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The Advisor

Region Legal Service Office Southeast

CDR Mike Holifield, CNRSE SJA and Director, Command Services

This issue, besides representing the very cutting edge of legal information dissemination, marks a transition in editorial control. After a mere 37 months—roughly the length of the Korean War, slightly longer than Henry VIII's marriage to Anne Boleyn, and the approximate interval between *Despicable Me* movies—the Command Services Department (unlike Anne Boleyn) will have a new Head. As of 1 August, CDR(s) Nell Evans takes the reins as Regional Staff Judge Advocate, Director of Command Services, and overseer of this august publication. While the diplomas on the wall and stale snacks in the drawer will change, one thing certainly will not: You can count on The Advisor to bring you the latest, most relevant updates in the world of military law. To bolster these assurances, I humbly offer the current edition. Inside you will find useful articles on official complaints, mental health evaluations, sexual assault reporting and death investigations, not to mention the ever popular puzzler (that I have now needlessly mentioned). If this doesn't set your legal toes to tappin', check your pulse.

As always, the men and women of RLSO SE are standing by, ready to assist with any legal questions. You'll find their contact numbers on page 14. Likewise as always, feel free to call my office—just don't be surprised when someone else answers.

Exitus.

Highlights:

- VWAP Overview
- Mental Health Evaluation Procedures Change
- Death Investigations

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VWAP: An Overview

LT Jessica Burrell, SJA, NSB Kings Bay

As a Unit Commander, Commanding Officer, or OIC you are responsible in part for the care and well-being of the Sailors and Marines (and their family members) assigned to your command. To assist in meeting that charge, the Navy has created a program to address the needs of victims and witnesses of crimes – the Victim and Witness Assistance Program (VWAP). So what is this program, who does it cover, what does it do, and how do you comply?

1. What is VWAP?

The VWAP program was established to address the needs of victims and witnesses throughout judicial proceedings. It is governed by SECNAVINST 5800.11B and OPNAVINST 5800.7A. Without the cooperation of victims and witnesses, our justice process would no longer function efficiently, if at all. Following the enactment of a series of laws by Congress designed to inform victims and witnesses of their rights and responsibilities, the Department of Defense and the Department of the Navy established policy in the area of VWAP that must be followed by all commands.

2. Who does it cover?

VWAP, as the name suggests, covers victims and witnesses to crimes in violation of the Uniform Code of Military Justice or the law of another jurisdiction in cases where military authorities have been notified. Sounds easy enough, but when is someone a victim and when is someone a witness? Generally speaking, the term "victim" applies to persons who have suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime. A "witness" is a person who has information or evidence concerning a crime, and provides that knowledge to a Department of the Navy representative about an offense in the investigative jurisdiction of the Department of the Navy. If the victim or witness is a minor, then the term also includes a parent or legal guardian. Detailed definitions of both terms can be found in the governing instructions. It is important to remember that this is not just for courts-martial. VWAP also applies to nonjudicial punishment and administrative separation boards.

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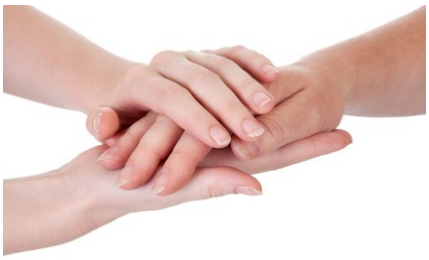
VWAP...*continued*



3. What does it do?

The program ensures that crime victims and witnesses are made aware of their rights and responsibilities. Commands are expected to help ensure this happens. In order to do so, the command must know what those rights are.

a. A crime victim has the following rights:

(1) The right to be treated with fairness and respect for the victim's dignity and privacy.

(2) The right to be reasonably protected from the accused offender.

(3) The right to be notified of court proceedings.

(4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.

(5) The right to confer with the attorney for the government in the case.

(6) The right to receive available restitution, if appropriate.

(7) The right to information about the conviction, sentencing, imprisonment, and release of the offender from custody.

b. A witness in a court-martial proceeding has the following rights:

(1) The right to be treated with fairness and respect for the witness' dignity and privacy.

(2) The right to be reasonably protected from the accused offender.

(3) The right to be notified of any scheduling changes that will affect the witness' appearance at court-martial.

(4) The right to be notified of the apprehension of an accused, the initial appearance of an accused before a military judge, the release of the accused pending court-martial, and trial proceedings (including entry of a guilty plea).

(5) The right to information about the conviction, sentence, confinement, and release from custody of the accused.

4. How do you comply?

As a Unit Commander, Commanding Officer, or OIC, you are responsible for understanding and ensuring VWAP compliance . You must ensure your staff involved in criminal investigations, law enforcement, and security are trained in VWAP policies and requirements. In addition, you must appoint in writing a command Victim Witness Assistance Coordinator (VWAC) and educate command personnel as to the rights of victims and witnesses. By utilizing all available tools available, you can help victims and witnesses take advantage of the opportunity for meaningful interaction in what can be a daunting criminal justice process. Please contact your local Staff Judge Advocate with questions.

SAPR: A Primer on Restricted and Unrestricted Reporting

LTJG Sarah Burkett, RLSO SE Pensacola Trial Services Office

There is certainly no confusion as to the importance of the Department of Defense's Sexual Assault Prevention and Response (SAPR) Program. However, there are aspects of the reporting process that can be complicated. A victim of sexual assault has two options when it comes to reporting a sexual assault. It is important for commands to understand the difference between a restricted and an unrestricted report.

There are some things common to both restricted and unrestricted reports. Both restricted and unrestricted reports give victims access to medical care, counseling, and advocacy, as well as assistance from the Sexual Assault Response Coordinator (SARC) and Victim Advocate. However, only an unrestricted report triggers a NCIS investigation, notifies the command of the assault with identifying information, and gives the victim the option of an expedited transfer

A restricted report is only available to military members and adult dependents. Importantly, a restricted report can only be made to a SARC, SAPR Victim Advocate (VA), or health care providers. Restricted reports enable the victim to maintain confidentiality while seeking counseling and medical treatment. Victims have the option to turn a restricted report into an unrestricted report at any time.

What if the victim wants to make a restricted report but has already told someone about the assault? The Department of Defense SAPR

SAPR Reporting...*continued*

Instruction, DODI 6495.02, recognizes that a victim may consult with certain third parties prior to reporting to the SARC or SAPR VA. As long as the third party is not in the victim's chain of command and does not disclose the information to anyone in the victim's chain of command, the ability to make a restricted report is preserved. If the third party is a service member outside the victim's chain of command, he or she does not have a legal duty to report the information unless he or she personally observed the sexual assault.

Similarly, legal assistance attorneys may be informed by a client that he or she is a victim of sexual assault. This does not impact the victim's ability to make a restricted report because a legal assistance attorney has no duty to disclose the information. However, the legal assistance attorney should immediately put the victim in contact with the SARC. Only the SARC, SAPR VA, or health care provider can take an official restricted report of sexual assault.

If restricted reporting is no longer possible, the SARC or SAPR VA will direct the victim to make an unrestricted report and an investigation will open. An unrestricted report does not force a victim to participate in the investigation. This declination will not affect the victim's right to advocacy, medical or psychological treatment, but neither does it automatically end the investigation. Commands should be sensitive to the victim's decision not to participate. The DOD SAPR instruction makes it clear that the victim's decision not to participate should be honored by all personnel, including commanders, advocates, and the victim's chain of command. While a victim can be subpoenaed to testify at a court-martial, it is highly unlikely that this would ever occur.

As legal assistance attorneys, staff judge advocates, and trial attorneys, RLSO SE personnel play an important role in the Navy's SAPR program. If you have any questions about reporting requirements, or the SAPR program in general, please contact your staff judge advocate or trial counsel.

Mental Health Evaluations of Servicemembers

LT Jeffrey S. Marden, SJA, NAS JRB New Orleans

On 19 June 2013, ALNAV 040/13 officially canceled SECNAVINST 6320.24A (Mental Health Examinations of Members of the Armed Forces). That instruction, originally promulgated in February 1999, established detailed procedures for involuntarily referring servicemembers for inpatient and outpatient mental health evaluations. It also required commands to provide servicemembers with advanced written notice and the opportunity to consult with counsel prior to referral.

Although these requirements safeguarded servicemembers' rights, the delay imposed barriers to receiving mental health treatment. As a result, on 4 March 2013 the Department of Defense issued DoDI 6490.04 (Mental Health Evaluations of Members of the Military Services) to eliminate some of the barriers to treatment and to remove any stigma associated with mental health referrals.

Significant sections of DoDI 6490.04 include:

1) For non-emergency evaluation referrals, only a commander (any commissioned officer who exercises command authority over a servicemember) or supervisor (a commissioned officer or civilian employee in a grade level comparable to a commissioned officer who exercises supervisory authority over the servicemember and is authorized because of the impracticality of involving an actual commanding officer in the servicemember's chain of command) may initiate.

2) The commander or supervisor must advise the servicemember that there is no stigma associated with obtaining mental health services, refer the servicemember to a mental health provider, and tell the servicemember the date, time, and place of the scheduled evaluation.

3) For emergency referrals, the commander or supervisor may delegate the authority to a senior enlisted servicemember for enlisted servicemembers and to a commissioned officer of rank senior to the officer for officer referrals.

4) Eliminates the requirement to provide servicemembers with a two-day advanced notice or permit them to speak with an attorney prior to the referral.

5) Commands must provide periodic training to all commanders, supervisors, and servicemembers that explains how to recognize servicemembers who exhibit physical or mental behaviors that may prove dangerous to themselves, others, or the mission.

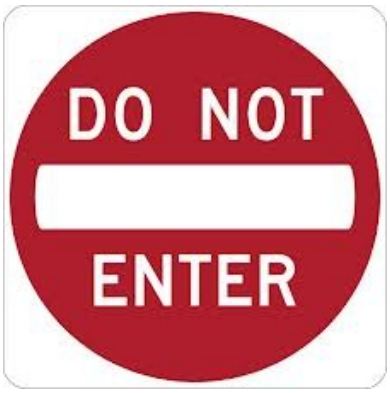
In addition, the instruction makes clear that mental health evaluation referrals have the same status as any other military order. However, referrals shall not be ordered as a reprisal against any servicemember for any lawful communication (i.e. proper complaints under Articles 138 or 1150 of the U.S. Navy Regulations, writing to Congressmen, contacting the local Inspector General, etc.). In fact, if a servicemember believes that his referral was in retaliation, then his remedy is to file a complaint with the Inspector General.

Remember that every case is different, so before referring your servicemembers always CYA (consult your attorney)!

To Debar or not to Debar?

LT Elan Ghazal, SJA, NAS Key West

Installation Commanding Officers (COs) are charged with the duty of protecting personnel and property under their jurisdiction, and maintaining order on the installation to ensure the uninterrupted and successful accomplishment of the military mission. DoDI 5200.08, Navy Regulation 0826. To carry out this duty, installation COs have inherent authority to exclude individuals from military installations under their control. The term used for this denial of access, removal, or exclusion is "debarment."



Debarment is the most powerful tool an installation CO has to protect the base. A debarment is simple to effectuate, but extremely powerful. In determining whether to debar an individual, the CO must be evenhanded, remain neutral, and state a sound reason for the action. A debarment that is arbitrary, capricious, or discriminatory against a constitutionally protected status (race, religion, sex, age, etc.) will not stand and may subject the CO to personal civil liability. Categorical exclusion of a certain group or classification of individuals is probably arbitrary and capricious.

Common complicating factors in the debarment analysis include whether the individual is a DoD civilian employee, lives in on-base housing, or has a statutory entitlement to medical care at a military treatment facility (MTF). When a DoD civilian employee commits an act or series of acts disrupting the orderly administration of the installation, the first step should be to engage the Human Resources Office. The employee's activity may be a basis for adverse administrative action. To avoid giving the employee the equivalent of a paid vacation, be sure to consult the Human Resources Office and local collective bargaining agreement for due process requirements before issuing a debarment.

Individuals leasing property in on-base housing have certain, limited, property rights. As with the debarment of civilian employees, the first step a CO should take in considering a removal would be to evaluate whether another route is available. For on-base residents, eviction proceedings may be used to remedy the problem. Many issues that serve as the basis for debarment are also violations of the resident's lease agreement. If available and timely, eviction procedures should be used to terminate the resident's property rights before issuing a debarment letter.

Retirees and dependents also have rights to be considered before debarment. They are entitled to medical care at MTFs subject to space, facilities, and capabilities. This right is created by statute. When contemplating a debarment of an individual in this group, first see if a limited debarment permitting access to the MTF will remedy the situation. However, denial of access at one MTF does not deny access to all MTFs. A debarment from one installation does not prohibit the retiree or dependent's exercise of their right to medical care at another installation.

All debarments require a case-by-case analysis and the full consideration of all the facts. With all debarment decisions, please consult your Staff Judge Advocate to help guide you through the analysis and to draft the letter. Two checklists are provided below to assist you in exercising your debarment authority.

Debarment Analysis Checklist:

1. Identify the conduct that threatens the orderly administration of the installation. The CO does not need to wait for the conclusion of any civilian criminal proceedings before issuing a debarment, but the CO must consider all the facts of each debarment action on their own merit.
2. Identify the status of the person to be debarred: active duty, dependent, DOD civilian, retiree, reservist, contractor, non-affiliated civilian, etc.
3. Determine whether administrative measures short of a debarment would remedy the concern. Consider eviction procedures for installation residents or adverse administrative action through the Human Resources Office for DOD civilian employees.
4. Determine whether a limited debarment will remedy the concern (i.e. stay 200 yards away from X building/residence, installation access limited to direct transit to/from place of work/residence, debar from specific annexes/areas of the installation, debar for a limited period of time).
5. If other administrative action and a limited debarment are ineffectual, issue an installation-wide debarment.

Debarment Procedures Checklist:

1. The period of debarment must be reasonable and definite;
2. Issue the debarment in writing, signed by the Commanding Officer or "acting" CO, but never "by direction;"
3. After your input, have your Staff Judge Advocate prepare the debarment letter for your signature;
4. Ensure the letter provides a process for appeal. (Usually routed via the Staff Judge Advocate);
5. Have it hand-delivered, if possible, and obtain a signed/dated acknowledgment of receipt from the debarred individual;
6. If personal delivery is not possible, send it by certified or registered mail, return receipt requested;
7. Upon personal delivery or mailing of the debarment letter, complete an affidavit or certificate of delivery or mailing. While you may not need these if you have obtained a signed acknowledgment of receipt upon personal delivery, preparation of the affidavit or certificate by one of your members is extra evidence of delivery in case the recipient later claims the signature is not genuine; and
8. Ensure copies of the letter are maintained by the installation Security Officer and Staff Judge Advocate.

What is a BOOFOO and what do I need to know about one?

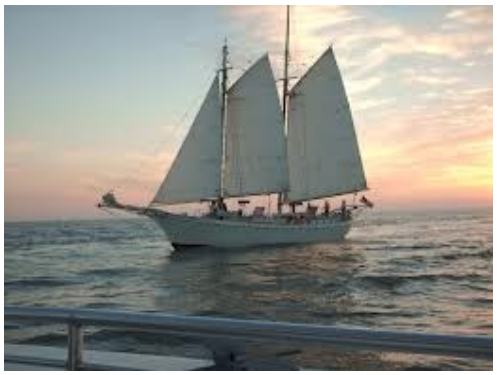
LT Alex Homme, SJA, NAS Corpus Christi

You may recall the 1990's clothing brand FUBU – ostensibly standing for "For Us, By Us." Or you may not. Either way, the close cousin in the legal ethics world is a BOOFOO (standing for "by our own, for our own") organization. While not as stylish as FUBU, BOOFOOs are very important organizations onboard naval installations. According to the Joint Ethics Regulation (JER), a BOOFOO is "composed primarily of DoD employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members or their dependents." Basically, this means an on-base organization that fundraises on base. Many organizations we are familiar with fall into this category. This could be a First Class Petty Officer's Association, a Navy Ball committee, a Spouse's Club, etc. A BOOFOO is just like any other Non-Federal Entity (NFE), but with a few important differences. According to JER 3-210.a, a BOOFOO is not subject to the logistical support restrictions, including those on fundraising, that govern regular NFEs. As you may recall, these standard provisions state that logistical support can only be granted when certain conditions are met: non-interference with mission, community relations support, willingness to support to the same level other similarly situated NFEs, no admission fees, etc. When fundraising for charity, these rules also include not fundraising for organizations on the Combined Federal Campaign list. However, BOOFOOs are simply excluded from these rules. In addition, JER 3-210.a states that DoD employees can officially endorse fundraising efforts by BOOFOOs. Finally, Executive Order 12353 and JER 2-302.a state that BOOFOOs are exempt from the CFC's restrictions on charitable fundraising, and may conduct gambling activities, when used for charitable purposes.

Clearly, there are some benefits to being a BOOFOO. However, there are also limitations. The fundraising must be done amongst the group. This is generally recognized to be amongst DoD personnel and dependents. If fundraising is done outside the group, then the organization loses its BOOFOO status for that event. Let's show these differences with two scenarios: A) a local Chief's Mess wants to raise funds for its annual party. As long as it only fundraises among DoD employees (i.e. on base) it can hold a car wash, a burger burn, and a talent show where admission is charged. It can use installation spaces, barbecues, and water for these events. The CO can endorse the events, sending all-hands emails (careful not to order people to attend!). The CO can also allow the Chief's Mess to be logistically supported in a way that other NFE's aren't – for instance, hanging posters around base. All of this is allowed. B) The Chief's Mess then decides to approach a local bar and ask for donations. When this happens, the Chief's Mess has lost its BOOFOO status for this fundraiser. The needle skips off the groove – the poker night is off, the CO's endorsement is out, the specialty logistics support is gone, and the Chief's Mess is just another NFE under JER 3-210. The moral is that BOOFOO status can be something special, but it has to be done the right way! Best practice: have every BOOFOO run its plans by the SJA's office.

MWR Special Interest Groups (SIGs)

LTJG Jennifer Maguire, Command Services Department, NAS Pensacola



The recently revised MWR instruction (CNICINST 1710.3, 14 Jun 2013) is a huge instruction that covers a wide variety of MWR topics. One thing that can be overlooked is the supplemental guidance on the operation and management of a unique type of organization: MWR Special Interest Groups (SIGs). SIGs are formed when like-minded authorized MWR patrons come together to participate in a particular recreation program that is not offered on base. While a SIG may appear to be an entity separate from MWR, due to perhaps having a separate group name or members who are also part of a Non-Federal Entity (NFE), it will not fall into the realm of NFEs or Private Organizations. As long as the group is operating as a SIG, it is still considered an MWR activity.

As mentioned above the big advantage to forming a SIG is that SIGs can provide recreational programs not otherwise offered on base, benefiting the MWR program and the military community overall. Typical SIGs include martial arts, theater, and photography groups. SIG status provides the advantage of being able to operate on base, under the MWR framework, and with limited logistical and financial support from the MWR. For example, the Diego Garcia Yacht Club (DGYC) serves the military community in Diego Garcia by offering sailing lessons, windsurfing lessons, regattas, and social events on a monthly basis. The DGYC also sells its own line of clothing and leisure items at the MWR Marina, utilizing the MWR framework.

Any recreational MWR group applying for SIG status should keep in mind that SIGs should be self-sufficient and low-risk in nature. Insurance for SIG activities should also be obtained in accordance with CNICINST 5890.1. Funding may come from user fees and, to an extent, from MWR funds. However, MWR support to any SIG, both logistical and financial, should be closely supervised to ensure that the SIG is servicing only authorized MWR activity patrons and that the ultimate goals of the MWR program are being met. As SJAs and legal officers, it is good to know that these sorts of organizations exist, as well as the rules that guide them. If you have Sailors that participate in recreational programs off base because they are not offered onboard the installation, it may be in their best interest to form a SIG. Contact your local MWR for more information. If you have questions as to whether a SIG is being run properly, contact your local SJA.

Detachment for Cause: Is it appropriate and how is it done?

LT Ingrid Paige, SJA, NAS Jacksonville

"I want this guy outta here!"

Maybe you have heard that from a CO once or twice, or said it yourself. This is a brief primer on the do's and don'ts of getting an officer removed from command or position of authority. As you will see, Detachment for Cause is not always appropriate. If it is, it is important that it be done right.

First, let's discuss the term, "Detachment for Cause" (DFC). Many people say that someone was "Detached for Cause," but they do not understand what that term really means. It is a term of art. A Detachment for Cause is a complex procedure that must be approved by the two-star Admiral at PERS. It is not a description of someone who was merely relieved from his or her position or for someone who was sent TAD to another command.

When a command calls and says they want to "DFC" someone, SJAs should find out what they mean and their desired end state. If the command just wants that person out of his or her position, they can relieve the officer and send him or her to another department or division. If they want that person out of the command, they may be able to send the officer TAD to another command. Commands do not have to request a DFC in order to remove the officer from his or her position. There is no obligation to request a DFC when an officer is alleged to have committed misconduct.

Commands have a number of options for officers who are under investigation. Starting at the bottom, they can just keep the officer in place. This would happen with low level allegations. If that is not enough, the next step would be to send the person to another division or department. If that is still not enough, they could send that person TAD to another command. And, if the allegations are extremely serious, they could confine the officer pursuant to R.C.M. 305. Commands can also utilize non-punitive options to manage an officer's problem behaviors. The range of options include informal counseling, nonpunitive letters of caution (NPLOC), letters of instruction (LOI), notations in fitness reports, removal from screening for a prestigious next position, or removal from screening for command.

You may then wonder, "When is DFC appropriate?" DFC is only appropriate when the misconduct or substandard performance is serious enough to end an officer's career. If that decision is made, go to MILPERSMAN 1611-020 as your guidebook. It takes you through the process step-by-step. The process is involved, as would be appropriate for something with such impact on an officer's career.

For what behavior can you request a DFC? You can request a DFC for misconduct, substandard performance involving one or more significant events resulting from gross negligence or complete disregard of duty, substandard performance of duty over an extended period of time if it continues to exist after corrective action has been taken, or loss of confidence in an officer in command.

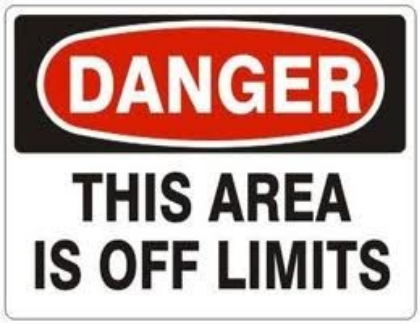
What do you have to do before initiating a DFC request? If the request is for misconduct, you should have taken disciplinary action first. It is rare for a DFC request to be approved if the command has not first taken any disciplinary action. If the request is for substandard performance of duty over an extended period of time, you would want to give counseling and guidance such as a Letter of Instruction (LOI) or a notation in his or her fitness report. You must give the officer a reasonable amount of time to improve after counseling. LOIs are encouraged not only to document the problem but to motivate the officer. LOIs can be noted in an officer's fitness report and can serve to document the command guidance given. LOIs must describe specific weaknesses, recommend suitable and reasonable measures for improvement, clearly establish the desired performance standard, and if appropriate, establish a period of time for correction. While useful in many instances, LOIs may not be appropriate for cases of misconduct, substandard performance involving a significant event, or loss of confidence.

Also, before a DFC request is initiated, the leadership must determine that reassignment within the command has been considered but is not a reasonable alternative. The command must have supporting documentation or investigation in cases where the basis is one or more significant events. When there has been an NJP or trial by court-martial and the misconduct is the sole reason for the request for DFC, the command must notify PERS following the guidance in MILPERSMAN 1611-010.

To submit the request, follow the steps on the chart on page 5 of MILPERSMAN 1611-020. Remember, the officer is not "DFC-ed" instantly upon sending the request. So, the command cannot immediately mention the DFC request in his or her fitness reports. Only after the DFC has been approved by the two-star Admiral at PERS, can the command comment on it in the officer's fitness report. To ensure that all of the steps in the DFC process are completed properly, do not hesitate to contact your local SJA when you determine that DFC may be the right course of action to take.

Reducing Threats to Sailors – The Armed Forces Disciplinary Control Board

LNC(SW/AW) Lucia Abreu, CNRSE Legal Office



The Armed Forces Disciplinary Control Board (AFDCB) was established to advise and make recommendations to commanders on matters concerning eliminating conditions, which adversely affect the health, safety, welfare, morale, and discipline of the Armed Forces. Liquor violations, alcohol and drug abuse, illicit gambling, and unfair commercial or consumer practices are just of few of the things that may require that the establishment be placed off limits.

Commander Navy Region Southeast Instruction 1620.2C establishes four Areas of Responsibility for AFDCBs within COMNAVREG SE. All installation commands are represented at the board by designated voting members. Additional non-voting key members are invited as advisors to the board such as the Staff Judge Advocate, Equal Opportunity Advisor, Public Affairs Officer, Security Officer, Command Master Chief, Chaplain, Naval Criminal Investigative Service, other law enforcement/local police liaison, and a Legal Assistance Advisor. For all area AFDCBs, the participation and feedback from installation commands, tenant commands, NCIS, and local authorities are imperative for the effective function of the board. Likewise, feedback from personnel is of great fundamental value to the mission of the AFDCB. Establishments can only be placed off limits if the AFDCB knows about them and the dangers they present to Sailors.

Below is a breakdown of COMNAVREG SE AFDCB Regional Areas:
Area 1 – Gold (NAS Jacksonville, NS Mayport, NSB Kings Bay, NOTU, NSA Orlando, NSA Charleston)
Area 2 – Green (NAS Key West, NS Guantanamo Bay)
Area 3 – Blue (NAS Pensacola, NAS Whiting Field, NS Panama City, NAS Meridian, NCBC Gulfport, NAS JRB New Orleans)
Area 4 – Red (NAS Corpus Christi, NAS Kingsville, NSA San Antonio, NAS JRB Ft. Worth)

For more information about the AFDCB, please contact your local SJA or the CNRSE legal office.

Navigating the Article 138 Complaint Process

LCDR Mary Murphy, SJA, CNATRA

For a commanding officer, receiving an Article 138 Complaint can be surprising and stressful. Article 138 of the Uniform Code of Military Justice allows for any servicemember (complainant) to make a complaint (138 Complaint) against his or her commanding officer (respondent). In a 138 Complaint, the complainant alleges the respondent has committed a wrong against him and the complaint requested redress of the wrong by the respondent and was denied redress (the redress requirement can be waived). The review authority for 138 Complaints is the first flag (General Court-Martial Convening Authority) in the complainant's chain of command above his or her CO. The GCMCA's standard of review is whether the respondent acted in an "arbitrary and capricious" manner. After the GCMCA reviews the complaint and makes his determination, he forwards it to the Secretary of the Navy via the Office of the Judge Advocate General (OJAG) Code 13. SECNAV will review the GCMCA's determination for any defects and also apply the "arbitrary and capricious" standard of review.

The easiest way to understand the 138 Complaint process is to think of the GCMCA as a civil court judge, with the complainant as the "plaintiff" and the respondent as the "defendant." As with a civil suit, there must be a cognizable wrong, and the complaint must be against the person who committed a wrong. The complainant and respondent present evidence to the GCMCA who then considers all evidence before him and makes a determination as to whether the respondent acted "arbitrarily and capriciously" which resulted in a wrong against the complainant. If the GCMCA finds in favor of the complainant, then he must determine what remedy is necessary to address the wrong. If the GCMCA finds in favor of the commanding officer, then the complainant is not entitled to remedial action.

The best way to ensure success in processing and handling 138 Complaints is to allow each party a chance to present evidence and to comply with the procedural guidelines set forth in the JAGMAN. Here is the path to success for commands and Staff Judge Advocates to follow:

1. Read Chapter Three of the JAGMAN. Read it again.
2. Print out two copies of the checklist found in the Chapter Three Appendix.
3. Contact the GCMCA's Staff Judge Advocate.
4. Send an advance copy of the complaint to OJAG's Code 13 and call them with questions.
5. Provide the complainant and the respondent all documents considered by the GCMCA.
6. Keep track of the time it takes to answer the complaint.
7. Complete the checklist; retain a copy.
8. Draft the GCMCA's letter and follow the format listed in the JAGMAN.
9. Be prepared to answer any questions that may arise when complaint is being reviewed.

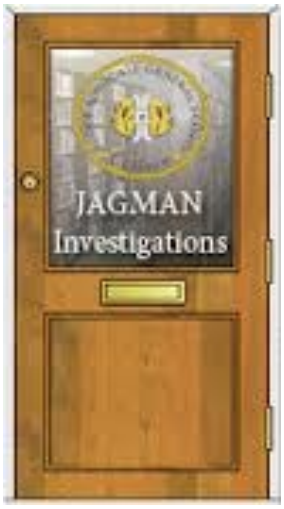
So long as you follow this path, processing the 138 Complaint should be relatively stress free. Commands should contact their SJA as soon as a 138 Complaint is received to ensure it is handled properly.

Special Considerations in Death Case Administrative Investigations

LTJG Brendan Horgan, Command Services Department, NAS Jacksonville

If a servicemember dies, whether on duty or off, the last thing a command wants to think about is paperwork. However, after the initial shock has worn off, there are administrative requirements that must be met. If servicemembers or certain Department of Defense (DoD) civilian employees die, Part F of Chapter II of the JAGMAN dictates the requirements of the subsequent administrative investigation (*See* JAGMAN 0225 through 0232). Benefits to surviving family members can be delayed if these investigations are not done right.

First, in the event of a death, a preliminary inquiry (JAGMAN 0203) will be conducted to determine whether an investigation should commence. A command investigation is required if the occurred aboard an activity under military control, the adequacy of military medical care is at issue, the death involves a probable nexus to Naval service (unless due to enemy action), or in the event of a "friendly fire" incident (JAGMAN 0226b). The command must notify Military Service Casualty Headquarters, family members of the deceased, and Naval Criminal Investigative Service (NCIS) at the commencement of the investigation (JAGMAN 0225b). If the death occurred in the context of a major incident, a board of inquiry may convene for investigative purposes (JAGMAN 0230a). NCIS must also be notified of any death occurring on Navy vessel, Navy/Marine Corps aircraft, or installation, unless the death is caused by disease or natural causes (JAGMAN 0225D).



A full command investigation is not always necessary or appropriate. If the death occurred in an area not under military control, while the member was off-duty, and the circumstances of the death had no discernible nexus to the Naval service, a limited investigation may be appropriate (JAGMAN 0226c). A limited investigation primarily involves obtaining and maintaining the investigation conducted by civilian authorities. In some cases, a medical report attached to the preliminary inquiry is sufficient. If the death occurred as a result of a known preexisting medical condition, or as the result of enemy action, no death investigation shall be conducted (JAGMAN 0226a).

Next, a line of duty (LOD) determination is made for any active duty death cases. The military LOD determination is done within the context of the investigation. The LOD determination is always made by a General Court-Martial Convening Authority (GCMCA) with an assigned JAG in accordance with JAGMAN 0215-0220. The standard of proof for any adverse LOD determination is by clear and convincing evidence (JAGMAN 0227). Prior to an adverse LOD determination being made, a Survivor Benefit Plan beneficiary must be afforded the opportunity to review the investigation. (JAGMAN 0229d(4)). In the event of an adverse LOD determination, the GCMCA must forward a copy of the investigation to PERS-62. The Chief of Naval Personnel will review all LOD determinations in death cases. (JAGMAN 0229d).

Under no circumstances is it proper to conduct a litigation-report investigation regarding a death case. Because the DON generally makes death investigations available to surviving family members, the privileged nature of a litigation-report is inappropriate. When the report is received by the GCMCA, the reviewer generally provides an advanced copy to the next of kin (JAGMAN 0225f).

In addition to the original investigator, in certain instances the Convening Authority (CA) may elect to have the report reviewed by an individual outside the CA's immediate chain of command (JAGMAN 0231a). The independent reviewer shall critically review the report from the perspective of the deceased and comment on the thoroughness of the report, the validity of the facts, and the accuracy of the report's findings. These comments must be reported within 10 days of the receipt of the investigation by the reviewer and shall be appended to the report (JAGMAN 0231c).

The timeline for a completing a death case investigation is shorter than non-death investigations. In the absence of the grant of extension for good cause by the CA, the investigation must be completed within 20 calendar days of the discovery of the death (JAGMAN 0225e). Investigations should not be delayed by waiting on documents, unless their inclusion is "absolutely essential to the completion of the investigative report." Just send the documents when they become available by separate correspondence via the review chain, referencing the original investigation (JAGMAN 0228b). Because the GCMCA may have to make a line of duty determination without some of these documents, it is crucial that the investigation is thorough.

A death investigation report gets routed in the same manner as a normal administrative investigation. However, if an investigation beyond a preliminary inquiry or limited investigation is required, a copy of the report, and a copy of each subsequent endorsement, shall be forwarded to the Echelon II Commander (JAGMAN 0232). If a Sailor at your command passes away, please contact your local SJA and he or she will be able to guide you through this process.

Privacy Act: What you need to know

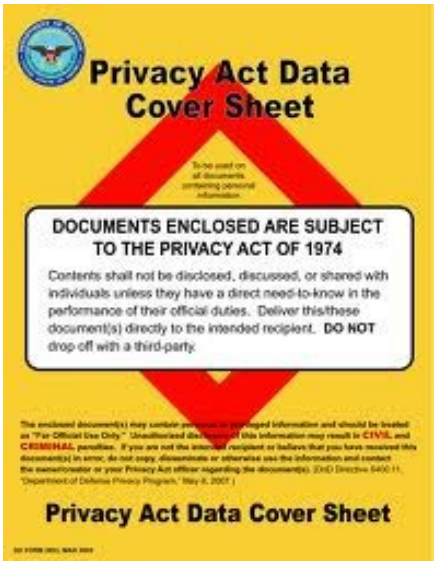
LTJG Matt Benson, Command Services Department, NS Mayport

The Privacy Act regulates the collection and use of information by government agencies. Fortunately, the Privacy Act is not concerned with *every* piece of information collected by the government; just Personally Identifiable Information (PII). We've all had training on what PII is, but you might be surprised at just how much information it includes.

Names and Social Security Numbers are the most common examples of PII. However, the Privacy Act also protects leave balances, types of leave used, home addresses, drug tests, an individual's participation in a drug rehabilitation program, telephone numbers, dates of birth, personal medical information, and much more.

Here are some basic steps to ensure you and your command do not run afoul of this information-protecting act:

1. Non-disclosure. Do not disclose the PII of any individual without a written request or prior written consent of the individual for whom the record pertains. There are twelve exceptions to this non-disclosure default, but given that you probably don't have time to read a fifty page article on the Privacy Act, my suggestion is to "consult your JAG" (or, as I like to call it, "CYJ"). For now, here are five common examples of when disclosure is permitted:



   a. Law enforcement purposes
   b. Emergent need to protect health or safety
   c. Court order asking for the info
   d. Congress or one of its committees needs it
   e. Routine use (this requires public notice in advance)

2. Safeguarding. Safeguard all PII. PII must always be treated "FOR OFFICIAL USE ONLY" and marked accordingly. In any Navy legal office, hand-carried PII is usually "marked accordingly" by placing any document containing PII into a folder, slapping a giant Privacy Act warning sign on the front (DD Form 2923 – Privacy Act Data Cover Sheet), and delivering the folder to its destination with the care and concern that one would show a newborn baby. Anyone handling PII should do the same.

In regards to email, there are three notable (and all too common!) Privacy Act violations.

First, if you've had any correspondence with a JAG or anyone else who's Privacy Act savvy, you may have noticed that below their signature block there's a paragraph warning the recipient to not disclose or forward the information therein. This is a Privacy Act compliance measure. Second, the Privacy Act also requires that any email containing PII must be encrypted. If you don't know how to encrypt your email, consult your resident IT guru. It's easy! And fun! Third, you may not send an email containing PII to your personal, home, or commercial email address.

One other important point regarding the Privacy Act and email: Observe proper Common Access Card procedures. Don't leave your computer unattended with your CAC card in it; pretty simple, but very important. Make it a habit.

3. Storing. During duty hours, PII should be covered with the very bright and very stylish Privacy Act Cover Sheet mentioned above (DD Form 2923). You should also lock your computer when leaving, even for brief periods. After duty hours, records should be placed in a locked drawer, cabinet, or office.

4. Disposing. My favorite category in regards to PII, disposing can be done in a variety of entertaining ways, such as burning, melting, pulverizing, and mutilating. The goal here is to "use any means that prevents inadvertent compromise."

Three more points to briefly mention:

   1. If you're not already collecting PII and want to start, a System of Records Notice must be filed with the Federal Register. CYJ!
   2. If an agency solicits information from an individual, a Privacy Act notice must be signed. (JAGs love these… CYJ).
   3. Report Privacy Act breaches immediately! Lost your PII folder despite the very bright Privacy Act Cover sheet? Sent an unencrypted email that should have been encrypted? The discovering command needs to report such breaches to the Department of the Navy Chief Information Officer and US Emergency Readiness Team within 1 hour! More requirements follow, but just know that such breaches are a big deal. And if you have any other questions after this information-overload? You guessed it…CYJ.

For Renters: Maximizing the Return of Your Rental Deposit

LT Courtney Gordon-Tenant, Legal Assistance Attorney, Corpus Christi Legal Assistance Office, RLSO SE

Whether you stay in the military a few years or make it a career, chances are you will be moving a few times in your lifetime. For renters, careful planning prevents heavy deductions of your deposit with your landlord after you have moved out. These tips will help you avoid common pitfalls.

Before you sign the dotted line…
First, if you are a prospective tenant, you may consider having a legal assistance attorney review your lease BEFORE you sign it. Sometimes unscrupulous landlords try to sneak in items such as waiver of your military rights through an early termination fee, they may make you responsible for some landscaping, or require you to have the carpets professionally cleaned. The last two provisions are not illegal, but the point is to be informed so you avoid unpleasant surprises with your lease obligations.

See if there is a military clause within your lease. If you sign a year-long lease, but you are moving due to military or deployment orders for at least 90 days, you may break the lease with proper written notice. Keep a copy of your lease! As soon as you get the orders, you need to provide your landlord with a copy and state that you are terminating your lease. This notice may be delivered by hand, private business carrier, or mailed, return receipt requested to the address designated by the landlord. If you have an email address for your landlord, I recommend emailing the written notice with the orders as well in case your return receipt gets misplaced during your move. Bottom line: Oral notice is insufficient and does not require the landlord to let you out of the lease.

When is the notice of termination effective?
Let's say you have a year-long lease from January 1, 2013 to December 31, 2013. Let's assume that the first day of the lease is the first day of the month. Once proper notification has been provided to the landlord, the effective date of termination for a property lease that requires monthly payments of rent is 30 days after the first date on which the next rental payment is due. If you give written notice (with your orders) on July 1st, then you will only have to pay for July; 30 days after July 1 is July 31st. But if you wait until July 2nd to give written notice, under the SCRA your notice is effective *August* 1st and you are responsible until August 31st. (This is an additional month of financial liability for just a day's delay!) Finally, don't forget about providing notice to the utility companies and paying those bills as well.

What can I do if I don't have orders?
Understand that the landlord doesn't need to legally let you out of the lease without your orders. But don't lose heart! First, see if state law offers you additional protections. Some states may allow you to break your lease with other official military documentation, such a letter from your commanding officer. If state law doesn't help, it's still worth talking to the landlord. Some are reasonable and willing to accommodate service members. But the bottom line is that they are concerned about their regular income (i.e. rent) coming in. If you are able to find a reputable tenant to replace you (*and ask the landlord for permission FIRST*), you stand a better chance of getting out of your lease. Keep in mind if this tenant defaults on the lease, the landlord may still be able to come after you for the rest of the rent. So choose wisely.

Prove how nice the rental looked when you left – take pictures!!!!
Finally, on the day you move out, take pictures of how you left your rental and email them to your landlord and yourself. If your lease requires landscaping, take pictures of this as well. Countless tenants say they left their rental in spotless condition but have no proof to back this up. Taking pictures will avoid your word against your landlord if he or she comes back with a heavy deduction from your deposit. If possible, do a walk-through with your landlord.

In conclusion, give your landlord a copy of your orders with your WRITTEN notice of termination by certified mail and/or email. If orders are not yet available, see if state law allows you to break the lease with other military documentation (i.e. a letter from your CO). Keep a copy of this along with the original lease and take pictures on the day you vacate. This proof will help you dispute allegations from your landlord. You can also request further descriptions and/or proof if the deductions are vague, or you may have to ultimately file in small claims court if the matter cannot be resolved. By following these steps, you will be better prepared and will hopefully avoid these difficulties altogether.

Protecting Tenants at Foreclosure: What you need to know if you rent your home

LT Matt Kozyra, Legal Assistance Attorney, Mayport Legal Assistance Office, RLSO SE

It is an unfortunate fact of the modern housing world that homes across the country are going into foreclosure every day. Many of these homes are rental properties, and in many cases the tenant sadly is the last one to know about it. If you rent your home and have come home to a "Notice of Sale" on your front door, or if you've started receiving court documents in the mail about your home going into foreclosure, this article is for you. Luckily, there are steps you can take to make sure you're protected against your landlord's foreclosure, and resources available to assist you and your family.

How Can I Prevent This Situation?

There are simple steps you can take to make sure the home you're about to rent is not going into foreclosure. Having this information upfront is one of the things you'll want to consider, along with location, price, and whether there's plenty of running space for your pet hedgehog when you determine which house to rent.

The first and easiest way is to ask your landlord whether his home is in foreclosure. It's a simple step to take, and there is no guarantee that your landlord will be honest with you. Many homeowners will avoid giving out that information to their tenants for fear that they (a) won't sign a lease, or (b) will stop paying rent on a lease they already have. Still, it doesn't cost anything to ask, and it's an easy early warning system for upcoming foreclosure issues.

If your landlord refuses to answer, or if you are still suspicious, you can always check your local newspapers. Foreclosure sales will be listed daily. The downside is that you have to check every listing regularly, and it will only list homes that are just about to be put up for sale. It still won't give you any notice that your landlord might be headed for trouble down the road. You can also contact your local Clerk of Court.

Too Late – I've Already Gotten the Notice!

If you start getting notifications of a pending foreclosure in the mail or on your door, you will have to decide whether you want to terminate your lease early or wait until the end of your lease. Many families want to avoid moving in the middle of a tour, but having a bank as a landlord can be a huge hassle. The bank may not care that your plumbing is broken or there are roaches in the home. They may not fix the heating, and they probably won't return your calls about the water heater. Many families decide that it's better to just find a new place to live. The decision is yours to make.

I've Decided I Want to Stay

Until recently, a foreclosure nearly always meant that the tenants were about to be evicted. That all changed in 2009, when Congress passed the Protecting Tenants at Foreclosure Act (PTFA). If you **don't** have a lease, the new homeowner is required to give you 90 days' notice before you have to move out. If you **do**, the PTFA requires the new homeowner to stick to the terms of that lease, unless the new owner wants to move into the home as her primary residence. Even then, the new owner is required to give you 90 days' notice before you are required to leave.

In order to benefit from the PTFA, you should file a Notice of Tenancy in the court that's hearing the foreclosure case. This lets the judge know that there is someone living on the property. If you are wondering whether to pay rent to the bank or to your old landlord, you can also file a Motion to Deposit Rent into the Court Registry, which will let you pay rent to the court, who will then figure out where it goes. For assistance in drafting either one of these documents, make an appointment with your local Legal Assistance office.

I've Decided I Want to Move

The PTFA does not automatically give you the right to terminate your lease if the property is foreclosed. The good news is that most banks don't want to act as landlords. Some will even offer "Cash for Keys" programs that will pay you money in exchange for you moving out. The best way to get out of your lease if the home is being foreclosed is to talk to your landlord and the bank.

If you do decide to move, the Navy is here to help. In 2008, the Department of the Navy began authorizing funded local moves for Sailors and Marines who are breaking their leases as a result of their landlord's foreclosure. You will need to bring a copy of the Notice of Foreclosure and a Notice of Lease Termination to either your command's Staff Judge Advocate (SJA) or your local Legal Assistance office to help you get the authorization you need.

That's It!

Being a tenant in a home that's being foreclosed can be stressful and confusing. If you find yourself over your head, please make an appointment with your local Legal Assistance office. We're here to help!

Sex Offender Registration

LTJG Jessica Bunkers, Trial Counsel, NAS Pensacola

While technically a collateral consequence of conviction, registration as a sex offender is a very important part of every sex offense court-martial. In the following, I will briefly describe the registration process and show why it is so important.

Who is a sex offender?
Under the federal Sex Offender Registration and Notification Act (SORNA, discussed below), a sex offender is "an individual who was convicted of a sex offense." DoDI 1325.07 lists relevant UCMJ convictions at general or special court-martial, including: Rape, Sexual Assault, Aggravated Sexual Contact, Abusive Sexual Contact, Rape of a Child (Under 12 years of age), Rape of a Child (Has attained the age of 12 but not 16), Sexual Assault of a Child, Sexual Abuse of a Child, Indecent Viewing, Visual Recording, or Broadcasting and Forcible Pandering.

Registration, Generally:
A servicemember who is convicted of the offenses listed above must register with the appropriate authorities in the jurisdiction he/she will *reside, work, or attend school* within three days of leaving confinement (or within three days of conviction, if not confined).

The convicted servicemember must be informed of, and acknowledge in writing, his/her duty to register and must inform the appropriate

Sex Offender Registration...continued

officials in the offender's stated jurisdiction of residence as soon as possible after conviction, if not confined, and prior to the prisoner's release, if confined. There may be a requirement to register as a condition of parole. The Military Clemency and Parole Board may use DD Form 2716 (Parole Acknowledgement Letter) and DD Form 2716-1 (Department of Defense Certificate of Supervised Release), for these purposes.

Sex Offender Registration and Notification Act:
SORNA was passed, "In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators…." The Act sets minimum standards for sex offender registration and notification in all fifty states, District of Columbia, five U.S. Territories and several federally recognized Indian tribes.

Federal courts have interpreted SORNA as directly imposing a duty to attempt to register if the person meets the definition of "sex offender" under SORNA. SORNA standards call for jurisdictions to register all persons who have been convicted of a tribal, territory, military, federal, or state sex offense. SORNA also allows for ease in searching for sex offenders geographically.

Registration is Local:
Generally speaking, sex offenders in the U.S. are required to register with law enforcement of any state, locality, territory, or tribe within which they reside, work, and attend school. However, every jurisdiction (meaning each state, Territory, or Tribe) makes its own determinations about who will be required to register, what information those offenders must provide, which offenders will be posted on the jurisdiction's public registry website, etc.

Almost all registration requirements in the U.S. are triggered by a conviction for a criminal offense. Most jurisdictions limit their registration and notification systems to persons convicted of sex offenses and non-parental kidnapping of a minor. To make things more complicated, some local jurisdictions include "catch-all" provisions which generally require any person convicted of an offense which is "by its nature" a sex offense to register as well.

Failure to Register:
Nearly all jurisdictions which require sex offender registration also have a criminal penalty for failure to register. Many jurisdictions hold that a failure to register is a "continuing offense," much like larceny or escape, so a person cannot be prosecuted for multiple failures to register within a given time frame. Many jurisdictions require a *mens rea* of some sort to be proven prior to permitting a person to be convicted of failure to register, while others hold it is a strict liability offense.

As you can see, registration as a sex offender can be a very serious consequence of a conviction for a sex offense. It is important to realize this in cases where a command is a convening authority for a court-martial. Sex offense registration may affect pretrial negotiations, or even the decision whether to go to trial at all. This article is just a broad overview of the sex offender registration process. If you have any questions, please contact your local trial counsel or SJA.

Recent Court-Martial Sentences in Navy Region Southeast

Courts-martial in Navy Region Southeast recently heard the following cases:

- At a special court-martial convened on board NS Mayport, a Lance Corporal was found guilty of wrongfully using cocaine. The military judge sentenced the Accused to 45 days confinement, reduction in rate to E-1, and a bad conduct discharge.

- At a special court-martial convened on board NAS Pensacola, a Seaman was found guilty of unauthorized absence, wrongfully consuming alcohol while under the age of 21, wrongfully using cocaine, and assault. The military judge sentenced the Accused to restriction for 45 days, forfeiture of $850.00 pay per month for two months, and reduction in rate to E-1.

- At a general court-martial convened on board NAS Jacksonville, a Commander was found guilty of unauthorized absence and conduct unbecoming of an officer. The military judge sentenced the Accused to three months confinement, forfeiture of all pay and allowances, and a dismissal.

- At a general court-martial convened on board NAS Jacksonville, a Seaman was found guilty of possessing drug paraphernalia, wrongfully transporting and possessing a loaded and concealed firearm onto a Navy installation without appropriate approval, possessing marijuana, possessing anabolic steroids, and distributing oxycodone. The military judge sentenced the Accused to 15 months confinement, reduction in rate to E-1, and a bad conduct discharge.

- At a special court-martial convened on board NAS Jacksonville, a Seaman was found guilty of attempting to possess drug paraphernalia and assault. The military judge sentenced the Accused to 75 days confinement and reduction in rate to E-1.

(Continued on page 13)

Recent Court-Martial Sentences...continued

- At a special court-martial convened on board NAS Jacksonville, a Seaman was found guilty of failing to obey a lawful order, false official statement, assault, adultery, and breaking restriction. The military judge sentenced the Accused to one year confinement, reduction in rate to E-1, and a bad conduct discharge.

Courts-martial in Navy Region Southeast are tried with few exceptions at NAS Jacksonville, NS Mayport, and NAS Pensacola. Therefore, the location of where a court-martial described above was convened does not necessarily correlate to the command that convened the court-martial. Adjudged sentences may be modified by pre-trial agreement or clemency.

The Advisor Puzzler—From This Issue

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Region Legal Service Office Southeast (RLSO SE) supports the operational readiness of Department of Navy assets in the Southeastern United States by providing responsive, timely and accurate legal guidance, support services and training in the areas of military justice and administrative law. RLSO SE headquarters is located onboard Naval Air Station Jacksonville, Florida, and has detachments throughout the Region and Guantanamo Bay, Cuba. RLSO SE geographic area of responsibility includes the states of Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas as well as Cuba, Puerto Rico, South America and portions of Mexico.

Navy Region Southeast Staff Judge Advocate Offices:

Commander, Navy Region Southeast	(904) 542-2133—DSN 942
CNRSE Deputy SJA	(904) 542-3904—DSN 942
Naval Air Station Jacksonville	(904) 542-2941—DSN 942
Naval Station Mayport	(904) 270-6289 x1801—DSN 270
Naval Submarine Base Kings Bay	(912) 573-4732—DSN 573
Naval Air Station Key West	(305) 293-2833—DSN 483
Naval Station Guantanamo Bay	011-53-99-4834—DSN 660
Naval Air Station Pensacola	(850) 452-4402—DSN 459
Naval Air Station Meridian	(601) 679-2340—DSN 637
Naval Construction Battalion Center Gulfport	(228) 871-2627—DSN 868
Naval Air Station Joint Reserve Base New Orleans	(504) 678-9555—DSN 678
Naval Air Station Corpus Christi	(361) 961-3569—DSN 861
Naval Air Station Fort Worth Joint Reserve Base	(817) 782-7990—DSN 739
Naval Air Station Whiting Field	(850) 623-7231—DSN 868
Chief of Naval Air Training (CNATRA)	(361) 961-3578—DSN 861
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