

The Advisor



Special points of interest:

- New Instructions
- Changes in the Law
- VWAP

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

One of the great joys of being SIQ is the ability to sample the weekday afternoon television commercial fare. In between the “Learn to weld at home” and “I’m so free on my Jugger-naut adult scooter!” ads, one finds more than a few pitches from law firms. Since I don’t have mesothelioma or a need to settle with the IRS for pennies on the dollar, I usually let these commercials pass with only slight professional amusement. One catchphrase, however, is worth noting: “You have a team of lawyers working for you!” Unlike every other item on daytime television, this promise finds an analogue in RLSO SE. Our Command Services Department is comprised of sixteen attorneys, fifteen civilians and a dozen Legalmen, all focused on serving the Fleet. These professionals represent hundreds of years of combined experience and education, and mil-

lions of dollars in student loans. And we’re here for you.

My goal as Director of Command Services is to ensure every Legal Officer in our AOR has the support needed to handle any legal situation. Bottom line (albeit mid-paragraph and repeated): We’re here for you. There are few, if any, novel legal chestnuts left to crack, so chances are good that someone at RLSO SE has dealt with a problem similar to the one causing your command’s current sweat-ex. Give us a call—we’ve included an updated contact list in this issue. First, last and all consultations are free-of-charge.

Got a legal question? Put the RLSO SE Command Services Team to work for you—we’ll tell you everything you need to know. (Of course, if you need to know about the new and exciting developments in the world of hair replacement, you’ll just have to watch TV.)

DUI NJP and the adverse consequences for the Government

Taking a servicemember to mast for a DUI sounds like a no-brainer, but in a recent case ([U.S. v. Espinosa](#)) the magistrate judge threw out the federal government’s efforts to prosecute the member, for the DUI following mast, based on the due process clause of the Constitution. The judge ruled that, in waiving his right to trial by court-martial, a member’s due process right was violated when he was not informed of the potential for penalties in federal court, the potential for administrative separation and the likelihood of those events.

Of course it would be easy to say, “defense counsel advise your client,” but the problem runs deeper. A literal reading of JAGMAN 0109(d)(2) directs that NJP advice should be limited to an explanation of legal ramifications involved in the right to refuse mast.

A recent Code 20 newsletter advised defense counsel to “cover all circumstances relevant to the servicemember’s decision whether to waive the right to demand trial by court-martial.” But commands are left in the quandary of having to guess whether the servicemember’s waiver is knowing, voluntary and sufficiently aware of the consequences to ensure that cases prosecuted after mast in federal court do not suffer the same dismissal fate as [Espinosa](#).

While the JAGMAN is undergoing a revision and we can assume Code 20 (OJAG’s Criminal Law Division) will act to remedy the deficiency pointed out in [Espinosa](#), commands must be aware of the collateral consequences of decisions to take members to mast for DUI when the cases are likely to end up as federal prosecutions. SJAs and Legal Officers are advised to review both the Code 20 newsletter and [U.S. v. Espinosa](#), and commands are advised to consult with their SJAs before proceeding to NJP for DUI.

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FAMILY READINESS GROUPS: What They Are & What You Should Know

LT Ari Craig, SJA's Office Corpus Christi. The Family Readiness Group (FRG) Instruction was completely revised 31 MAR 2011 (OPNAVINST 1754.5B) in an effort to better delineate FRG roles and responsibilities. The following is a quick overview of FRG's, the command role in supporting them and a review of some of the issues related to them.

Definition & Characteristics

FRGs are private organizations which provide Sailors with tools for adjusting to Navy deployments and separations, support the flow of information from the command to its Sailors and serve as a link between the command and Sailors' families. While the close affiliation with commands helps FRGs do more good for the Sailors, it also necessitates more vigilant ethics rules navigation by Commanding Officers and SJAs. Before making any substantive decisions on command support of an FRG, the FRG Instruction should be consulted. However, a quick review of the following principles will provide a basic understanding of the Navy's policies on command support of FRGs.

Overall Command Support

The FRG Instruction encourages Command support of FRGs. As a result, FRGs are not only allowed to operate on naval installations, but individual commands are, by instruction, expected to provide limited logistical support, such as access to command spaces, use of equipment, and command representatives for FRG events. Nonetheless, COs must stop short of funding FRG events. Generally, no Navy funds

may be used for FRG social activities (i.e., providing food and beverages).

Official Volunteer Activities

COs are authorized to accept voluntary services from FRG members to assist family support programs. Such volunteers are considered to be employees of the Federal Government and must be made to adhere to the same standards of conduct as paid employees. Consequently, their participation in fundraising efforts, solicitation, or acceptance of gifts is prohibited. Official volunteers are also not authorized to drive government vehicles due to liability concerns.

FRG Use of Command Name, Seals, Logos, or Insignia

FRGs may, with the CO's approval, use the name of the command in the name of the FRG. However, the FRG's status as a private organization must be apparent and unambiguous. Therefore, FRGs may not use seals, logos, or insignia of commands on any FRG letterhead, correspondence, titles, or in association with any FRG programs, locations, or activities. In addition, printed material, websites, and electronic media must include the prominent disclaimer contained in DoD Instruction 1000.15.

Fundraising & Solicitation

This is possibly the most complicated aspects of FRGs. As private organizations, it is appropriate for FRGs to fundraise. Additionally, COs may officially endorse and approve FRG fundraising events when the fundraising occurs within command spaces and is conducted among their own members or dependents to raise money for the benefit of their own command members or dependents. However, FRGs must obtain approval of the Base CO to hold fundraisers on

base when the location is outside of unit command spaces.

While FRGs are allowed to solicit local businesses or conduct fundraising off the base, members may not solicit gifts or donations on behalf of the command or imply that the Navy officially endorses their fundraising activity. Still, it is not up to the CO to approve or disapprove of such off-base activities. Service members and civilian employees are still prohibited from soliciting donations from defense contractors, even if acting in their personal capacity as a private member of the FRG. While other members may fundraise and solicit on behalf of the FRG, official volunteers are prohibited from such activities.

Gifts

An FRG is free to accept solicited and unsolicited gifts offered in compliance with its by-laws. However, an FRG may never accept a gift on behalf of a command or the Department of the Navy. Similarly, a CO may never accept a gift on behalf of an FRG. Finally, any donation of gifts from an FRG to a command must be processed following the Navy's gift acceptance rules.

When dealing with FRG questions, your first step (as always) is to read the relevant instruction. If questions remain, don't hesitate to reach out to your local SJA

SPICE NAVADMIN—

OPTIONS FOR COMMANDS IN FOLLOWING DEA MOVE TO COMBAT SPICE

SECNAVINST 5300.28D informs commands of a significant change in the landscape in dealing with designer drugs such as spice. On 1 March 2011, the Drug Enforcement Administration (DEA) used its emergency powers to place five chemical compounds on the controlled substance list. These compounds are used to make designer drugs. The DEA's action means that the wrongful use, manufacture, distribution, importation or exportation of these chemical compounds can now be charged under UCMJ Article 112A, which increases the maximum potential punishment at courts-martial.

The United States Army Criminal Investigative Laboratory (USACIL) has the means to detect the five substances through physical evidence testing. Where commands seek to have evidence tested, they should coordinate with law enforcement to facilitate submission of evidence to the Army for testing.

Paragraph 4 of the Instruction states:

while a positive confirmation test from an approved DOD laboratory is required to charge wrongful use, manufacture, distribution, possession, importation or exportation of these five compounds under Article 112A, [this test] is not required to charge under Article 92. However, charging under either section can only be used as a basis for separation based on positive findings of an approved DOD laboratory. Non-DOD laboratory results cannot be used to separate a member under either Article.

This language may appear to be contradictory to what most practitioners and commands have known to be true in the past. Fortunately, additional language has been released to clarify the issue:

Paragraph 4 in the NAVADMIN pertains to urinalysis results. The purpose of this language was to limit the use of drug testing results to DoD labs only. In other words, a person cannot be separated based on lab results from a non-DoD approved lab. Commands have sought to send samples to other labs and then separate on the basis of those positive tests; that is prohibited under the NAVADMIN and instruction. Evidence other than a lab test, including that of possession and/or a confession, may be used as a basis for accountability action and/or separation."

The bottom line is that Commands should, when they want to test a member for these designer drugs, consult with NCIS and their JAG. What commands should not do is send samples to an independent drug lab and believe they can use the results in any proceeding.

VWAP: The continuing mission

As you breathe a sigh of relief at the passing of the CNIC directed IG inspection into VWAP, you must remember - it's not over, in fact it has just started!

It would be easy to sit back and wipe away the sweat and move on to the next hot item on your desk, but VWAP is not something you can fire and forget; now is the time to review the process and make sure it is the best it can be.

If you are the CO, OIC or Commander of a unit, do you know what VWAP is? Do you know who you appointed as your VWAC? Do you know who should be getting DD Form 2701s? The IG inspection revealed that some of these issues were unclear.

If you are the command VWAC, do you know what you are supposed to do and when? Do you know who is defined as a "victim" or a "witness"? Do you have an appointment letter? And is it filed with the VWLO? Do you know what information you are supposed to track and to whom you are supposed to report at the end of the year? Do you know to whom to go for training or advice?

Base security, Fleet and Family support, and command leadership all have a vital roll in ensuring VWAP is alive and doing its incredibly important job. If you need help setting up a program, please contact your SJA.

DADT— More shifts in the Landscape

LT Cheryl Ausband, SJA NAS Pensacola. In the ever changing and developing world of Don't Ask Don't Tell, new guidance, direction and policy is not unexpected. But a recent development in the chaplains world is worthy of note, not only because of the prospective change, but also because of the legal analysis that led to the initial announcement of the change and the political and legal response that leads us to our current position—where we started. The proposed change was to the policy on conducting same-sex marriages aboard naval installations. The policy directed that if the installation is located in a state that recognizes same-sex marriages then spaces aboard the base can be used to conduct same-sex marriage.

For a chaplain to perform a same-sex marriage he or she would first have had to agree to perform the service and have been approved to conduct civil marriages within the state. The legal analysis that supported the proposed change relates to the interplay between federal and state law, and an analysis of the act rather than the location. While the Defense of Marriage Act (DOMA) applies to the interpretation of federal law, which includes DOD and DON regulations (i.e., the rules that determine who are dependents and entitled to benefits), it does not apply to the interpretation of state law, which is what is used to determine if a marriage can be conducted.

However, DOMA remains the law of the (federal) land and legal wordsmithing is not seen as good enough reason to rewrite the law—Civics 101 tells us that is a job for Congress. So the Chief of Chaplains message has been put on hold. Chaplains have been directed to follow previous protocols and abide by the law.

As we continue to watch the evolution of the DADT policy and await the directives and instructions that flow from higher headquarters, we can expect that nuances will create additional reactions and the need for further guidance.

If any requests are received to conduct same-sex marriages, it is recommended that you consult with your local staff judge advocate to ensure an appropriate response is provided to the request.

Post Trial Processing:

New instruction for RLSOs, SJAs and LOs

COMNAVLEGSVCCOM INST 5814.1A is a major revision for post-trial processing of records of trial (ROT). The instruction updates post-trial checklists for RLSOs, SJAs and LOs for use during the post trial review process.

In the aftermath of *U.S. v. Moreno*, new and improved guidelines and checklists are necessary to ensure strict compliance with the burden the government has in processing cases after a sentence is adjudged at trial. As you may or may not know, *Moreno* creates a presumption that delay in processing is unreasonable and, unless rebutted by the government, the appellate court must assess the impact of delay on the due process rights of the accused. Appellate courts can direct relief for the appellant, including dismissal of the case.

In cases where a punitive discharge and/or confinement in excess of one year is awarded, the government

has to ensure (1) the Convening Authority takes action within 120 days after sentencing; (2) the case is docketed with the Navy-Marine Corps Court of Criminal Appeals within 30 days after the CA's action; and (3) NMCCA issues an opinion within 18 months after the case is docketed.

The new instruction checklists are aimed at improving the quality of the post-trial process while simultaneously reducing post-trial processing times. If you are reviewing a case post-trial, you must have a copy of the appropriate checklist — they must be attached to the ROT before it is sent to the CA.

Legal Officers with questions either about the *Moreno* requirements or the new checklists should contact their local SJA or trial counsel.