

(i) If the preliminary investigation does not support a violation of Auxiliary policy or guidelines, or if there is insufficient evidence to support a violation, the elected leader will inform the Complainant that no action will be taken or that minor corrective action will be taken. The Complainant has the right to appeal this finding to the next senior elected leader. The Manual is silent in respect to the treatment of this appeal by the senior elected leader;

(ii) If the preliminary investigation indicates that a minor violation has been committed, the Auxiliarist being complained of shall be advised of the unacceptable conduct, specific deficiencies, and acceptable standards of performance by informal disciplinary action as discussed below, or if the preliminary investigation discloses that formal disciplinary action is required, the elected leader will continue the proceeding under the formal disciplinary section of the Manual.

### III Informal Disciplinary action verses formal disciplinary action

At this juncture it is important to understand the difference between informal disciplinary action and formal disciplinary action. The elected leader receiving the preliminary report must make this determination. Aux Man 1F Chapter 3, Section G & H provide the guidance.

(a) Informal disciplinary action is the correcting of minor violations of Auxiliary policy made by an Auxiliarist This is addressed in Chapter 3, Section G.

(b) Formal disciplinary action is the correcting of serious violations of Coast Guard and/or Auxiliary directives, policies or procedures which may ultimately result in disenrollment of the offending Auxiliarist. This is addressed in Chapter 3, Section H.

The Manual provides a list of offences which are the subject of informal and formal disciplinary action. The Manual suggests that each list is intended to be suggestive of primary areas of activity subject to disciplinary action but the lead-in sentence to each list states that the listed areas could include offences not set forth on the particular list and further, that the list of formal disciplinary actions could result in only an informal disciplinary action being taken. Thus, the list set forth under Section H could be added to the list under Section G. These two lists are not intended to list the only violations which may be subject to discipline but rather set forth some of the major violations. **Both of these lists are thus deemed to be non-inclusive.** There are many other policies set forth in the various directives, instructions, policy statements which may be the subject of a disciplinary proceeding, however, it is incumbent upon the elected officer and the investigator(s) to identify them as part of the investigation. Legal counsel should be requested assist in connection with this task.

#### IV Informal discipline:

As already noted, informal discipline seeks to correct minor violations. There are three disciplinary options available to the elected leader – Counseling Session; Denial of Web Privileges and Letter of Caution. **USE OF ANY OTHER METHOD IS NOT CALLED FOR AND BEYOND THE SCOPE OF AUTHORITY OF THE ELECTED LEADER.**

(a) **Counseling Session:** A frank discussion between the elected leader, the Complainant (if other than the elected leader) and the subject Auxiliarist. This counseling session must be documented in writing and the memorandum retained by the elected leader. The elected leader may choose to file a copy of the counseling session memorandum with the Director and this would remain in the member's file for a period of two years to be automatically removed if the subject Auxiliarist does not incur any further disciplinary counseling sessions. **Upon removal of the counseling session memorandum from the member's file, it should be kept in a separate file for reference in respect to prior disciplinary actions taken against this member.** Retaining of this information can prove useful if any subsequent disciplinary proceedings are taken against the Auxiliarist in determining the outcome of this later proceeding.

(b) **Denial of web privileges:** This is an additional option to the counseling session where the subject Auxiliarist must refrain from use of the web which includes e-mails, Twitter, Face Book or any other networking organization to communicate with other Auxiliarists as an Auxiliarist. This sanction is to correct misuse of the web, Coast Guard and Auxiliary policies.

(c) **Letter of Caution:** This is the most severe of the informal sanctions and has a record life of three years in the member's file. This informal corrective letter

(i) shall advise the subject Auxiliarist of specific, improper action(s),

(ii) that any statements made by the subject Auxiliarist during the preliminary investigative process were considered by the elected leader and

(iii) a statement of the facts which influenced the decision of the elected leader.

(iv) **The subject Auxiliarist shall have the right within thirty (30) calendar days from the receipt of a letter of caution to file a written reply which will be kept with the letter of caution. This advice to file a written MUST be contained in the Letter of Caution.**

## V Formal Discipline:

Formal disciplinary action is the correcting of serious violations of Coast Guard and/or Auxiliary directives, policies or procedures which may ultimately result in disenrollment. This procedure is found in Chapter 3, Section H of AuxMan 1F.

(a) If the elected leader who ordered the preliminary investigation determines that facts support a formal disciplinary action the leader must advise, in writing, the DCO and the Director by way of the chain of management recommending that formal disciplinary action be commenced.

(b) The DCO and Director, in consultation with the DSO-L will have the duty of determining whether formal disciplinary action is warranted. The DCO will have thirty (30) calendar days to make this determination from the time of receipt of the communication from the elected leader. Since formal disciplinary action involves possible disenrollment and other severe sanctions only the higher echelon of the Auxiliary determines whether to proceed to this level of punishment.

(c) The task falls on the Director, in writing, to inform the subject Auxiliarist of the allegations that prompted the initiation of a formal disciplinary proceeding. The Director's letter should contain the following information:

(i) The circumstances that prompted the formal proceeding;

(ii) The policy, directive, manual, instruction of the Coast Guard or the Coast Guard Auxiliary which is alleged to have been violated;

(iii) A statement of facts, information, documents upon which the Director basis the proceeding;

(iv) A clear notice that the subject Auxiliarist has thirty (30) calendar days from the date of the letter to provide a written response to the allegations and facts contained in the Director's letter.

(d) The subject Auxiliarist receiving the letter has four options:

(i) Take no action – this tantamount to a default;

(ii) Admit the charges;

(iii) Deny the charges, but this must be done with integrity otherwise this act of false may result in additional disciplinary charges for lying;

(iv) Admit the charges with an explanation. The subject Auxiliarist's written response will be made part of the formal record.

(e) The DCO has the task of reviewing the entire file, which includes the investigative record and make a written recommendation to the Director regarding the appropriate sanction if any. A copy of this written recommendation must be sent to the DSO-L. The Manual is silent regarding the role that the DSO-L is to play but one can presume the DSO-L should be in consultation with the DSO in respect to the contents of the letter. The DSO-L should also advise the DCO whether the investigation record supports the findings and conclusions and clearly shows that the subject Auxiliarist did commit the violation(s) set forth in the complaint. Please note the prior discussion about reviewing the investigatory report.

Since the Auxiliary is a part of the Federal Government, its administrative investigative procedures are generally governed by those that apply to other Federal agencies. The "Substantial Evidence Rule" governs Federal administrative agencies. "Substantial Evidence" means such relative evidence as a reasonable mind might accept as adequate to support a conclusion. ref. Appalachia Electric Power Co. v. NLRB, 92 F2d 985, 989 (4<sup>th</sup> Cir.)

(f) The DCO has two options:

(i) Recommend that a Letter of Reprimand be sent or

(ii) Recommend disenrollment of the subject Auxiliarist. In this instance the DCO must send the entire file to the Director for further review.

(g) Sanctions: There are two primary formal disciplinary sanctions –

(i) Letter of Reprimand

(ii) Disenrollment.

(h) Letter of Reprimand:

(i) Can be issued either by the DCO or Director;

(ii) Is a formal corrective letter;

(iii) Issued only after the DCO and Director have agreed on the appropriate wording for the letter;

(iv) Discusses the specific improper actions on the part of the Auxiliarist and acceptable standards;

(v) Must show that the record was considered together with any response provided by the Auxiliarist;

(vi) Make references to prior disciplinary actions – here is where the set aside file maintained by the Director of previous actions can be utilized;

(vii) **Auxiliarist MUST BE advised of the right to make a response to the Letter that will be retained with the Letter. THIS ADVICE MUST BE CONTAINED IN THE BODY OF THE LETTER.**

(i) Duration of Letter:

(i) Remains in the Auxiliarist's file for 3 years unless removed earlier upon a convincing showing that the Auxiliarist has reformed by concurrence of the Director and the DCO. Even after the Letter is removed it will be kept in a set aside file for future reference if the occasion arises.

(ii) An Auxiliarist who receives a Letter may be denied the right to hold elected or appointed offices, vacate current office held, have insignia forfeited, denied right to wear past officer's pin for forfeited office – to be determined by the DCO and Director.

#### VI Temporary Suspension of an Auxiliarist

(a) The Director has the authority to temporarily suspend an Auxiliarist during the pendency of formal disciplinary proceedings. Such suspension would involve a serious violation that may result in the disenrollment of the Auxiliarist. The letter of suspension must set forth the reason for the suspension and its length.

(b) Serious violations include the Auxiliarist being arrested, but not yet convicted for a felony outside the scope of Auxiliary activities; serious breach of Coast Guard or Auxiliary policies such as theft of unit funds, Auxiliary or government property; commission of assault on another member of the Auxiliary; breach of security on a Coast Guard base; negligent actions in surface or aviation operations; deliberate destruction of government property or serious violations of human rights laws, rules or policies of the Coast Guard, to name but a few.

(c) During the period of temporary suspension the Director may suspend:

(i) holding of elected and/or appointed office duties including elected leader's duties;

(ii) extend the initial period of suspension if the investigation is not complete;

(iii) if a suspension may lead to disenrollment, the Auxiliarist is not entitled to any rights or privileges except as may be determined by the Director.

(d) An Auxiliarist has the right to appeal an initial suspension, extended suspension and the rights, offices or privileges suspended by a Director to that Director's supervisor, which means that the decision of the District Director can be appealed to the Chief Director.

## VII Appeals of Disciplinary Actions

### (a) Informal Disciplinary Actions:

(i) From the determination of the elected leader having jurisdiction over the investigation to the next senior leader in the chain of leadership and management within the district or region. Not clear is whether an appeal from the action of a DCDR goes to the DCO or first to the DCAPT. The DCAPT is not one of the elected offices identified in Section F.2 that states that complaints involving a DCDR should go to the DCO. I referenced this question to the DC-L who opined that the DCAPT IS NOT in the appeals chain.

(ii) From the decision of a DCO the appeal goes to the ARCO;

(iii) From a District Director's decision the appeal goes to the Chief Director.

(iv) An appeal must be taken within thirty (30) calendar days of the determination of the by the officer in charge.

(v) There is only one level of appeal of an informal disciplinary action. The decision of the reviewing elected officer or Chief Director is final.

### (b) Formal Disciplinary Actions

(i) Appeal from the determination of the DCO goes to the ARCO.

(ii) The appeal must be made within thirty (30) calendar days of the determination of the DCO.

(iii) The determination of the ARCO is final. The ARCO may only determine whether correct procedures were adhered to – procedural review and not subject matter review.

(iv) The determination of a District Director that is found in a Letter of Reprimand goes to the Chief Director. The Chief Director determines whether correct procedures were adhered to. This decision is final and cannot be appealed.

(c) Disenrollment Appeals

(i) If the District Director has imposed the sanction of disenrollment of an Auxiliarist for cause, within thirty (30) calendar days of the District Director's determination, an appeal must be made to the District Commander (one star admiral).

(ii) The District Commander shall review the entire record of the disciplinary action. The Commander may make independent findings of facts and conclusions. This is the only stated situation where the appeals officer may make a complete review.

(iii) The determination of the District Commander is final.

(d) Action common to all appeals:

(i) An appeal does not stay the imposition of any disciplinary action while the appeal is pending.

(ii) Only the Auxiliarist who is the subject of a disciplinary action may appeal.

(iii) A Complainant whose complaint has been found lacking grounds for action or where the action taken appears to be insufficient, may make a written appeal to the next elected senior leader. The Manual does not discuss the authority of the senior leader. One can speculate that the elected senior leader may give advice to the junior elected leader which may or may not have to be accepted.

Hopefully this guide will provide you with a degree of comfort in carrying out your duties as the elected leader charged with undertaking a disciplinary case. In a separate module following this one are several forms in Word format for you to adapt in connection with any investigation you are tasked with. You should never be embarrassed to seek advice. Furthermore, you should always select the best qualified members of the Auxiliary to carry out your investigation. A thorough and objective, well documented investigation will permit you to expeditiously dispose of the matter. It is better to do the job right the first time than have to do it over.

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