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This edition of The Counselor includes topics that cover: line-of-duty/misconduct investigations, temporary detentions and the NDW Transient Personnel Department, Sailors self-reporting crimes, ethics on gifts, contemptuous speech, and Navy-Marine Corps Relief Society fundraising support. Also included is the Results of Trial for the 1st Quarter 2017. The articles are designed as a quick reference and overview on these subjects. Please do not hesitate to reach out to us for legal advice. A directory of Command Services Department Staff Judge Advocates is below.

SICK / INJURED SAILOR IN YOUR COMMAND? YOU MAY NEED TO PERFORM A LINE OF DUTY/MISCONDUCT INVESTIGATION (LODI)

Line of Duty / Misconduct Investigations (LODI)

Have you had a Sailor injured, fall sick, or even killed at your command under what appears to be abnormal circumstances? A line of duty/misconduct investigation (LODI) protects an injured service member's interests and future benefits by documenting how their injury occurred, and, depending on the circumstances, helps the command determine whether a service member's injury or disease is a result of the member's misconduct or willful negligence. Often, an investigation is not necessary when a medical officer or a senior representative of a medical department and the member's commanding officer concur that the service member's injury was incurred in the line of duty not due to misconduct. This finding can be documented by a health or dental record entry.

When the command has questions about how the member's injury occurred or other circumstances discussed below, a LODI is appropriate. Guidance for conducting a LODI can be found in JAGMAN, JAGINST 5800.7F, Chapter II, Part E. The result of a LODI can determine the benefits the member or their family may receive. LODIs are required in two instances:

1. When a service member has an injury or disease that can result in a permanent disability; or
2. When an injury or disease results in the member's inability to perform his or her duty for over 24 hours.

Typically, injuries or diseases incurred by a service member are presumed to have been incurred "in the line of duty." However, when there is clear and convincing evidence that the injury or disease was a result of the member's misconduct, this presumption no longer remains. Generally, misconduct is when an injury was intentional or due to willful neglect (*i.e.*, more than mere carelessness).

(LODI continued on Page 2)

The Counselor

LODI (CONTINUED FROM PAGE 1)

A service member is always assumed to be “in the line of duty,” except when:

- the injury is a result of the member’s own misconduct (*i.e.*, intentional misconduct or willful negligence);
- the member is a deserter or in an Unauthorized Absence status (UA) (Note: if the member is UA, the UA must materially interfere with the performance of military duties); or
- the member is confined either following a court-martial with an unremitted dishonorable discharge or in a civilian jail as a result of a felony conviction.

Depending on the circumstances of the injury, disease, or death, LODI determinations control the receipt of certain benefits, including Survivor Benefit Plan (SBP), Dependency and Indemnity Compensation (DIC), Dependents’ Educational Assistance, disability retirement, and severance pay.

There are three possible outcomes for a LODI:

1. “In the line of duty, not due to the member’s misconduct.”

This is where presumption is the most favorable determination and qualifies the member involved for all available benefits.

2. “Not in the line of duty, not due to the member’s misconduct.”

This is considered an adverse finding, and often results in diminished benefits. This finding is typically made where the injury or disease was incurred or contracted while the service member was UA (unless he or she was mentally unsound at the beginning of the absence), *but that* the injury or disease was not caused by the member’s intentional misconduct or willful negligence.

3. “Not in the line of duty, due to the member’s misconduct.”

This is an adverse finding and will result in diminished benefits. It should also be noted that a finding of intentional misconduct leads to this finding of “not in the line of duty, due to member’s misconduct,” regardless of the service member’s status at the time.

Generally, a member cannot be held responsible if the injury or disease was the result of a mental defect where the member was unable to comprehend or control his or her acts. This is true for bona-fide suicide attempts or suicides. However, an injury that is the result of a suicide gesture is deemed to be a result of the member’s misconduct. When the injury is a result of a suicide or bona-fide suicide attempt, a command investigation must be convened.

Finally, it should be noted that legal rights and protections are available to any service member being investigated. Before any questioning, the service member must be advised that he or she does not have to make any statement that is against his or her interests, that relates to the origin or aggravation of the injury or disease. Any statements made without such warning may not be used as evidence for an unfavorable line of duty determination. It is important for your command to document – in writing – in the report that the required warning was given.

-written by LT Kate Clark-Dawe

The Counselor

THE TRANSIENT PERSONNEL DEPARTMENT, NAVAL DISTRICT WASHINGTON

Transferring Personnel TPD NDW

Looking to the Transient Personnel Department (TPD) to place a Sailor in the barracks for restriction awaiting disciplinary action? Sorry, but not this time.

This issue comes up from time to time – commands often look to send their problem Sailors to TPD Naval District Washington (NDW) in order to use NDW barracks for restriction. Unfortunately, this is not the TPD’s mission, which is to process Sailors through the administrative, transfer, discipline and medical transition pipelines for commands that, because of their structure or mission, cannot provide the appropriate facilitation themselves. The TPD is not able to transition Sailors to the NDW barracks for restriction, and then return them once their punishment is over. Restriction awarded by a CO at non-judicial punishment should be served at the location of the command that imposes the punishment.

TPD NDW is not authorized to act as a holding facility for those personnel awaiting disciplinary actions; there is a very limited exception to this, which is in cases where it is determined that transferring the Sailor temporarily would be in the best interest of the Navy. The TPD NDW Department Head, the NDW Staff Judge Advocate’s office, and the NDW Chief of Staff will consider each request for transfer to TPD on a case-by-case basis.

TPD NDW is not authorized to act as a Medical Holding Company (MHC) for personnel receiving outpatient care. TPD NDW is not authorized to hold student dropouts from local school commands, except when U.S. Naval Academy Midshipmen or U.S. Navy Ceremonial Guard Sailors will not complete their training. In these cases they *may* be assigned to TPD to await transfer and assignment.

For more information, please refer to NDWINST 5300.2, BUPERSINST 1306.77C, and NAVPERS 15560D. Please contact your SJA or command services attorney with any additional questions.

-written by LT Brian Yang

HANDLING SAILORS WHO SELF-REPORT MISCONDUCT

Self-Reporting Sailors

A Sailor at your command comes to you or someone in their chain of command to report that he/she has been arrested out in town or charged with a crime. Under paragraph 5.1.6 of OPNAVINST 3120.32D (SORM) Sailors that are arrested or charged with a crime by the civilian authorities have a duty to report the arrest or charges to their immediate commander. This duty creates interesting legal questions for the command.

While commands will want to know what happened, the Sailor is only required to disclose the date of the arrest, which police agency or authority arrested the Sailor, and the charges being brought. There are no requirements to report any of the underlying facts surrounding the arrest or the criminal charge.

Under the SORM, commands are prohibited from asking the Sailor any further questions about the incident without advising the Sailor of his/her rights under UCMJ Article 31(b). Moreover, a command cannot discipline the Sailor based merely on a self-report; there are still options for the command.

(Self-Reporting Sailors continued on Page 4)

The Counselor

SELF-REPORTING SAILORS (CONTINUED FROM PAGE 3)

Can a command still discipline a Sailor that self-reports?

Yes, but only under specific circumstances.

Be sure that the Sailor has been read his/her UCMJ Article 31(b) rights. Once the Sailor has been read his/her rights, if the Sailor waives his/her rights the command may ask him/her questions regarding the incident. The Sailor can be disciplined based on any details about the arrest or charges that he/she voluntarily provides. Be sure to document that the Sailor was read his/her rights by using a rights advisement found in the JAGMAN at Appendix A-1-v.

A command may also discipline the Sailor based on any evidence that was obtained *independent* of the self-report or would have *inevitably* found out about the arrest/charges, regardless of the self-report. Either of these can be difficult to show and would need to be clearly documented with your SJA.

What proactive steps can a command take?

A command does not need to rely on a Sailor to self-report. A command can use independent means of finding out when one of its Sailors gets into legal trouble. Many commands have contacts with the local police departments and obtain daily blotters to review. Commands may also wish to periodically monitor public arrest records.

Finally, be sure to involve your command's SJA before issuing any type of discipline after a self-report. Questions can arise about the violation of a Sailor's rights in self-reporting situations, and this can affect the ultimate outcome of any civilian prosecution or subsequent punishment by the command. If your command does not have an SJA, please contact a RLSO NDW command services attorney for assistance.

-written by LTJG Taylor Onik

YOUR QUARTERLY ETHICS' NOTE - GIFTS

In an effort to improve your command's understanding of the DoD's important ethics rules, we will include a short note on various rules and situations in each newsletter going forward. This month's note addresses gifts.

Retiring in the next few months? Having a birthday party at the command? Learn the Gift Rules and what "special, infrequent occasion" means.

As a general rule, service members cannot accept a gift from a subordinate (anyone who is paid less including civilians or superiors based on pay grade and time in service). This general rule does not apply if there is a personal relationship that justifies the gift *and* there is no superior-subordinate relationship. The personal relationship exception is a fact-dependent analysis. To minimize risk of a potential violation, please consult with your SJA or command services attorney.

There also is an important exception to this rule, which is, on **special, infrequent occasions**, subordinates may give a gift or donate towards a group gift for a superior, and the superior may accept the gift. A retirement gift would be considered a special, infrequent occasion, as would a wedding gift, or a gift celebrating the birth of a child – something that happens infrequently.

(Ethics Note continued on Page 5)

Self-Reporting Sailors

Your Quarterly Ethics' Note

The Counselor

ETHIC'S NOTE (CONTINUED FROM PAGE 4)

Birthdays, Christmas/holidays, or anniversaries, which occur regularly, are not considered infrequent, and do not fall into the special, infrequent occasions exception.

There are two very important limitations to this exception:

- (1) Requests to contribute towards the group gift may not exceed ***\$10 per person***.

Any request for voluntary contributions towards a group gift cannot ask for more than \$10 per person. When making the request amongst other group members, be sure to note that the donation is voluntary. However, employees are free to donate more, but any request for a donation more than \$10 would violate the Joint Ethics Regulation (JER). Further, it has become standard practice that any email or request soliciting for donations come from a junior member of staff to reduce the perception that senior members or the chain of command is making the donation a requirement.

- (2) The group gift is limited in value to ***\$300.00*** from the ***entire group***.

The \$300 limitation is a strict cap under the JER. Giving multiple gifts from separate groups that total more than \$300 is not authorized. If you are in a superior position and you have received a gift that you know violates this \$300 cap, you can still remedy it by either returning it (as graciously as possible), or paying for it. Note, the JER specifically provides that one cannot “pay down” a gift either (e.g., pay \$5 back for a \$305 gift). If the gift goes over the threshold, then it must be returned or paid for in its entirety.

If you have any questions as to whether your situation is considered a “special, infrequent occasion,” or if your gift (or gifts) are under the required threshold, feel free to call your local SJA.

-written by LTJG Chuck Ball

CONTEMPTUOUS SPEECH – WARN YOUR SAILORS AGAINST DISPARAGING OUR CIVILIAN LEADERSHIP

Political social media posts or other comments can impact a Sailor’s career and disrupt good order and discipline. Although the First Amendment of the U.S. Constitution guarantees freedom of speech, the fundamental need for good order and discipline within the military means that civilians enjoy a greater degree of constitutional protections against limitations on free speech than service members. Provisions of the UCMJ prohibit disrespectful criticism of the President, Vice-President, Congress and other civilian officials.

Included in the UCMJ are several provisions which prohibit service members from contemptuous speech, protecting our senior elected leaders and their staff in much the same way that all officers (commissioned or non-commissioned) are protected from contemptuous speech from their subordinates.

(Contemptuous Speech continued on Page 6)

The Counselor

CONTEMPTUOUS SPEECH (CONTINUED FROM PAGE 5)

Contemptuous Speech

What you need to know:

- Article 88 of the UCMJ provides that *“Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.”*
- The UCMJ does not define what “contemptuous” is, and there is very little case law on point, but the Military Judges’ Benchbook provides contemptuous speech as *“insulting, rude, and disdainful conduct or otherwise disrespectfully attributing to another a quality of meanness, disreputableness, or worthlessness.”* The Manual for Courts-Martial further outlines that language violating Article 88 may be contemptuous *per se*, or may become so by virtue of the circumstances (measured by how the words are taken by those who see or hear them).
- Although extremely rare, service members have been brought to court-martial for their contemptuous speech. For example,
 - In 1962, an Army private was convicted of violating Article 134 after using obscene language with respect to President Kennedy.
 - In 1967, an Army Lieutenant was convicted of violating Article 88 for carrying a sign during an anti-war demonstration, which stated *“Let’s Have More Than a Choice Between Petty Ignorant Fascists in 1968”* on one side, and *“End Johnson’s Fascist Aggression In Viet Nam”* on the other. This has been the only Article 88 conviction to date.
- During the Clinton Administration, several military officers were issued reprimands, letters of caution, and even fined, for making publicly disparaging remarks against President Clinton.

While it continues to be rare for anyone to be punished for contemptuous speech, with social media easily providing an avenue to publicly complain about elected officials, the above should be a reminder for all service members of the potential consequences of political social media posts or other comments.

-written by LTJG Chuck Ball

NAVY-MARINE CORPS RELIEF SOCIETY: FUNDRAISING SUPPORT

Navy-Marine Corps Relief Society: Fundraising Support

With the annual Navy-Marine Corps Relief Society’s fundraiser coming soon, we thought it would be helpful to link a copy of an article written by RLSO NDW’s Professional Development Officer, LCDR Nicholas Kadlec, when he was at OJAG Code 13. This article helpfully consolidates guidance related to the fund drive. Click on the icon to open the article.



The Counselor

**Results of Trial,
1st Quarter 2017**

RESULTS OF TRIAL, 1ST QUARTER 2017

A Navy Midshipman received a full acquittal of one specification of sexual assault. The court was held 25 to 28 October 2016.

A Navy Midshipman was sentenced to dismissal, forfeiture of all pay and allowances, and confinement for 30 months after being found guilty of one specification of sexual assault. The court was held 14 to 18 November 2016.

Any sentence awarded by a judge or panel members may be reduced pursuant to pretrial agreement or subsequent action by the convening authority.

For NDW related issues, please contact:

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ETHICS GRAM

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NAVY-MARINE CORPS RELIEF SOCIETY (NMCRS) ANNUAL ACTIVE DUTY FUND DRIVE REFRESHER

Ref: (a) 5 C.F.R. 950.102
(b) SECNAVINST 5340.7
(c) DoD 5500.07-R, Change 7

1. **Purpose.** To provide a refresher on the NMCRS annual active duty fund drive by consolidating guidance provided over the years into one resource for staff judge advocates (SJAs). Thank you to all of our Ethical Conehead alumni whose work over the years on this issue provided the foundation for this ethics gram.

2. **NMCRS Annual Active Duty Fund Drive.** The annual active duty fund drive begins this month and in preparation for the variety of fundraising events held by commands, it is important for all SJAs to re-familiarize themselves with the regulations governing fundraising for NMCRS and the activities that are not permissible during the fund drive. While this ethics gram is lengthy, it is a one-stop shop for the most frequently asked questions.

a. Generally, reference (a) prohibits fundraising in the Federal workplace other than for the Combined Federal Campaign (CFC). As an exception, heads of departments or agencies may authorize solicitations by their own members for the benefit of their own members. Accordingly, the Secretary of the Navy enacted reference (b) which provides guidance for an annual active duty fund drive for NMCRS. NMCRS is a private, non-profit, charitable organization whose mission is to assist Navy and Marine Corps families in need. Reference (b) authorizes commanders/commanding officers to provide their personal support in ensuring an effective call for contributions, to inform Department of the Navy (DON) personnel of the work of NMCRS, and of the need for individual contributions and continuing support. Each year, the active duty fund drive occurs during the month of March.¹

b. The annual fund drive relies on personal solicitation of service members by designated individuals. This work place solicitation is permissible because the fund drive is a "by our own, for our own" (BOOFOO) solicitation which is a specific exception under references (a) and (c). Therefore, only members of the BOOFOO may be solicited. Civilians and contractors in the work place are not members of the BOOFOO and may not be solicited for donations.² The annual active duty fund

¹ Commanders/commanding officers may designate another time period if March is impractical due to operational schedules provided that the alternate time period does not conflict with other Federal fundraising campaigns, including the CFC.

² Civilian employees and contractors are not eligible for assistance from NMCRS which is why they are not members of the BOOFOO. However, if they voluntarily choose to donate, you may accept the donation.

drive is run by commands and is separate and distinct from fundraisers hosted by NMCRS. As a non-federal entity, NMCRS may fundraise among the public which commands may not do. In addition, Section 3-210 of reference (c) only permits Department of Defense endorsement of NMCRS fundraisers when they do not involve public solicitation. Therefore, for the active duty annual fund drive, NMCRS may not actively participate but may provide assistance in the form of advice, support, information, publicity materials, and copies of the active duty fund drive manual.

c. Each year, Code 13 fields questions regarding fundraising ideas and incentives. There are several recurring themes that will sound familiar to many SJAs. Below are the most frequently asked questions:

1. Coercion is prohibited. Charitable contributions should be truly voluntary. Reference (a) prohibits coercive types of fundraising activities in connection with the CFC and DON has incorporated this policy into reference (b). Actions that do not allow free choices, or create the appearance that employees do not have a free choice to give or not to give, or to publicize their gifts or to keep them confidential, are contrary to Federal policy. Types of actions that are specifically prohibited include: (1) supervisory inquiries about whether an employee chose to participate, or the amount of an employee's donation; (2) setting 100 percent participation goals;³ (3) establishing personal dollar goals and quotas; (4) developing and using lists of non-contributors; (5) providing and using lists of contributors for purposes other than the routine collection and forwarding of contributions and allotments; and (5) using the results as a factor in a supervisor's performance appraisal.

2. Civilian Clothes Privilege. There is no authority under the Navy Uniform Regulations for granting a "civilian clothes privilege" to those who contribute to a fundraising effort.

(i) Section 1202 of the Uniform Regulations states that "Navy personnel shall wear the uniform of their respective rate or rank as prescribed by the designated uniform prescribing authority." The "prescribing authority" is generally the regional coordinator and he/she is not permitted to delegate this authority.⁴

(ii) Section 1201.4 provides that "[a]ll military personnel on naval shore activities must wear either the uniform of the day or appropriate civilian attire prescribed by the activity's prescribing authority." Section 7101 of the Uniform Regulations details specific times when civilian clothes may be authorized for wear.⁵ There is no authority that allows a local command to "exempt" itself from the prescribed uniform of the day and authorize civilian clothes privileges for a military member in the work place during the regular duty day. If you are on duty, you wear your uniform.

³ Remember, it is not 100 percent participation but rather 100 percent contact!

⁴ See section 1201, table 1-2-1 or section 4 of the Standard Navy Distribution List to determine the area regional coordinators and their assigned regions.

⁵ "[Civilian] clothing may be authorized for wear while leaving or returning to ships or stations, while awaiting transportation after permission to leave the ship has been given, while on authorized leave of absence, liberty, or in any off-duty status."

(iii) Separate from the Uniform Regulations, there is the principle that privileges should not be for sale or extended according to a member's ability to contribute to a fundraising campaign. The granting of such a privilege under these circumstances could be viewed as coercive. Remember, non-donor lists are not permitted. By having donors in civilian clothes and non-donors in uniform, the command has effectively published a donor/non-donor list to the whole command.

3. Selling Liberty. Commands may not award special liberty for charitable contributions. MILPERSMAN 1050-280 authorizes the awarding of special liberty for "unusual reasons, such as emergencies, to exercise voting responsibilities of citizenship, for observance of major religious events [which] require the individual to be continuously absent from work or duty, or for special recognition." Furthermore, MILPERSMAN 1050-280 states that special liberty in excess of three or four days are "intended as compensation for unusually long working hours, members on-board ship in overhaul away from home port, or as recognition for exceptional work performance." Contributing to a fundraising campaign does not meet the criteria set forth in the MILPERSMAN and may not be used as incentive to donate.

4. Parking Space Privileges. Perhaps the most contested fundraising idea is the raffle of parking spaces. Many commands want to authorize use of a senior officer's reserved parking space as an incentive to donate. It has always been Code 13's position that government property, including the use of such property, cannot be used as a prize for fundraising activities. The authority in section 3-210 of reference (c) for official endorsement of NMCRS does not equate to a finding that any action in support of the annual active duty fund drive is for an official purpose. Therefore, the limitations of section 2-301 of reference (c), regarding the use of Federal Government resources apply. Apart from these requirements, there is also the principle discussed above that privileges should not be for sale or extended to a member's ability to contribute to a fundraising campaign.

5. Gambling. Section 2-302 of reference (c) prohibits employees from conducting or participating in any gambling activity, including operating a gambling device, conducting a lottery or pool, participating in a game for money or property, or selling or purchasing a numbers slip or ticket while on Government-owned or leased property. There are limited exceptions to this prohibition, one of which is for activities composed primarily of Department of Defense (DoD) employees for the benefit of welfare funds for their own members under policies and procedures approved by the Secretary of the Navy.⁶ Reference (b) provides an exception to this prohibition against gambling and allows commanding officers to sponsor raffles, lotteries, and carnival-type games within their installations in conjunction with the annual fund drive. This exception does not extend to casino-type games of chance. Commands must also comply with local or state laws on gambling.⁷

⁶ Section 7 of Executive Order 12353.

⁷ Prior to holding an event, the commander/commanding officer must determine that the fundraising event complies with local/state laws, even when the command is located in an area of exclusive federal jurisdiction. States that prohibit gambling may have an exception for charitable organizations.

(i) Please keep in mind, that reference (b) does not provide an exception to the rule against solicitation. Personnel may not solicit businesses for donations to use as prizes for a raffle. These prizes may be purchased from a portion of the proceeds earned from those participating. Under no circumstances may personnel knowingly solicit a prohibited source for gifts to use in a raffle.

d. So, what may commands do? There are always the tried and true forms of fundraising such as bake sales, car washes, gently used baby clothing sales, or bowling tournaments. Again, these must be conducted on the installations or the fundraising group loses its BOOFOO status. Incidental contributions from civilians not targeted for solicitation do not cause the fundraising group to lose their BOOFOO status (e.g., a civilian employee sees the car wash at the on-base gas station and decides to have his car washed). More creative forms of fundraising are certainly acceptable provided they follow the guidelines in references (a) – (c). We realize that there are activities that remain in a “gray area,” such as those activities that occur at sea. If you have any doubt about a creative fundraising idea, please do not hesitate to contact us.

3. **Point of Contact.** For questions, please contact LCDR Catherine Chiappetta, at 703-614-6005 or catherine.chiappetta@navy.mil or LT Nick Kadlec at 703-614-7384 or nicholas.kadlec@navy.mil.