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March 2013

The Advisor

Region Legal Service Office Southeast

CDR Mike Holifield, CNRSE SJA and Director, Command Services

Like the universe and the average American's waistline, *The Advisor* continues to expand at a phenomenal rate. In this issue we bring you no less than fifteen articles on legal issues critical to the fleet—yet still find room for the now traditional and eagerly awaited crossword puzzle. In fact, this edition is so immense that it may intimidate the casual reader. Accordingly, I've summarized a few of the articles for the faint of heart (or short of time):

-The fact that Washington and Colorado have legalized marijuana use does not mean Sailors are free to light up in those states. These changes in state law in no way diminish the Navy's clear, zero-tolerance policy, any more than a Brainerd, Minnesota ordinance requiring every man to grow a beard provides justification for Sailors to ignore the uniform regs. (*Ya, you betcha.*)

-Gambling on March Madness is wrong. Doing so while using synthetic marijuana only makes it worse. Forcing someone to gamble on March Madness while using Spice as a form of hazing is right out. And using the term "March Madness" without acknowledging its copyrighted status is beyond the pale.

-Military justice issues, like dead fish and teen-heartthrob pop-star careers, rarely improve with time. Consult the RLSO SE Trial Shop early and often to resolve such issues with all deliberate speed. Speaking of "deliberate speed"…congressional inquiries require a response (interim or final) within specific timelines. Failing to meet these requirements shows a lack of respect for the legislative branch—this can lead to nothing good.

I trust this aperitif has whetted your appetite for more. Grab a big ol' heapin' helpin', find a comfy chair, sit back and enjoy.

Highlights:

- Hand-Held Alcohol Detection Devices
- Courts-Martial 101
- March Madness

Contents:

Auxiliary Resale Outlets (AROs)

LT Adam Brandon, Command Judge Advocate, Naval Air Station Jacksonville

Auxiliary Resale Outlets (AROs) provide food and beverage services to Sailors in need of a quick meal when the Galley or the NEX is either not open or far away from their worksite. While AROs are convenient, they must be carefully managed so as not to result in legal or ethical issues, or compete with installation MWRs. This article summarizes the requirements of OPNAVINST 4060.4C, the primary instruction that governs how AROs should be operated.

To establish an ARO, a command should request approval from Commander, Navy Installations Command (CNIC) (N9) via the installation commanding officer and Commander, Navy Region Southeast. A template for this request is available in OPNAVINST 4060.4C. The request letter and the approval from CNIC should be kept on file with both the command as well as the installation Staff Judge Advocate.

Once approved, an ARO may sell limited food and beverage items to its Sailors, including non-alcoholic hot and cold beverages, commercially packaged donuts and pastries, and commercially prepared and packed snack items and sandwiches. An ARO may also offer plaques, ball caps, and decals with the insignia of the ARO's command. However, AROs may not sell alcohol or food items that require cooking or assembly (e.g., hamburgers, hot dogs, or deli sandwiches).[1]

To stock its inventory, an ARO must buy from the local NEX or a list of approved vendors that can be obtained from the NEX. Your NEX should be flexible and will likely be willing to purchase any items that your ARO would like to sell, even if not normally stocked. Aside from being required, purchasing from the NEX is good for two reasons. First, buying from the NEX benefits an ARO because, as a general rule, the NEX sells to AROs at 10% less than the NEX price. This allows an ARO to make a small

(Continued on page 2)

AROs...*continued*

profit on the items it sells, even if they are sold at the same price as the NEX. This arrangement also benefits the installation MWR because about one-third of a local NEX's profits go to installation MWRs.

Potentially serious legal and ethical issues can occur when an ARO does not buy from the NEX or an approved vendor. Sailors should never use a government vehicle to go shopping, and they should also not use a government credit card to purchase items from an unapproved vendor. In addition, Sailors should not seek to buy items tax-free from unapproved outlets. In other words, if you want to buy items tax-free, then buy from the NEX.

Since most AROs will make a profit from their sales, net income may (at the installation CO's discretion) be used to benefit the unit MWR fund. By instruction, an ARO's profits should be allocated either to the equipment needs of the ARO or in support of the "collective general welfare" of the personnel assigned to the unit operating the ARO. Nonetheless, Navy directives also require that AROs not be run in such a manner as to compete with the installation MWR.

To staff an ARO, a command may assign active duty military to perform AROs on a collateral duty basis only. Military personnel may also be hired to work in an off-duty capacity (subject to NAF personnel policies and procedures).

For accountability purposes, AROs should be inspected annually. These audits are the responsibility of the unit commander and the installation Commanding Officer. An ARO should maintain records of its income, expenses, cash funds/receipts, sales, procurements, disbursements, payroll, and merchandise inventory. The ARO should close out accounts at the end of each month and reconcile the records. OPNAVINST 4060.4C also requires AROs to purchase and maintain insurance to protect the United States Government and the ARO's command from third party claims.

If you have any concerns about how your command's ARO, please review OPNAVINST 4060.4C and contact your installation Staff Judge Advocate. Your SJA will be happy to ensure that your ARO is able to both benefit your Sailors and operate legally and ethically.

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[1] Please note that AROs are not the same as MWR fundraisers. MWR fundraisers may sell items that require cooking provided that these fundraisers are infrequent. In contrast, an ARO may continuously sell its packaged goods.

Where the DoD is NOT Going Green

LT Elan Ghazal, SJA, Naval Air Station Key West

On 4 FEB 2013, the Office of the Assistant Secretary of Defense for Readiness and Force Management issued a memorandum titled, "Prohibition on the Use of Marijuana by Military Service Members and Department of Defense (DoD) Civilian Employees." The memorandum reaffirms the categorical prohibition of marijuana use, possession, and distribution by uniformed and civilian members of the Department of Defense in all locations.

This past fall, voters in Washington and Colorado legalized the recreational use of marijuana – the first two states to do so. Of course, this follows a trend among states to ease laws against marijuana. In 1996, California became the first state to legalize the medical use of marijuana. Since then, 17 more states (Alaska, Arizona, Connecticut, Colorado, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Washington, and Vermont) and the District of Columbia enacted similar laws. At the Federal level, however, marijuana remains classified as a Schedule I substance under the Controlled Substances Act.

You may ask why Federal law matters if the state in which you reside legalized the recreational or medical use of marijuana. The answer is because Federal law supersedes State, District, and Territorial legislation. Though a State, District, or Territory may not pursue criminal charges against a Department of Defense employee, the United States Attorney or a commanding officer may. Legislative initiatives of the States, District, or Territories are not binding on the military in the administration of military justice under Chapter 47 of title 10, the Uniform Code of Military Justice (UCMJ). In the same vein, DoD civilian employees remain subject to restrictions governing drug use contained in DoD Instruction 1010.09 and applicable Department of Health and Human Services, Substance Abuse and Mental Health Services Administration Guidelines.

Military personnel who use, possess, or distribute marijuana, regardless of their location, remain subject to prosecution and adverse administrative action under Article 112a of the UCMJ and the 1910 series of the Military Personnel Manual (MILPERSMAN). Civilian employees could face written reprimand, suspension, or removal from service. State, District, or Territorial law is not a defense. So while you continue your employment in DoD, continue to say no to marijuana!

Should you have any questions on this topic, please contact your Staff Judge Advocate or Office of General Counsel attorney.

Hand-Held Alcohol Detection Devices and You

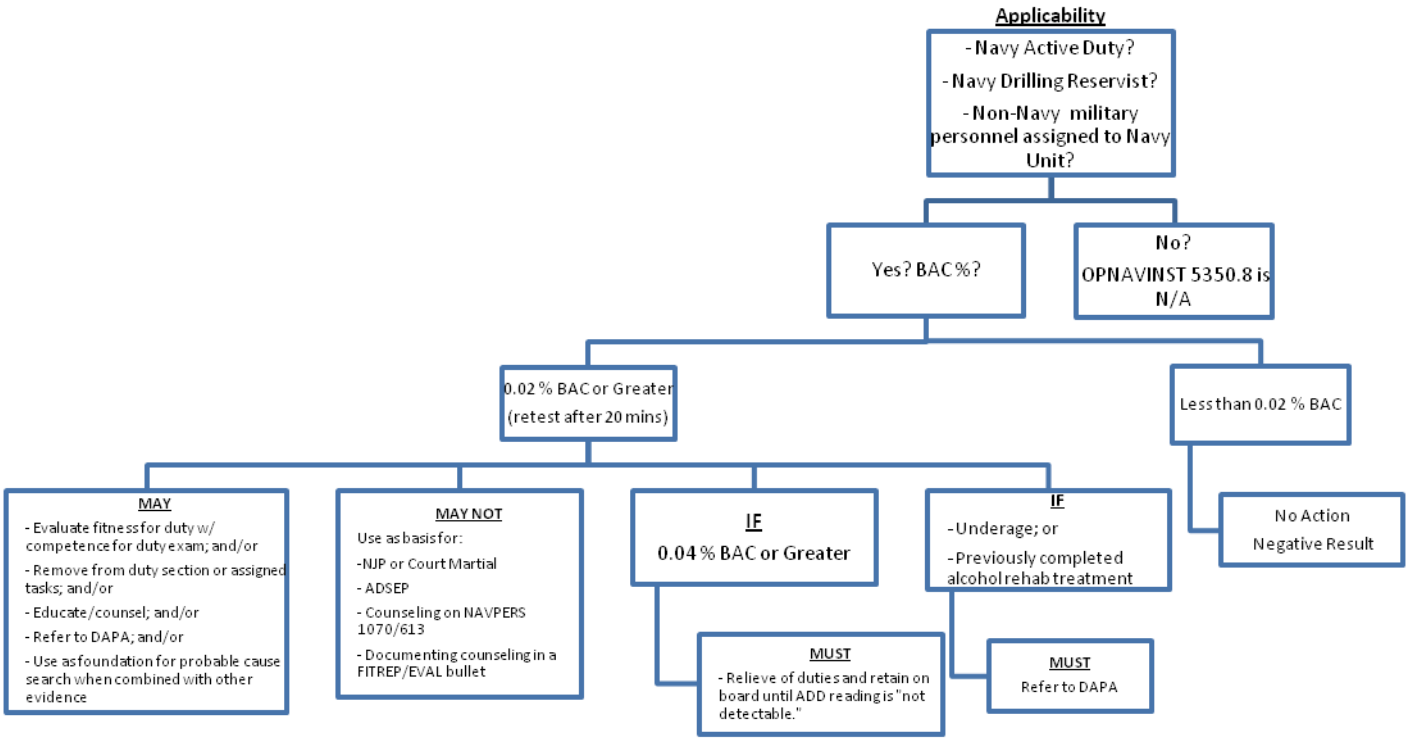
LT Jesse Adams, SJA, Naval Station Mayport

So, what actions can commanders take if their Sailors register a positive Alcohol Detection Device (ADD) result? NAVADMIN 012/13 and OPNAVINST 5350.8 state that actions should mainly focus on training, counseling and education. There are some actions that need to be taken, however. If a Sailor's blood alcohol concentration (BAC) is greater than 0.04 percent, it is presumed that the Sailor is not able of safely performing his or her duties and shall be relieved of these duties and retained on board until the alcohol level is undetectable (below 0.02 percent). Sailors under the legal drinking age with a BAC above 0.02 percent shall be referred to the drug and alcohol program advisor (DAPA). A flow chart explaining the process is located below.

The NAVADMIN also states that ADD results may be used to refer the Sailor to the DAPA or Navy's alcohol abuse prevention program. However, command referrals are not considered "alcohol-related incidents," and a positive breathalyzer result cannot be documented in a Sailor's record. Commanders should still note that if they refer a Sailor to DAPA based on a positive ADD result, and the Sailor subsequently fails the DAPA treatment program, the command may initiate administrative separation processing based on the treatment failure per OPNAVINST 5350.4D.

In addition, OPNAVINST 5350.8 states that a positive ADD result can be a basis for a competence for duty examination or a probable cause search when considered along with "other evidence" of intoxication such as a Sailor's manner, disposition, speech, general appearance, etc. In other words, no disciplinary action can be based on a positive ADD result *alone*. However, *taken together with other factors*, the breathalyzer results may be a basis for a probable cause search. Disciplinary action may be taken if the subsequent search yields evidence of wrongdoing independent from the breathalyzer results.

It is important to note that regardless of the action ultimately taken by the command, the instructions state that the new ADD testing must be random, such as in a unit or sub-unit sweep. Other parameters for administration of the ADD testing can be found within OPNAVINST 5350.8. The rollout of ADDs began on 4 February and is expected to be distributed Navy-wide by the end of May.



Defusing a Delicate Situation: A Basic Primer on MPOs

LT Alex Homme, SJA, Naval Air Station Corpus Christi

It's the call that no one wants to get, but unfortunately is all too common: an allegation of domestic abuse by one of your Sailors. Following an allegation of this kind, one of the first considerations for a command is whether to issue a Military Protective Order (MPO), and what the MPO should say. This article is intended to serve as a quick guide on this subject.

DOD Instruction 6400.06 (2007 with CH-1 in 2011) states that it is DOD policy to provide for the safety of victims and coordinate the response to domestic abuse with the local community. Commanding officers are specifically directed to respond to reports of domestic abuse and ensure that victims are informed of services available. A whole host of required responses, from VWAP forms to notifying FAP staff, follow an allegation of domestic abuse. MPOs are discussed in section 6.1.2 of the instruction.

MPO or Not?

DODI 6400.06 states that MPOs shall be issued when necessary to safeguard a victim, quell a disturbance, or maintain good order and discipline. An MPO is an order to a military member, enforceable under Article 90 or 92, to prohibit the member from contacting or communicating with the protected person or their family. An MPO can be issued even if a civilian protective order has also been issued.

The CO has discretion to determine if the facts warrant the issuance of the MPO. The facts may come in any form, written or not. As long as the CO believes an MPO is appropriate, he or she may base the decision on any available facts. That being said, as in any other determination, the credibility of the facts is very important, and is required to be considered under DODI 6400.06.

There may be situations where credible allegations of domestic abuse do *not* warrant an MPO – for instance, if the alleged victim is out of state and the circumstances don't otherwise warrant an MPO. Situations such as these will be rare. Credible reports of domestic or child abuse will likely warrant an MPO. Because an MPO can be rescinded or modified later based on new information, an initial reaction to issue an MPO is usually the safest course.

Terms

An MPO can be issued orally if needed, but a written order should follow as soon as possible. DD Form 2873 *may* be utilized, but is not required. The DD Form is a good place to start in looking for appropriate terms/conditions in any case. Local practice and ease of use may dictate using letter format. This is acceptable, as long as the terms/conditions are clearly annotated. In addition, the MPO must be tailored to meet the specific needs of the individual case. Often, a blanket prohibition on contact, direct or indirect, is appropriate. However, in some cases it may not be – for instance, if the husband must return home to pick up uniforms and the wife will be there. (In such a case, a CO can include a requirement in the MPO that the Sailor be accompanied by a senior enlisted or officer escort.) Regarding the duration of the MPO, some factors to consider: what is necessary to protect the victim? Is there evidence that more violence may occur in the absence of an MPO? What kind of abuse is alleged? Will there be criminal charges (NJP/Court-Martial/civilian) following the allegations? 30 days is often a good starting point in terms of duration. However, circumstances may dictate a longer or shorter period. It is always important to look at all available information in making this decision.

Much is left to the CO's discretion regarding MPOs. However, it will often behoove the CO to be quick on the draw in their issuance. Consider the facts of the case, from whatever source they come, and make a determination of credibility in consultation with your Staff Judge Advocate. Tailor the order to the situation and protect the victims. While this is required by the DOD policy, it can also help defuse otherwise volatile situations on your installation and potentially prevent future violence.

Synthetic Drugs Awareness Campaign

LT Aubrey Charpentier, Asst. Deputy SJA, CNRSE

Since the beginning of 2013, the Crime Reduction Program (CRP) has focused its efforts on the use of synthetic drugs in the Navy and Marine Corps. While we may normally think of the Naval Criminal Investigative Service (NCIS) as only investigating crimes that have occurred, the CRP is a way for the NCIS, along with the Office of the Judge Advocate General, the Family Advocacy Program, the Chaplain Corps and others, to proactively fight crime affecting the naval community.

Synthetic drugs include spice and bath salts. The CRP campaign has utilized the message: "It's not legal. It's not healthy. It's not worth it." In addition to preventing synthetic drug use, the campaign is also focused on bystander involvement and intervention. One thing your Sailors may not know is that NCIS has a Text & Web Tip Line if they wish to remain anonymous. Simply text 274637, and add "NCIS" to the beginning of the text message. NCIS representatives are available to provide synthetic drug awareness briefings. Contact your local NCIS field office, or go to www.ncis.navy.mil, for more information about this campaign.

Courts-Martial 101

LT Bradley Meyer, RLSO SE Trial Services Office

As we talked about in the last issue of the Advisor, when the decision is made to take a Sailor to court-martial, you will receive the assistance of trial counsel to help you every step of the way. The Navy is fortunate to have a well-equipped and capable court-martial process to handle the disappointing reality of Sailor misconduct. Although we lawyer-types love to complicate things (think: job security), at its root the court-martial process is just a set of simple steps that must be followed to ensure your Sailor gets his day in court. This article seeks to briefly explain the process of a court-martial with as little legal jargon as possible to help you more fully understand the process.

There are three major triggers in the court-martial process. First is the Sailor's misconduct, which naturally initiates an investigation. The second trigger is what's called "preferral," which is the equivalent of charging the sailor with the crime(s) committed. The third and final trigger is "referral," which is the assignment of a court and jury to handle the case.

Trial counsel's review of an investigation into misconduct will determine which articles of the UCMJ have been violated. Trial counsel will discuss with the convening authority the proposed charges, often through the SJA or legal officer. Once a final version of the charge sheet is completed, trial counsel will proceed with preferral. Preferral is simply the process where an "accuser" (typically a RLSO SE Legalman) signs and swears to charges on the charge sheet, thereby charging the Sailor who allegedly committed the misconduct. This Sailor will now be known as the "accused." Upon preferral, the accused will be detailed a defense counsel by the local Defense Service Office.

Preferral sets several wheels into motion. Most pressing to trial counsel is what's called the "707" clock (for Rule for Courts-Martial 707), which requires that the accused be brought to trial within 120 days of preferral. (NOTE: This clock can also start with pretrial confinement, so it is important to involve your SJA as soon as possible when deciding that one of your Sailors should enter pretrial confinement.) An important consideration at this point will be whether the convening authority (the commanding officer with jurisdiction over the Sailor in question) refers the charges to special court-martial (the equivalent of a misdemeanor civilian court – maximum punishment of 1 year, forfeiture of 2/3 pay, and a bad conduct discharge) or general court-martial (felony-level court – punishment is limited only by the maximum punishment listed in the UCMJ).

In order to refer charges, there must exist a court-martial to which to refer them. Accordingly, *before referral of charges*, the convening authority will need to draft a convening order. The convening order is a document which identifies and directs the officers (or, in some cases, enlisted personnel) to sit as members (jury) of a court-martial. A new order should be established each calendar year. While trial counsel may advise about the requirement for a convening order, they may have no part in the choosing of members, so it is imperative that your legal officer works with the SJA to create a convening order prior to referral of charges, discussed below.

Once the convening order is drafted, charges may be referred. Depending on the level of crime alleged, the case may be appropriate for referral to general court-martial. If this is the case, trial counsel will work with the command to schedule an Article 32 investigation. This is the equivalent of a grand jury hearing in the civilian court system. A neutral and detached officer will investigate the charges, review evidence, hear witness testimony and make a recommendation whether to refer the charges to a general court-martial.

After referral, the accused will be arraigned; this is the point where the accused is asked for his pleas. An accused will either plead "guilty" as part of a pre-trial agreement and be sentenced, or plead "not guilty" and the judge will establish a schedule for the trial to proceed. While there are number of steps that must be followed on the road to a court-martial, it is important to understand that trial counsel and your staff judge advocate are here to answer your questions every step of the way.

VWAP Corner: Transitional Compensation in a Nutshell

LCDR Jared Edgar, CNRSE SJA Office

Transitional compensation for victim-dependants is a congressionally authorized program designed in response to a Department of Defense "abused victims study." The results identified disincentives to reporting abuse and recommended actions to be taken to eliminate such disincentives. Therefore, the primary goal of transitional compensation is to help dependents during the transition from military to civilian life, including basic needs, relocation and education programs for future employment. By helping with these basic needs, the hope is that more victims will feel empowered to report abuse rather than suffer in silence. DoD Instruction 1342.24 and OPNAV Instruction 1750.3 provide important information about transitional compensation that all commands should know. Important takeaways are discussed below:

Who is eligible?

Spouse of service member at the time of abuse as well as dependent children living in the home of the service member at the time of abuse

Program Benefits?

In addition to financial compensation, dependants are entitled to health care benefits, Exchange and Commissary access, as well

(Continued on page 6)

VWAP Corner...*continued*

as the retention of military ID cards. In addition, family members may be entitled to relocation (PCS) allowances.

Requirements?

Service member must have been on active duty for more than 30 days and separation must include a dependent abuse offense that is referred to a court-martial or the subject of an administrative separation (enlisted) or Board of Inquiry (BOI) (officers), and, if resolved at court-martial, includes forfeiture of all pay and allowances.

However, dependents may also be entitled in cases where a service member was administratively separated or convicted and sentenced to be separated from active duty on grounds that do not include a dependent-abuse offense, but have a substantiated dependent abuse offense under 10 U.S.C. 1059.

Duration of payments?

Dependants are eligible for a minimum of 12 months and a maximum of 36 months. The length of eligibility is based upon the portion of service member's obligated active duty that is not served because of the dependent abuse offense.

When do payments start? Payment Rates?

Payments start on: 1) the date of results of trial; 2) the date notification of separation letter is served for enlisted members; or 3) the date of a BOI for officers.

Current rates are based on the rate in effect for Dependency and Indemnity Compensation, which is subject to change each year. As of 1 Dec 12, current entitlements rates were $1,215 for spouse, per month, plus $ 301 per child, per month. Payments are non-taxable, but must be reported to the IRS.

Loss of benefits?

Individuals will lose eligibility for payments if: 1) they participated in the abuse/abusive environment; 2) upon remarriage; or 3) cohabitation. Annual certification of individual circumstances is required.

Application Procedures?

In order to apply, the following documents must be submitted for a review of eligibility for Transitional Compensation entitlements:

1) DD Form 2698, Application for Transitional Compensation;
2) SF 1199A, Application for Direct Deposit;
3) Supporting Legal Action:
   For a court-martial, submit results of trial;
   For an administrative separation *(enlisted),* submit notification of administrative separation;
   For an administrative separation *(officer)* submit the Board of Inquiry (BOI) results; and
4) Acknowledgement of Actions letter.

Point of Contact?

NAVPERSCOM N130G is the point of contact for questions regarding Transitional Compensation and can be reached at 703-604-5476 or DSN 312-664-5476. In addition, commands are encouraged to contact their local Staff Judge Advocate for more information.

Navy Office of Hazing Prevention Established; Updated Reporting Requirements

LCDR Jared Edgar, CNRSE SJA Office

On 20 Feb 13, NAVADMIN 034/13 was released. In it, the Chief of Naval Operations announced the establishment of the Navy Office of Hazing Prevention (OPNAV N137). This message also provided updated guidance on the reporting of substantiated hazing incidents, and assigned OPNAV N137 the responsibly to track and establish a historical record of substantiated incidents. While the message states that Command Managed Equal Opportunity (CMEO) Program Managers are responsible for tracking incidents at the command level, the importance in ensuring Judge Advocate oversight in this process cannot be overstated. In addition, substantiated hazing cases, in which disciplinary action is taken, will continue to be reported via the Quarterly Criminal Activity Report (QCAR).

It is important to remember that under SECNAVINST 1610.2A, the Department of the Navy Policy on Hazing, the definition of "hazing" is very broad. "Hazing" is defined as any time, without proper authority, when one service member causes another to "suffer or be exposed to any activity which is cruel, abusive, humiliating, oppressive, demeaning, or harmful." Even merely soliciting another to participate in these activities is considered hazing, and hazing can be verbal or psychological in nature.

As a reminder, when responding to allegations of hazing, commands must take certain steps. First, they must investigate every reported incident of hazing. Second, they must determine if the case is substantiated. Finally, commands must report substantiated incidents of hazing via OPREP-3 NAVY BLUE or NAVY UNIT SITREP as applicable in accordance with OPNAVINST 3100.6J CH-2. NAVADMIN 034/13 lists additional addressees for hazing OPREPs, as well as a report on the type of hazing alleged. Hazing victims and witnesses must be advised of their rights under the Victim and Witness Assistance Program (VWAP). Victims and witnesses shall also be offered the opportunity to seek legal advice, medical assistance and counseling as needed.

The release of this NAVADMIN serves as a good opportunity for Judge Advocates, CMEOs and Command leadership to sit down and ensure a coordinated team approach is in place before the need to respond to a hazing incident arises.

Administrative Separation for "Erroneous Enlistment" in Cases Where "Disabilities Identified" Existed Prior to Service

LT Jeffrey Marden, SJA, Naval Air Station, Joint Reserve Base, New Orleans

The Naval Military Personnel Manual (MILPERSMAN) controls the administrative separation process; however, its text is not dispositive on how a command should proceed because the language is generally derived from an instruction. Therefore, commands should review the implementing law (and contact their supporting judge advocate) prior to taking action.

I raise this point because recently a command administratively processed a Sailor for "erroneous enlistment" when the command claimed that her anxiety disorder "existed prior to service" (EPTS). The command justified its decision by reading paragraphs four and five of MILPERSMAN 1910-130 (Separation By Reason of Defective Enlistments and Inductions – Erroneous Enlistment) to imply that a Sailor can be separated if her naval service did not aggravate the EPTS condition.

1910
CH-11, 13 Apr 2005
Page 1 of 1

MILPERSMAN 1910

ENLISTED ADMINISTRATIVE SEPARATIONS (ADSEP)

Responsible Office	NAVPERSCOM (PERS-4832)	Phone:	DSN COM FAX	882-4433 (901) 874-4433 882-2624

References	(a) DODD 1332.14 of 21 Dec 93

1. In this Section. Per reference (a), this section covers:

Topic	See MILPERSMAN
Administration Separation Policy and General Information	1910-010
Reasons for Separation	1910-100
Guidelines on Separation and Suspension of Separation	1910-200
Guidelines on Characterization of Service	1910-300
Administrative Separation Processing Notification	1910-400
Guidelines on Conducting an Administrative Board	1910-500
When Forwarded to the Separation Authority	1910-600
Separation Authority	1910-700
Actions Which Effect the Separation	1910-800
Disposition of Personnel Awaiting Final Action on Physical Evaluation Board (PEB) Proceedings	1910-900

April 2008 CD

However, this is an incomplete analysis. Under the controlling DoD and SECNAV instructions, no Sailor (even if she is within her first 180 days of service) may be administratively separated under "erroneous enlistment" if the EPTS the condition is one that must be referred to the Physical Evaluation Board (PEB).

Section E3.P2.5 (Members with a Non-waivered Pre-Existing Condition) of Department of Defense Instruction 1332.38 (Physical Disability Evaluation) only permits administrative separation for pre-existing conditions when four factors are met: 1) the impairment is identified within the first 180 days of service; 2) the impairment does not meet accession standards; 3) the impairment is not a cause for referral to the PEB under Enclosure 4; and 4) the impairment was not aggravated by the Sailor's service.

The "Enclosure 4" mentioned above is titled "Guidelines Regarding Medical Conditions and Physical Defects that are Cause for Referral into the Disability Evaluation System." As the (lengthy) name suggests, the enclosure lists afflictions that must be referred to the Disability Evaluation System; however, the list is not inclusive.

Bottom line: A command's analysis must not end at the MILPERSMAN section; sometimes the language differs from that of the implementing instruction (as exemplified by MILPERSMAN 1910-130 where the section does not mirror the instruction and effectively combines the rules for disability and non-disability cases). Remember: In such cases, a Sailor's career is at stake (as well as her physical and mental health), so it pays take the extra time to look up the instruction.

RLSO Staff Judge Advocates are standing by to assist; when in doubt always CYA (consult your attorney).

Investigation of Adult Sexual Assault in the Department of Defense

LT Aubrey Charpentier, Asst. Deputy SJA, CNRSE

While there has rightfully been placed an increased emphasis on sexual assault in the military, the sexual assault investigation process can be extremely confusing. On 25 January 2013, Department of Defense Instruction 5505.18 was released to help clarify the process. DoDI 5505.18 "establishes policy, assigns responsibility, and provides procedures for the investigation of adult sexual assault within the DoD."

Most important to commanding officers and legal officers are the portions of this instruction that discuss command obligations. For example, commands are required to immediately report Unrestricted Reports of adult sexual assault immediately to the applicable military criminal investigative organization (MCIO). For Navy commands, this will be the Naval Criminal Investigative Service (NCIS). In addition, MCIOs are not allowed to close an investigation in which they are the lead agency without receiving, in writing, all disposition data of the case such as administrative, judicial, and non-judicial action taken against the alleged offender.

It is also important to note that issues involving the sexual orientation of the alleged victim and alleged offender are discussed in the instruction. Specifically, sexual orientation will have no effect on whether to investigate an alleged sexual assault. In fact, unless it is pertinent and significant to the investigation, sexual orientation shall not be addressed or documented in the investigation. In the interest of privacy, sexual orientation may not be disclosed to anyone without an official need to know.

Much of this procedure establishes and describes a process for MCIOs to use in the event of an adult sexual assault allegation and will thus not directly affect commands. However, it is still extremely beneficial to review this procedure and see what investigators must do in the course of their investigation, such as ensuring victims are aware of their rights under the Victim and Witness Assistance Program and ensuring the sexual assault response coordinator (SARC) has been notified. It may also be useful to see the numerous subjects that MCIOs must learn in order to investigate sexual assault. A copy of this instruction is located at http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf.

Think Before You Click: Beware What You (Or Your Neighbors) Download

LT Tadd Blair, RLSO SE Trial Services Office

Can you imagine life without the internet? For most of us, the internet is essential to almost every aspect of our lives. We use email to communicate at work. We attend virtual meetings and trainings. We keep in touch with loved ones across the world. The internet allows us to look up the answer to any question in the blink of an eye and download that song we just can't get out of our heads. Unfortunately, the cyber dream can also quickly turn into a nightmare that could cost Sailors thousands of dollars. Recently, there has been an increase in the number of individuals who have been notified by their internet provider that their Internet Protocol ("IP") address has been identified as a "copyright infringer." The letter from the internet provider explains that some entity has filed a lawsuit alleging a copyright infringement has been committed (usually an improper file upload/ download). In most of these cases, the entity sends a long list of IP addresses to internet providers requesting that they release the personal identifying information associated with each IP Address. For some, this is the first time they realize that they may have downloaded something illegally. For others, they realize that their IP address has been compromised and that they should have secured their wireless router or uninstalled a file sharing program, or, that the IP address could be wrong and the customer associated with that IP address may have never even downloaded any copyrighted material.

Whether you downloaded something without thinking, used a file sharing software (e.g. *bit torrent*, *pirate bay*, *gnutella*), or think your neighbor may have been mooching off of your router, you could be held liable for copyright infringement and ordered to pay anywhere between $200 and $150,000 in damages, in addition to attorney fees and court costs! Even if you (or your mooching neighbor) never actually downloaded the copyrighted material, release of your information by your internet provider could lead to threats to settle the case, still potentially costing you thousands of dollars.

The letter from the internet company usually informs you that your name, address, and other information connected with your IP address may be released if you do not take action by a certain date. If you receive one of these letters, it is essential that you see an attorney as soon as possible; an attorney can help drop your name as a defendant in a lawsuit, get the case dismissed or help prove that you should not be held liable.

Think before you download. Just as you would not steal a CD from a music store, you shouldn't download something without permission. File sharing programs may seem like a great way to build your music collection or catch up on that episode you missed, but much of this "free" entertainment is copyrighted, meaning that the download can end up costing you thousands of dollars in a lawsuit. No act online is private; every visit can be tracked. If your network is not secure, not only can your neighbors slow down your internet, but they could download something illegally. If you can't prove that you were not the one who illegally downloaded the file, then you may still be on the hook. If you secure your wireless router and think before you click, you can live the cyber dream without exposing yourself to a cyber nightmare.

If you have any other questions, please contact your local legal assistance office. This article is not intended to substitute for the personal advice of a licensed attorney.

Jurisdiction for Family Law Cases

LT Emil Marcinskas, JAGC, USN – RLSO SE Pensacola Legal Assistance Attorney

Where to file for divorce or other matters related to family law is often very confusing for Sailors and their spouses. Before judging the merits of a case, a court must be satisfied that it has personal jurisdiction (power over the parties in the suit) and subject matter jurisdiction (power to handle the matter at issue).

Personal jurisdiction is determined by the parties' domicile, the state where a party resides and intends to remain indefinitely. Generally, the law of the state in which the petitioner is domiciled at the time of filing governs, unless the petitioner consents to filing in or is compelled to file in another state.

Many servicemembers have ties to multiple states. In order to determine domicile, the following are important considerations: the location of real property, the state where one is registered to vote, the state where one's vehicles are licensed and registered, and the state listed on a LES for state income tax withholding purposes.

Every state has its own specific requirements to establish personal jurisdiction. In order to file for divorce in Florida, the petitioner must have lived in Florida for six months immediately prior to filing. Alabama, Mississippi, and Texas require that at least one party be a resident of the state for six months prior to filing. Louisiana requires that the petitioner be a resident of the state for twelve months prior to filing.

In the event that both spouses live in separate states, either party may file in their respective state, provided that they meet the jurisdictional requirements. Some states offer residency exceptions to servicemembers who are stationed there, allowing them to file a petition for divorce in their jurisdiction, even if they are not a legal resident. If a party is not satisfied with where the petition has been filed they

(Continued on page 9)

Jurisdiction for Family Law Cases...*Continued*

(Continued from page 8)

can initiate a proceeding to challenge a state's jurisdiction.

Cases Involving Child Custody

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is enforced in every state except Massachusetts, establishes "exclusive and continuing" jurisdiction for child custody litigation to the child's "home state"; all suits where child custody is an issue need to be brought in the child's "home state." A child's "home state" is established when he/she has lived in that particular state for six consecutive months. If the child is less than six months old, then the child must have lived in the state since birth. Alternatively, if the child has not lived in any one state for six consecutive months, then the state which has the most "significant connections" with the child and at least one of the parents will be considered the "home state."

A state can lose jurisdiction if it is determined that the child or the parents no longer have a significant connection with the state. In order to modify an existing child support order, the parties would have to go back to the original state that issued the order or file in the child's new "home state." Once jurisdiction has been established and an order is finally entered, the Full Faith and Credit clause of the United States Constitution ensures that the order is enforceable in all states.

Identifying the proper jurisdiction for filing a legal petition is complicated, and will require examination of multiple factors. For assistance on this and other complex legal questions, contact the nearest Region Legal Service Office legal assistance department.

How to Have Fun in March Without Going to Jail

LCDR Jared Edgar, CNRSE SJA Office

That most sacred of all athletic competitions is nearly here. Yes, that's right, *March Madness*! March Madness leads to great basketball, but it can also lead to the violation of federal ethics rules against gambling.

Friendly wagers are ok, right?

The middle of March marks an escalation of sports-mania for not only basketball enthusiasts, but also gambling enthusiasts. In fact, there is more gambling in March than all other months of the year combined. Over $2.5 billion is estimated to have been illegally wagered over the 2012 March Madness tournament, not to mention the more than $1 billion in wages paid to distracted workers. While betting a couple of bucks is often seen as a fun, social activity, if done at work it can run afoul of federal regulations prohibiting gambling in the Federal workplace.

What constitutes "gambling"?

"Gambling" is defined as any game of chance where the participant risks something of value for the chance to gain or win a prize. Common sports-related examples include: football pools, fantasy football leagues, and March Madness basketball pools.

If you provide consideration (i.e. something of monetary value, no matter how small) for the opportunity to participate in a game of chance where, if that game of chance works out in your favor, you would receive some form of consideration in return, then you are gambling. Gambling includes wagers, raffles (with the exception of Navy-approved fundraising activities, such as Navy Marine Corps Relief Society raffles)[1], lotteries and other games of chance.

Federal regulations prohibit all persons from participating in such games for money, operating gambling devices, conducting lotteries and selling or purchasing number tickets in federal work spaces or during official duty time. Gambling with subordinates may also violate UCMJ, Article 133 (conduct unbecoming) and Article 134 (fraternization and/or gambling with subordinates).

So what does this mean?

Bottom line: March Madness pools constitute gambling. While gambling in NCAA tournament pools may be fun for some, it is prohibited in the workplace.

[1]Before conducting any raffle, including for the benefit of NMCRS, contact your local SJA.

Three High Visibility Issues: (1) Extension of Benefits to Same-Sex Domestic Partners; (2) Religious Accommodation Requests; and (3) Personal Firearms

Office of the Judge Advocate General, Code 13

Ref: (a) SECDEF Memo 11 Feb 13
(b) NAVADMIN MSG 121907Z FEB 13
(c) DoD1300.17 (under revision)
(d) SECNAVINST 1730.8B (under revision)
(e) CJCS Memo 24 May 12
(f) 10 U.S.C. § 774 (RFRA)

BLUF. This update provides information on the above three issues. Benefits extension and religious accommodation requests present unique and complex challenges, are undergoing change, and require higher level coordination. Regarding firearms, while close coordination is not as necessary, this update provides information regarding a recent amendment to the 2013 National Defense Authorization Act (NDAA).

Extension of Same-Sex Benefits. The Secretary of Defense recently announced the planned extension of additional benefits to same-sex domestic partners. References (a) and (b) provide general information on this announcement. Member designated benefits, which are listed in attachment 1 of reference (a), should already be available to all service members and their designees. DoD is leading a substantial policy revision to ensure extension of benefits listed in attachment 2 of reference (a) is implemented. This policy revision will be followed by a revision of service implementing instructions, as well as training. DoD instructed that the entire process should be completed by 31 Aug 13, but no later than 1 Oct 13. A senior DoN Working Group is creating an implementation plan, and will coordinate with the necessary stakeholders that require adjustments to policies and practices. In the interim period, we anticipate questions will arise across the spectrum, and we encourage SJAs to contact Code 13 for assistance and further guidance. No service is authorized to extend any benefit listed in attachment 2 of reference (a) until specifically instructed to do so. DoD is coordinating final authorization to extend these additional benefits to ensure all services implement on the same day.

Religious Accommodation Requests. DoD and DoN are currently in the process of revising religious accommodation instructions, contained in references (c) and (d), respectively. Reference (e) requested that DoD revise policies on religious accommodation requests to ensure such decisions are made at the Service Chief level. The primary purpose behind revising references (c) and (d) is to ensure a centralized approval authority is in place to adjudicate exceptions to policy on uniformity. Code 13 anticipates that the revised policy will require commanding officers, with assistance from their SJA, to provide the requisite information to establish the specific facts and circumstances surrounding the service member's religious accommodation request, and provide an endorsement of the request to the Chief of Naval Operations (or designee).

In the interim period prior to final revision of the instructions, Code 13 recommends that commanding officers engage with their ISIC when adjudicating religious accommodation requests. SJAs must ensure religious accommodation requests comply with current instructions, as well as reference (f). SJAs may want to consult with Code 13 for the latest policy developments and information on how similar requests have been addressed by commanders.

Firearms. Congress recently passed the NDAA for 2013, which included a section on firearms. Specifically, section 1057 states in part that a health care professional who is a member of the Armed Forces, or, a commanding officer, who has reasonable grounds to believe that a service member or DoD employee "is at risk for suicide or causing harm to others" may inquire with such members whether they plan to acquire and/or already possesses a privately-owned firearm, ammunition, or other weapon. This authority existed prior to passage of the 2013 NDAA. However, Congress memorialized this authority explicitly into law.

Recent Court-Martial Sentences in Navy Region Southeast

- At a General Court-Martial convened on board NAS Pensacola, a Seaman Apprentice pled guilty to knowingly and wrongfully possessing a memory stick containing images and videos of child pornography. The military judge sentenced the Accused to 33 months of confinement, reduction in rate to E-1, and a Dishonorable Discharge.
- At a General Court-Martial convened on board NAS Jacksonville, a Lance Corporal was found guilty of engaging in a sexual conduct in the presence of others. The military judge sentenced the Accused to 90 days confinement, reduction in rate to E-1, to forfeit $900.00 pay per month for three 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 wrongfully using marijuana. The court martial sentenced the Accused to reduction in rate to E-1 and forfeiture of $994.00 pay per month for two months.

(Continued on page 11)

Recent Court-Martial Sentences...*Continued*

(Continued from page 10)

- At a General Court-Martial convened on board NAS Jacksonville, a Lance Corporal was found guilty of two specifications of violating a lawful general order, wrongfully committing indecent conduct, and two specifications of assault. The military judge sentenced the Accused to 18 months confinement, reduction in rate to E-1, and a Bad Conduct Discharge.
- At a General Court-Martial convened on board NAS Jacksonville, a First Class Petty Officer was found guilty of aggravated assault with a firearm. The court-martial sentenced the Accused to three months of hard labor without confinement, reduction in rate to E-5, forfeiture of $1,500 of pay per month for three months, and restriction to the limits of Naval Station Mayport for 60 days.
- At a General Court-Martial convened on board NAS Jacksonville, a Captain (O-6) in the U.S. Public Health Service pled guilty to driving while drunk, driving while impaired by cocaine, wrongful use of cocaine, and wrongful possession of cocaine. The military judge sentenced the Accused to be confined for 100 days, to forfeit $9,000 per month for six months and to be reprimanded.
- At a Special Court-Martial convened on board NAS Pensacola, an Airman was found guilty of assault and wrongful sexual contact. The court-martial sentenced the Accused to 60 restriction and 60 days hard labor without confinement.
- At a Special Court-Martial convened on board NAS Jacksonville, a Petty Officer First Class pled guilty to failing to obey a lawful order and assault. The military judge sentenced the Accused to six months confinement, reduction in rate to E-1, and a Bad Conduct Discharge.
- At a Special Court-Martial convened on board Naval Station Mayport, a Second Class Petty Officer was acquitted by the court-martial of wrongful possession of and wrongfully seeking to obtain various controlled substances.
- At a General Court-Martial convened on board NS Mayport, a Lieutenant (Junior Grade) was found guilty of attempted wrongful sexual contact, violating a lawful general regulation by wrongfully engaging in sexual conduct with an E-3, and wrongful sexual contact. 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 Petty Officer First Class was found guilty of soliciting to transfer control of a minor with knowledge that the minor would engage in prostitution, traveling for the purpose of engaging in unlawful sexual conduct with a person believed to be a child after using a cell phone to solicit a person believed to be a custodian or guardian of a child to consent to the participation of the child in sexual conduct, and using a cell phone to solicit to transfer control of a minor with knowledge that, as a consequence of the transfer, the minor would engage in prostitution. The military judge sentenced the Accused to 14 years confinement, total forfeiture of all pay and allowances, reduction in rate to E-1, and a dishonorable discharge.
- At a General Court-Martial convened on board NAS Jacksonville, an Airman was found guilty of failure to obey a lawful order (3 specifications) and assault consummated by a battery (3 specifications). The military judge sentenced the Accused to 18 months confinement, reduction in rate to E-1, and a bad conduct discharge.
- At a General Court-Martial convened on board NAS Jacksonville, a Marine Corporal was acquitted of engaging in sexual contact with an incapacitated person and committing indecent conduct.
- At a General Court-Martial convened on board Joint Base Charleston, South Carolina, a Lieutenant Junior Grade was found guilty of failing to obey a lawful general order, making a false official statement, and conduct unbecoming of an officer and gentleman. The military judge sentenced the Accused to 60 days confinement and to be dismissed from the naval service.
- At a General Court-Martial convened on board NS Mayport, a First Class Petty Officer was found guilty of wrongful sexual contact, indecent exposure, wrongfully requesting to engage in sexual activities, and false official statement. The court-martial sentenced the Accused to 10 months confinement, reduction in rate to E-1, forfeiture of all pay and allowances, and a Bad Conduct Discharge.
- At a Special Court-Martial convened on board Joint Base Charleston, South Carolina, a First Class Petty Officer was found guilty of unauthorized absence. The military judge sentenced the Accused to 60 days confinement and a Bad Conduct Discharge.
- At a General Court-Martial convened on board NAS Pensacola, an Ensign was found guilty of rape. The court-martial sentenced the Accused to 4 years confinement and to be dismissed from the naval service.

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.