



REGION LEGAL SERVICE OFFICE EUROPE, AFRICA, SOUTHWEST ASIA

THE MILLRIND

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Greetings, Team EURAFSWA!

By way of introduction, I am LCDR Nicole Agricoli, JAGC, USN, and the RLSO EURAFSWA Command Services Department Head. Welcome to the inaugural edition of the The Millrind. The 2018 Holiday Season seems a fitting time to grace our clients with the invaluable practical wisdom that lies within the following pages. Not intended to replace (but possibly authored by) your own assigned Judge Advocates, this newsletter is a compilation of our efforts. A quarterly publication, our goal is to provide you with relevant updates and practices as they occur, as well as timely refreshers on the legal issues our Navy leadership face on a recurring basis. Our target audience is the command triad and legal officers.



I would be remiss if I did not mention the newly minted, and not yet released UCMJ. For all those who are court-martial convening authorities or NJP authorities, this gift comes with a quid pro quo - mandatory MJA 16 training, by 1 January 2019. If you have questions about this training (i.e. does this apply to me?) please don't hesitate to reach out to me at nicole.agricoli@eu.navy.mil.

NPLOC vs LOI? What is the Difference?

By: LCDR Elizabeth Kiessling, NSA Bahrain

Commanding Officers and Officers in Charge may use administrative measures to further the efficiency of their command or unit. Two common examples include Non-Punitive Letters of Caution (NPLOCs) and Letters of Instruction (LOIs). These documents may not be used for punishment, but can be effective ways to correct performance deficiencies or document substandard performance of duty. People often use the terms "NPLOC" and "LOI" interchangeably, but these documents actually serve different purposes.

NPLOCs

NPLOCs are used to correct minor deficiencies in performance of duty without creating a permanent record. They are meant to serve as a tool for teaching and training instead of punishment. NPLOCs are considered a private matter between the service member and the superior, and cannot be entered into the service member's permanent record or mentioned in or attached to fitness reports or evaluations, except as rebuttal to the service member's allegations of inadequate counseling. However, the underlying facts giving rise to the NPLOC may be referenced in fitness reports or evaluations and used to support detachment for cause requests, relief of command, or to support a negative endorsement.

NPLOC vs LOI (Cont'd)

LOIs

LOIs are a means of creating a permanent record of counseling given because of a service member's sub-standard performance of duty. LOIs can be used as evidence that the service member was counseled and, unlike NPLOCs, can be placed in the service member's official record and referenced in fitness reports and evaluations, if the service member signed acknowledging receipt of the LOI and was given an opportunity to submit a statement.

NPLOCs should contain:

- ⇒ Identification of conduct or performance of duty deficiencies;
- ⇒ Direction for improvement;
- ⇒ Language of admonishment;
- ⇒ Identification of sources of assistance;
- ⇒ Outline of corrective action; and
- ⇒ Consequences of failing to correct deficiencies.

Ref: JAGMAN, Ch 1, §0105

LOIs should:

- ⇒ Describe specific weaknesses;
- ⇒ Recommend suitable and reasonable measures for improvement;
- ⇒ Clearly establish the desired performance standard; and
- ⇒ Establish a reasonable period of time for correction of the deficiency.

Ref: MILPERSMAN 1611-020

Conclusion

NPLOCs and LOIs are intended to serve different purposes, and it is imperative that documents be properly drafted and specifically designated as either a NPLOC or LOI in the subject line, consistent with the intended use. If you have questions about whether to use a NPLOC or LOI, or about the contents of either document, contact your Staff Judge Advocate or local Region Legal Service Office Command Services Department.

Victims' Legal Counsel (VLC) - We're here to help!

By: LCDR Rob McRight and LT Katie McMahon, VLC EURAFSWA

The Victims' Legal Counsel Program (VLCP) has noticed some understandable confusion from commands about different issues including: who VLC can represent and assist, to whom we report, where we are located, etc. This article aims to answer some of those questions; but the critical takeaway is:

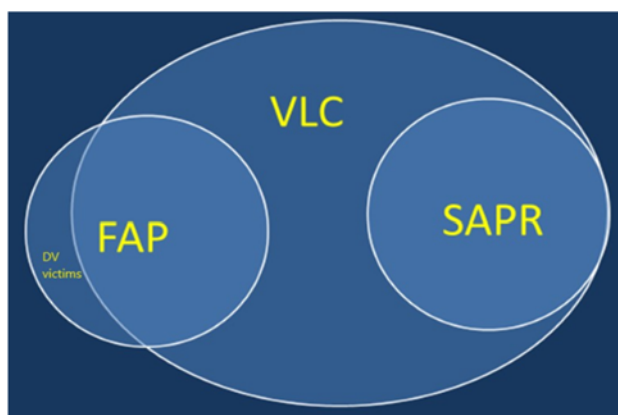
WE ARE HERE TO HELP!



VLC (Cont'd)

Who do we represent? VLCs are uniformed attorneys whose sole mission is to advise and represent victims—including dependents, minors, reservists, and civilians—of sexual violence. It is easy to associate VLC and the Sexual Assault Prevention and Response (SAPR) program. The two are heavily related, but statutorily, the VLCP eligibility matrix is broader than SAPR, and usually based on the independent determination of each individual attorney.

VLC authority to represent victims is separate and distinct from SAPR, thus our eligibility diverges in some cases. For example, minors and victims of sexual domestic violence usually fall within the Family Advocacy Program (FAP), not SAPR. Often, VLC can represent them. Sometimes, we encounter "gap" victims – people who fall outside both FAP and SAPR – VLC can help! Many of these victims are the most in need of legal advice, and our assistance often goes a long way to ensuring individual recovery and participation in accountability processes. In some cases, we can obtain waivers to represent a victim who would not normally be eligible, including foreign national victims. Please, encourage any victim of sexual assault to speak with us confidentially so we can make an eligibility determination and hopefully help them!



Where are we located? There are four VLCs in Europe, Africa, Southwest Asia (EURAFSWA). Our OIC, LCDR Rob McRight, Naples, Italy; LT Tadd Blair, Sigonella, Italy; LT Lindsay Ainsworth, Bahrain; and LT Katie McMahon, Rota, Spain. The VLCs maintain offices in the Fleet and Family Support Centers. We assist victims across EURAFSWA, including any installations and transiting units. Although we work closely with the Region Legal Service Office, the Defense Service Office, and other embedded JAGs in seeking positive outcomes for victims, our program is completely and intentionally separate. This structure allows the VLCs to work completely independently of the trial counsels (TCs), Staff Judge Advocates (SJAs), and defense counsels (DCs). This structure helps assure our clients that we are their attorneys.

How can COs use us? Please feel free to reach out to us at any time (see *Page 10 for VLC Contact Info*). Although our mission is to support and advocate for our clients, communication with commands is essential for our representation and for victim support. VLC can help victims make informed choices to streamline the investigative process, we can act as a liaison between victims and command to reduce stress and confusion, we can help ensure victims have the support they need to feel safe in supporting your mission, and we can provide updates on important case milestones affecting the victim.

VLC Cont'd

Did I say too much? In our experience, COs want to support victims, and that is fantastic. However, please keep in mind that no matter how well-meaning, some information is sensitive and if elicited or shared—even during Sexual Assault Case Management Group (SACMG)—it can be counterproductive and even create legal issues for victims. For instance, while generic updates about the wellbeing of a victim are okay, specific mental health information and conversations between a victim and their Victim Advocate should never be discussed during SACMG or otherwise as those matters are legally privileged and confidential. Please be mindful of what information is passed at these meetings.

VLC MISSION

- ◆ Uniformed attorneys
- ◆ Advise and represent victims
- ◆ Dependents, minors, reservists, and civilians can all be victims

You're a Mean One, Mr. Ethics Counselor —Holiday Ethics

By: LNI Constance Casey; Reviewed by: LT Laura Jacobson, NSA Souda Bay

'Tis the season to consult your Ethics Counselor! Below are some issues that come up annually during the holidays. See Page 8 for a discussion on NFEs and BOOFOOs.



GIFTS—Cash is NEVER an acceptable gift!

Personal Gifts: Anyone can accept any gift from their spouse, family, or close personal friend. Issues only arise when gifts are given solely because of a member's position. These gifts are thus governed by 5 U.S.C. § 2635 and are discussed below.

Outside Sources: Federal personnel may not solicit, nor accept, a gift from a source seeking to do business with the U.S. Government (or risk making an appearance on Navy Times). However, military members may accept personal gifts up to \$20 in value from one source per occasion, and \$50 per year, with the exception of gifts from a foreign government valued at \$390 or less.

Flag Officers: All gifts must be reviewed and documented by a JAG.

Superiors: Superiors cannot solicit nor accept gifts from their subordinates. However, an exception to that is a superior can accept a gift from a subordinate on an occasion in which gifts are traditionally given if the gift is less than \$10. Superiors gifting to subordinates are not limited to \$10.

White Elephant: An anonymous gift exchange is authorized under 5 U.S.C. § 2635.304 if it is unsolicited and under \$10 in value. This only pertains to groups that differ in rank (e.g. a department).



DECORATIONS

Holiday decorations within government offices, buildings, and other establishments are authorized, and even encouraged to boost morale during a season in which Sailors are often far away from home. Generally, it is advisable to choose neutral decorations like pine trees, sparkly lights, and reindeer with googly eyes. But in fact, there is no Navy instruction directly prohibiting religious holiday decorations. The distinction is this: if one religion is allowed, all must be allowed (*Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Allegheny v. ACLU*, 492 U.S. 573 (1989)). Therefore, as long as there is a clear, unbiased command policy in place, it is perfectly acceptable to open the quarter-deck, or anywhere on base, for any and all religious organizations to place their holiday marker.

Military Claims Act—What is it and how does it work?

By: Ms. Barbara Perotti, NAS Sigonella

What is the Military Claims Act (MCA)? The MCA is a mechanism to administratively settle and pay claims arising from personal injury, death, or damage and loss of real or personal property caused by the Department of Defense (DOD).

What claims are payable? MCA claims are payable ONLY if they are caused by a negligent or wrongful act or omission by DOD personnel, acting within the scope of their employment.

MCA claims may also arise from DOD accidents or noncombat activities, regardless of whether such injuries or damages resulted from negligent or wrongful acts or omissions. The MCA claim may be settled under this provision if it arises from authorized military activities in which the U.S. has assumed broad liability. In this case, there is no requirement that the injuries or damages be caused by a particular act or omission by DOD personnel acting within the scope of their employment.



Who can file a claim? The MCA claim may be filed by U.S. citizens and inhabitants for personal injury and damage/loss of personal property. U.S. military personnel and civilian employees can only make a claim for damage/loss of personal property - NOT personal injury.

EXAMPLE: If a service member driving a government vehicle hits another vehicle, the person whose vehicle was damaged by the government vehicle could potentially file a claim under the MCA. However, the claim would only be successful if it is shown that the service member driving the government vehicle was acting within the scope of his/her duties and was at fault for the accident.

“

The goal of the MCA is to compensate individuals who have been personally injured or had their property damaged or destroyed by the DOD.

”

How does someone file a claim? The MCA claim should be presented in writing within two years from the date of the accident or loss. Within Navy Region EURAFSWA, the MCA claim should be filed with a local legal office or directly with the RLSO EURAFSWA Claims Office. Once the administrative and investigatory requirements have been met by the RLSO EURAFSWA Claims Office, the claim will be forwarded to the Tort Claims Unit (TCU) in Norfolk for final adjudication.

It is up to the potential claimant to provide the full documentation to substantiate his or her claim. Documentation should include the original form SF95, signed and dated by the claimant, reporting a sum in U.S. dollars. In order to substantiate the request, two estimates of repair must be provided by the claimant. If it is not viable to get a second estimate of repair, the local command may request a waiver from the TCU through RLSO EURAFSWA.

Can a foreign national file a claim? Claims arising from losses or injuries suffered by foreign nationals, occurring in the country they inhabit, are NOT covered under the MCA, unless they are a command-sponsored dependent whose claim is not payable under the NATO SO-FA or the Foreign Claims Act (FCA).

MJA16: A New Court-Martial for Good Order and Discipline

By: LT DeNealia Cunningham-Peterson, NSA Bahrain

A new and improved Uniform Code of Military Justice (UCMJ) will be in effect not later than 1 January 2019. After a comprehensive and holistic review of the UCMJ and the military justice system, the Military Justice Act of 2016 enacted significant changes recommended by the DoD Military Justice Review Group. Though these DoD-wide changes will impact the entire military justice process from offense to appeal, this article will focus on the new special court-martial forum.

UCMJ (2019) Article 16(c)(2)(A) authorizes new special courts-martial, referred to henceforth as a “no BCD SPCM.” In this new forum, there is no option for a service member to elect to be tried or sentenced by members—it is presided over by a military judge alone. The function of this new forum is to provide a streamlined process for good order and discipline, while maintaining due process for service members and the formality of a court-martial forum. This is another tool in a convening authority’s toolbox, in addition to the existing special court-martial.

The process to convene a no BCD SPCM is similar to the existing special court-martial, from the convening authority’s perspective. Of note, even if a service member objects, a convening authority can still elect to convene a no BCD SPCM if each independent offense carries a maximum confinement punishment of less than two years, if tried at general court-martial; and, does not require sex offender registration per DoDI 1325.07. There are limitations, however, on which offenses can be handled at this new forum, and maximum imposable punishment.

No BCD SPCM Max Punishment:

- ⇒ Not more than 6 months confinement;
- ⇒ Two-thirds forfeiture of pay per month for up to 6 months
- ⇒ A punitive discharge is not authorized in this forum.
- ⇒ NOTE: If the command wishes to discharge a Sailor, an Administrative Board MUST be convened. NO DISCHARGES at the NO-BCD Special!

No BCD SPCMs are designed as a tool to handle minor offenses. Offenses eligible for the no BCD Special are: offenses with a maximum punishment of 2 years or less (if tried at a General Court-Martial); and the offense **MUST NOT** require Sex Offender Registration upon conviction. There is one major exception: UCMJ Article 112(a) drug offense/possession is exempt from the maximum confinement limitation. Drug offenses **may** be preferred to the no BCD SPCM, even where the maximum punishment imposable for a single offense is 2 years or more.

In addition to offense limitations, there are limitations on the punishments that are authorized. Confinement and forfeitures are limited to no more than 6 months, and punitive discharges are not authorized.

Convening authorities should continue to seek advice from their staff judge advocates in consideration of whether a no BCD SPCM is an appropriate forum to prefer charges.

Naturalization Through Military Service

Become a U.S. citizen while serving in the U.S. military!

By: Ms. Daniela Floco, NSA Naples

Did you know that over 4,000 Sailors are not U.S. citizens?

Historically, the process of becoming a citizen, or naturalization, has been complicated and lengthy. However, for applicants who are, or were, in the Armed Forces, the United States Customs and Immigrations Service (USCIS) has streamlined this process and implemented certain waivers (i.e. application fees and residency requirements).

Under the Immigration and Nationality Act (INA), Congress established general requirements for administrative naturalization that accelerates the citizenship process for Active Duty and Reserve personnel honorably serving in the United States Armed Forces.

Sailors who meet the requirements for U.S. citizenship through naturalization need to file a Form N-400, "Application for Naturalization." Useful information is available on the USCIS website. To begin, Sailors can download "A Guide to Naturalization," available at <http://www.uscis.gov>.

Pursuant to MILPERSMAN 5352-010, Sailors also need to submit a request through their chain of command to obtain a certification of honorable service using Form N-426, "Request of Certification of Military or Naval Services."

NOTE: Significant changes have been made to this process. Prior to 13 October 2017, a Sailor could obtain Form N-426 from their local personnel support detachment (PSD) or personnel office; however, as of 13 October 2017, local PSDs and personnel offices are no longer authorized to certify honorable service. Unfortunately, as a result of being improperly certified, many applications are now being returned by the USCIS for proper certification.

All naturalization applications should then be routed through the Sailor's chain of command. Every command should have a Command Citizenship Representative (CCR), who is a designated point of contact to help handle naturalization applications. CCRs are trained to review immigration application packages and provide pertinent information regarding the process. Sailors who need assistance should consult their command's CCR.

Help and assistance is also available at the Region Legal Service Office Europe, Africa, Southwest Asia Office (located at Naval Support Activity Naples, Admin II, Rm 1074). Primary point of contact is the Region Citizenship Program Manager (RCPR) Ms. Daniela Floco.



INDIVIDUAL BENEFITS OF CITIZENSHIP

- ◆ Access to programs (e.g. officer commissioning program)
- ◆ Right to vote
- ◆ Security clearance
- ◆ Immigration opportunities for non-U.S. citizen family members

COMMAND BENEFITS OF CITIZENSHIP

- ◆ Operational readiness
- ◆ Diversity
- ◆ Retention
- ◆ Morale

NFE Fundraising Rules and Reminders

By: Ms. Hadeel Mohammed, NSA Bahrain

A non-federal entity (NFE) is a self-sustaining organization that is not a part of the U.S. Government. These organizations are established and operated by individuals acting outside the scope of any official capacity and include petty officer associations, ball committees, and spouses clubs. Below please find a reminder regarding fundraising activities that are generally prohibited.



- ◆ **Endorsements (JER 3-300):** NFE activities may not create the appearance that the NFE is an official part of or is endorsed by the installation, Navy, or any DoD component.
EXAMPLE: A fundraiser poster should not include any command or DoD logos or titles, and a disclaimer must be prominently displayed on all print and electronic media.
- ◆ **Use of Government Resources (31 USC 1301):** The use of government resources in support of NFE fundraising efforts is generally prohibited.
EXAMPLE: NFEs cannot use command government vehicles or office supplies in support of fundraising.
- ◆ **Use of Official Titles (5 CFR 2635.802(c)(2)):** The use of official titles, positions, and organization names to endorse or promote fundraisers is prohibited.
EXAMPLE: The CO or CMC's official title should not be used by an NFE to promote a fundraiser.
- ◆ **Soliciting (5 C.F.R. §950.101, JER 2-205, 5-409):** Fundraisers should not involve the one-on-one solicitation of junior-ranking members by higher-ranking participants.
EXAMPLE: An O-4 should not walk around command spaces asking junior sailors to participate in a fundraiser.
- ◆ **Gambling (JER 2-302):** NFEs typically may not conduct games of chance, lotteries, raffles, or other gambling-type activities.
EXAMPLE: A fundraiser should not allow participants to buy as many raffle tickets as they want to increase their chances of winning; however a fundraiser could provide a single raffle ticket to each attendant at a holiday party as part of the door prize, as each participant has an equal chance of winning.
- ◆ **Competing with Base Activities (CNICINST 11000.1):** NFE fundraisers should not compete with the Navy Exchange (NEX), any MWR activities, or any other appropriated or non-appropriated fund activities on the installation.
EXAMPLE: An NFE cannot sell Krispy Kreme donuts when they are also sold at the NEX.
- ◆ **Alcohol (CNICINST 11000.1):** NFEs should not sell or furnish alcohol on Navy installations as part of any fundraising activity.
- ◆ **By-Our-Own-For-Our-Own (BOOFOO) Organizations (JER 3-210):** Fundraisers conducted by NFEs composed primarily of DoD employees or their dependents, when conducted exclusively among their own members for the benefit of their own members, in their own spaces, may be exempt from certain fundraising rules.
EXAMPLE: Command endorsement, use of (further) government resources, and use of titles may be authorized to promote a BOOFOO.

Preliminary Inquiries and Command Investigations—PART 1

By: LT Lauren Yutchishen, NSA Bahrain

As a Commanding Officer, OIC, or legal officer, you are bound to do your fair share of JAGMAN investigations (reference: JAGINST 5800.7F). This article focuses on a few critical issues: finding an Investigating Officer (IO), concurrent investigations, and civilian rights advisements.

WHY DO I NEED TO DO AN INVESTIGATION, JAG??

Some investigations are directed by the JAGMAN, and sometimes it is just sound practice. A Preliminary Inquiry (PI) or Command Investigation (CI) gathers facts and organizes them to enhance understanding. The goal: understanding what happened so the command (the CO) can respond appropriately and/or prevent “it” from happening again. They also provide accountability and demonstrate that the command takes the issue or allegation seriously. Not every incident will require an investigation – when in doubt about whether a JAGMAN is warranted, or which type, contact a JAG.

MULTIPLE INVESTIGATIONS A.K.A. MORE THAN ONE COOK IN THE KITCHEN:

Depending on the situation, your PI or CI might not be the only investigation into the same incident. A couple of basic go-bys:

- NCIS has the first right of refusal! If an investigation involves misconduct, coordinate with NCIS.
- Sometimes an incident involves separate commands – usually, there is only ONE investigation. Make sure the Legal Officer is coordinating!
- Safety/IG inspections or investigations are different. They are aimed at discovering the root cause/ enhancing safety. Statements made will not be shared with another investigation.

PRELIMINARY INQUIRIES

A preliminary inquiry is the CO’s most informal tool to gather additional information, and to determine if any additional investigation is warranted. They are often misused.

- Standard Time Frame: 3 working days.
- A true JAGMAN PI has 3 outcomes, the CO can (1) take no further action, (2) make a line of duty determination, or (3) refer the matter to a more in-depth investigation.
- BEST PRACTICE: Document the CO’s decision in an endorsement to the report. This does not have to go anywhere, but it creates a record for your files.

IF you are investigating misconduct, keep in mind the following basic guidelines for interviewing a Suspect:

31(b) (Military Suspects Only)

- * Always have warnings on hand.
- * Review and practice the presentation beforehand – they are not overly complicated, but can be tricky!
- * If you are conducting a misconduct investigation, then the warnings should be prepared in advance.
- * Persons subject to the UCMJ should issue Service Members their 31(b)s.

Kalkines (Civilian Employees)

- * Require federal employees to cooperate truthfully, or risk adverse employment action.
- * Cannot be ordered to participate!
- * ALWAYS consult HR and Office of General Counsel when you are investigating civilian employees!

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NAVY JAG COMMUNITY—DEDICATED TO SERVICE, COMMITTED TO EXCELLENCE

Preliminary Inquiries (Cont'd)

COMMAND INVESTIGATIONS—CHOOSING AN IO

BLUF: CIs should be used in the event of serious property damage or loss, complex line of duty investigations, and deaths.

To choose an IO consider the following factors:

- Officers or Senior Enlisted are appropriate choices.
- If misconduct is suspected: IO must be a higher paygrade than the accused.
- The IO can come from a different command, and this may be appropriate depending on the rank/position of the persons being investigated.
- A civilian can act as an IO, but where there is suspicion of Service Member misconduct, the BEST PRACTICE is to have a uniformed IO.

Many basic investigations will be straightforward. It will be easy to distinguish whether to use a PI or a CI, and an appropriate IO will be easy to find. In cases where the investigations are more complex, hopefully this article will assist you in the more difficult determinations: when a concurrent investigation is needed, cooperation with local law enforcement/NCIS or where there is a mix of military and civilian witnesses. Look for Part II of this discussion in the next issue to read about interviews, witness statements, and drafting the PIO/CIO report and CO's endorsement.

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