

REPORTS OF SURVEY

The Army uses Reports of Survey (ROS) to account for and assign responsibility for property that is lost, damaged, or destroyed. This handout explains how the system works and how you appeal an unfair result. (For simplicity, I'll refer only to lost property, but damaged and destroyed property is treated exactly the same.) A sample request for reconsideration or appeal is at the end of the handout.

Appeals can be based on either or both of two types of errors: procedural or substantive. Procedural errors are flaws in the way the ROS was processed, regardless of whether the findings are correct. Substantive errors are mistakes that affect the correctness or fairness of the findings, regardless of whether the procedural requirements were met.

Procedural Requirements.

When property is lost, the Appointing Authority (AA), usually a battalion commander or similar authority, appoints an Investigating Officer (IO) to find out the "who, what, when, where, why, and how" of the loss. The IO gathers relevant documents, witness statements, and other evidence. After reviewing the evidence, if the IO concludes that a particular person or persons should be held pecuniarily liable for the loss, the IO must notify that person or persons and give them an opportunity to respond. If they respond within a reasonable time, the IO reviews the new evidence, investigates any new issues that are raised, and then sends the ROS to the AA for decision.

If the AA decides to hold someone pecuniarily liable, the respondent is notified of that fact and is given another 30 days to submit a request for reconsideration to the AA. If the AA grants the respondent's request for reconsideration, the respondent is relieved of liability.

If the AA does not grant the request, the request for reconsideration is automatically transformed into an appeal, which is forwarded to the next higher commander. If that commander grants the appeal, the respondent is relieved of liability.

If the commander denies the appeal, the Finance Office is notified to start taking the respondent's pay, until the proper amount is paid back. The respondent may appeal the final action to the Army Board for Correction of Military Records (ABCMR).

Theoretically, if the ABCMR action is also unfavorable, the respondent may file a lawsuit in federal court, but that's extremely rare, since filing a lawsuit usually costs more than the amount in controversy.

As you can see, it's a long process, and procedural errors can creep in at any point. Of course, not all errors affect legal sufficiency. Many administrative errors, such as typographical errors, misspelling the respondent's name, etc., have no cognizable impact on the legality of either the process or the substance of the ROS.

On the other hand, the errors listed in paragraphs a, b, and h, in the sample appeal memorandum at the end of this handout, may be serious enough to require the original findings and recommendations either to be thrown out or at least reviewed again.

Another serious procedural error is failure to notify the respondent. The Fifth Amendment to the Constitution of the United States provides that "... no person shall be ... deprived of life, liberty, or property without due process of law...." So before the Army may hold a respondent liable on a ROS, the respondent must be notified and given an opportunity to respond.

One particular aspect of "notice" is that AR 735-5 provides that an individual who has been recommended for pecuniary liability has the right to legal advice. Failure to make legal advice available may constitute a fatal lack of due process.

One final error is using the "Short Form" ROS inappropriately, as explained in para c of the sample appeal memorandum.

Substantive Requirements.

The findings and recommendations of the IO and the AA must be based on evidence, not mere suspicion. (See para d in the sample appeal.)

The evidence must show first of all that something was actually lost. You may find that the missing property never was issued.

a. For example, when dealing with lost components from major end items, if the lost property was identified by using a new edition of a manual, and the property was originally issued and accounted for using a prior edition of the manual, then the "missing" property may simply be the result of the new edition having a more inclusive list of required components. In other words, the missing property may not really be missing, because it never was issued as a separate item.

b. Similarly, when dealing with losses from major end items, determining if shortage annexes have been prepared is important. If a shortage annex exists, the property may never have been present in the unit. The date that the shortage annex was prepared is critical. If the shortage annex is recent, the property was probably lost recently. If it is old, the property may never have been present, and no loss has occurred.

The evidence must also show that a particular person was responsible for the lost property. In this case the most common error is the belief that whoever signed for the property is responsible for the loss. That is emphatically not true (at least, not all the time).

a. For example, if SSG A signed for the property and subsequently issued it, but failed to obtain a subhand receipt, and now you can neither find the property nor determine to whom the property was issued, then SSG A may be held liable for failing to maintain accountability for the property.

b. However, if the evidence shows that SSG A issued the now-missing property to SGT B, then SSG A should not be held liable; because even though a subhand receipt was not obtained, we still know that SGT B received the property, and therefore accountability for the property was not lost. Because the property clearly was issued to SGT B, SSG A's negligence in issuing the property without a hand receipt, did not cause the loss (for further guidance, see the discussion below on proximate cause).

The evidence must also show that the person responsible for the property did something negligent. It's not enough to show that Property B was lost while issued to SSG A. The evidence must also show that the loss was due to some negligence, or fault, of SSG A. (See para e in the sample appeal.)

a. Determining whether a person was at fault is not always easy. The IO must consider the soldier's age, training, and experience. So an experienced sergeant who has an accident might be held liable, even though a trainee who has exactly the same accident might not be held liable.

b. The regulation defines simple negligence as "... failure to act as a reasonably prudent person would have acted under similar circumstances." So the evidence must show that another individual, of similar experience and relationship to the property, would have acted differently as a matter of common sense.

c. For example, on a field exercise 1SG Loud yells that PVT Meek is dripping wet and getting everything wet in the tent. He orders PVT Meek to put his Gortex coat outside the tent. Someone steals the coat. PVT Meek was simply following orders. Any private in the same situation would have acted the same way. PVT Meek should not be held liable.

In some cases, the IO may be allowed to conclude that a certain individual is responsible for the loss, even though there is not enough evidence to prove the actual cause of the loss. This is done by "presuming" negligence. This is not really an exception to the rule stated above, because before the IO may presume negligence, there must be enough evidence to show that the presumption is reasonable.

a. The IO may presume negligence if one individual had exclusive access to and control over property and there is no other reasonably possible cause for the loss.

b. For example, PVT Gone goes AWOL. His TA-50 is immediately inventoried, and most of it is missing. Since PVT Gone had exclusive control over his TA-50 prior to going AWOL, and it was inventoried right after he left, he may be presumed to have been the cause of its loss.

c. However, if PVT Gone's property is not inventoried until several months later, the presumption will probably not apply.

Not only must the evidence show that the person responsible for the property did something negligent, it must also show that the negligent act was the "proximate cause" of the loss. Causation is demonstrated by the following examples.

a. SPC A leaves a set of night vision goggles unattended in an unlocked HMMWV in downtown Frankfurt. That was negligent. The goggles are stolen. By leaving the goggles in a location where theft was reasonably foreseeable, SPC A created the conditions that allowed the theft to occur. In other words, SPC A's negligence proximately caused the resulting loss.

b. In the same situation, however, if SGT B saw the goggles, picked them up himself, but subsequently lost them, then SPC A is off the hook. SPC A was still negligent, but that negligence did not cause the loss. The goggles were returned to the control of the Army when SGT B recovered them, and SPC A cannot be held responsible for the actions of SGT B. Of course, if the findings support it, SGT B may be recommended for liability.

c. PVT Prudent is driving his HMMWV slowly down the street when MAJ Maniac in his bright red Porsche, going 20 MPH over the posted speed limit, passes in a no passing zone, on a blind curve, and slams into PVT Prudent. When the MP's arrive, they discover that PVT Prudent didn't have his driver's license with him. Here, even though PVT Prudent was negligent for driving without a license, that's not really what caused the accident. MAJ Maniac would have hit him anyway, even if he had had his license. Therefore, PVT Prudent may not be held liable. (Of course, he'll still get a ticket for driving without a license!)

d. Finally, SSG Supply negligently issued property without obtaining hand receipts. The property cannot be located, nor can you determine to whom the property was issued. SSG Supply's negligence caused the loss, since the property cannot be located due to the lack of accountability documents.

If the survey contains contradictory evidence, or if the IO relied on self-serving statements from the individual responsible for the property, then the IO must

explain how the contradiction was resolved or what other evidence confirms the self-serving statement. (See para g in the sample appeal.)

a. This is a frequent problem. It is not uncommon for three or four witnesses to have three or four different versions of events. The IO is not allowed just to flip a coin to determine who's telling the truth, but must have some rational basis, supported by evidence, for all conclusions.

b. If the AA overrules the IO's recommendation to relieve someone of liability, then the AA must explain the basis for his decision, and the AA's decision must also be based on evidence, not on mere speculation or suspicion.

How Much Liability.

An individual's liability is usually limited to the actual loss to the government or one month's basic pay at the time of the loss, whichever is less. However, liability may be the full amount of the loss to the government if personal arms or equipment or public funds are involved, or if the liable party is an accountable officer. For damage to government quarters or their contents, liability may be the full amount of the loss, if the damage resulted from gross negligence or willful misconduct.

Liability based on the actual loss to the Government:

a. Repairable Property. Liability is the cost of repairs or the value of the item at the time of the damage, whichever is less. The cost of repairs includes materials, labor, overhead, and transportation, minus any salvage or scrap value of replaced parts, and minus any increase in value due to the repairs. When the actual cost of damage cannot be obtained in a reasonable period of time, an estimated cost of damages (ECOD) may be used, but the IO must state the reason for using an ECOD and the basis on which the estimate was made.

b. Lost or Destroyed Property. Liability is the actual value of the property at the time of its loss or destruction. The preferred method of establishing actual value is an appraisal. When an appraisal is not feasible and the property is in less-than-new condition, depreciated value will be used. To compute depreciated value, the IO starts with the Army master data file price of the property, shown at block 10 of the ROS, and then subtracts:

- 10% for organizational clothing and individual equipment and non-power handtools;

- 25% for items constructed of relatively perishable material (with the exception of CTA 50 items) such as leather, canvas, plastic and rubber;

- 5% per year, up to a maximum of 50%, for electronic equipment and office furniture;
- 5% per year, up to a maximum of 90%, for tactical and general purpose vehicles;
- See AR 210-6 for family quarters furniture;
- 5% per year, up to a maximum of 75%, for all other property.
- If the initial time of service cannot be determined, use 25%.
- These rates may be changed if the IO concludes that the property was subjected to more or less use than normal. Army Regulation 27-20 may also be used as a depreciation guide.

c. Salvage Value. When property has been damaged irreparably, give credit for salvage or scrap value, plus the depreciated value of repair parts.

d. Obsolescence. If equipment is obsolete, the Army master data file price may not reflect the true value of the property. This is common in technical equipment, such as medical devices and computer items.

If more than one individual is responsible for the loss or damage, each individual may be held liable on a pro-rata basis.

Strategy for a ROS.

Generally your best chance of beating a ROS is with the IO. You should supply the IO with as much information as possible and try to get the IO on your side. If you don't think the IO is giving you a fair hearing, you might want to have your platoon sergeant or NCOIC present your side of the story to the IO to show the IO why you should not be held liable.

If the IO can't be persuaded, then you probably are going to have to appeal. You have to write or type your own appeal. Typing is better than writing. In typing your appeal:

- a. Focus on the important issues; don't get bogged down in trivia.
- b. Focus on the evidence, not personalities. "The IO is a jerk," may be true, but it's not relevant and is not going to help on your appeal.
- c. If the current evidence is incomplete, then get supporting statements from knowledgeable persons. (It's best to type the statements yourself, and then just have the witnesses sign them.)

d. Keep it simple and short.

e. If there were others involved who were not held liable, ask that they share liability with you.

f. Write the appeal, keep it overnight, and proofread it the next day. You'll find a lot of errors or find a more persuasive way to present your case after sleeping on it overnight.

g. Keep a copy for your records.

The sample appeal at the end of this handout contains sample arguments for some of the most common errors that occur. Pick the arguments that apply to your case and delete the ones that don't apply.

If most of the errors are procedural errors, it usually helps to show how those errors prevented you from getting a fair hearing. Complaining about "technicalities" that didn't have any real impact on the final outcome probably isn't going to do any good.

If you really are guilty, but there was an error of some sort in the ROS that could be fixed easily, you may not want to raise that in your appeal to the AA. For example, there may have been an important piece of adverse evidence or an adverse witness statement mentioned in the IO's findings and recommendations, but not included as an exhibit. That's a pretty serious error. However, if you raise that as an issue in your appeal, the IO will just go back and fix it, and then you'll still be held liable. However, if you appeal on some other reason, they won't fix the real error, and then, after they've collected the money from your pay, you can raise that error in your appeal to the ABCMR. If you raise the error with the ABCMR after enough time has gone by, it might be impossible for anyone to fix the error at that point, and your appeal might be granted on that basis. You have to be careful though. If the ABCMR thinks you were sandbagging on your initial appeal, they may deny your appeal on that basis. However, if you really are guilty, you haven't lost anything, since you would've been held liable anyway.

Request for Remission of Indebtedness.

If an enlisted soldier is held liable on a ROS, even after appeal, the soldier may still submit a request for remission of indebtedness (RRI).

If your RRI is granted, you won't have to pay any more money. Any money that has already been collected or paid, however, is not going to be returned to you, so you have to act quickly. You may also want to request that Finance action be delayed, so you can submit your RRI first.

There are two possible justifications for a RRI: fairness and hardship.

a. Since fairness was probably considered in processing your ROS, it probably is not going to work on a RRI.

b. Hardship means that you simply can't afford to pay the debt. To demonstrate hardship, you have to show what other expenses you have and why being held liable on the ROS will have a devastating affect on you and your family.

To submit a RRI, fill out DA Form 3508-R, which you can get from your PAC. The form is submitted through your chain of command, so make sure you stay on the good side of your First Sergeant and Company Commander while the request is being processed.

Remember, each case is different. This summary gives you general information only. It is not intended to substitute for talking with a lawyer.

SAMPLE APPEAL

The following is an example of how to word your appeal and some common issues in reports of survey. When writing your appeal, remember to consult the latest edition of AR 25-50, Peparing and Managing Correspondence, for the correct format.

(YOUR OFFICE SYMBOL)

DATE

MEMORANDUM FOR (APPOINTING AUTHORITY)

SUBJECT: Report of Survey 29-95, \$32920.32

1. I request reconsideration of the liability assessed against me in the subject ROS. The recommendations in the subject report of survey are legally invalid, because they do not comply with the requirements of AR 735-5.
2. The report of survey is legally flawed for the following reasons.
 - a. ROS must be processed within 75 days from the date of loss, in accordance with (IAW) AR 735-5, para. 13-5a. The ROS in this case took more than XXX days. This delay is more than just a technical error; it had a direct and substantial impact on the ROS. The delay was so long that evidence and witnesses who would have been favorable to me became unavailable and could not be used by the survey officer. Specifically, ...

b. Delays in processing must be documented and explained on the record by the person responsible, IAW AR 735-5, para. 13-5. That was not done in this case.

c. The Approving Authority (AA) used the short form survey. IAW AR 735-5, paras. 13-9 and -24, the short form is not permissible, unless the information contained in Block 11 is, first of all, thorough; and secondly, provides a clear, unambiguous basis for assessing liability. Also, UP AR 735-5, the final decision must be based on all the facts. In this case the information contained in Block 11 was incomplete and insufficient to support the assessment of liability. Since the information in block 11 was incomplete, it was improper for the AA to use the short form.

d. IAW AR 735-5, para. 13-32a, the determination of liability must follow from the facts developed during the investigation. The findings must be directly supported by evidence in the record, and may not be based on sheer speculation or mere suspicion.

e. A person may not be held financially liable IAW AR 735-5, para. 13-30b, unless the facts show that he or she violated a particular duty of care, that is, that he or she was negligent. Determinations of whether a soldier's conduct is negligent must take the soldier's age, training and experience into consideration.

f. IAW AR 735-5, para. 13-30c, "Before holding a person financially liable for a loss to the Government, the facts must clearly show that the person's conduct was the 'proximate' cause of the loss...." Appendix D, para. 11c(2) provides an example demonstrating that a person may only be held liable for the portion of the damage that he or she is directly responsible for.

g. IAW AR 735-5, para. 13-29b, if the findings rely on a disputed fact, the findings must explain how the dispute was resolved. UP para. 13-55, the Approving Authority must resolve conflicts, and his findings must be based on evidence in the record.

h. IAW AR 735-5, para. 13-28b, the survey officer must be senior to all individuals subject to potential liability, unless the approving has documented in the record that military exigencies prevented such an appointment. In this case, the survey officer was not senior to XXXXXXXXXXXX, who was subject to potential liability, and there is no documentation of any military exigency.

3. Point of contact for this memorandum is the undersigned at XXX-XXXX.

CLIENT
RANK, U.S. Army