

# MIDLANT Legal Compass

*Guiding Warfighters through Legal and Ethical Waters*

THIS EDITION FOCUSES ON  
BEING BRILLIANT ON THE  
BASICS

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The primary mission of Region Legal Service Office Mid-Atlantic (RLSO MIDLANT) is to provide prosecution, command services, and legal assistance support to eligible commands and persons in support of Fleet operational readiness.

The *MIDLANT Legal Compass* is a periodic newsletter published by the RLSO MIDLANT Command Services Department.



## Brilliant on the Basics

*Brilliant on the Basics* is the theme for this edition of the Region Legal Service Office Mid-Atlantic Legal Compass. At all levels, being professional is built upon knowing and executing the fundamentals. Legal and administrative processes work, and are at their best, when those who carry out the functions focus on doing the basics right each and every time. The authors of this edition’s articles are subject-matter experts on their topics, not because they have performed their duties for an extended period of time, but because they know the resources to consult and follow the correct procedures every time.

This edition covers topics commands address every day, including: non-judicial punishment, administrative separation, Victim Witness Assistance Program, and post-trial procedures. We hope this edition of the Legal Compass will help you navigate some of the fundamental legal procedures you perform every day.

Very Respectfully,  
/S/  
D.E. Stich  
CAPT, JAGC, USN  
Commanding Officer, RLSO MIDLANT

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## Non-Judicial Punishment

LN1 Alisha Smith, RLSO MIDLANT, Command Services, Norfolk

From the Navy’s origins through today, non-judicial punishment (NJP) —also known as Captain’s Mast, Office Hours, or Article 15—has been a tool for commanders and commanding officers to maintain good order and discipline. NJP is authorized by Article 15 of the Uniform Code of Military Justice and subject to regulations prescribed by the President in Part V of the Manual for Courts-Martial (MCM). The Manual of the Judge Advocate General (JAGMAN), JAGINST 5800.7F, provides service specific regulations for NJP processing. This article addresses some common questions regarding NJP.

### **Who may impose NJP?**

Commanders may impose NJP upon officers and enlisted persons of their command. The authority to impose NJP extends to Reserve commanders of commissioned units, any commissioned officer who is designated as Officer-in-Charge of a unit, and Principal Assistants who are designated in writing. Joint Commanders may impose NJP on members of the Naval service who are attached to their command. Although no commander may direct a subordinate to impose NJP in a particular case, a superior commander may limit or withhold the exercise by subordinate commanders of any disciplinary authority they might otherwise have.

### On whom may NJP be imposed?

The accused must be a member of the command or of the unit of the officer imposing NJP. A member may be of more than one command or unit at the same time and, consequently, may be subject to the NJP authority of both commanders. For example, when performing temporary duty (TDY), a servicemember is subject to the NJP authority of the commanders of both the parent and TDY commands (although only one command should exercise the authority for a single event or occurrence).

### What types of offenses should be referred to NJP?

NJP should be used for “minor” offenses, which begs the question: What is a minor offense? The decision whether an offense is minor is a matter of discretion for the commander imposing NJP. Generally, a minor offense is an offense for which the maximum sentence available would not include a dishonorable discharge or confinement for longer than one (1) year. The MCM provides several factors for commanders to consider when determining whether an offense was minor. These factors include: the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record and experience; and the maximum sentence.

### What is the standard of proof at NJP?

The standard of proof at NJP under Navy regulations is “preponderance of the evidence.” This means that the commander must determine whether it is more likely than not that the accused committed the offense(s) for which he/she is charged. In other words, is there a 51 percent likelihood that the accused committed the offense(s)?

### Are there guiding documents a command should follow when imposing NJP?

The appendix to chapter I of the JAGMAN provides useful documents for commands imposing NJP. First, starting at page A-1-b, the JAGMAN provides different versions of the accused’s notification and election of rights for servicemembers attached to or embarked on a ship and those who are not. The notification informs the accused of the offenses charged, the evidence to be considered, and the maximum punishment available. Because servicemembers who are not attached to or embarked on a ship can refuse NJP, it is crucial for commands to use the proper form. Additionally, there is another version of the notification and election of rights if a command may want to use the record of NJP at a court-martial, which includes additional rights for the servicemember. Second, there is an NJP guide for commands to follow during the proceeding. This script helps ensure the rights of the accused are protected, and it helps commands protect the process assuring that all steps are followed. Finally, at page A-1-g, the JAGMAN provides a post-NJP form for documenting the accused’s acknowledgment of his or her appeal rights.

### What are the limitations on punishment imposed at NJP?

The punishment limits at NJP are determined by the rank of the officer imposing NJP, and the rank of the accused. Commands should consult Part V of the MCM and Section 0111, Part B, Chapter I of the JAGMAN, or, contact your servicing Staff Judge Advocate’s office or the Command Services Department for assistance.

*The standard of proof at NJP is “preponderance of the evidence.” This means that the commander must determine whether it is more likely than not that the accused committed the offense(s) for which he/she is charged. In other words, is there a 51 likelihood chance that the accused committed the offense(s)?*

**What are the accused's right to appeal following NJP?**

The accused has the right to appeal within five (5) working days of receiving NJP. The servicemember can appeal if he or she believes that the punishment was unjust or disproportionate. Unjust is defined as the belief that the servicemember did not commit the offense charged. Disproportionate is defined as the punishment being too severe for the offense.

**Can punishment be lessened or altered at or following NJP?**

At NJP, the accused's punishment can be suspended for a period up to six months. Unless the suspension is sooner vacated, suspended portions of the punishment would be remitted upon the termination of the suspended period of time, without further action (which means the punishment goes away without ever being executed).

Following NJP, the accused can request mitigation, remission, or set-aside for any punishment that he or she receives. Mitigation is a reduction in either the quantity or quality of a punishment. Remission is an action whereby any portion of the unexecuted punishment is cancelled. Setting aside in an action whereby the punishment or any part is set aside and any property, privileges, or rights affected by the portion of the punishment set aside are restored. NJP may only be set aside if there is new clear and convincing evidence presented or if there was a clear injustice. It should ordinarily be exercised within 4 months of the NJP absent unusual circumstances.

Although the above article provides foundational guidance for commands imposing NJP, it is not a complete roadmap. As with other disciplinary and administrative issues, please feel free to consult your local Staff Judge Advocate's office or Command Services Department to discuss possible considerations and answer these and other legal questions. Our staff is trained and experienced in addressing the legal and administrative considerations and in helping supported commands work through these issues.

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**Enlisted Administrative Separations (ADSEPS) Common Errors**

Mr. Jeffrey Downs, Administrative Separations Supervisor, RLSO MIDLANT, Command Services, Norfolk

The administrative separation (ADSEP) process is an essential manning mechanism for commands, but it can be confusing. The key to success with ADSEP is to read and understand the Naval Military Personnel Manual (MILPERSMAN). Regardless of one's experience with the ADSEP process, success comes from taking time to read the entire 1910 section of the MILPERSMAN. After reading the 1910 section in its entirety at least once, it is essential to go to the MILPERSMAN online and read the corresponding articles that fit each specific situation each time as the articles are updated frequently. The following discussion provides some helpful steps for success and addresses some of the most frequent ADSEP errors. All references are to MILPERSMAN Section 1910.

**\* Not Processing for All Reasons**

Per 1910-210, commands are required to process members for all reasons for which minimum criteria are met. Commands must look at everything the member did in an enlistment and determine the relevant bases under which to process the servicemember. Many times, a member may have multiple incidents of misconduct that qualify him or her for a Pattern of Misconduct. However, in addition to a Pattern of Misconduct, the servicemember may also qualify for processing under Commission of a Serious Offense or Civilian Conviction. If a member were to meet the criteria for all three reasons, the servicemember must be notified of ADSEP and processed for all three reasons.

Misconduct takes precedence over Convenience of the Government type separations such as Personality Disorder, 1910-122 and Physical Fitness Assessment Failure, 1910-170. For example, if a member meets the criteria for Commission of a Serious Offense and also has a recommendation from medical to process for MILPERSMAN 1910-122 (Personality Disorder), then the servicemember should be processed for commission of a serious offense and not for personality disorder. This is essential as it dictates the rights and benefits of the servicemember during and after separation.

**\* Using Notification Procedures when Board Procedures Required**

Per 1910-233, Mandatory Separation Processing, "Certain bases for administrative separation (ADSEP) are so detrimental to good order and discipline, mission readiness, and appropriate standards of performance and conduct that processing for ADSEP is mandatory." A brief list of the conduct that board procedures must be used for includes: deviant sexual behavior, sexual harassment, drug abuse, use of synthetic drugs such as Spice, multiple DUIs, and PFA failures. Again, the best course of action is to review MILPERSMAN 1910-233 every time the command is administratively processing a servicemember for separation to assure they are using the right forms and procedures.

**\* Notifying Members of ADSEP for Reasons that Occurred in a Previous Enlistment**

Generally speaking, you should not notify members for ADSEP using a basis that occurred in a previous enlistment because, in most cases, a reenlistment wipes the slate clean. When processing, always check when the member last enlisted/reenlisted and make sure the basis for processing did not occur before that date. If it did, then a mental flag should go up and you need to consult 1910-214, adverse matter from a prior enlistment, for how to proceed.

**\* Notifying Members under Drug Abuse (1910-146) Only For Drug Offenses**

If the only reason for processing is drug abuse, do not notify a servicemember for ADSEP under commission of a serious offense; or both commission of a serious offense and drug abuse, even though wrongful use of a controlled substance is technically considered a serious offense; notify for drug abuse only. MILPERSMAN 1910-146 (Misconduct - Drug Abuse) cases include those involving controlled substances (i.e. THC, Cocaine, PCP, Meth, Prescription Meds, etc.) but does not include analogue drugs (i.e. Spice & Bath Salts). For example, if a member is found guilty at NJP for Violation of the UCMJ, Article 112a - wrongful use of marijuana, the servicemember should be processed only under MILPERSMAN 1910-146 (Misconduct - Drug Abuse).



*Drug analogues, such as SPICE, should be processed under 1910-142 (Commission of a Serious Offense) until a change is made to the MILPERSMAN as the current 1910-146 (Misconduct – Drug Abuse) does not include analogue drugs.*

**\* Notifying Members under Commission of a Serious Offense (1910-142) For Analogue Drugs**

Do not notify analogue drug cases (Spice, Bath Salts, etc.) under 1910-146 (Drug Abuse). Rather, drug analogues should be processed under 1910-142 (Commission of a Serious Offense) until a change is made to the MILPERSMAN as the current drug abuse MILPERSMAN article does not include analogue drugs.

**\* Common Errors Received by Navy Personnel Command (PERS 832)**

Navy Personnel Command section 832 (PERS 832) is the unit that reviews enlisted administrative separation packages. Packages received by PERS 832 are frequently missing documents required for the specific basis for processing. Each basis for processing has different requirements. To ensure successful processing, commands should follow the pertinent MILPERSMAN requirements. Again, reading the article every time it is used is the key in reducing errors. Below are the most common errors PERS 832 finds in ADSEP packages.

**1. MILPERSMAN 1910-124 (Parenthood) ADSEPs:**

To improve proper processing for ADSEPs for Parenthood, 1910-124, commands should avoid the common pitfalls below, and follow these recommendations for success. The first common error involves not having complete packages for both members in a dual military couple situation. It is recommended that ADSEP packages for dual military couples be coordinated through each command. The command recommending separation of one member should send its package via the command recommending retention of its member. Packages missing Page 2s, Counseling/Warning Page 13s, and Family Care Plan Certificates will be deemed insufficient for processing.

**2. MILPERSMAN 1910-120 (Physical or Mental Conditions) & MILPERSMAN 1910-122 (Personality Disorder) ADSEPs:**

These ADSEP packages must contain proof of medical reasons, doctor recommendation, and Counseling/Warning (if required) to be processed. Again, these errors could be avoided by going online and reviewing the specified MILPERSMAN article.

**3. Errors on Administrative Separation Processing Notice (aka Letter of Notification):**

The notification documents require signature in the “Command Certification” block in the Letter of Notification. The signature must be the CO or “by direction” and must be signed and dated prior to notification of member.

#### 4. Errors with Letters of Transmittal:

To reduce the potential for letters of transmittal being returned, you should follow the following suggestions and avoid these mistakes. First, ensure you are using the current MILPERSMAN 1910-600 sample that comments on Post-Traumatic Stress Disorder (PTSD). Next, ensure the letter is Privacy Act compliant by using only the last four digits of the social security number. Third, redact privacy information that is not required for ADSEP. Fourth, redact other service member's personal information (such as names listed on the urinalysis register besides the servicemember being processed). Fifth, redact date of birth on medical record documents as they are not needed.

Commands are encouraged to contact your servicing Staff Judge Advocate's office or the Command Services Department for assistance with ADSEP cases.

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### *Post-Trial Process Practice Points*

Ms. Aubrey Lombardi, Post-Trial Processing Division (PTPD), RLSO MIDLANT, Command Services, Norfolk

The post-trial process ensures that administrative procedures and requirements of the court-martial process, including Staff Judge Advocate Review (SJAR)/Legal Officer Review (LOR), convening authority's (CA) action, and submission for appellate review, are done correctly the first time. Below is a discussion of some post-trial steps and resources to aid legal officers (LO) and commands in the post-trial process.

**Post-trial Checklists:** JAG/COMNAVLEGSVCCOMINST 5814.1A provides checklists for commands to use in the post-trial process. The RLSO MIDLANT Post-trial Processing Division (PTPD) provides a checklist on the front of the package when a record of trial is forwarded to the convening authority following a trial. These checklists are designed to help the convening authority as well as the SJA/LO when preparing the CA action, and the SJAR or LOR. It is important that these checklists are followed to assure that all steps have been completed. These checklists are attached to the original record of trial and forwarded to the Office of the Judge Advocate General (Code 40), which is the administrative support department for all Navy and Marine Corps courts-martial cases heading towards the Navy-Marine Corps Court of Criminal Appeals. Code 40 maintains the central files for court-martial records of trial. By not completing the checklist, commands risk delaying appellate review and cause an inaccurate reflection of the command's action during the post-trial process.

**DNA Processing:** DNA processing is required if the maximum sentence to confinement for any charge can be over a year. At a Special Court Martial, the maximum amount of confinement authorized is one year. However, DNA processing is not based on the forum, rather it is based on the crime or charge and what could have been the maximum sentence (regardless of forum). When DNA processing is required the first page of the Convening Authority action needs to state, "**DNA processing is required in accordance with 10 U.S.C. § 1565.**"

*If post-trial time frames are not met, reports are made to Vice Admiral DeRenzi, the Judge Advocate General of the Navy, and higher Navy officials, which contain the command's name and the reason for the delay.*

*PTPD includes a checklist on the front of the package when a record of trial is forwarded to the convening authority following a trial.*

*These checklists are designed to help the convening authority as well as the SJA/LO when preparing the CA action, and the SJAR or LOR.*

**CA Actions:** CA Actions should be clear, concise, and state what the CA's intentions are. Appendix 16 of the Manual for Courts-Martial has examples designed to assist the CA in what action they can take and how to word the actions. Using the examples in the Appendix 16 will help in clearly stating what action the CA is taking and what part of the sentence ordered is to be executed. Plain language is best when drafting the CA action portion, but it does not replace the need to be complete in stating the intent of the CA. Convening Authorities must pay close attention to having the CA Action signed before the 120<sup>th</sup> day after the sentence is imposed as this is a requirement under US v. Moreno, a United States Court of Appeal for the Armed Forces decision. **If this time frame is not met, the command must be ready to present evidence to overcome a presumption of unreasonable delay during the post-trial processing.**

**64 (a) Reviews:** Under UCMJ Article 64(a), if the servicemember does not receive a Bad Conduct Discharge (BCD), the convening authority must refer the case for review by a judge advocate not directly involved in the case. Our Navy and Marine Corps post-trial processing system allows for 30 days after the CA Action is signed for the 64(a) review to be completed. However, if the 64(a) is not signed within 30 days, the command will need to again be able to articulate the reason for the delay and why the servicemember's due process rights have not been violated.

Post-trial processing has some very specific procedural and timeline requirements. For assistance, please contact the RLSO MIDLANT's PTPD at 757-341-4568 or the Command Services Department Head at 757-322-3065.

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### *Victim Witness Assistance Program*

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Legal procedures such as Captain's Mast and administrative separation are well-known, basic processes critical to maintaining good order and discipline for commands. Less-well-known, but just as critical to the legal functions of commands is the Victim and Witness Assistance Program (VWAP). The purpose of the program is to ensure victims and witnesses of a crime are properly informed of all the benefits and resources available to them. The article below will highlight VWAP definitions, application, roles, and responsibilities important for commands to know. As with other topics covered in this issue, commands should consult their local RLSO command services or servicing staff judge advocate for any questions.

#### **Who Is A Victim or Witness?**

There are two questions that are essential to understand in order for commands to execute VWAP: who is a victim and who is a witness. A victim is a person who has suffered direct physical, emotional, or monetary harm as a result of a crime committed in violation of the Uniform Code of Military Justice (UCMJ) or in violation of the law of another jurisdiction. A witness is a person who has information or evidence about a

*A victim is a person who has suffered direct physical, emotional, or monetary harm as a result of a crime committed in violation of the Uniform Code of Military Justice or in violation of the law of another jurisdiction.*

crime and provides that knowledge to a Department of Defense (DoD) Component about an offense in the investigative jurisdiction of the DoD Component. These terms do not include a defense witness or an individual involved in the crime as a perpetrator or accomplice. However, when a victim is under 18 years of age, incompetent, incapacitated, or deceased, the term does include a spouse, legal guardian, parent, child, sibling, or person designated by the court.

#### **What Are a Command's VWAP Responsibilities?**

Per OPNAVINST 5800.7A, COs and OICs are responsible for understanding and ensuring compliance with VWAP. Each command must have a Victim and Witness Assistance Coordinator (VWAC) assigned. When a member of a VWAC's command is accused of a crime, the VWAC should provide a DD Form 2701 to all victims or witnesses, regardless of their military status. The VWAC must be at least an E-5 or civilian equivalent, appointed in writing with name, title, duty address and phone number. While it is the role of the VWAC to coordinate the program for a command, the rights may be provided by someone from legal, security, admin, etc. so long as a record is made and the VWAC knows the notification has occurred.

If an offender is processed through non-judicial punishment (NJP), summary court-martial (SCM), or administrative separation (ADSEP), provide victims and witnesses: 1) the date and time of the NJP, SCM, or ADSEP board, 2) the opportunity to make a statement at the proceeding, 3) notification when the offender is released from restriction, and 4) notification when the offender is separated.

VWACs must record the number of DD 2701, 2702, 2703, 2704 forms issued each calendar year. In January each command will be required to fill out a DD 2706 form reflecting those numbers and submit to your Victim Witness Liaison Officer (VWLO), assigned at the Region or TYCOM level. VWACs also must ensure victims and witnesses are reasonably protected when they fear harm from the offender (e.g. Military Protective Orders) and provide information on counseling and other victim assistance programs within the Department of Navy or civilian equivalent. For victims who have been harmed by a civilian who is not part of DoD, you should provide information on civilian victim assistance programs. Any VWAC dealing with a victim who is underage, incompetent, incapacitated or deceased should seek assistance from the Region Legal Service Office or VWLO.

If you have been assigned as a VWAC, the most important thing to do is communicate. We all have responsibility to take care of our shipmates. If the command has questions regarding VWAP or a VWAC's responsibilities, ask the local command services office or servicing staff judge advocate.

*COs and OICs are responsible for understanding and ensuring compliance with VWAP. Each command must have a Victim and Witness Assistance Coordinator assigned.*

*Region Commanders serve as Convening Authorities for Boards of Inquiry (BOI) and assist Navy Personnel Command by coordinating officer administrative separation processing. These BOI results are disseminated to provide more awareness to the officer community on the adverse administrative action that may result because of officer misconduct.*

### Region Mid-Atlantic Board of Inquiry Results

On 28 June 2012, Navy Personnel Command ordered a Navy lieutenant to show cause for retention due to misconduct and substandard performance of duty. The board found the member had committed sexual perversion, had received a civilian conviction, and had failed to conform to prescribed standards of military department. The board recommended the member be separated with a General discharge. On 3 August 2012, Navy Personnel Command ordered a Navy lieutenant to show cause for retention due to misconduct and substandard performance of duty. The board found the member had committed a violation of UCMJ Article 112a (wrongful use of a controlled substance) and had failed to conform to the prescribed standards of military department. The board recommended the member be separated with a General discharge.

On 28 August 2012, Navy Personnel Command ordered a Navy commander to show cause for retention due to misconduct and substandard performance of duty. The board found the member had intentionally misrepresented or omitted a material fact in official written documents or official oral statements; the member had a pattern of discreditable involvement with military or civilian authorities, notwithstanding the fact that such misconduct had not resulted in judicial or nonjudicial punishment under the UCMJ; the member had a civilian conviction; and the member failed to conform to prescribed standards of military department. The board recommended the member be separated with an Honorable discharge.

On 30 August 2012, Navy Personnel Command ordered a Navy CWO2 to show cause for retention due to misconduct and substandard performance of duty. The board found the member had committed three violations of UCMJ Article 92 (failure to obey order or regulation); the member had committed a violation of UCMJ Article 107 (false official statement); the member had committed two violations of the UCMJ Article 133 (conduct unbecoming an officer and gentleman); the member had committed two violations of UCMJ Article 134 (adultery and obstruction of justice); and that the member failed to conform to prescribed standards of military department. The board recommended the member be separated with an Other Than Honorable discharge.

On 19 November 2012, Navy Personnel Command ordered a Navy CAPT to show cause for retention due to misconduct and substandard performance of duty. The board found that: The member had committed two violations of the UCMJ Article 92 (Failure to obey order or regulation) and violation of the UCMJ Article 133 (Conduct Unbecoming an officer and gentleman); the member had failed to demonstrate acceptable qualities of leadership required of an officer in members grade; and the member failed to conform to the prescribed standards of military department. The board recommended the member be separated with an Honorable discharge.