



REGION LEGAL SERVICE OFFICE EUROPE, AFRICA, SOUTHWEST ASIA

THE MILLRIND

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Greetings, Team EURAFSWA!

As Officer-in-Charge of RLSO EURAFSWA's Rota detachment, it is my privilege to introduce the second edition of our quarterly publication – *The Millrind*. We appreciate all the positive feedback we received after dissemination of our first edition and hope that you find this one just as enlightening and useful.



Given that this edition is also 2019's first, we would like to take this opportunity to help you frame your New Year's resolutions and intentions as leaders in our Navy. To start, we recommend re-reading former Secretary of Defense James Mattis' memo "Discipline and Lethality" dated 13 Aug 2018. In his memo, he stressed that "[e]nforcing standards is a critical component of making our force more lethal," and charged all leaders "to choose the harder right over the easier wrong" when it comes to disciplining our people.

One thing that can cloud the ability to "choose the hard right" is a lack of confidence in our familiarity with Navy's rules governing discipline. It is RLSO's hope that *The Millrind* can help fill that knowledge gap and bring discipline to the forefront of your leadership practice. In this edition, you'll find helpful guidance on EMI vs. Extra Duties, JAGMAN investigations, and foreign criminal jurisdiction. Please put this information in your leader's tool kit and as always, if you have any questions or concerns, don't hesitate to reach out to your local RLSO office.

LCDR Dennis Harbin, JAGC, USN
NAVSTA Rota, Spain

BEST PRACTICE: Command Authorized Search and Seizure (CASS)

A CASS **must** be based upon probable cause and may be verbal or written – written authorizations are preferred. If a commander verbally authorizes a search or seizure, the cognizant SJA should reduce the verbal authorization to writing as soon as possible. This can be done in a memorandum to file and should include:

- * Date and time the CASS was authorized
- * Precise scope of the search authorization (the *where* and *what* of the search)
- * A statement of the specific facts and information presented prior to search (probable cause)

Failure to document a verbally authorized CASS could result in the suppression of evidence at trial – to include the dismissal of charges, and, potentially, the entire case. Recently, DNA evidence obtained by a Navy-issued CASS was suppressed in a case tried by the USAF because the verbal authorization was not memorialized, and when the case went to trial (8 months later), the CO's and NCIS agents' memories had faded.

Early Return of Dependents—How Does it Work?

By: LT Diana Ohrt, RLSO Naples and LN2 Jessica Collinsworth, NAS Sigonella

We tend to see the same questions again and again when it comes to Early Return of Dependents (ERD):

Where can I find information regarding the ERD process?

Is my dependent eligible for ERD? If so, how can I get it approved?

Are there resources on base to help me through this process?

As we will discuss below, there are several instructions and on-base service providers that can help a servicemember and his/her family navigate the process before, during, and after an ERD. First and foremost, however, it is important to remember that, per the Joint Travel Regulations (JTR), Chapter 5, ERD “must be authorized judiciously and as a last resort.” In other words, ERD is intended to be exceptional, not commonplace, and therefore should only be pursued when all other efforts and avenues have been exhausted.

Base Resources For Servicemembers and Dependents to Use During the ERD Process:

- ◆ The Chain Of Command
- ◆ The Fleet And Family Support Center
- ◆ The Chaplain
- ◆ Behavioral Health
- ◆ The Legal Assistance Office
- ◆ Personnel Support Detachment

In order to assess whether ERD is appropriate for a particular servicemember’s situation, MILPERSMAN 1300-306 and Chapter 5 of the JTR are two excellent resources that explain the ERD process and requirements. Many commands will also have a local instruction in place that should be consulted in conjunction. As Chapter 5 of the JTR outlines, there are very specific reasons for which ERD is authorized, to include: an official situation, a matter of national interest, compelling personal reasons such as financial difficulties, marital difficulties, unforeseen family problems, death or serious illness of a close relative, or when disciplinary action is taken against a servicemember stationed OCONUS.

Personnel who request ERD under these circumstances will often be required to provide evidence that demonstrates that their current situation “has an adverse effect on the servicemember’s performance of duty, and the best interests of a servicemember, or the dependent, or the Government are served by the movement of one or more dependents” (JTR, Ch. 5, Table 5-22). For example, if a servicemember and his/her dependent wish to pursue an ERD due to marital difficulties, PSD may require them to provide a

ERD cont.

separation agreement or a petition for divorce/dissolution of marriage in order to demonstrate the existence of the marital difficulties warranting ERD.

If the command determines that ERD is the appropriate action to take, the command should ensure the servicemember and their dependents are aware of all available resources to assist them during the process. Depending on the situation, the servicemember or their spouse may have questions about housing, BAH, medical care, and child support. The RLSO Legal Assistance Department is available to help the servicemember and/or spouse with those questions.

Don't Get Mad With March Madness!

By: LNI Constance Casey, NSA Souda Bay

Now that you have successfully navigated the ins and outs of holiday gifts and parties, we enter a new ethics minefield known as "March Madness." Brackets and betting abound, it is possible to participate in this great American pastime without violating any regulations.



While you are free to participate in bracket pools outside of the workplace, the issue facing servicemembers is that a March Madness office pool can be considered *gambling*. Gambling is not allowed on Navy installations outside of very, very limited circumstances. Under the UCMJ, Article 92, servicemembers are prohibited from participating in gambling activities while on federal property. Members are even prohibited from individually going to the NCAA's March Madness webpage on government computers!

Fear not, though, basketball fanatics—this does not mean that you cannot organize a March Madness office pool as a morale booster. The only caveat is that if you do so, your competition should be free to enter into and not offer the winner a prize of any value. Bragging rights, for all their satisfaction, are not a prize that would constitute gambling.

There are ways to join in the fun of March Madness, but just be certain to clear it with the local Staff Judge Advocate first! It may initially just seem like a small \$5 gamble, but you could end up losing far more than that.



Q: So can we do March Madness brackets at work?

BLUF: Yes, as long as it doesn't involve paying in to win a prize.

EMI vs Extra Duty—What's the Difference?

By: LN3 Jessica Brown, NAVSTA Rota

All leaders are responsible for ensuring that their Sailors are performing in accordance with the Navy's principles. Two often used measures to aid in correcting performance deficiencies are Extra Military Instruction (EMI) and Extra Duty. Frequently, these two are used interchangeably and misunderstood. Because one is a type of administrative action and the other a type of punishment, it's critical to understand the purpose and limitations of each.

EMI is a non-punitive, administrative measure designed to correct a deficiency and improve a Sailor's duty performance, but may not be used as a substitute for punishment. The authority to assign EMI is given by the Commanding Officer or Officer in Charge and may be delegated to commissioned officers, non-commissioned officers, or petty officers. Most importantly, it must relate to the deficiency for which it was assigned. For example, if Seaman Brown has been continuously late for muster, his LCPO can order her to muster 15 minutes before Quarters for the next two weeks. This ensures not only that Seaman Brown is present for Quarters, but it also teaches him the importance of timeliness.

EMI LIMITATIONS:

- SHALL NOT EXCEED 2 HOURS PER DAY
- IF OUTSIDE OF NORMAL WORKING HOURS, SHOULD BE IMMEDIATELY BEFORE OR AFTER WORKING HOURS
- WILL NOT EXCEED A PERIOD LONGER THAN NECESSARY TO CORRECT PERFORMANCE DEFICIENCY
- MUST RELATE TO THE DEFICIENCY
- CANNOT DEPRIVE NORMAL LIBERTY
- SHOULD NOT BE CONDUCTED ON MEMBER'S SABBATH

When ordering EMI, leaders should consider whether the Sailor would benefit from the training. If not, more serious measures may need to be taken, such as non-judicial punishment (NJP). Of course there are some deficiencies that cannot simply be corrected by ordering some extra training, but instead require punishment. For example, Seaman Brown was UA for 3 days. In this instance, because the offense is a violation of the Uniformed Code of Military Justice (UCMJ), administering EMI might not be the right corrective action. If the CO decides to take the Sailor to Captain's Mast, one form of available punishment is Extra Duty. When Extra Duty is awarded, the CO must establish the amount and the character of the extra duties to be performed. Additionally, he or she should specify if the extra duties should be performed daily and if so, whether it is before or after military duties.

For example, Seaman Brown might be ordered to conduct extra maintenance in the work center, polish brass around the command or be tasked to help another division's work load. Keep in mind, the punishment cannot be a safety hazard, demeaning, or extend for more than 2 hours per day.

All leaders have the responsibility for holding their Sailors accountable. The military provides several options that can be used to correct deficiencies in performance, whether administrative or punitive. EMI and Extra Duty are tools that are effective in ensuring our Sailors meet the standards our nation expects.

For further reading on EMI and Extra Duty, please see JAGMAN 5800.7F Ch. 1 par. 0103 and Manual for Courts-Martial Part V par. 5.c.(6)

5 Principles of Effective Leadership

By: LCDR Conor O'Brien, RLSO Naples

Military Service is considered by many to be one of the most effective methods of leadership development. A culture of preparation, repetition, and effort are reflected in each individual service's core values. These institutions are in the business leader development, because in the profession of arms the consequences are most severe.



Effective leaders demonstrate a deliberate commitment to grow personally and professionally throughout their careers. They work from a foundation of humility, embracing our core values of honor, courage, and commitment. They pursue excellence in accordance with our core attributes of integrity, accountability, initiative and toughness. They commit to improving competence and character in themselves and in their teams. They set ambitious goals, and then inspire their teams to learn so as to achieve their best possible performance to achieve those goals.

Warren Bennis, a renowned author on leadership has laid out several guidelines to success in leadership.

- 1. Manage the dream.** Olympic Gold Medalist Jesse Owens once said: "We all have dreams. But in order to make dreams come into reality, it takes an awful lot of determination, dedication, self-discipline, and effort." Communication of your vision and the ability to set realistic short, medium, and long term goals that track with your vision is imperative to lead a group of people.
- 2. Speak truth to power.** Intelligent devil's advocates are important to recognize personal and systemic weaknesses. Cultivating a collaborative and respectful working environment within your team is important in fostering candid communication. Relying on your trusted advisors rewards asymmetric thinking and increases lethality.
- 3. Display faith, optimism, and hope.** Nobody likes working for a grouch. Just as positivity, humor, and cheerfulness are contagious, so too are pessimism, negativity, and blame shifting. As a leader, you alone are responsible for mistakes in your unit and your subordinates should receive the accolades. It is incumbent upon you to know your personnel and recognize them.
- 4. Expect the best from your people.** Encourage them to expand beyond self-imposed or artificial limitations and excel in ways that may surprise both you and them.
- 5. Take the long view.** "Eyes clear, hearts full, can't lose." Do not become a slave to short-term, bottom-line thinking. Create an atmosphere that encourages your people to take risks. Assure them with both your words and your actions that the only mistake is inaction.

By implementing the Bennis guidelines, Naval Leadership can prepare itself to combat new threats, address our weaknesses, and utilize our greatest strengths: our people.

Sources: Chief of Naval Operations, *Navy Leader Development Framework (Version 2.0)*, April 2018 ; Warren Bennis, *On Becoming A Leader* (Addison-Wesley Pub. Co. 1989)

What You Don't Know About Preliminary Inquiries & Command Investigations (Part II)

By: LT Lauren Yutchishen, NSA Bahrain

Whether you are a Staff Judge Advocate or legal officer, you are bound to do your fair share of JAGMAN investigations (reference: JAGINST 5800.7F). This article serves as a JAGMAN 201 course and assumes a basic understanding of the process. For additional guidance, contact your servicing SJA Office.

OVERVIEW: Part I, featured in the last edition of *The Millrind*, discussed concurrent investigations, preliminary inquiries, choosing an Investigating Officer (IO), and rights advisements. This installment resumes that discussion, focusing on evidence, the interview process and the final report.

EVIDENCE: Evidence can be almost anything — documents, records, logs, witness statements (sworn or unsworn), physical items, photos and videos (labeled if graphic), and the IO's personal observations. When possible, original documents are best. If the originals are unavailable, the report should indicate their location. Witness statements are the most common form of evidence. A common question is whether all witnesses need to be read their rights, be given a privacy act statement, or provide a sworn statement. The answer to all is no.

A COMMON QUESTION IS WHETHER ALL WITNESSES NEED TO BE READ THEIR RIGHTS, BE GIVEN A PRIVACY ACT STATEMENT, OR PROVIDE A SWORN STATEMENT. THE ANSWER TO ALL IS

NO.

- ◆ Rights advisements are only required if the interviewee is suspected of having violated the UCMJ.
- ◆ Privacy act statements are only required if the IO is asking the witness about personally identifiable information. Requests for information about what a member did, observed, or thought while performing official duties does not require a Privacy Act statement.
- ◆ Sworn statements are always preferred, but they are not required. Witness testimony can be recorded in a sworn or unsworn written statement, a signed, typed summary of a verbal statement, or if necessary, just the IO's notes from the interview.
- ◆ If collecting physical items, or examining a witness's phone, it is a best practice to have them sign a permissive authorization for search and seizure, especially if they are suspected of wrongdoing. NOTE – it is neither required nor recommended to confiscate a servicemember's phone without first consulting a JAG. The IO can take photos of pictures or text messages on a witness's device if given permission to do so. If the IO is capturing explicit or graphic images (especially child pornography) STOP, and immediately contact NCIS and JAG. Do not make copies, and do not forward copies.

Finally, the IO should document their own observations following each interview. In some cases, the witness's statement will be comprehensive and additional interview notes will be unnecessary. In other instances, the witness may omit part of their verbal statement, in which case the IO should then include any additional information or observations in their interview notes. Because every finding of fact in the IO's report must cite to an enclosure, the IO's notes can be a critical enclosure if a witness made a comment in the interview that is not reflected in their written statement.



INTERVIEWS: If the matter under investigation is sensitive, the interviews should be conducted in a private location, avoiding contact between witnesses. The IO should begin the interview by showing the witness a copy of the appointing letter and explaining their role as an impartial fact finder on behalf of the convening authority. When necessary, the witness should be read their rights. Always try to interview the subject last.

Preliminary Inquiries and Command Investigations Cont.

The IO should start the interview by giving the witness a point of reference – asking if they are familiar with the person or event in question. That should be followed by a series of open-ended questions. It is perfectly fine to interrupt to ask clarifying questions, but to the extent possible, let the witness talk. Take notes and ask follow-up questions! Remember, that while the IO will become intimately familiar with the events in question, the report will be read by someone who has no background knowledge. If a witness says something that does not make sense, ask follow-up questions. If a subsequent interview reveals a question or discrepancy, reach back out to the witness for clarification. NOTE – if you read a witness their rights during an initial interview, you must re-read their rights before conducting a follow-up interview.

At the conclusion of the interview, provide the witness with a statement form – or blank paper – and request that they summarize, in writing, their statement. Remember, everything must be documented, so if the witness does not provide their statement in writing, the IO will be required to do so.

THE REPORT: The investigation report has five sections: the opening block, preliminary statement, findings of fact (FoF), opinions, and recommendations. Your advising JAG can provide you with a template for reference. The opening block is standard and is where you will list your enclosures and individuals interviewed. The preliminary statement follows a similar standard template, but is a good place to include any questions that may not be addressed in the report. For instance, if a witness declines an interview, you can note that in the preliminary statement.

The FoF section is where the IO will lay out the results of their investigation. It is usually best to work chronologically through the FoF. Each FoF should be *one fact only*, as specific as possible, and cite at least one enclosure. Consider the audience and try to give them an organized and complete picture. Following the FoF section, is the opinion section. The opinions should be reasonable inferences based on the evidence. Each opinion should reference at least one FoF which supports how the IO came to form that opinion. This is the section where good IO notes come to bear. If it is your opinion that the subject of the investigation has anger issues, and that opinion is informed in part by the fact that that person got visibly angry in their interview, that interaction must first be documented in the notes and then in a FoF (to later be cited to as the basis for an opinion).

Finally, the recommendations section. Recommendations are informed by the opinions, but there is no need to cite to them. The IO should state whether they think additional investigation is required, and then, if appropriate, recommend specific administrative or disciplinary measures. Instead of saying “disciplinary measures,” recommend “the member should be taken to Captain’s Mast.” Instead of saying “this should be addressed administratively,” specifically recommend EMI or a NPLOC. When the report is complete, it should be sent to the advising JAG for review before signature, and again after any suggested edits are made.

CONCLUSION: Documentation is paramount! From evidence to rights advisements to interview notes, every aspect of the investigation should be clearly documented and submitted as enclosures. Approach both your interviews and your report in chronological order as much as is practicable. Write your report as though the reader knows absolutely nothing about the situation. Make sure that the final draft of the report is sent to the advising JAG for review before signing and submitting to the CA, but never hesitate to reach out to the JAG throughout the process. Good luck!

PRO TIP: There are two standard questions that can be useful to ask at the very end of every interview:

1. “Who else should I talk to about this?”
2. “Is there anything else you think I should know?”

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Limited PCS Flexibility for Families Overseas

By: LT Kyle Doherty-Peters, RLSO Naples

In September, the Navy announced expanded PCS travel flexibility for Sailors with dependents in school (K-12) and other categories. The policy change authorized Advanced Dependent Travel (ADT) or Delayed Dependent Travel (DDT) for up to six months before or after the sponsoring Sailor's PCS. The policy announcement has caused a great deal of confusion for families overseas. Unfortunately, the added flexibility only permits ADT when dependents depart an overseas location BEFORE the sponsor and DDT when dependents arrive at an overseas location AFTER the sponsor. This means DDT is not an avenue for dependents to remain overseas for six months after the sponsor's departure in order to complete school.

Depending on the location, overseas Commanding Officers may grant Continued Logistical Support in exceptional situations when dependents are permitted to temporarily remain after the departure of the Sponsor. Each installation's ability to grant support, however, is based on international agreements (such as a Status of Forces Agreement) and host nation law. In situations where Navy policy regarding dependent travel and host nation law/international agreements conflict, we must abide by host nation law/international agreements. If you have questions on how host nation laws and international agreements impact dependent PCS travel, please reach out to your local RLSO office.

Region Legal Service Office Europe, Africa, Southwest Asia develops Navy professionals and delivers legal solutions to enable military operations in defense of the U.S. and it's allies in Europe, Africa, and Southwest Asia.

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