

The Advisor



Happy New Year

CDR Michael Holifield, CNRSE Staff Judge Advocate and Director, Command Services.

You may notice that this edition is somewhat shorter than the last. That is intentional, not a sign of laziness. Understanding that many current legal issues (e.g., DADT) seem to be changing almost daily, we've adopted the jungle warfare approach to legal advice dissemination: Faster, smaller, targeted hits are better than a delayed massed attack. Accordingly, you should be seeing a streamlined version of The Advisor on a more frequent basis. (But don't worry; like the finest jungle fighters, we will still include a crossword puzzle for your enjoyment.)

Now, something more substantive: For allegations involving sexual assault, NAVADMIN 377/10 requires

that commanding officers "consult a judge advocate before adjudicating a case." This consultation must be documented in any related close-out sitrep; that is, the sitrep must indicate by name the judge advocate consulted. This serves two purposes: First, it ensures that the NAVADMIN's requirement has been met; and, second, it protects the CO by documenting that he or she has consulted with a lawyer before disposing of such a case. (Note: This requirement to name the attorney consulted also applies to domestic violence sitreps.) Bottom line—call your lawyer. We're standing by to assist, and, to borrow the words of John "Bluto" Blutarsky, "don't cost nuthin'."

Special points of interest:

- CNRSE SJA 's and Legal Offices
- Legal updates
- Where we are now on current legal issues
- Holiday Ethics
- Test your knowledge on the crossword puzzle

New Year Brings Change in Separation Pay for PFA Failures

LT Ryan Mattina, SJA NS Mayport. On 29 December 2010, OPNAV released NAVADMIN 420/10 announcing changes in involuntary separation pay (ISP) benefits for personnel separated for PFA failure. As of 1 January 2011, such personnel have been divided into two categories. Those who fail the Body Composition Assessment (BCA) portion of any relevant PFA cycle will receive a Separation Program Designator (SPD) code of "CR" (Weight Control) and may receive one-half ISP. Those separated solely for failing the Physical Readiness Test (PRT), while passing the BCA portion of each cycle, will receive an SPD code of "FT" (Physical Standards) and are no longer eligible for ISP. Revisions to OPNAVINST 1900.4 (Separation Pay for Involuntary Separation from Active Duty) are forthcoming. Commands are reminded that pursuant to MILPERSMAN 1910-170 (Separation by Reason of PFA Failure), separation is mandatory for Sailors failing to pass 3 PFA cycles in a 4-year period. Sailors must sign a NAVPERS 1070/613 (Administrative Remarks) after their first and/or second PFA failure - those forms are automatically generated in PRIMS but must be signed by the Sailor upon failure. Separation processing for PFA failure may only occur if a Sailor violates that NAVPERS 1070/613 by failing a subsequent PFA. Many separations have been delayed for an additional PFA cycle because the Command neglected to have the Sailor sign a NAVPERS 1070/613. Don't be that Command!

Inside this issue:

ALNAV KILEAKS Guidance	2
Cracking Down on Spice	3
MDVP Banned	3
VWAP Reporting	3
Health and Comfort Inspections	4
Crossword	5

DOD WIKILEAKS GUIDANCE

Per ALNAV 055/10, DON personnel are directed not to access the WikiLeaks website to view or download the publicized classified information.

Doing so would introduce potentially classified information on unclassified networks.

There has been rumor that the information is no longer classified since it resides in the public domain. This is NOT true. Executive Order 13526, Section 1.1(4)(c) states "Classified Information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."

The subject information was neither properly nor improperly "declassified" by an appropriate authority and requires continued classification or reclassification. It is "apparently classified information" that appears to have been disclosed without appropriate review and authority. The information posted needs to be reviewed by the appropriate Original Classification Authorities (OCAs) to:

determine if it is classified, conduct damage assessments, and make a determination regarding continued classification.

Despite circumstances surrounding the WikiLeaks, all DON military, civilian, and contractor support personnel must continue to protect similar or identical information commensurate

with the level of classification assigned per SECNAV M-5510.36, until the information is assessed by the appropriate OCAs. DON personnel shall:

A. Not confirm or deny the existence of potentially classified NSI in the public domain, and report the incident per SECNAV M-5510.36, Chapter 12.

B. Not contribute to the further dissemination of potentially classified NSI on DON unclassified IT systems by accessing websites or any other internet based capability (IBC) (e.g. Twitter, Facebook, etc.) to view, copy or forward this information.

C. Ensure classified NSI is only shared with personnel with an authorized clearance, access, need to know, and only via authorized channels and systems.

D. Protect classified NSI commensurate with the level of classification assigned per SECNAV M-5510.36, until the information is declassified by the appropriate OCA.

E. Adhere to the services systems authorization access request form (SAAR; i.e., user agreement form) for the protection of information residing on DON networks.

F. Adhere to their non-disclosure agreement (SF-312) when granted a security clearance.

Please remember, Government information technology capabilities should be used to enable our war fighters, promote information sharing in defense of our homeland,

and to maximize efficiencies in operations. It should not be used as a means to harm national security through unauthorized disclosure of our information on publicly accessible websites or chat rooms.

Attempts to access the WikiLeaks site are being monitored by the OSD Computer Network Defense Service Provider (CNDSPP).

REQUESTED ACTIONS

1. Visit the Information Assurance Support Environment website and read the DoD WikiLeaks guidance, https://powhatan.iiie.disa.mil/w ebteam/content_pages/guidance.html
2. Do not attempt to access the WikiLeaks website or access WikiLeaks information using search capabilities.
3. Inform other DoD military, civilians, and contractor personnel of the DoD WikiLeaks guidance.



Cracking Down On Spice

LT Kevin Mejeur, Staff Judge Advocate, NAS Jacksonville, FL.

In the last edition of The Advisor, LT Christopher George outlined the Navy's latest efforts to combat the use of "fake pot" products, such as Spice, K2, Blaze, and Red X Dawn (hereafter referred to as "Spice products"). The products, marketed online and over-the-counter as "herbal incense" and "herbal smoking blends", consist of plant material laced with synthetic chemicals designed to mimic the effects of THC (found in Marijuana). In light of a nation-wide rise in the use of Spice products, and increased reporting on their severe negative side-effects, many States have taken action to control products containing these synthetic chemicals. Now, the Federal Government is getting in on the act.

On 24 November 2010, the Drug Enforcement Agency (DEA) announced its intent to temporarily control five prominent chemical compounds (JWH-018, JWH-073, JWH-200, CP-47,497, and cannabicyclohexanol) used for the production of Spice products, listing them under Schedule I of the Controlled Substances Act (21 U.S.C. 812). The proposed action implements the DEA's emergency authority to control unsafe, highly abused substances with no medical uses, pending further governmental action, and -once taken - could remain in effect for up to 18 months. Though the DEA did not meet its 24 December 2010 deadline for releasing the announced ruling, we anticipate release in the near future.

What does this mean for your command? Once the DEA releases its emergency ruling, the use, possession, and/or distribution of Spice products will be punishable under Article 112a of the UCMJ. In addition, all Spice-related offenses will qualify for mandatory processing under section 1910-146 (Drug Abuse) of the MILPERSMAN. Until that time, commands should continue charging the use and possession of Spice products under Article 92, UCMJ, per CNREINST 5820.1 and NAVADMIN 108/10. The use of Spice products likewise remains subject to mandatory processing under MILPERSMAN 1910-142, while administrative processing for mere possession is subject to command discretion.

MDVP—"Bath Salts" banned.

On Wednesday 26 January Florida Attorney General Pam Bondi temporarily banned the synthetic drug MDVP—commonly sold as "Bath Salts". The drug that can produce hallucinations, seizures, paranoia, increased blood pressure and kidney failure is sold at malls, convenience stores and other retail outlets.

The 90-day emergency order went into effect immediately, making it a third-degree felony—punishable by up to five years in prison—to sell or possess the drug. Indications are that legislation banning the drug will be introduced when the new session begins in March.

Commands should be on the look out for this product which is marketed, in foil packages or small jars, as Purple Rain, Ivory Wave, Pure Ivory, Vanilla Sky and Bolivian Bath amongst other names.

Sailors should be advised that deaths from this drug have been reported in Sweden, the UK and in the US.

Possession of these types of drugs should cause commands to consider Administrative separation proceedings, while use of this or any other "designer drug" is the basis for mandatory processing under MILPERSMAN 1910-142

VWAP REPORTING: IS YOUR COMMAND READY?

As you count your blessings for the new year, and prepare to count your tax refund, there is more counting to be done. OPNAVINST 5800.7A mandates this joyous time of year for reporting of DD 2700 series documents.

For most commands the DD Form 2701—Initial information for Victims and Witnesses of Crimes, is the only form required in the VWAP arena. 2701's are reportable to the Region Victim Witness Liaison through each commands Victim Witness Assistance Coordinator (VWAC) - each Unit Commander, CO and OIC is required to appoint a VWAC in writing. If your command does not have a duly appointed VWAC please contact your local SJA for guidance. You can expect your base SJA's to come knocking. Installation police, base security and all commands must report these numbers.

Other forms, including: DD Form 2702—Court-Martial Information for Victims and Witnesses of Crime; DD Form 2703—Post-Trial Information for Victims and Witnesses of Crimes; and DD Form 2704—Victim/Witness Certification and Election Concerning Inmate Status, are reported through the CO of the Naval Legal Service Command.

Finally, NAVPERSCOM reports the DD Form 2705—Victim/Witness Notification of Inmate Status relating to inmate status changes.

THE DISCOMFORT OF HEALTH AND COMFORT INSPECTIONS

By LT Christopher A. George, Staff Judge Advocate, Naval Submarine Base Kings Bay

An often forgotten arrow in the commander's quiver is the administrative inspection, popularly known as the "health and comfort" inspection. The realities of military life being what they are - barracks, ship's quarters, loaded weapons and dangerous flight decks - the administrative inspection has long been used by commanders as a tool to ensure that government property is properly cared for, living and working conditions are sanitary, and servicemembers are not in possession of prohibited items. There are many opinions regarding the proper way to conduct a health and comfort inspection. Some are tactical decisions, others are legal. To set the record straight, the legal boundaries of a proper administrative inspection are detailed here, along with some tactical considerations for the efficient conduct of an inspection. M. R. E. 313 (Inspections and inventories in the armed forces) states that evidence obtained during administrative inspections is generally admissible at trial whenever relevant. An inspection is defined as:

An examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to examination of [and for] equipment condition and function, personnel fitness for duty, sanitation, weapons and contraband.

Legally speaking, that is a pretty broad mandate for commands to work with. Leaders should be aware that an examination made for the primary purpose of obtaining evidence for court-martial is not an inspection under MRE 313. Commands cannot use administrative inspections as a subterfuge for an investigative search. Such actions will not be taken lightly by a military judge hearing a motion to suppress.

Inspectors may use reasonable aids, both natural (i.e., military working dogs) and technological. Subjects of inspection are not required to be warned beforehand.

What kind of latitude does this give leadership? They may order inspectors to examine areas under government control (offices, barracks rooms, ship's quarters) for deficiencies up to and including contraband. Any container or area, locked or unlocked, that could contain contraband may be inspected, so long as contraband is part of the official purview of the inspection.

Some myths associated with the administrative inspection process are commonly encountered. "Military working dogs can't be used in inspections!" They can. "The servicemember whose quarters are being inspected must be present!" That would be nice, but it isn't required. "You can't look for drugs and weapons in an inspection!" You may, and you should.

If you or your command are contemplating an administrative inspection, consider the following suggestions:

Have a written inspection order signed by the CO. This will help resolve for all inspectors (and any military judge) the true scope and purpose of the inspection. Contact your SJA for a draft copy.

Brief all inspectors on the legal boundaries of their inspection and the types of contraband to look out for. Not everyone knows what Spice looks like or what kinds of knives are prohibited on base.

Ensure the person ordering it stays away from the actual inspection so they can neutrally exercise their authority to grant a search authorization if required.

Make sure security personnel are standing by to take possession of contraband and they are properly briefed on the required chain of custody.
