

MIDLANT Legal Compass

Guiding Warfighters through Legal and Ethical Waters

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Basic Legal Information for Command TRIADs and individual Sailors.

This edition of the Legal Compass discusses the issuance of page 13s following a PFA failure, dual processing policy in PTSD/TBI Cases, the use of Culinary Specialists at changes of command, FY17 NDAA and the Military Justice Act of 2016, and the addition to Navy regulations governing online conduct. For the most up-to-date guidance and advice, contact your local RLSO MIDLANT Command Services Office.

As always, we end with a brief discussion of the courts-martial and Boards of Inquiry completed this quarter. For questions about these cases, please contact either the RLSO MIDLANT Trial Department or the Staff Judge Advocate to Commander, Navy Region Mid-Atlantic (CNRMA).

If you seek additional information or have a topic suggestion, please contact our Legal Compass Editor, the Command Services Department Head, LCDR Erik Carlson.

Very Respectfully,
/S/
Lawrence D. Hill, Jr.
CAPT, JAGC, USN
Commanding Officer, RLSO MIDLANT

The primary mission of Region Legal Service Office Mid-Atlantic (RLSO MIDLANT) is to provide prosecution, command services, and legal assistance support to eligible commands and persons in support of Fleet operational readiness.

The *MIDLANT Legal Compass* is a periodic newsletter published by the RLSO MIDLANT Command Services Department.



The Issuance of Page 13s Following a PFA Failure

By LT Meridith Wailes, JAGC, USN

Physical Fitness Assessment (PFA) administrative separations (ADSEPs) are occurring with greater frequency now that Sailors can be separated for two failures in a three-year period. Just as the Navy PFA program holds Sailors to standards, the governing regulations also contain rules that commands must follow. One of the major issues that often occurs is the failure to document and maintain Page 13s. Failure to properly document a PFA failure could prevent ADSEP later.

What is required?

A NAVPERS 1070/613 (Letter of Notification for officers) is required in the separation package. At least one form is required for separation, and it must be violated by failing a subsequent PFA. Even though the instruction does not state this requirement, the Page 13 issued after the member's first PFA failure must be signed. Additionally, the signed copy must be tracked by the Command Fitness Leader (CFL). A sample Page 13 can be found in PRIMS. The proper sequence of documentation is show below:

First PFA failure → Page 13 issued → Second PFA failure → ADSEP

When is it required?

Within 30 days following completion of the PFA cycle.

What do I do with it?

Verify the Page 13 in Navy Standard Integrated Personnel System (NSIPS) and electronically forward to NAVPERSCOM via the servicing personnel support detachment office or personnel office (PERSUPPDET/PERSOFF). Note that signed Page 13s are not available in NSIPS; the CFL needs to maintain signed copies.

Anything else I should do?

Enter PFA data into PRIMS within 30 days of the close of the command's PFA cycle. PRIMS is the only official way of tracking PFA results. Enroll Sailors in the Fitness Enhancement Program (FEP) after their first failure—FEP is mandatory for any member who fails the PFA. Sailors enrolled in FEP for Body Composition Assessment (BCA) failures must be given nutritional counseling. All Sailors enrolled in FEP are required to participate in a mock PFA every 30 days, and Sailors will be taken out of FEP when they pass the Physical Readiness Test (PRT) and BCA.

A Page 13 must precede the second PFA failure in order to ADSEP the member, whether officer or enlisted

After the second failure, give a 1.0 score in the “Military Bearing” Evaluation or FITREP block. Initiate ADSEP processing within 14 days of the second failure.

References:

- NAVADMIN 178/15
 - NAVADMIN 061/16
 - OPNAVINST 6110.1J
 - MILPERSMAN 190-170
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Dual Processing Policy in PTSD/TBI Cases

By LT Claire Rumler, JAGC, USN

Many Sailors who receive service-related Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) diagnoses enter the Disability Evaluation System (DES). A number of them commit misconduct while the process is running, and the misconduct often requires mandatory processing. As an example, GM3 John Doe deploys to Afghanistan, where his post receives shelling from insurgents and he is tasked with removing bodies from the perimeter of the post. When he redeploys, he is diagnosed with PTSD and enters the DES. Unfortunately, GM3 decides to 'self-medicate' with marijuana and he tests positive on a random urinalysis for Tetrahydrocannabinol (THC). Given the misconduct, mandatory processing for administrative separation applies and the command may be wondering how to proceed.

Historically, confusion has existed about how to deal with these dual processing (medical separation and misconduct separation) cases. SECNAV released a memorandum on 1 June 2016 in order to standardize this issue. In cases where a military member has been diagnosed with service-related PTSD or TBI, separation authority is removed from the command and, per MILPERSMAN 1910-704 section 8(b), rests with the Chief of Naval Personnel. Under the new guidance, therefore, the Chief of Naval Personnel alone may decide to suspend DES processing and separate the member on the basis of misconduct despite his or her medical condition. This decision may only be made after consulting a military healthcare provider with regard to whether the member's PTSD/TBI contributed to the misconduct that formed the basis for the separation.

To put it in practical terms, GM3's command may give him his notice of administrative separation before DES processing is complete. The command may also conduct the administrative separation board. If the board recommends separation, then the command must forward the separation package through the appropriate channels until it reaches the Chief of Naval Personnel for separation authority action.

It is important to note that in these cases, where the DES process is pending, separation authority does not rest with the first Flag officer in the chain of command. Only if the service member is declared fit for full duty by the DES after exhausting the appellate process is the separation authority returned to the first Flag officer in the member's chain of command.

The Use of Culinary Specialists at Changes of Command

By LTJG Ashlee Goodwin, JAGC, USN

Typically, the use of military personnel in their official capacity is prohibited at unofficial events. Prior to the Naval Supply P486 update, Culinary Specialist (CS) personnel could be used at change of command receptions. The updated NAVSUP P486 eliminated these exceptions and affirmed that follow-on receptions at changes of command and retirement ceremonies are not considered official functions. Consequently, military personnel, including Culinary Specialists, may not be used in their official capacity to support those events.

Military personnel may only be used to support events that accomplish a valid military purpose. Determining if the event is “official” will guide commands on whether military personnel may be used in their official capacities. Changes of command and retirement ceremonies coinciding with changes of command are considered official functions and therefore accomplish valid military purposes. Commands may use appropriated funds and military personnel in their official capacities to support these official events. Retirement ceremonies that do not coincide with changes of command are only official functions if the retiring member receives approval for a command-sponsored retirement ceremony from the commanding officer. However, receptions following or related to any of these events are not deemed to be official functions. Therefore, military personnel may not be used at such events in their official capacity.

Alternatively, officers and retirees hosting unofficial events may employ military members in a personal capacity to support unofficial events. Military personnel can only be employed on a volunteer-basis and must be compensated at market wage in accordance with the Bureau of Labor and Statistics. It is also advised that both the officer hosting the event and the service member sign an employment agreement to avoid the appearance of involuntariness. In order for military members to volunteer, they must be in an off-duty status (on leave or liberty). The members’ official duties cannot be adjusted or re-scheduled to accommodate unofficial events, including granting special liberty to support such events. Further, hired military personnel cannot wear uniforms or clothing with organizational and/or command insignia.

References:

- NAVSUP P486, Appendix E
- MILPERSMAN 1800-010
- MILPERSMAN 1050-290

“[F]ollow-on changes of command and retirement ceremony receptions are not considered official functions. Consequently, military personnel, including Culinary Specialists, cannot be used in their official capacity to support those events.”

FY17 NDAA and the Military Justice Act of 2016

By Navy JAG Corps, Code 20

On 23 December 2016, the President signed the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA), which includes numerous changes to military justice in the Military Justice Act of 2016 (MJA 16).

Major changes include:

- Authorized punishment at NJP: Bread and water is no longer authorized as a punishment.
- Military Judge pre-referral authority: Prior to referral, military judges or magistrates may address certain legal issues such as investigative subpoenas, warrants or orders for electronic communications (military judges only), or matters referred by an appellate court.
- Fixed member panel size: Panels will have 12 members for capital cases, 8 members for non-capital general courts-martial and 4 members for special courts-martial. Except for capital cases, 3/4 of members must agree on findings and sentence.
- Special courts-martial: There is a new military judge alone, or magistrate with the consent of the parties, special court-martial where the maximum punishment is 6 months confinement, reduction to E-1, and forfeitures of 2/3 pay, but no discharge is authorized.
- Article 32: The preliminary hearing officer must make a disposition recommendation in the preliminary hearing report. The hearing officer must also analyze any additional information submitted by the parties or victim that is relevant to disposition.
- UCMJ Punitive Articles: The punitive articles have been restructured. Many forms of misconduct addressed by Executive Order under Article 134 (General Article) are now designated as new articles. Changes include a new punitive article criminalizing retaliation and a modification of Article 120 eliminating "bodily harm" as an element and replacing it with a new element of "without consent."
- Sentencing: If the accused elects sentencing by military judge alone, sentencing will be segmented with the military judge having discretion to run sentences concurrently or consecutively. Sentences by military members will remain unitary.
- Expanded appeals: Article 66 automatic review jurisdiction is raised to courts-martial that include a sentence of death, punitive discharge, or confinement for more than two years. There is a new affirmative right to appeal for courts-martial that include a sentence of confinement of more than six months, and which are not otherwise subject to automatic review. The government may appeal sentences with TJAG approval on grounds that the sentence is illegal or plainly unreasonable.

These updates should be kept in mind instead of the now out-of-date version in the Manual for Courts-Martial (MCM).

Effective date:

The FY17 NDAA authorizes the President to establish an effective date for the MJA 16 by 1 January 2019. The MJA 16 additionally requires the President to prescribe implementing regulations no later than 23 December 2017.

The text of FY17 NDAA may be found at – <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt840/pdf/CRPT-114hrpt840.pdf>.

Addition to Navy Regulations Governing Online Conduct

By Navy JAG Corps, Code 20

The U.S. Navy defines online conduct as the use of electronic communications in an official or personal capacity that is consistent with Navy values and standards of conduct. It is important that all Sailors know that once they have logged on to a social media platform, they still represent the U.S. Navy, on or off duty.

The wrongful distribution or broadcasting of an intimate image is now prohibited by the U.S. Navy Regulations, 1990, Article 1168 pursuant to ALNAV 021/17 (18 Apr 2017). The new Article 1168 of the U.S. Navy Regulations reads substantially as follows:

1168. Nonconsensual distribution or broadcasting of an image

(1) The wrongful distribution or broadcasting of an intimate image is prohibited.

(2) The distribution or broadcasting is wrongful if the person making the distribution or broadcast does so without legal justification or excuse, knows or reasonably should know that the depicted person did not consent to the disclosure, and the intimate image is distributed or broadcast:

- (a) With the intent to realize personal gain;
- (b) With the intent to humiliate, harm, harass, intimidate, threaten, or coerce the depicted person; or
- (c) With reckless disregard as to whether the depicted person would be humiliated, harmed, intimidated, threatened, or coerced.

Distribution means the act of delivering to the actual or constructive possession of another, including transmission by electronic means.

"Broadcasting" means the act of electronically transmitting a visual image with the intent that it be viewed by a person or persons.

An intimate image is any visual depiction, including by electronic means, that:

- a. Includes another person who is identifiable from the depiction itself or from information conveyed in connection with the depiction;
- b. Depicts that person engaging in sexually explicit conduct or depicts the private area of that person; and
- c. Taken under circumstances in which the person depicted had a reasonable expectation of privacy.

"Sexually explicit conduct" is defined in Part IV, paragraph 68b, Manual for Courts-Martial (2016 Edition).

"Private area" is defined in Part IV, paragraph 45c, Manual for Courts-Martial (2016 Edition).

Leaders should communicate social media expectations with their Sailors. It is important to outline unit policy, making sure Sailors know what they may and may not do on social media.

Explicit images taken without consent, or posted online without consent now constitute violations of Article 92, the Uniform Code of Military Justice (UCMJ). Further, Deputy Secretary of Defense Policy Memorandum, Hazing and Bullying Prevention and Response in the Armed Forces, December 23, 2015, identifies hazing as so-called initiations or rites of passage in which individuals are subjected to physical or psychological harm." It identifies bullying as, "acts of aggression intended to single out individuals from their teammates or coworkers, or to exclude them from a military element, unit or Department of Defense organization." Additionally, the memo states that hazing and bullying are unacceptable and are prohibited in all circumstances and environments, including off duty or unofficial unit functions and settings, as well as on social media and other digital environments.

Sailors using social media are subject to the UCMJ at all times, even when off duty. Commenting, posting, or linking to material that violates the UCMJ may result in administrative or disciplinary action. Punitive action may include violations of Articles 88, 89, 91, 92, 120(b), 120(c), 133, or 134. Other potential federal crimes include electronic harassment, electronic threats, cyber stalking, obscenity, child exploitation/child sexual exploitation, and computer misuse ("hacking").

Leaders should communicate social media expectations with their Sailors. It is important to outline unit policy, making sure Sailors know what they may and may not do on social media. When conducting themselves online and in social media, Sailors should:

- Consider what messages are being communicated and how they could be received
- Create or share content that is consistent with Navy values
- Only post if messages or content demonstrate dignity and respect for self and others

Any member of the Navy community experiencing or witnessing incidents of improper online behavior should promptly report matters to their chain of command via the Command Managed Equal Opportunity (CMEO) or Fleet and Family Support Office. Additional avenues for reporting any information include Equal Employment Opportunity Offices and the Inspector General.

The Naval Criminal Investigative Service (NCIS) encourages anyone with direct knowledge of criminal activity to contact them via text, web or smartphone app. Specific instructions are available at: www.NCIS.navy.mil/contactus/pages/reportacrime.aspx.

The Judge Advocate General's memo of 17 March 17 (Commander's Options Concerning Conduct on Social Media) for all Commanders, Commanding Officers, and Officers-in-Charge provides guidance to assist with employing the UCMJ to address inappropriate social media behavior. Contact your SJA or a command services attorney for additional guidance or for assistance.

RLSO MIDLANT Adjudged Court-Martial Sentences
October 2016 – January 2017

General Courts-Martial

At a General Court-Martial in Norfolk, Virginia, an E-6 pled guilty to larceny and providing a false official statement and was convicted of providing a separate false official statement, obstruction of justice, and using a false writing in connection with a claim. He was acquitted of adultery. On 7 October 2016, the panel of members sentenced him to 12 months confinement, reduction in rank to E-1, a \$20,000 fine, and a bad-conduct discharge.

At a General Court-Martial in Norfolk, Virginia, an E-4 was found guilty of sexual harassment and wrongful disposition of property. On 13 October 2016, the panel of members sentenced him to 2 months confinement, reduction in rank to E-3, a \$785 fine, and a bad-conduct discharge.

At a General Court-Martial in Norfolk, Virginia, an E-5 pled guilty, pursuant to a pretrial agreement, to six specifications of attempted indecent visual recording and one specification of indecent visual recording. On 3 November 2016, the Military Judge sentenced him to 21 months confinement, reduction in rank to E-1, and a bad-conduct discharge.

At a General Court-Martial in Norfolk, Virginia, an E-6 pled guilty, pursuant to a pretrial agreement, to false official statement, assault consummated by battery, and obstruction of justice. On 4 November 2016, the Military Judge sentenced him to 15 months confinement, reduction in rank to E-1, and a bad-conduct discharge.

At a General Court-Martial in Norfolk, Virginia, an E-3 pled guilty, pursuant to a pretrial agreement, to assault consummated by battery. On 7 November 2016, the Military Judge sentenced him to total forfeitures and a bad-conduct discharge.

At a General Court-Martial in Norfolk, Virginia, an E-2 was charged with rape and sexual assault. On 18 November 2016, the panel of members returned a verdict of not guilty to all charges.

At a General Court-Martial in Norfolk, Virginia, an E-5 was charged with one specification of attempted indecent acts and three specifications of indecent acts. On 18 November 2016, the panel of members found him guilty of two specifications of indecent acts and sentenced him to a reprimand, reduction in rank to E-3, and confinement for 12 months.

At a General Court-Martial in Norfolk, Virginia, an E-8 pled guilty, pursuant to a pretrial agreement, to three specifications of sexual harassment and four specifications of assault consummated by battery. On 1 December 2016, the Military Judge sentenced him to a bad-conduct discharge, reduction in rank to E-1, and confinement for 36 months.

At a General Court-Martial in Norfolk, Virginia, an E-4 was charged with sexual assault. On 15 December 2016, the panel of members returned a verdict of not guilty.

At a General Court-Martial in Norfolk, Virginia, an O-3 was charged with four specifications of sexual assault. On 19 January 2017, the panel of members returned a verdict of guilty for two specifications of sexual assault and sentenced him to dismissal, a reprimand and confinement for 12 months.

At a General Court-Martial in Norfolk, Virginia, an E-5 was charged with sexual assault. On 27 January 2017, the panel of members returned a verdict of not guilty.

Special Courts-Martial

At a Special Court-Martial in Norfolk, Virginia, an E-3 pled guilty, pursuant to a pretrial agreement, to one specification of conspiracy to commit larceny and one specification of larceny. On 13 October 2016, the Military Judge sentenced him to reduction in rank to E-1, 6 months confinement, a \$4,000 fine, and a bad-conduct discharge.

At a Special Court-Martial in Norfolk, Virginia, an E-7 pled guilty, pursuant to a pretrial agreement, to two specifications of unauthorized absence and a single specification of false official statement. On 19 October 2016, the Military Judge sentenced him to reduction in rank to E-6, 3 months of hard labor without confinement, and 2 days confinement.

At a Special Court-Martial in Norfolk, Virginia, an E-5 was acquitted of adultery.

At a Special Court-Martial in Norfolk, Virginia, an E-5 pled guilty, pursuant to a pretrial agreement, to three specifications of false official statement, one specification of abusive sexual contact, and one specification of obstruction of justice. On 8 December 2016, the Military Judge sentenced him to reduction in rank to E-1, 6 months confinement, forfeiture of \$1,044 pay per month for 6 months, and a bad-conduct discharge.

At a Special Court-Martial in Norfolk, Virginia, an E-4 pled guilty, pursuant to a pretrial agreement, to one specification each of wrongful possession with intent to distribute, wrongful use, and wrongful distribution of drugs. On 8 December 2016, the Military Judge sentenced him to reduction in rank to E-1, 11 months confinement, and a bad-conduct discharge.

At a Special Court-Martial in Norfolk, Virginia, an O-4 pled guilty, pursuant to a pretrial agreement, to four specifications of wrongful appropriation. On 20 January 2017, the Military Judge sentenced him to forfeit \$1,000 per month for 4 months and a reprimand.

RLSO MIDLANT Board of Inquiry Results
October 2016 – January 2017

During a Board of Inquiry (BOI) held on 6 October 2016, a CWO3 was ordered to show cause for retention due to misconduct under Articles 107 and 121 and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be separated with an Other Than Honorable characterization of service.

During a BOI held on 7 October 2016, an O-4 was ordered to show cause for retention due to misconduct under Article 112a and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be retained.

During a BOI held on 7 December 2016, an O-4 was ordered to show cause for retention due to misconduct under Article 134 and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be retained.

During a BOI held on 7 December 2016, an O-4 was ordered to show cause for retention due to misconduct under Article 107 and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be separated with a General characterization of service.

During a BOI held on 8 December 2016, an O-3 was ordered to show cause for retention due to misconduct under Articles 128 and 134 and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be retained.

During a BOI held on 8 December 2016, an O-5 was ordered to show cause for retention due to misconduct under Articles 92, 107, and 133 and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be separated with an Honorable characterization of service.

During a BOI held on 12 December 2016, an O-1 was ordered to show cause for retention due to misconduct under Article 112a and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be separated with a General characterization of service.

During a BOI held on 14 December 2016, an O-5 was ordered to show cause for retention due to misconduct under Article 112a and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be separated with a General characterization of service.

During a BOI held on 19 December 2016, an O-4 was ordered to show cause for retention due to misconduct under Article 93 and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be retained.

During a BOI held on 20 December 2016, a CWO2 was ordered to show cause for retention due to misconduct under Article 134 and substandard performance of duty. The BOI found that the member committed misconduct and recommended that the member be separated with a General characterization of service.

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