



Understanding FY15 NDAA's New Changes to Article 60

Background

The Fiscal Year 2014 (FY14) National Defense Authorization Act (NDAA) significantly curtailed the power of a Convening Authority (CA) to modify the findings and sentence under Article 60, Uniform Code of Military Justice (UCMJ) in certain cases. While Practice Advisories 2-14 and 3-14 explained these changes, the FY15 NDAA included additional, "technical" amendments to Article 60 that require the cancellation of both advisories. This practice advisory provides a consolidated explanation of Article 60 as amended by the FY14 and FY15 NDAA's.

Key Terms

The following terms affect the range of a CA's post-trial discretion to act on findings and/or sentences:

Pre-24 June 2014 Offenses: Cases that only include offenses that were committed prior to 24 June 2014. These cases remain eligible for the full range of post-trial actions on findings and sentence: approval, disapproval, commutation, suspension, and deferment.

Straddling Cases: These cases straddle the 24 June 14 implementation date of the changes to Article 60 - with at least one offense occurring before 24 June 14 and at least one offense occurring on or after 24 June 14. Straddling cases remain eligible for the full range of post-trial actions on findings and sentence: approval, disapproval, commutation, suspension, and deferment, except that mandatory punitive discharges for certain offenses committed on or after 24 June 2014 still apply.

Qualifying Offenses: These cases only include qualifying offenses that were committed on or after 24 June 2014. A qualifying offense must meet all of the following criteria:

- 1) The offense is **not** charged under Sections (a) or (b) of Article 120; Article 120b; Article 125; or an offense specified by the Secretary of Defense (none have been specified to date); and
- 2) The maximum authorized punishment for the offense, as listed in the Manual for Courts-Martial (MCM), does **not** exceed two years; and
- 3) The adjudged sentence for the offense does **not** include confinement for more than six months; and
- 4) The adjudged sentence for the offense does **not** include a punitive discharge—Dismissal, Dishonorable Discharge (DD), or Bad Conduct Discharge (BCD).

Often, determining whether a conviction is a qualifying offense is straightforward. A number of minor offenses have maximum punishments that by definition meet the requirements for qualifying offenses, such as simple assault (maximum punishment: 3 months confinement and no punitive discharge). However, in multiple specification cases with adjudged sentences that include confinement for more than six months or a punitive discharge, determining whether or not minor offenses in the case are qualifying offenses requires an analysis of the adjudged sentence to determine if the confinement adjudged for the minor offense exceeded six months and if the discharge was adjudged for the minor offense.

Qualifying offenses remain eligible for the full range of post-trial action on **findings** although modification requires written explanation in the action.

Other than Qualifying Offenses: Offenses that occur **on or after 24 June 2014** and fail to meet **one or more** of the criteria for qualifying offenses are other than qualifying offenses.

Post-Trial Authorities: The analysis of whether the CA may make modifications is different for findings and sentence. For example, the terms "qualifying offense" and "other than qualifying offense" do not apply when determining whether the CA may modify the sentence – the adjudged sentence is determinative.

Findings: The CA must analyze each offense separately. A CA may modify the findings for any offense that occurred before 24 June 2014. The rules are a little trickier for cases that include offenses that occur after 23 June 2014. A CA cannot modify a finding for an offense that occurred after 23 June 2014 unless that offense is a qualifying offense or is part of a straddling case. In straddling cases, the CA can modify the findings of any offense, regardless of the date the offense occurred. If the CA modifies the findings of a qualifying offense, the CA must provide and attach a written explanation for such action to the record of trial. Flowchart (FC) 1 (attached) illustrates the analysis.

Sentences: The CA must conduct an analysis of each piece of the sentence individually (e.g. confinement, punitive discharge, and all other punishments). The analysis is straight-forward in cases that only involve offenses that occurred prior to 24 June 2014. In such cases, the CA may approve, disapprove, commute, or suspend the sentence, or any portion thereof. The analysis is more complicated in cases that include all offenses that occurred after 23 June 2014. In such cases, the CA may not disapprove, suspend, or commute any adjudged sentence of (1) confinement greater than six months or (2) a punitive discharge, with two exceptions, discussed below. A CA can modify, in whole or in part, other punishments included in the adjudged sentence, such as reduction in pay grade, forfeiture of pay and allowances, fine, reprimand, restriction, and hard labor without confinement. See FC 2, and 3, for the analysis. In straddling cases, the CA may modify any part of the sentence except for certain mandatory punitive discharges, see FC 4.

Pre-trial Agreement Exception: Pre-trial agreements (PTA) expand the authority of CAs to act on sentences. If acting pursuant to a PTA, a CA has discretion to disapprove, suspend, or commute the adjudged punishment for any offense, except for punitive discharges involving sexual assault. For offenses with a mandatory minimum sentence of a DD under Article 56(b), UCMJ—currently, rape, sexual assault, forcible sodomy, or attempts to commit those offenses a CA may only commute the DD to a BCD. Note that mandatory dismissals under Article 56(b) may not be commuted pursuant to a PTA. CAs may disapprove, suspend, or commute non-mandatory discharges and other mandatory minimum punishments, pursuant to a PTA.

An important effect of this provision pertains to breach of a PTA after sentencing, but before the CA's action (CAA). If a CA withdraws from the sentence limitation portion of a PTA due to breach by the accused at this point, the CA no longer has the authority to disapprove, suspend, or commute a punitive discharge or sentence of confinement greater than six months. Such action is not "pursuant to" the PTA (due to the withdrawal), and CAs no longer have the authority to honor the terms of a breached PTA as a matter of clemency.

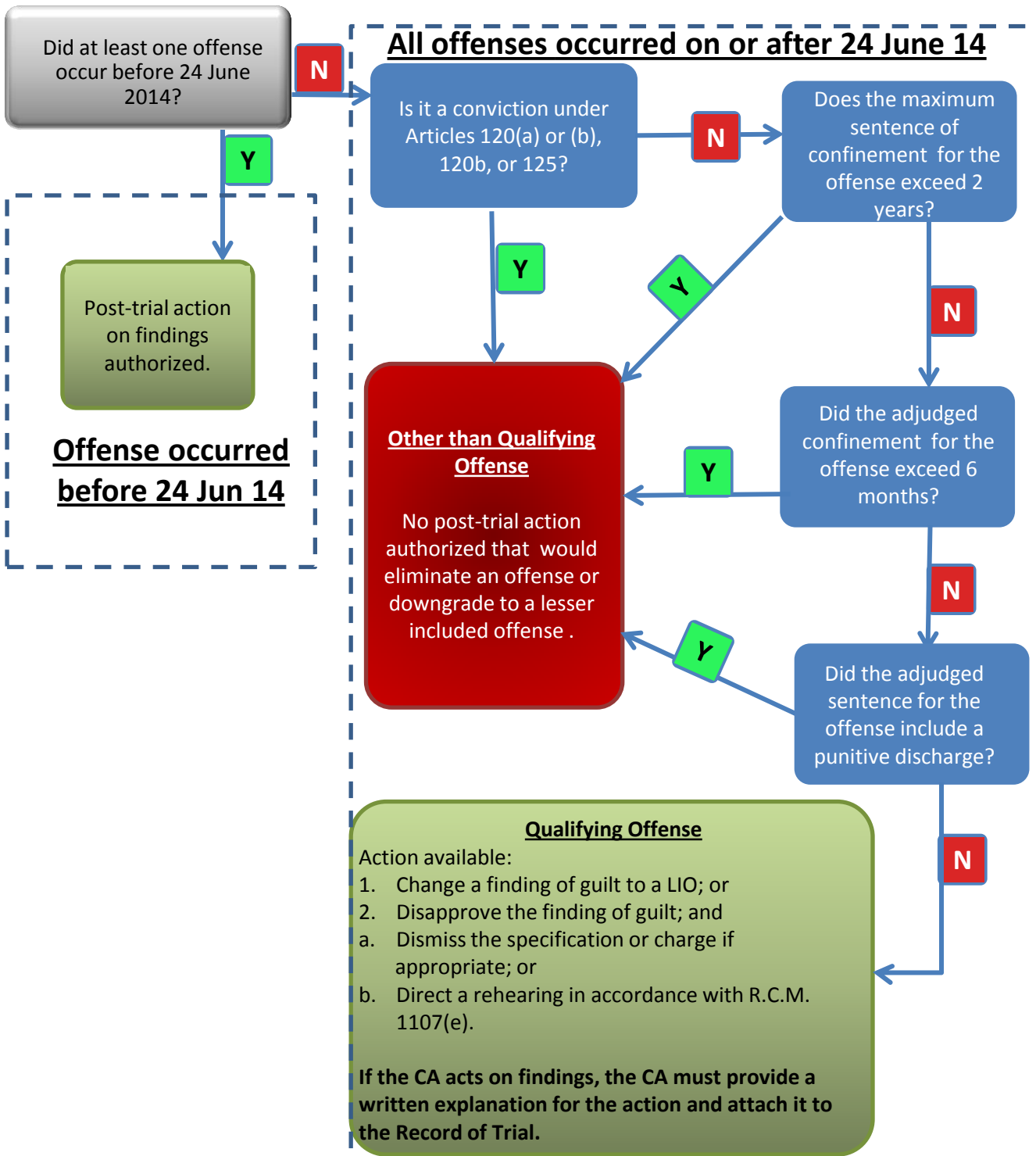
Substantial Assistance Exception: If the trial counsel recommends clemency in recognition of the accused's substantial assistance in the investigation or prosecution of another person, the CA has the discretion to approve, disapprove, suspend, or commute all or part of the adjudged punishment even if there is a mandatory minimum sentence. The Trial Counsel Memorandum of Substantial Assistance (TCMSA) may be provided to the CA at any time before the CA acts on the sentence.

Written Explanation: If the CA disapproves, commutes, or suspends, in whole or in part, the sentence for a non-qualifying offense or acts on the findings of a qualifying offense by dismissing or changing any charge or specification, a written explanation of the reasons for the action must be included in the CA's action. Given the analysis required to determine whether or not a written explanation must be included in the CA's action, we recommend, as a best practice, including such explanation in all cases when the CA takes any action other than approving the findings or sentence.

Points of Contact: You may reach the Head of the Military Justice Branch, LtCol Wissman, at angela.wissman@usmc.mil or 703-693-9005; the Policy and Legislation Deputy, Maj Robles, at benjamin.robles@usmc.mil or 703-614-1513, and the OIC of TCAP, Maj Mark Sameit at mark.sameit@usmc.mil or 703-693-8955.

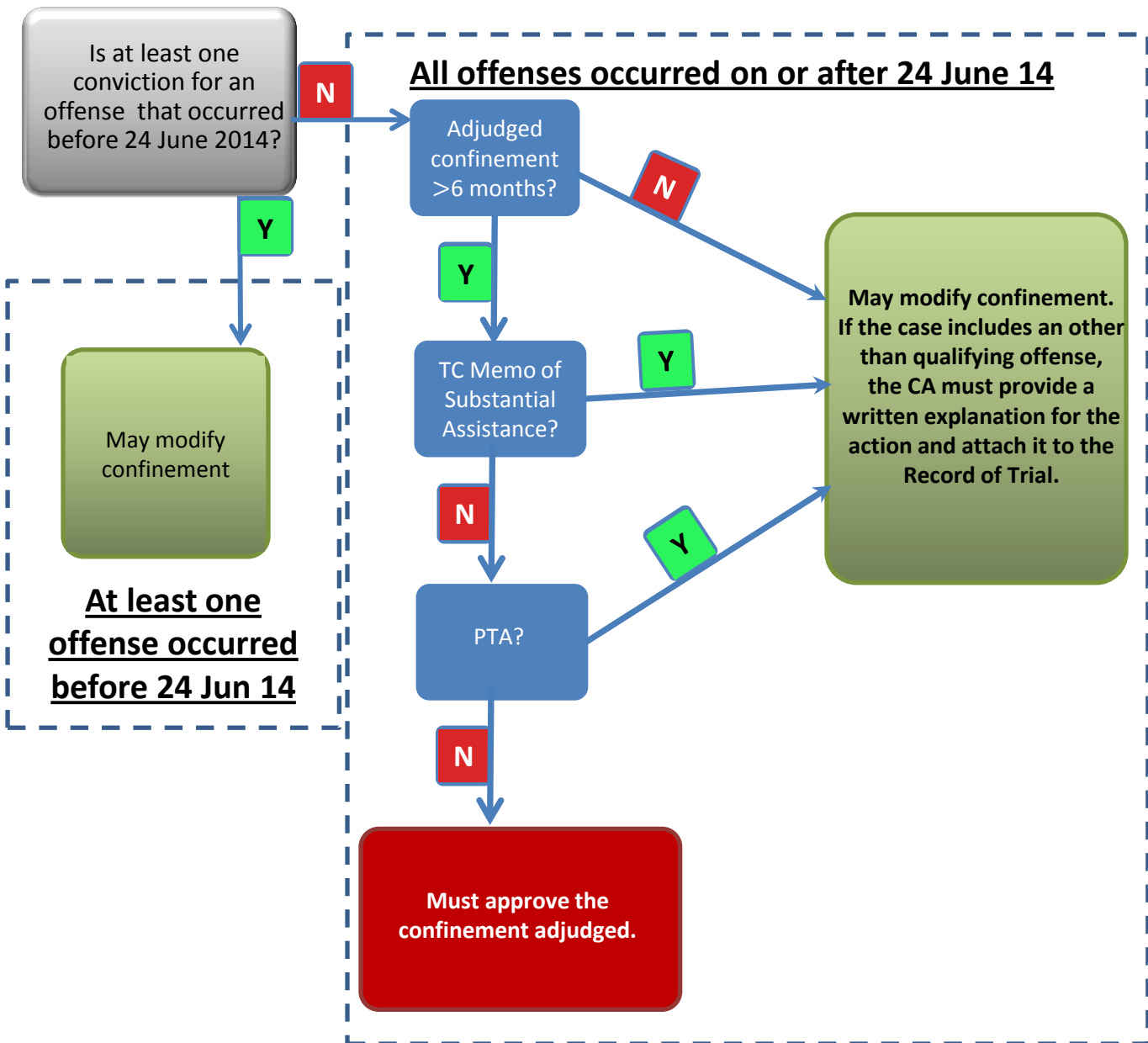


FINDINGS ANALYSIS UNDER ARTICLE 60





CONFINEMENT ANALYSIS UNDER ARTICLE 60



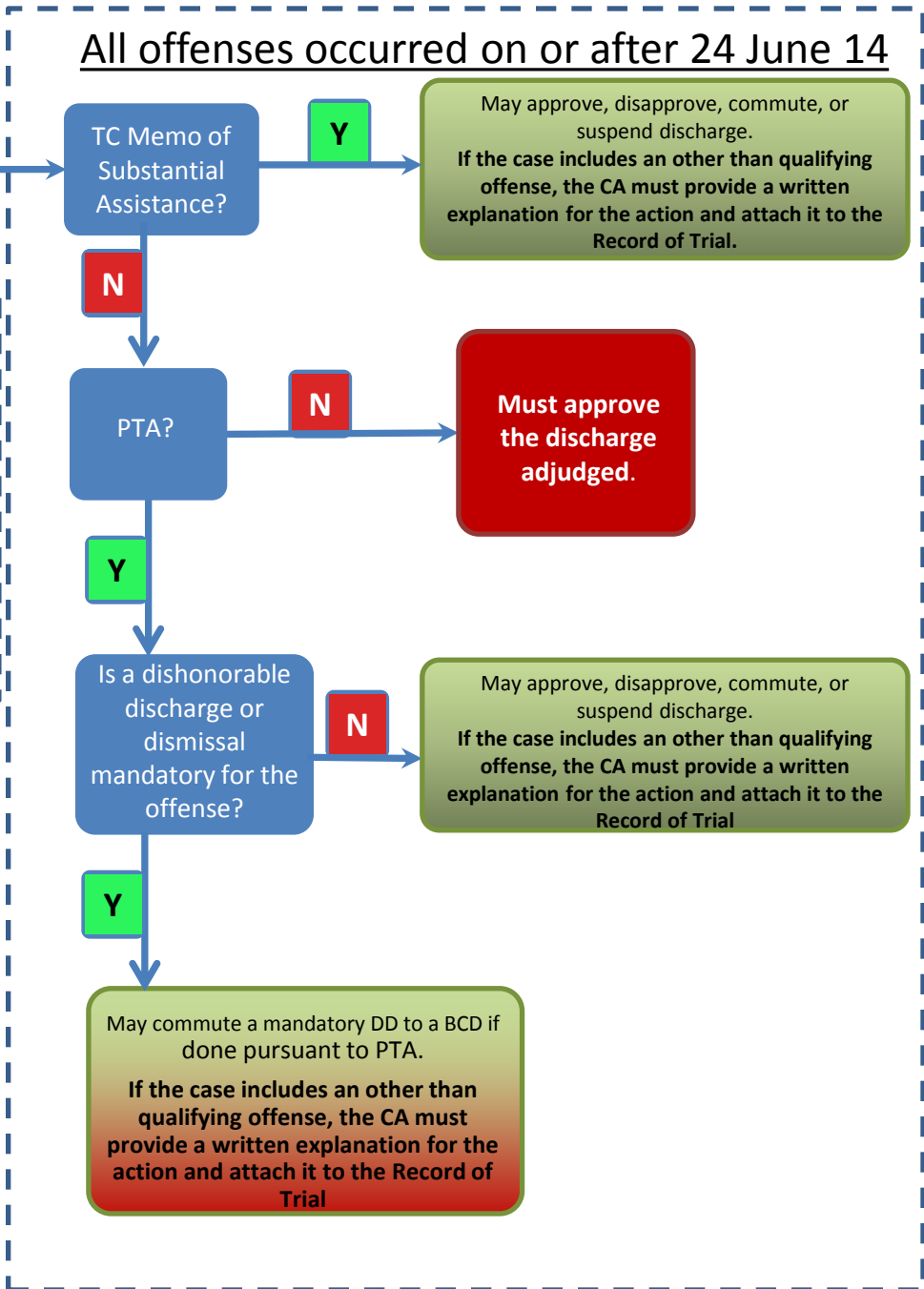


PUNITIVE DISCHARGE ANALYSIS IN NON-STRADDLING CASES*

Assumption:
Punitive discharge adjudged. When did all offenses occur? **

May approve, disapprove, commute, or suspend discharge.

All offenses occurred before 24 Jun 14



*Non-Straddling Cases: All offenses either all occurred before 24 June 14 or all offense occurred on or after 24 June 14.

** If some offenses occurred before 24 June 14 and some offenses occurred on or after 24 June 14, stop and go to Flow Chart 4: Punitive Discharge Analysis in Straddling case



PUNITIVE DISCHARGE ANALYSIS IN STRADDLING* CASES

Assumption: Punitive discharge adjudged due to conviction for more than one offense, with at least one occurring before 24 June 14, and at least one occurring on or after 24 June 2014.**

*Straddling Cases:

The offenses straddle 24 June 14, with at least one offense occurring before 24 June 14 and at least one offense occurring on or after 24 June.

** If all offenses occurred before 24 June 14 or all offenses on or after 24 June 14, stop and go to Flow Chart 3: Punitive Discharge Analysis in Non-Straddling cases

