

§ 99.7

(a) To be eligible for an indemnification agreement a State or locality must have had a law in effect on December 4, 1985 that prohibited or had the effect of prohibiting the disclosure of criminal history record information to the DoD, OPM, or CIA.

(b) A State or locality is also eligible for an indemnification agreement if it meets the conditions of paragraph (a) of this section, but nevertheless provided criminal history record information to the DoD, OPM, or CIA on or before December 4, 1985.

§ 99.7 Procedures for requesting an indemnification agreement.

When requesting an indemnification agreement, the State or locality must notify each Federal agency as appropriate, at the address listed in the appendix to this part, of its eligibility of an indemnification agreement. It must also:

(a) Certify that on December 4, 1985, the State or locality had in effect a law which prohibited or had the effect of prohibiting the disclosure of criminal history record information to the DoD, OPM, or CIA; and

(b) Append to the request for an indemnification agreement a copy of such law.

§ 99.9 Terms of indemnification.

The terms of the Uniform Federal Agency Indemnification Agreement (UFAIA), must conform to the following provisions:

(a) *Eligibility:* The State or locality must certify that its law prohibits or has the effect of prohibiting the disclosure of criminal history record information to the DoD, OPM, or CIA for the purposes described in section 910.101(a) and that such law was in effect on December 4, 1985.

(b) *Liability:* (1) The Federal agency agrees to indemnify and hold harmless the State or locality from any claim for damages, costs and other monetary loss arising from the disclosure or negligent use by the DoD, OPM, or CIA of criminal history record information obtained from that State or locality pursuant to 5 U.S.C. 9101(b). The indemnification will include the officers, employees, and agents of the State or locality.

(2) The indemnification agreement will not extend to any act or omission prior to the transmittal of the criminal history record information to the Federal agency.

(3) The indemnification agreement will not extend to any negligent acts on the part of the State or locality in compiling, transcribing or failing to delete or purge any of the information transmitted.

(c) Consent and access requirements:

(1) The Federal agency when requesting criminal history record information from the State or locality for the release of such information will attest that it has obtained the written consent of the individual under investigation after advising him or her of the purposes for which that information is intended to be used.

(2) The Federal agency will attest that it has advised that individual of the right to access that information.

(d) *Purpose requirements:* The Federal agency will use the criminal history record information only for the purposes stated in § 910.101(a).

(e) *Notice, litigation and settlement procedures:* (1) The State or locality must give notice of any claim against it on or before the 10th day after the day on which claim against it is received, or it has notice of such a claim.

(2) The notice must be given to the Attorney General and to the U.S. Attorney of the district embracing the place wherein the claim is made.

(3) The Attorney General shall make all determinations regarding the settlement or defense of such claims.

APPENDIX TO PART 99—ADDRESSES OF RELEVANT U.S. GOVERNMENT AGENCIES

Department of Defense, Office of the General Counsel, Room 3E988, Washington, DC 20301-1600

Office of Personnel Management, Office of Federal Investigations, P.O. Box 886, Washington, DC 20044

Central Intelligence Agency, Attention: Office of General Counsel, Washington, DC 20505

PART 100—UNSATISFACTORY PERFORMANCE OF READY RESERVE OBLIGATION

Sec. 100.1 Reissuance and purpose.

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AUTHORITY: 10 U.S.C. 510, 511, 593, 597, or 651, and 32 U.S.C. 302.

SOURCE: 44 FR 51568, Sept. 4, 1979, unless otherwise noted.

§ 100.1 Reissuance and purpose.

This part is reissued to update DoD policy on actions to be taken in regard to members of the Ready Reserve whose performance of duty or participation in Reserve training is unsatisfactory; and provides greater flexibility to the Military Departments when dealing with unsatisfactory performance.

§ 100.2 Applicability.

The provisions of this part apply to the Office of the Secretary of Defense and the Military Departments.

§ 100.3 Policy.

Persons who are enlisted or appointed in, or transferred to a Reserve component of the Armed Forces of the United States, under the provisions of 10 U.S.C. 510, 511, 593, 597, or 651 and 32 U.S.C. 302 are expected to participate and perform satisfactorily as members of the Ready Reserve to fulfill their obligation or service agreement. This policy is also in accordance with the standards prescribed by 32 CFR parts 102 and 101 and the Military Departments concerned.

§ 100.4 Responsibility.

The Secretaries of the Military Departments shall ensure that:

(a) Ready Reserve applicants understand their obligations for satisfactory participation in the Ready Reserve before their enlistment or appointment.

(b) Members of the Ready Reserve continue to understand their obligations for satisfactory participation in the Ready Reserve after their enlistment or appointment in accordance with 32 CFR part 44.

§ 100.5 Procedures.

(a) *Unsatisfactory participation in the Ready Reserve.* (1) Members of the Selected Reserve who have not fulfilled their statutory military service obligation under 10 U.S.C. 651 and whose participation has not been satisfactory *may be*:

(i) Ordered to active duty, *if they have not served on active duty or active duty for training for a total period of 24 months*, for such period of time as may be deemed necessary by the Secretary of the Military Department concerned under the provisions of 10 U.S.C. 673a (such individuals may be required to serve on active duty until their total service on active duty or active duty for training equals 24 months); or

(ii) Ordered to active duty for training, *regardless of the length of prior active duty or active duty for training*, for a period of not more than 45 days under provisions of 10 U.S.C. 270; or

(iii) Transferred to the Individual Ready Reserve (IRR) for the balance of their statutory military service obligation with a tentative characterization of service, normally under other than honorable conditions, when the Military Department concerned has determined that the individuals still possess the potential for useful service under conditions of full mobilization; or

(iv) Discharged for unsatisfactory participation under the provisions of 32 CFR part 41, when the Military Department concerned has determined that the individual has *no* potential for useful service under conditions of full mobilization.

(2) Members of the Selected Reserve who have fulfilled their statutory military service obligation under 10 U.S.C. 651 or who did not incur such obligation,² and whose participation has not been satisfactory *may be*:

(i) Transferred to the IRR for the balance of their current enlistment contract or service agreement with a tentative characterization of service, normally under other than honorable conditions, when the Military Department

² This includes women whose current enlistment or appointment was effected before February 1, 1978.

concerned has determined that the individual still has a potential for useful service under conditions of full mobilization; or

(ii) Discharged for unsatisfactory performance under 32 CFR part 41 when the Military Department concerned has determined that the individual has no further potential for useful service under conditions of full mobilization.

(3) When a member of the Selected Reserve is identified as an unsatisfactory participant and considered a possible candidate for involuntary transfer to the IRR or for discharge, a board of officers shall be convened, as required by 10 U.S.C. 1163 to consider the circumstances and recommend appropriate action.

(4) When an individual is transferred to the IRR as a result of an approved board recommendation, no further board action shall be required before discharge if the individual fails to take affirmative action in an effort to upgrade the tentative characterization of service.

(5) Members of the IRR who have not fulfilled their statutory military service obligation under 10 U.S.C. 651 were enlisted or appointed under any program that provided that the obligation could be fulfilled by service in the IRR only, and whose participation in such a program has not been satisfactory *may* be:

(i) Retained in the IRR for the duration of their statutory military service obligation with a tentative characterization of service, normally under other than honorable conditions, when the Military Department concerned has determined that the individual still possesses the potential for useful service under conditions of full mobilization; or

(ii) Discharged for unsatisfactory performance under 32 CFR part 41, when the Military Department concerned has determined that the individual has no potential for useful service under conditions of full mobilization.

(6) When a member of the IRR, whose enlistment or appointment provided that the service concerned could be performed entirely in the IRR (as opposed to the Selected Reserve), is identified as an unsatisfactory participant,

a board of officers shall be convened as required by 10 U.S.C. 1163 to consider the circumstances and recommend appropriate action. When an individual is retained as a result of an approved board action, no further board action shall be required before discharge if the individual fails to take affirmative action in an effort to upgrade the tentative characterization of service.

(7) Individuals assigned to the Selected Reserve who are ordered to active duty under 10 U.S.C. 673a or to active duty for training under the provisions of 10 U.S.C. 270 may be returned to their previous unit of assignment or transferred to the IRR upon the completion of the active duty or active duty for training. When necessary, the individual's term of enlistment or service agreement may be extended to permit completion of the designated period of active duty or active duty for training in accordance with 10 U.S.C. 270(b) and 673(b).

(8) Individuals who are transferred or assigned to the IRR who have a tentative characterization of service of less than honorable because of unsatisfactory participation in the Ready Reserve shall be discharged at the end of their statutory military service obligation or their period of enlistment or service agreement, whichever is later with such characterization *unless* the individuals have taken affirmative action to upgrade the tentative characterization of service. Affirmative actions may include, but are not limited to, rejoining a unit of the Selected Reserve and participating satisfactorily for a period of 12 months, or volunteering for and completing a tour of active duty for training of not less than 45 days. When necessary, the individual's term of enlistment or service agreement may be extended to complete the affirmative action and qualify for a more favorable characterization of service.

(9) When members of the Selected Reserve are ordered to active duty, active duty for training, or transferred to the IRR because of unsatisfactory participation, copies of their orders should be furnished to the individuals through personal contact by a member of the command and a written acknowledgment of receipt obtained. When such

efforts are unsuccessful, the orders shall be mailed to the individual.

(i) Orders mailed to such members shall be sent by Certified Mail (Return Receipt Requested), and a Receipt for Certified Mail (PS Form 3800) obtained. In addition, the individual who mails the orders shall prepare a Sworn Affidavit of Service by Mail (format at enclosure) that shall be inserted, together with the PS Form 3800, in the member's personnel file.

(ii) Notification shall be made through the mailing of orders to the member's most recent mailing address.

(iii) Provided the orders were properly mailed to the most recent address furnished by the member, absence of proof of delivery does not change the fact that the member was properly ordered to report for active duty, active duty for training, or transferred to the IRR, as appropriate.

(iv) Individuals ordered to active duty who fail to report shall have their names entered into the National Crime Information Center of the Federal Bureau of Investigation within 30 days following their reporting date and appropriate screening by the Deserter Information Point concerned.

(10) Orders affecting members of the IRR that involve active duty for training required by the terms of their enlistment or service agreement may be handled by mail in the manner prescribed in paragraph (a)(9)(i) of this section.

(11) Each member of the IRR must keep the organization of assignment informed of:

(i) His/her accurate and current mailing address;

(ii) Any change of address, marital status, number of dependents, and civilian employment; and

(iii) Any change in physical condition that would prevent the member from meeting the physical or mental standards prescribed by 10 U.S.C. 652 and part 44 of this title.

(12) Individuals involuntarily ordered to active duty or active duty for training under provisions of this part may be delayed as prescribed by the Secretary of the Military Department concerned.

(13) Individuals whose involuntary order to active duty would result in ex-

treme community or personal hardship may, upon their request, be transferred to the Standby Reserve, the Retired Reserve, or discharged, as appropriate, in accordance with 10 U.S.C. 673a(c) and part 44 of this title.

(b) *Exceptions.* As exceptions to the criteria in paragraph (a) of this section, members of the Ready Reserve who do not or are unable to participate for any of the following reasons shall be processed as indicated:

(1) Members of the Selected Reserve who are unable to participate in a unit of the Selected Reserve by reason of an action taken by the Military Department concerned, such as unit inactivation or relocation, to the effect that they now reside beyond a reasonable commuting distance (as defined in §100.6(e)) of a Reserve unit, shall be assigned to the IRR until they are able to join or be assigned to another unit, or complete their statutory military service obligation.

(2) Members of the Selected Reserve who change their residence:

(i) May lose their unit position. However, they will be transferred to another paid-drill unit with the same Reserve component if possible or be given 90 days after departing from their original unit to locate and join another unit. At the new unit, they will fill an existing vacancy or be assigned as a temporary overstrength within the congressionally authorized standard-years (defined in §100.6(f)) or funds under paragraph (b)(2)(iii) (A) and (B) of this section.

(ii) May locate position vacancies that require different specialties than the ones they now possess. Therefore, the Secretary of the Military Department concerned may provide for the retaining of these individuals (with their consent) by ordering them to active duty for training to acquire the necessary specialties.

(iii) Must be accepted in a Reserve unit by their parent Military Department regardless of vacancies, subject to the following conditions:

(A) The losing unit certifies that the reservist's performance of service has been satisfactory.

(B) The reservist's specialty is usable in the unit, the member can be retrained by on-the-job training, or the

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member is willing to be retrained as outlined in paragraph (b)(2)(ii) of this section.

(iv) Are authorized to transfer to another Reserve component under the provisions of DoD Directive 1205.51, "Transfer of Persons Between Reserve Components of the Armed Forces," June 25, 1959, when the conditions outlined in paragraph (b)(2)(iii) apply.

(3) If members of the Selected Reserve who change their residences fail to join another unit within a period of 90 days, and at least 1 unit of their component is within a reasonable commuting distance, as such distance is defined in §100.6(e) they shall be processed in accordance with §100.5(a) unless they are considered eligible to be handled as "exceptions" under policies outlined in paragraph (b) (5) through (8) of this section.

(4) If members of the Selected Reserve who change their residences locate in an area where they reside beyond a reasonable commuting distance, as such distance is defined in §100.6(e) of a paid-drill unit of the same Reserve component, they shall be assigned to the IRR of their service until they are able to transfer to a paid-drill unit of another Reserve component; or complete their statutory military service obligation.

(5) Members of the Ready Reserve who are preparing for, or are engaged in, critical civilian occupations will be screened in accordance with 32 CFR part 44.

(6) Individuals who are preparing for the ministry in a recognized theological or divinity school may participate voluntarily in the Ready Reserve. However, under 10 U.S.C. 685, such individuals may not be required to do so. Members who do not wish to participate shall be transferred to the Standby Reserve. If such training is terminated before graduation, the member may be transferred back to the Ready Reserve. A member eligible for assignment to the Standby Reserve under the provisions of 10 U.S.C. 268(b), 270, 510, 511, 593, 597, 651, 652, 672, 673, 673a, 673b, 685, and 1163 who voluntarily remains assigned to the Selected Reserve and participates in the training required, waives any right to request delay to exemption from any later mobilization

on the basis of preparation for the ministry.

(7) Individuals who are enrolled in a course of graduate study in one of the health professions shall be screened in accordance with DoD Directive 1200.141, "Reservists Who Are Engaged in Graduate Study or Training in Certain Health Progressions," July 30, 1969.

(8) Individuals who incur a bona fide, temporary nonmilitary obligation requiring overseas residency outside the United States, or religious missionary obligation shall be processed in accordance with 32 CFR art 103.

(9) Nothing in this part shall be construed as limiting the right of the individual to voluntarily request transfer to the Standby Reserve or to the Retired Reserve, or discharge from the Reserve components when such action is authorized by regulations of the Military Department concerned.

(10) Nothing in this part shall be construed as precluding action against a member of the Ready Reserve, either by court-martial or review by a board of officers convened by an authority designated by the Secretary of the Military Department concerned, when such action might otherwise be warranted under 10 U.S.C. 268(b), 270, 510, 511, 593, 597, 651, 652, 672, 673, 673a, 673b, 685, and 1163 and the regulations of the Military Department concerned.

§100.6 Definitions.

(a) *Ready Reserve.* Consists of the Selected Reserve and the Individual Ready Reserve. Members of both are subject to active duty as outlined in 10 U.S.C. 672 and 673.

(b) *Selected Reserve.* Members of the Ready Reserve in training/pay categories A, B, C, F, M and P. These reservists are either members of units who participate regularly in drills and annual active duty for training, in annual field training in the case of the National Guard, or are on initial active duty for training; or they are individuals who participate in regular drills and annual active duty on the same basis as members of Reserve component units. *Excluded* from the Selected Reserve are Reserve component members who are:

(1) Participating in annual active duty for training and not paid for attendance at regular drills (pay categories D and E), or awaiting, in a non-pay status, their initial active duty for training (pay category L).

(2) Enrolled in officer training program (pay category J) members of the Individual Ready Reserve pool (pay category H), and reservists on extended active duty. (See 10 U.S.C. 268(b) 32 CFR part 102.)

(3) Members of the Inactive Army National Guard.

(c) *Individual Ready Reserve (IRR)*. Members of the Ready Reserve not assigned to the Selected Reserve and not on active duty.

(d) *Unsatisfactory participation*. A member of the Ready Reserve who fails to fulfill his/her obligation or agreement as a member of a unit of the Ready Reserve described in 10 U.S.C. 268(b), 270, 510, 511, 593, 597, 651, 652, 672, 673, 673a, 673b, 685, and 1163. Or a member who fails to meet the standards as prescribed by the Military Departments concerned for attendance at training drills, attendance at active duty for training, training advancement, or performance of duty.

(e) *Reasonable commuting distance*. The maximum distance a member of a Reserve component may travel involuntarily between residence and drill training site, in accordance with § 100.5(b)(1). This distance may be within:

(1) A 100-mile radius of the drill site that does not exceed a distance that can be traveled by automobile under average conditions of traffic, weather, and roads within 3 hours. This applies only to those units that normally conduct four drills on 2 consecutive days during the training year, if Government meals and quarters are provided at the base where the unit drills. (The provisions of this paragraph shall apply only to those individuals enlisting, reenlisting, or extending their enlistments after November 1, 1972.)

(2) A 50-mile radius of the drill site that does not exceed a distance that can be traveled by automobile under average conditions of traffic, weather, and roads within a period of 1½ hours.

(f) *Standard-year*. Personnel authorizations that describe the amount of

work expected of one individual during a calendar or fiscal year.

(g) *Tentative characterization of service*. An interim description of the quality of performance during a period which is less than the time required to earn an administrative discharge. The quality of performance shall be described as honorable, under honorable conditions, or under other than honorable conditions. If the quality is described as under honorable conditions a General Discharge certificate shall be provided upon discharge. If the quality is described as under other than honorable conditions a Discharge Under Other Than Honorable Conditions certificate shall be provided upon discharge.

[44 FR 51568, Sept. 4, 1979, as amended at 45 FR 48618, July 21, 1980]

ENCLOSURE—SUGGESTED FORMAT,
AFFIDAVIT OF SERVICE BY MAIL

State of _____
County of _____

(Name of individuals who mailed orders), being duly sworn, deposes and says:

I am the _____ (Job Title, e.g., Personnel Officer) of _____ (Unit) on the day of _____ 19____, I mailed the original orders, a true copy of which is attached hereto, by Certified Mail (Return Receipt Requested) to _____ (Name and address of member of orders) that being the last known address given to _____ (Unit) as the one at which official mail would be received by or forwarded to the Reserve component member by depositing same in an official depository of the U.S. Postal Service at _____ (Location of Postal Facility) in a securely wrapped and sealed U.S. Government official postal envelope with a Return Receipt Card (PS Form 3811) attached and the envelope addressed to the member at the address provided. A Receipt for Certified Mail (PS Form 3800) attesting to such action is attached.

(Signature and Rank of Affiant)

Sworn and subscribed before me this day of _____ 19____.

(Signature and Rank of Officer Administering Oath)

**PART 101—PARTICIPATION IN
RESERVE TRAINING PROGRAMS**

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