

The Advisor

Region Legal Service Office Southeast



CDR Mike Holifield, CNRSE SJA and Director, Command Services

Welcome to FY-12's last and best edition of The Advisor—a dozen pages chock-full of legal news you can use. The articles this round run the gamut of legal issues seen throughout the Region (which, taken together, sound oddly like an Ivy-League frat party): Alcohol and drug abuse, crashing cars, sexual assault, and improper partisan political activity. Heck, we even give you a submarine-themed crossword and an NFE two-fer. (Depending on your Greek experience, the frat-party analogy probably wanes here.) Like a 60-foot Chinese buffet—there's something for everyone.

Most topics target command leadership and legal officers; others, however, contain information relevant to all. For example, Florida's sweeping new mandatory reporting law covers everyone in the state. Broadening the obligation beyond teachers and medical professionals, the law now proscribes any Sgt Schultz-like "I zee nuthink! Nuuuthink!" response. (For readers under 40 without TV Land: Sgt Schultz was a character on "Hogan's Heroes," a 1960's comedy showcasing the mad-cap hilarity and cuddly incompetence of a Nazi-run POW camp. On a related note, I hear CBS has optioned "Abu Ghraib Follies," and is negotiating with Charlie Sheen to star.) Also of general application are the rules regarding political activities. Contrary to an admonition I once overheard delivered to a young Sailor—"Freedom of speech didn't come in your sea bag!"—servicemembers do not surrender constitutional rights when taking the oath. But that does not mean these rights are without reasonable limitations. As you'll see on page 3, a political bumper sticker is fine on base; a neon-lit billboard bolted to your Camaro's roof is not.

So—dive in; take all you want, but read all you take. And try the moo shu.

Highlights:

- New guidance on sexual assault offenses
- Political Activities Review
- All about NFEs

Contents:

Disposition of Sexual Assault Allegations	2
Political Activities Review	3
VWAP Corner	4
Non-Federal Entities	5
CNIC Guidance on NFEs	5
Strike Guidance	6
Post-Government Employment	6-7
Repair or Replacement in Kind	7
Fitness for Duty Examinations	8
Important ADSEP changes	9
Report of Officer Misconduct	9
Recent CM Sentences	10
MCM/JAGMAN Changes	10
The Advisor Puzzler	11

Florida House Bill 1355: Protection of Vulnerable Persons

LT Jesse Adams, SJA, Naval Station Mayport

In the wake of the Penn State scandal, Florida passed what's been called one of the toughest mandatory abuse reporting laws in the country. HB 1355 was created both in response to the reporting loopholes brought to light during the Penn State scandal and to clarify Florida's mandatory reporting law. The new law goes into effect on 1 October 2012.

To help protect vulnerable persons, HB 1355 provides victim assistance, institutes reporting requirements, and mandates increased penalties for violation of those reporting requirements and for various other offenses. Most notably, the legislation provides relocation assistance for victims of sexual assault through the Victim Compensation Program. A \$1.5 million, non-recurring appropriation was made for this purpose. Victims of sexual assault will be eligible for a \$1,500 one-time/\$3,000 lifetime relocation benefit if the need is confirmed by a certified rape crisis center. As with all victim compensation benefits, eligibility requires that the crime must be reported to law enforcement. Moreover, the sexual violence must have occurred in the home or in a place that would lead the victim to reasonably fear for her/his safety.

HB 1355 also mandates that everyone must report abuse, not just professionals previously specified as mandatory reporters, such as teachers and health care professionals! Florida now requires any person to report known or reasonably suspected physical or emotional abuse of a child by any adult. The bill also requires any person to report known or reasonably suspected sexual abuse of a child by any person. HB 1355 makes a failure to report a potential felony! This is a big change from most states that only require that certain specified professionals report such abuse. In fact,

(Continued on page 2)

Florida House Bill 1355... *continued*

including Florida, only 17 States and Puerto Rico require anyone to report suspected child abuse or neglect. With this change, Florida now has the strongest and only fully mandatory abuse reporting law in the country. Sailors who witness child abuse should contact the Department of Children and Family Services at their abuse hotline (800) 962-2873. Of course your command legal officer, SJA or counselor at the Fleet and Family Service Office are also available to help ensure that you appropriately report the abuse.

South Florida Sun-Sentinel:

http://articles.sun-sentinel.com/2012-06-25/news/fl-penn-state-lauren-book-0625-20120625_1_sexual-abuse-mandatory-reporters-lauren-s-kids

USA Today:

<http://www.usatoday.com/news/opinion/story/2011-11-17/reporting-child-abuse-Penn/51276066/1>

Florida Department of Education:

http://www.fldoe.org/GR/Bill_Summary/2012/1355.pdf

Florida Department of Children and Family Services:

<http://www.myflfamilies.com/contact-us>

Child Welfare Information Gateway:

http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm

National Conference of State Legislatures:

<http://www.ncsl.org/issues-research/human-services/2012-child-abuse-mandatory-reporting-bills.aspx>

Disposition of Sexual Assault Allegations: Requirements Have Changed!

LT Aubrey Charpentier, Asst. Deputy SJA, CNRSE

As of 28 June 2012, the procedure for the disposition of allegations of certain sexual offenses has changed. If you are a commanding officer below the grade of O-6, or if you are an O-6 with subordinate OICs and COs, it is extremely important that you be aware of these changes.

The Secretary of Defense has determined that not all commanding officers will have the initial authority to determine the disposition of allegations of certain sexual offenses. In order to dispose of such allegations, the commanding officer must be at least a special court-martial convening authority and possess the rank of at least Captain or Colonel. These commanding officers will be known as "sexual assault initial disposition authorities" (SA-IDAs). For these commanding officers, the procedure for dealing with allegations at their command remains the same. Those commanding officers that are not SA-IDAs must follow the procedure detailed below.

First, the commanding officer must forward the allegation of sexual assault to a SA-IDA within 30 days of receipt of the allegation. Typically, this will be the commanding officer's ISIC. Your staff judge advocate can provide a template for this. This forwarding letter includes the actions taken by the commanding officer (e.g. issued a SITREP, transferred the alleged victim, issued an MPO, placed the accused in confinement, etc.), and can optionally include a recommendation to the SA-IDA as to disposition of the case. Any NCIS reports, command investigations or police reports will be attached to the forwarding letter as enclosures.

Second, the SA-IDA will make a decision as to how the case should proceed. Options include disposition of charges (court-martial),

(Continued on page 4)

Political Activities: A Quick Review Before Election Day

LT Adam Brandon, SJA, Naval Air Station Jacksonville

As a reminder, Department of Defense Directive (DoDD) 1344.10 lays out the basic rules for political activities by members of the Armed Forces. All service members may (and should) carry out the responsibilities of citizenship. For example, a Sailor or Marine may register to vote, vote, encourage others to participate in the political process, sign petitions, attend rallies as a spectator, give money to political organizations, and put normal-sized bumper stickers on their cars.



However, military members may not engage in partisan politics or campaign for or against a political candidate. Prohibited activities include putting political signs in government housing, marching in a partisan parade, attending a political dinner or fundraiser, speaking on behalf of or against a candidate, fundraising for a party or cause, distributing partisan literature, or wearing the uniform to a political event. The bottom line is that military members are entitled to their personal political opinions, but those opinions should stay personal. Sailors and Marines should never imply that the DoD, the Department of the Navy, or an individual command is anything other than a professional, non-partisan fighting force.

A summary of the rules for political activities is below. If you have any concerns, please consult a judge advocate.

	Members of the Armed Forces on Active Duty	Members of the Armed Forces NOT on Active Duty
Promote and encourage voting	Yes	Yes
Attend partisan political club meetings	Yes, when not in uniform	Yes, when not in uniform
Serve in an official capacity of a partisan political club	No	Yes, when not in uniform and no appearance of DoD endorsement
Speak before a partisan political gathering	No	Yes, when not in uniform and no appearance of DoD endorsement
Perform any duties for a partisan political committee or candidate	No	Yes, when not in uniform and no appearance of DoD endorsement
Write a letter to the editor	Yes (may need disclaimer)	Yes (may need disclaimer)
Publish partisan political writings soliciting votes	No	Yes, when no appearance of DoD endorsement
Attend partisan fundraisers and events (merely as a spectator)	Yes, when not in uniform and no appearance of DoD endorsement	Yes, when not in uniform and no appearance of DoD endorsement
Participate in partisan fundraisers and events (more than mere spectator)	No	Yes, when not in uniform and no appearance of DoD endorsement
Contribute money to a political party or candidate	Yes	Yes
March in a partisan political parade	No	Yes, when not in uniform and no appearance of DoD endorsement

Disposition of Sexual Assault Allegations... *continued*

(Continued from page 2)



non-judicial punishment, no action, administrative action, and forwarding for disposition. The SA-IDA also has the option to return the matter to a subordinate commanding officer for action deemed appropriate by the subordinate commanding officer. If the commanding officer made a recommendation to the SA-IDA, the commanding officer is not bound by the initial recommendation he or she may have made in the forwarding letter.

The sexual offenses affected by this new policy include allegations of rape, sexual assault, forcible sodomy, and all attempts to commit these offenses. It is important to note that disposition of all collateral misconduct that may have occurred arising from or relating to the incident, whether committed by the alleged perpetrator or by the alleged victim, must be decided by the SA-IDA as well. For example, if either the alleged victim or alleged perpetrator of a sexual assault were drinking underage, the initial disposition of these allegations would also be decided by the SA-IDA, in addition to the sexual assault allegations.

It is extremely important that commanding officers work closely with their SJAs to ensure that they meet the requirements of this new policy. SJAs can assist by providing advice as well as by providing templates and drafting forwarding letters to the SA-IDA. In addition, SJAs can provide templates for SA-IDAs to use in responding to a report from their subordinate commanding officer.

VWAP: A Litany of Forms to Disseminate Knowledge and Bring VWAP to Life

LCDR Matthew Kurek, Deputy SJA, CNRSE

Knowledge is power and the Department of Defense has leveraged its overarching role in the VWAP program to ensure victims and witnesses of crime are empowered.

Section 6 of Department of Defense Instruction 1030.2, Victim and Witness Assistance Procedures sets forth the procedures for Victim and Witness Assistance. The procedures include the dissemination of information through the use of DD Forms at different stages in the military justice process. The first five forms, DD Forms 2701-2705, provide information to victims and witnesses of crime. The sixth form, DD Form 2706, collates data for forwarding to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), who is required to provide an annual report to the Department of Justice, Office of Victims of Crime.

DD Forms 2701-2706 can be found at the following link: <http://www.dtic.mil/whs/directives/infomgt/forms/dd/ddforms2500-2999.htm>.

A brief description of DD Forms 2701-2706 is found below:

- **DD Form 2701:** Initial Information for Victims and Witnesses of Crime, this form contains a plethora of information and serves as evidence the victim(s) and witness(es) has/have been notified of their statutory rights. While this form is usually provided to victims and witnesses of crime by law enforcement, this occasionally does not occur. When that happens, command Victim and Witness Assistance Coordinators (VWACs) should be prepared to provide this form to victims and witnesses of crime.
- **DD Form 2702:** Court-Martial Information for Victims and Witnesses of Crime, provides an overview of the court-martial process and discusses participation of victims and witnesses of crime.
- **DD Form 2703:** Post-Trial Information for Victims and Witnesses, provides an overview of the post-trial process.
- **DD Form 2704:** Victim/Witness Certification and Election Concerning Inmate Status, is used for victim(s) and witness(es) (who fear harm from the offender) to elect whether or not to be notified of changes in the offender's confinement status.
- **DD Form 2705:** Victim and Witness Notification of Changes in Inmate Status, is used to inform victim(s) and witness(es), who elected to be notified, of changes in the offender's confinement status.
- **DD Form 2706:** Annual Report on Victim and Witness Assistance, is used annually to collate data to forward to USD(P&R).

Only You Can Prevent Unauthorized Relations with Non-Federal Entities (and Forest Fires)

LT Jeffrey S. Marden, Deputy Staff Judge Advocate, Naval Air Station Joint Reserve Base New Orleans

The local McDonald's wants to sponsor and conduct a 5K run in an effort to fight adult obesity (HA!), and it is asking for your base to assist with logistics and manpower. What do you do?

Question One: Is the organization a non-federal entity (NFE)? DoD 5500.07-R, the Joint Ethics Regulation (JER), defines an NFE as (SPOILER ALERT!) a "self-sustaining, non-Federal person or organization, established, operated and controlled by any individual(s) acting outside the scope of any official capacity as officers, employees or agents of the Federal Governments." Translated into English, that means any group that is not part of the federal government. Commands, MWR, and the NEX and Commissary are considered part of the federal government, while CPO Messes, Wardrooms, First Class Associations, and (most) Navy Ball committees are NFEs. Here, McDonald's is clearly an NFE.

Question Two: Are the DoD participants acting in their official or personal capacities? Generally, DoD members may not officially endorse NFEs, either expressly or implicitly; in their private capacities, however, they may endorse NFEs if their actions do not imply official endorsement. For example, it would not be prudent to take a picture in uniform at a McDonald's and submit it to your local newspaper. In our hypothetical, the race occurs during the work day, so security would be acting in its official capacity. Thus, the CO may not want to permit it.

Naturally, there are exceptions to this rule. Certain NFEs have been granted preferential treatment by statute, such as the United Service Organization (USO), Combined Federal Campaign (CFC), American Red Cross, Boy and Girl Scouts, and the Navy-Marine Corps Relief Society, and thus installations may officially endorse them. In addition, organizations composed primarily of DoD employees may fundraise among their own members for the benefit of their own members (so-called "by our own, for our own," or "BOOF00s").

Additionally, bases may provide limited logistical support to an NFE if the support does not interfere with the installation's military mission, and the base is willing and able to provide similar support to similar organizations if requested. In other words, once the CO allows McDonald's to enter, Burger King and Wendy's cannot be prohibited for similar requests because that would implicitly endorse McDonald's; in other words, granting access to one may require access to all.

This article provides a very cursory review of the rules governing support to NFEs. The key take-away is that while NFEs can do good things for the Navy, it is important to be wary of any appearance of endorsement. It is therefore generally a good idea to CYA (consult your attorney) when NFEs request our support.

New CNIC Guidance Standardizes NFE Operations on Navy Installations

LN1 (SW/AW) Daniela Briceno, Naval Station Guantanamo Bay

We know them all too well, often contribute money to them, and maybe are even members of them ourselves. They are the non-federal entities (NFEs), or private organizations, that are often ubiquitous on DOD installations. In a newly released instruction on NFEs, Commander, Navy Installations Command (CNIC), recognized that NFEs perform important functions that better the quality of life of the Navy family. Importantly for commands, CNIC also standardized requirements applicable to NFEs authorized to operate on Navy installations. This article will highlight some of those requirements

With CNICINST 11000.1, CNIC has both implemented the requirements already in DODI 1000.15 (i.e., by-laws, acknowledgements of liability, delegation of management responsibilities, insurance, bans on official endorsement and use of official logos), and expanded requirements in certain areas. Some of these requirements place additional administrative burdens on NFEs, while others require action by an installation.

From a program perspective, CNIC's policy may have its greatest impact through its "term of approval" provision. In most cases, this provision limits an installation Commanding Officer's approval of an NFE to a term of 2 years. While an installation CO may adopt a more restrictive local policy, the CNIC policy will likely mean that an installation SJA will have to conduct at least biennial review of NFE operations to ensure compliance with DOD and CNIC policy. CNICINST 11000.1 also mandates that NFEs maintain meeting minutes and submit those minutes when applying for renewal to operate (or whenever requested by the CO).

Finally, in accordance with DODI 1000.15's requirement that NFEs "show responsible financial management," some NFEs are now required to maintain annual financial statements and/or conduct periodic audits. NFEs with gross annual revenue exceeding \$2,500 must maintain an annual financial statement, while those exceeding \$25,000 or \$100,000 must perform audits biennially or annually respectively.

While NFEs certainly provide socially and professionally enriching opportunities, they also often present some of the more unique command services issues. With the guidance in CNICINST 11000.1, commands can now rely on more standardized policies with respect to NFEs. For any questions, please contact your installation SJA.

Strike!

LT Alex Homme, SJA, Naval Air Station Corpus Christi

What do you do as an installation when a labor strike is threatened? This article is part “how-to,” part “lessons-learned,” and part “recap” of a recent contractor/labor dispute aboard Naval Air Station Corpus Christi.

The beginning: For us, it began with a rumor that “there’s going to be a strike starting this weekend.” Obviously, this wasn’t the ideal way or time for the command to get this information. Every contractor that works on base has a contracting officer, a person in charge of that particular contract, who should be communicating with all parties well before a strike is called. Even so, it pays to keep an ear out for rumors, because work will need to be done as soon as you hear there is potential for a strike.

Step one. In cases of contractor/labor disputes that may lead to a strike, **SECNAVINST 4200.36A** is the governing instruction. The instruction lays out the procedures for a “reserve gate,” the one and only gate where striking workers are allowed to picket, and the one and only gate where all employees of the contractor in question can enter. The CO will have to sign a letter establishing this gate, along with posting signs by all gates.



Communication is key. Most importantly, you’ll need to talk to the union representative and the contractor representative so they know which gate is the reserve gate and that all contractor employees know to use this gate. If one employee enters through the wrong gate, the entire reserve gate procedure can be thrown off. You’ll also need to gauge what the contractor wants, and make sure what they want is allowed. In our case, the contractor wanted to take pictures of the employees on strike. Issue-spotting is important: can they take pictures of the base? Will it be seen as intimidation? From where can they take pictures? As this example shows, many equities will need to be balanced when a strike occurs.

Security. The instruction allows workers an area to picket. But what if they leave that area? What if they charge the gate? What if they block traffic? Playing the “what-if” game with your security department can help determine if they are ready. In our case, a local instruction on how to deal with picketers/protesters was helpful.

Logistics: Another area with advance work to be done. If a picketer’s only access to the base is by using an access card provided by the contractor, the contractor can collect their access cards should they strike; the worker is no longer sponsored onto the base. If ID cards are taken away, you’ll need a plan to get them back when the strike is over, or when the worker returns to work. Otherwise, it can appear that the Navy is interfering with the picketer’s right to work.

Is everyone set? Make sure the rest of the base community knows a strike is happening, and knows to remain neutral and not to interfere. This is a dispute between the contractor and the union, and although it may take place on federal land, the Navy has nothing to do with it. Another important figure is your Navy Labor Advisor. This advisor is tasked in the SECNAV Instruction to advise the CO on all matters pertaining to the dispute. There is one main Navy Labor Advisor headquartered in Washington DC, along with several regional Navy Labor Advisors. The regional advisor should be up to speed on the dispute in question and able to answer the CO’s questions. Should a strike take place, the Navy Labor Advisor should be in regular communication with CO.

Hope for the best, prepare for the worst. In our case, the strike was averted at the last minute. However, if it had gone as planned, NASCC would have been ready for it, thanks to the advance planning done by all parties.

Post-Government Employment—What to Think About When You’re Getting Out

LCDR Mary Murphy, SJA, Chief of Naval Air Training

Okay, so you are thinking about leaving government service – what do you need to know? Simply put, you need to know the rules. The post-government employment rules are comprised of statutes and regulations regarding conflicts of interest, procurement, and gifts. It is important to understand these rules and the implications of these rules for all phases of the post-government employment process which includes seeking employment, terminal leave, and post-government employment. It is prudent to consult with your local Command Services Attorney or Staff Judge Advocate to better understand these rules. Some of the post-government rules have significant consequences if violated; these consequences include a possible federal conviction, jail time, or a fine.

While seeking employment, government employees should notify their chain of command when and with whom they are seeking employment. The employee has a duty to disclose all conflicts of interest to his or her employer. Seeking employment is considered a conflict of interest. The definition of “seeking employment” includes sending out resumes, interviews, and possibly networking. A government employee is prohibited by statute from taking action on a matter in which he or she has a conflict of interest; therefore, if you are seeking

(Continued on page 7)

(Continued from page 6)

employment with company X, then you may not take official action on any matter involving company X. During the seeking employment phase, a prospective employer may offer you a gift. If this happens, consult an attorney to determine if the gift can be accepted. Once two months have passed since you last heard from a prospective employer, you are no longer “seeking employment.” And if you accept an employment offer, then you are no longer seeking employment, but other rules may apply.



It is very common for government employees to start working for their new employer during terminal leave. It is important to remember that while on terminal leave, government employees are still subject to all rules and regulations that apply to government employees. Of note, government employees cannot hold civil office (any elected position) while employed by the government. Civil office will have to wait until the terminal leave period ends. More importantly, federal law prohibits officers from making any representation back to the government on behalf of a non-government entity. So, while on terminal leave, an officer should not be working as a contractor in federal workspaces. Once the terminal leave period ends, officers are free to work as contractors in federal workspaces. (This prohibition does not apply to enlisted personnel.)

At the conclusion of terminal leave, government employees are no longer considered government employees. Most of the statutes and regulations alluded to above no longer apply; however, there are a couple of statutes and regulations that still apply after government employment. The applicability of these statutes is fact-specific, and the new non-Government employer may require the new employee to obtain a “Post-Government Letter.” If an employer asks for this letter, please call your local Command Services office, so you can meet with a designated ethics counselor.

Repair or Replacement in Kind—A Commanding Officer’s Guide

LT Elan Ghazal, SJA, Naval Air Station Key West

If you’re an installation CO, the likelihood that a Sailor or civilian drives a POV into a fence, building, or some other government property during your tenure is high. Your first questions will likely be “How can I fix the damage quickly, and who will pay for it?” Typically, the quickest, cheapest (for the command), and easiest way to get this repair made is through “repair or replacement in kind.”

“Repair or replacement in kind” (JAGINST 5890.1A, Enclosure 7) allows the CO to accept the repair or replacement in kind of property in lieu of payment of a claim. When pursuing this course of action, however, a command must be careful not to speak of money! A command does not have the ability to assert a claim or collect money. Repair or replacement in kind is not a claim. If you provide an insurance company with an estimate of damages or accept any money as payment for those damages, you have asserted a claim.



To effect repair or replacement in kind, you should contact the Sailor or civilian’s insurance company to see if they would like to hire a contractor to repair the damaged property. The insurance company must pay the contractor directly. (*Direct payment is key. No money can exchange hands between the government and the insurance company.*) The insurance company will usually have a list of preferred repair shops in the area, will get an estimate from the repair firm, authorize them to do the repairs and then pay the repair firm directly after the repairs are completed. The insurance company may ask the command to sign a release. The CO is authorized to sign the release, but should not sign it until he is absolutely certain all repairs are done to his satisfaction. After executing the release, no additional funds for repair may be requested or collected.

This will unfortunately not work in every situation. If the Sailor or civilian does not have insurance, he is unlikely to have adequate funds to pay for the repair or replacement in kind. For situations like these, you will need to pursue an affirmative claim with a Litigation Report or hope restitution may be pursued in the course of a criminal proceeding (i.e. for a DUI, trespass, etc.). These latter options cannot guarantee reimbursement.

If this happens to you, please consult with a judge advocate. Though a judge advocate is not technically required for repair or replacement in kind, the procedure must be strictly followed to avoid improperly asserting a claim. Your SJA will be able to help make sure the procedure is followed, and provide assistance if this procedure cannot be used in your particular situation.

Commanding Officer's Guide to Fitness for Duty Examinations

LT Jessica Burrell, SJA, Naval Submarine Base Kings Bay

Commanding Officers must ensure the security, military fitness, and good order and discipline of the units they command. When a Commanding Officer questions a servicemember's competency to stand duty, operate a motor vehicle, or perform other functions, where should he turn? While the best answer is always to reach out to the SJA, there are other tools at a Commanding Officer's disposal. A key tool often relied upon is urinalysis testing to determine "Fitness for Duty."

Commanding Officers are authorized to utilize Fitness for Duty testing only under very specific circumstances. Per Enclosure (2) paragraph 4 (e) of OPNAVINST 5350.4D, there are three categories of Fitness for Duty Testing: (1) Command-directed tests; (2) Mishap Investigation Tests; and (3) Medical Examinations. It's important to note that once the Commanding Officer orders the urinalysis test, there are limited things he can do with a positive result.

COMMAND-DIRECTED TESTS:



Command-directed urinalysis is appropriate whenever a member's behavior, conduct, or involvement in an accident or other incident gives rise to a reasonable suspicion of drug abuse. While a consensual sample should be sought, if the member refuses to provide one a probable cause test may be conducted – provided there is sufficient probable cause to suspect drug use. Reasonable suspicion may exist when a member is involved in:

- (a) A serious accident/incident in which unusually careless acts were performed;
- (b) A motor vehicle offense involving excessive speed, loss of control of vehicle, reckless driving, or driving under the influence of alcohol;
- (c) Fights, assaults, disorderly conduct, disrespect to superiors, willful disobedience of orders, and similar incidents of misconduct;
- (d) Bizarre, unusual, or irregular behavior; or
- (e) Alcohol abuse treatment.

MISHAP INVESTIGATION TESTS:

Mishap Investigation urinalysis testing may be ordered in connection with any formally convened mishap or safety investigation.

MEDICAL EXAMINATIONS:

Medical Examinations are conducted by medical department personnel under the guidance of BUMEDINST 6120.2C. While the instruction states that most competence for duty examinations require clinical observation alone, medical personnel may assist in drawing samples subject to the restrictions summarized below from paragraph 4(d):

- (a) Medical personnel shall not assist in the taking of samples of bodily fluids against a person's will except when a valid search warrant/command authorization has been issued, or when law enforcement officials indicate that a warrant or command authorization is not required.
- (b) Medical personnel shall not assist in acquiring evidence solely for the purpose of enforcing or executing local, state, or Federal civil laws. However, medical assistance under the traffic safety program (OPNAVINST 11200.5D) or offenses committed under the Uniform Code of Military Justice may be permitted.
- (c) Samples of bodily fluid shall not be taken if, in the opinion of the physician, doing so would endanger the life of the patient.

POSITIVE RESULT – NOW WHAT?

While a Commanding Officer may order urinalysis testing in the above circumstances, there are limitations on the use of the test results. Positive results of urinalysis testing require processing of the servicemember for Administrative Separation and may result in loss of clearance eligibility. The results may not be used for punitive action against the member or as the basis for an unfavorable characterization of service on separation, unless the result is used to impeach or rebut evidence first introduced by the servicemember regarding drug abuse.

As always the Commanding Officer's SJA should be the first line of defense to ensure not only that the rights of servicemembers are safeguarded but also that the command can make appropriate use of any results obtained.

Two Important Changes to Enlisted ADSEPs

LCDR Bill Lucier, SJA, Naval Construction Battalion Center Gulfport

Change 3 (30 Sep 11) to DOD Instruction 1332.14, Enlisted Administrative Separations, contains two important changes. The first change addresses post traumatic stress disorder (PTSD) and traumatic brain injury (TBI). The second change addresses fit for duty determinations.

PTSD & TBI:

MILPERSMAN 1910-702 discusses the procedure to follow if a Sailor is diagnosed with PTSD or TBI. That procedure remains valid for separations with Honorable or General characterizations of service. However, before an Other Than Honorable (OTH) characterization can be authorized, additional steps must be taken and MILPERSMAN 1910-702 para 1.a.(3) conflicts with the above mentioned DOD instruction. Since the DOD instruction is the controlling authority, it must be followed. For cases where the Sailor receives an OTH characterization of service and is either diagnosed with PTSD/TBI or the Sailor *reasonably alleges* that he or she is affected by PTSD/TBI, the revised DOD instruction requires that the Sailor receive an actual medical exam (not just a medical record review). The purpose of the medical exam is to determine whether the effects of PTSD/TBI constitute matters in extenuation with regard to the basis of separation or to the overall characterization.

Additionally, the revised DOD instruction addresses who must administer this medical exam. For cases involving PTSD, a clinical psychologist or psychiatrist must perform the exam. For cases involving TBI, the exam may be performed by a physician, clinical psychologist, psychiatrist, or other health-care professional, as appropriate. If the examiner determines that PTSD/TBI may be a contributing factor, the separation authority will be the Chief of Naval Personnel or higher authority.

Fit For Duty:

The second change involves Sailors who've been through a Physical Evaluation Board (PEB) and have been found fit for duty. In the past, Sailors who were found fit for duty by a PEB could still be discharged if they were unsuitable for deployment or worldwide assignment. After the revision, these Sailors cannot be discharged for unsuitability for deployment or worldwide assignment based on the same medical condition that was the subject of their PEB, unless the separation is approved by the Secretary of Defense. The Secretary of the Navy may direct the PEB to reevaluate the Sailor if he believes that the Sailor is unsuitable for naval service. In addition to discharge protection, Sailors cannot be denied the opportunity to reenlist based on the same medical condition that was the subject of a PEB that found them fit for duty.

If you have any questions regarding the revision to DOD Instruction 1332.14, please contact the Command Services Department at your local RLSO.

Reporting Officer Misconduct to PERS

MILPERSMAN 1611-010 establishes when commands **must** notify Navy Personnel Command (PERS) of cases involving officer misconduct.

- **Courts-martial:** When court-martial charges have been preferred against an officer, the CO must send a copy of the charges and specifications with explanatory information to PERS-834.

- **NJP:** When a final decision is made to impose NJP on an officer, the command must notify PERS-834. If a recommendation is to be made to detach for cause, then notify PERS-4 as well.

- **Civil offenses:** Where an officer has been arrested in connection with, or charged with, a civil offense which would constitute an offense if charged under the UCMJ, the CO should report initial pertinent information to PERS-834 by e-mail. This includes drunk, impaired, or reckless driving.

- **Any matter requiring action by PERS:** Commands should notify PERS-834 of incidents involving officer performance, conduct which may be of widespread public interest, or those which will require action by PERS concerning the officer's status. This category includes substantiated FAP cases.

Commands that do not report officer misconduct may violate Navy regulations and policy. Non-reporting commands also assume a great deal of risk. Article 138 complaints, IG investigations, and FOIA requests give outsiders the tools to discover whether your command treats officer misconduct seriously. If you have a question regarding whether to contact PERS, please contact the Command Services Department at your local RLSO



Recent Court-Martial Sentences in Navy Region Southeast

General Courts-Martial:

- At a General Court-Martial convened on board NAS Jacksonville, an Airman pled guilty to engaging in a sexual act with a person substantially incapacitated. The Military Judge sentenced the Accused to four years of confinement, reduction in rate to E-1, and a Dishonorable Discharge.
- At a General Court-Martial convened on board NAS Jacksonville, a Second Class Petty Officer pled guilty to orders violations relating to a prisoner, while serving as a brig guard. The Military Judge sentenced the Accused to three years of confinement, reduction in rate to E-1, and a Dishonorable Discharge.
- At a General Court-Martial convened on board NAS Jacksonville, a Petty Officer Third Class pled guilty to making a false official statement and was found guilty of engaging in a sexual act with a person substantially incapacitated. The court-martial sentenced the Accused to two years of confinement, reduction in rate to E-1, and a Dishonorable Discharge.



Special Court-Martial:

- At a Special Court-Martial convened on board NAS Jacksonville, a Seaman Apprentice pled guilty to wrongfully using Spice, sending a lewd picture to a minor, and receiving and possessing child pornography. The court-martial adjudged a sentence of eleven months confinement, reduction in rate to E-1, forfeiture of \$994.00 per month for eleven months, and a Bad Conduct Discharge.
- At a Special Court-Martial convened on board NAS Jacksonville, a Petty Officer Second Class was found guilty of improperly accessing medical records. The court-martial imposed no punishment in addition to the conviction itself

NOTE: 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.

MCM and JAGMAN Changes—Important Links Below!

In the last few months, the two major references for Naval legal issues have changed. New versions of the MCM and JAGMAN are in effect.

First, the current Manual for Courts-Martial is now the 2012 edition. Hard copies should be coming soon, but until then, it can be accessed at the following site: <http://www.jag.navy.mil/documents/mcm2012.pdf>.

Important changes include a complete revamping of UCMJ Article 120 for sexual offenses. Appendix 27 and Appendix 28 include the previous versions of Article 120 in the event that the alleged offense was committed prior to 28 June 2012. In addition, there is now an Article 134 charge specifically for Child Pornography, as well as a Victim-Victim Advocate Privilege that can be asserted at trial.

Second, the Manual of the Judge Advocate General (JAGMAN) has undergone a complete revision. The new version is located at: <http://www.jag.navy.mil/library/instructions/JAGMAN2012.pdf>.

For commands, one of the most important changes is a complete revision of Chapter 2. When appointing an investigating officer for a preliminary inquiry, a command investigation, or a line of duty determination, it is important that the investigating officer re-read this chapter before conducting her investigation. Because of these changes, there have been changes to the forms in this chapter as well. Another important change is the fact that Commanding Officers and OICs can defer the execution of restriction for a reasonable period of time (not to exceed 15 days) when adequate facilities are not available or when the exigencies of the service require it.

As always, if you have questions about these changes, please contact your SJA.