



# THE MILLRIND

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## Greetings, Team EURAFSWA!

As the Officer-in-Charge of RLSO EURAFSWA's Sigonella detachment, I welcome the opportunity to introduce the third edition of our quarterly publication. Whether you are a Legal Officer, Legalman, or JAG, you hold a special place of trust and responsibility. More specifically, you are entrusted to provide Commanders with advice and assistance that ensure their official acts are lawful and defensible.



While any Commander's decision may be subject to review by superior officers, their decisions may still be declared unlawful by a federal court under the Administrative Procedures Act if they are arbitrary, capricious, contrary to law or an abuse of discretion. Please keep this in mind as you perform your duties, and remember to document and preserve records in case a decision is later challenged.

We hope the contents of this publication serve as a helpful resource, and you should not hesitate to reach out to your local RLSO office for assistance.

*LCDR Steve Gonzales, JAGC, USN  
NAS Sigonella, Italy*

## Can We Use ORF to Fund an Overseas Change of Command Reception ?

By: LCDR Elizabeth Kiessling, NSA Bahrain

It's that time of year again – longer days, beach vacations, cook outs, and...changes of command. Many commanding officers are set to turn over this summer, and a question that staff judge advocates often receive from executive officers and legal officers is, "Hey Judge – can we use ORF to fund the change of command?"

### WHAT IS ORF?

Governed by SECNAVINST 7042.7K, official representation funds (ORF) are a special set of funds used to maintain the standing and prestige of the United States by extending official courtesies to certain officials and dignitaries of the United States and foreign countries. ORF-eligible individuals include but are not limited to distinguished citizens, military officers, and government officials of foreign countries; senior federal (non-DoD), State, and local government officials from the United States; and distinguished and prominent U.S. citizens whose rank, position, function, or stature warrants official courtesies. A complete list of personnel who qualify for ORF courtesies can be found at SECNAVINST 7042.7K, Section 6.

## ORF cont.

In addition to the above restrictions on who is eligible to receive ORF courtesies, there are also strict ORF-eligible-personnel-to-DoD-personnel ratios that must be observed at ORF-funded events. At events of fewer than 30 persons, a minimum of 20% of invitees must be ORF-eligible. At events of more than 30 persons, a minimum of 50% of invitees must be ORF-eligible.

### ORF BASICS

- \* **WHO IS ELIGIBLE:** Distinguished citizens, military officers, and government officials of the U.S. and foreign countries whose rank, position, function, or stature warrants official courtesies
- \* **RESTRICTIONS:** If there are fewer than 30 people at the event, at least 20% must be ORF eligible. If more than 30, at least 50% must be ORF eligible.

#### THE GENERAL RULE – AND THE EXCEPTION TO THE RULE

The general rule is that ORF may not be used for expenses in connection with change of command ceremonies and receptions. However, there is an exception: when a change of command reception is intended to provide an opportunity for the incoming commander to meet ORF-eligible individuals, an exception to policy may be requested. If the request is approved, food and refreshments for the change of command may be funded utilizing ORF.

Requests for exceptions to policy must be requested in advance and routed as described in SECNAVINST 7042.7K. Requests should include a proposed guest list that meets the applicable ORF-eligible-personnel-to-DoD-personnel ratio, a quote for expenses, and a legal review.

#### CONCLUSION

Though ORF typically may not be used in connection with change of command expenses, policy exceptions can be made when the event is intended to provide an opportunity for the incoming commander to meet ORF-eligible individuals. Because such requests must be routed well in advance, plan to coordinate your request early through your staff judge advocate, or, if your command does not have a staff judge advocate, through your local Region Legal Service Office (RLSO).

**Q: Can we use ORF for an overseas COC reception?**

**BLUF: Yes, if the intent is for the incoming CO to meet ORF-eligible individuals.**

## NFEs Fundraising OCONUS: Playing By Different Rules

By: LN2 Tramaine Hunden and LT Jason Thelen, NAS Sigonella, Italy

A non-federal entity (NFE) is a self-sustaining organization that is not a part of the US Government. These organizations are established and operated by individuals acting outside the scope of any official capacity and can include military contractors, petty officer associations, ball committees, and spouses clubs.

### BAD NEWS

International agreements generally prohibit these groups from raising funds by selling goods/services in the local economy off base. As a result of these rules, NFEs overseas must turn to the base community to raise funds, requiring some additional requirements that do not exist back home on US installations.

This means that NFEs overseas who want to maximize their ability to operate and fundraise on military installations must:

- (1) be composed primarily of DoD members or their dependents;
- (2) fundraise only among DoD personnel, GS employees, and dependents (NOT foreign nationals);
- (3) use the funds raised to benefit the welfare of the group's own members or their dependents; and
- (4) receive approval from the installation CO for all fundraising events.

### GOOD NEWS

Meeting the requirements above gets your NFE special status known as a "by our own, for our own" (BOOFOO) group. This special status allows for some exceptions to policies listed below.

|   | No BOOFOO Status   | BOOFOO Status   |
|---|--|---|
| <b><u>Endorsements</u></b>                | May NOT state or imply official endorsement of NFE fundraising.  | May formally endorse NFE events and fundraising efforts.  |
| <b><u>Disseminating Information</u></b>   | May ONLY announce items of common interests (e.g., POCs for upcoming community events and MWR events). | May use command channels including government e-mail addresses to announce NFE fundraising events and activities.     |
| <b><u>Soliciting</u></b>                  | May NOT solicit any individuals or entities on base (e.g., fundraising events or membership drives).   | May solicit DoD personnel, GS employees, and dependents, but NOT foreign nationals (even those associated with NATO). |
| <b><u>Use of Government Resources</u></b> | May NOT use appropriated funds, official personnel, or government resources to assist NFE fundraising. | Some government resources (e.g., hoses/water, tables, BBQ pit) can be authorized but limited.                         |

EXAMPLES of permitted activities by DoD personnel participating in a BOOFOO fundraiser:

- ◆ Limited logistical support that may include access to facilities and resources to host events.
- ◆ Advertise in designated installation approved areas (e.g., local base radio, newspapers, all hands).
- ◆ List NFE fundraising events in the Command Plan of the Week.
- ◆ Using official .MIL email address to send out information about the fundraiser.

## New Expedited Transfer Request Policy Released May 2019

By: LT Katie McMahon, VLC, Rota, Spain

The Navy recently updated the Expedited Transfer policy, dividing it into two separate policies — one for expedited transfer requests (ETR) and one for safety transfers. The most significant change is that under the new ETR policy, servicemember victims of crimes under Articles 117a (wrongful broadcast or distribution of intimate visual images), 120a/130 (stalking), and 120c (other sexual misconduct) are now eligible for ETR.

The intent behind the expansion of the ETR policy is to address situations in which a servicemember feels safe, but uncomfortable (e.g., victim may be experiencing ostracism and retaliation), and to assist in the victim's recovery by moving the victim to a new location. Alternatively, if servicemembers are afraid for their safety, they should use the safety transfer request (MILPERSMAN 1300-1200) discussed below.

A servicemember may request an expedited transfer if: (1) he/she is a victim of sexual assault, and has filed an unrestricted report of sexual assault; or (2) he/she is a victim of stalking, other sexual misconduct, or wrongful broadcast or distribution of intimate visual images, and has filed a report with a military criminal investigation organization. ETRs may be made at any time in a servicemember's Navy career and there is no limit to the number of ETRs that a member can make over the course of their career. Service members may also ask for the offender to be reassigned instead.

### **EXPEDITED TRANSFER**

- \* *What changed?* Expanded to include servicemember victims of sexual assault or other sexual misconduct, stalking, and wrongful distribution of intimate visual images (“revenge porn”).

### **SAFETY TRANSFER**

- \* *Who can request?* Victims (including dependents) and witnesses of any crime under the UCMJ, FAP cases, violent crimes, or those who have received threats of bodily harm or

An ETR can include a temporary or permanent move to a different department, division, or unit within the current command, or a temporary or permanent move to a different command (within or outside) the current command's geographical area. As part of the ETR, a victim must include his or her reasons for the request, top three location preferences, and dependents (if desired). A Victims' Legal Counsel (VLC) is an excellent resource to help assist in drafting an ETR for a servicemember.

Upon receipt of the ETR, a CO has 72 hours to decide whether to approve or disapprove the request (refer to exhibit 7 of MILPERSMAN 1300-1205). The CO must consult with his or her SJA based on the available evidence to determine whether the report is credible or not. If a report is determined to be credible, there is a presumption in favor of approving the request. If the report is not determined to be credible, the CO must document the reasons. Even without a credible report, though, the CO can still transfer the person on other grounds. NOTE: An acquittal at a court-martial does not mean a report is not credible.

Unlike the ETR, the safety transfer request includes victims or witnesses of any crime under the UCMJ, FAP cases, violent crimes, or those who have received threats of bodily harm or death. A safety transfer involving only a dependent can be arranged in applicable cases. And, just like with ETRs, the CO must act within 72 hours.

## Why Doesn't My Dependent Child Allow Me to Get BAH, OHA, or Both?

By: LT Savannah Smidt, NAVSTA Rota

**? I AM PAYING CHILD SUPPORT SO MY CHILD IS OBVIOUSLY MY DEPENDENT — WHY CAN'T I RECEIVE A HOUSING ALLOWANCE?**

**? MY CHILD IS ON MY PAGE 2 — ISN'T THAT ENOUGH TO RECEIVE A HOUSING ALLOWANCE?**

**? MY CHILD AND HIS MOTHER LIVE WITH ME, BUT WE'RE NOT MARRIED—HOW DO I PROVE THE CHILD IS MY DEPENDENT IN ORDER TO GET A HOUSING ALLOWANCE?**

These are some of the common questions about housing allowances that we hear from servicemembers. Housing allowances can be a critical source of income for many military families, but the rules can often frustrate or confuse servicemembers. This article will help answer those questions and explore what entitlements you or your Sailors may be eligible for. See also: OPNAV 7220.12 and the JTR Chapters 8-10.

First, who is eligible? Active Duty or Reservists on Active Duty orders for 31 or more days (not training) who are stationed OCONUS on unaccompanied or dependent-restricted orders and have dependent minor children. A servicemember is NOT entitled to receive both an Overseas Housing Allowance (OHA) and Basic Housing Allowance (BAH) for dependents' location unless there is a court order stating that the servicemember parent has legal and physical custody of the child solely, or for a specific period of time.

**If you are providing child support and the other parent is the primary custodian:** As long as you are providing support that would be higher than BAH-Diff, then you are entitled to a single housing allowance at the with-dependent rate. BAH-Diff is the difference between a single servicemember housing allowance and a servicemember with dependents housing allowance. For example, OHA for an E-5 without dependents in Rota is \$1461.38, and with Dependents is \$1623.75 — making the BAH-Diff in this scenario \$162.37. If that E-5 is paying more than \$162.37 in child support, he will be entitled to the BAH-Diff. Generally, a servicemember will not be required to show proof of support as long as the child is on their Page 2.

**If you have custody of a child, but are not married:** You MUST have a court decree/order stating that you have custody of your child. PERS issued a bulletin (Pay and Personnel Information Bulletin 10-12 Issue) which states: custody is assumed to be with the mother even if the child is residing with the father. Therefore, for servicemembers who are fathers and have custody of their children without a court order, PERS assumes that the mother has custody. For those that share custody, you MUST have a court order that states the amount of time the child is to reside with each party. A servicemember can receive the with dependents housing entitlement for the time the child is supposed to reside with them.

**If you are unmarried and would otherwise have custody of your children, if not for a dependent-restricted or unaccompanied tour:** You may be entitled to a family separation housing (FSH) allowance. FSH targets housing expenses resulting from separation from a dependent. For servicemembers stationed OCONUS on an unaccompanied or dependent restricted tour, this type of allowance is known as FSH-O. FSH-O allows a servicemember to receive BAH with dependents for the location where his dependents reside and OHA without dependents for the area in which he is stationed. FSH-O is only payable if: 1) there are NO government quarters available, and 2) a Service member has a court order/decreed stating he has custody of his minor child AND the child is currently residing with a relative or other designated person due to military orders.

## Military Disabilities and Dual Processing

By: LT Ericka Droguett, RLSO EURAFSWA Reserve Unit

When it comes to military disability ratings, 30% is the magic number. Disabilities rated 30% or higher qualify a Sailor for medical retirement (meaning, similar benefits to having served a full 20 years, including: Tri-Care medical coverage for the retiree and dependents, legal assistance, access to base exchanges and gyms, etc.). Keep in mind that military disability is different than Veterans Affairs (VA) disability. VA disability accounts for all service-connected disabilities, whereas military disability only includes the condition(s) that prevents a Sailor from performing the duties of his/her rate/rank. It is not uncommon for a Sailor to have a high VA disability rating (say, 80%) and only have a 10% military disability rating (perhaps for a knee or back injury that prevents continued Naval service.)



It might surprise you to learn that most Sailors referred into the integrated disability evaluation system (IDES) never make it to a Formal Physical Evaluation Board hearing. Some sailors do not appeal the original disability rating provided by the Informal Physical Evaluation Board (either out of satisfaction or ignorance), bringing their case to a close. Of those Sailors who do choose to appeal the original informal board findings, some are able to get the desired outcome with the help of a disability attorney prior to the scheduled formal board.

Both formal and informal physical evaluation boards are comprised of three members – two line officers and one medical doctor – selected from a small pool of senior officers (on average about 15) whose billets are to solely perform physical evaluation board reviews. Informal physical evaluation boards are strictly

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**It is not uncommon for a Sailor to have a VA disability rating as high as 80% and only have a 10% disability rating.**

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document-based and conducted in the privacy of the board members' spaces. If the informal board results are appealed, then a formal board is scheduled and a Code 16 disability attorney is assigned. Typically, an attorney is assigned 4-6 weeks prior to a board, and carries 4-8 cases every week; making for quick turn-arounds and often heavy work-loads.

Cases of dual-processing (where the Sailor has some type of concurrent process pending for violating the UCMJ) are even more complex. Prior to June 2016, there was no instruction delineating which processing should take precedence. In effect, it ended up being a race to Millington - whichever processing finished and was reported first, won out – usually the punitive or administrative separation, not the results of a

medical disability board. The time it took to process through the Disability Evaluation System simply took too long to ever prevail in a race of the clock.

By the time Sailors are assigned to a formal board disability attorney, all of their medical records have been collected and reviewed by the Informal Physical Evaluation Board. Any additional questions arising from the Informal Board's review would have been posed to either a treating physician or the Sailor's chain of command. Once those answers were received, the Veterans Affairs Compensation & Pension exams would determine the Sailor's service-connected disabilities and a VA disability rating would be assigned. A Non-Medical Assessment (a letter explaining what affect the Sailor's medical condition has on performing her military duties) would then be provided by the Sailor's command.

## Disabilities cont.

After the informal board results are released, there may still be another 2-6 months before the formal physical evaluation board and then another 2-8 weeks before the results from the formal board are released. If the Sailor then wishes to appeal the formal board results, the disability attorney can submit a Petition for Relief (which are very seldom granted since it is the Board Members' own attorney who reviews the petitions) - which can take another month to draft and receive a reply. Even in cases where the formal board results are favorable, the processing time to close out the case and send it to PERS can be several weeks.

**BOTTOM LINE = MOST CASES TAKE BETWEEN 6 MONTHS TO A YEAR TO PROCESS THROUGH THE INTEGRATED DISABILITY SYSTEM.**

Of the 200 cases I was assigned during the year I did formal boards, I only handled one concurrent processing case. The low number is very likely attributable to would-be-dual-processing cases already having been settled in favor of ADSEP long before a formal board could be scheduled. Right before I PCSed, members of the Senate expressed concern about the reported number of prior service members with combat experience and diagnosed mental health conditions, who had been administratively separated for "minor misconduct." Their concern was that such misconduct could be reasonably attributed to Soldiers' mental health conditions. While these concerns were addressed to Army leadership, the Navy engaged in the same practices. About 7 months later, a memorandum dated 1 June 2016, issued by the Secretary of the Navy, provided long-awaited guidance related to concurrent processing cases involving administrative separation. It is now up to a Flag Officer in the Sailor's chain of command which processing is given preference.

In the one concurrent processing case I handled, the Sailor had undergone in-patient treatment for severe depression resulting from his deployment to Afghanistan while assisting Special Forces. Upon his return from deployment, his chain of command became displeased with his regular tardiness and lack of attention to detail. When he received a civilian conviction for public exposure (he claimed he forgot to put his clothes on correctly – take that for what you will) the command elected to take him to a court-martial. Prior to the court-martial, a formal physical evaluation board was conducted. During this proceeding, his mental health provider testified that his behavior was connected to his mental health condition – and the Sailor was found unfit for Naval service due to mental health disability at 70%. Afterwards, the Sailor's defense attorney worked with the command SJA in an effort to have the charges dropped and allow him to be medically retired. Ultimately, the command agreed to administratively separate the member in lieu of trial. Unfortunately, even though the formal board found in the Sailor's favor, because the ADSEP paperwork made it to Millington before the Physical Evaluation Board closed out the Sailor's case, the Sailor was ADSEP'd rather than medically retired. The Sailor was advised that he could petition to BCNR for medical retirement; whether he did is unknown.

Even in cases where no misconduct occurs, there is still a burden on the command in these cases. By definition, Sailors are referred into the IDES program because they are physically unable to do the job required of their rate and rank. Prior to IDES referral, a Sailor may have had up to two 6-month periods of limited duty (LIMDU). That is a long time for a command to wait for the billet to be filled by an able-bodied replacement. Even if the Sailor is able to contribute, in part, to the command's mission, he/she may still require regular medical appointments – further reducing their contribution to mission readiness. Add to this the stress and disruption of misconduct, it is not hard to see why, in concurrent processing cases, the command might favor administrative separation. It is important, however, that appropriate measures are taken to determine whether the misconduct is reasonably related to mental health conditions (or TBI) incurred in a combat zone, and that such situations be handled with care, in an effort to maintain the legal (and by extension, moral) high ground.

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NAVY JAG COMMUNITY—DEDICATED TO SERVICE, COMMITTED TO EXCELLENCE

## Involvement in Political Activities: Dos and Don'ts

By: LCDR Nicole Agricoli, RLSO EURAFSWA, Naples



“A picture is worth a thousand words...” Especially, when that picture is a uniformed servicemember at a political campaign event, or otherwise endorsing an official candidate. The DoD has a longstanding policy of encouraging military personnel and civilian federal employees to carry out the obligations of citizenship, but members should not engage in partisan political activity. DODI 1344.10 provides specific guidance for uniformed servicemembers and the Hatch Act provides additional

guidance regarding DoD civilian employees. The restriction on partisan political activity by active duty members is broad: any activity that may be reasonably viewed as directly or indirectly associating the DoD with a partisan political activity shall be avoided.

### **DoD Employees May Not Engage in Political Activity While:**

- ◆ On duty (includes teleworking)
- ◆ In a federal building (on or off-duty, includes surrounding area)
- ◆ Wearing a uniform or official insignia
- ◆ Using a government vehicle (Don't put your bumper sticker on the GOV)

### **Examples of Prohibited Political Activity:**

- ◆ Publicly wearing, displaying, or distributing items that are associated with a partisan candidate or political party, such as items reading: “Persist”; “MAGA” or “Make America Great Again”; “the Resistance”; or any other materials from a partisan candidate or party's current or past campaigns for office
- ◆ E-mailing, blogging, tweeting, or posting to social media while on duty or in the workplace - **EVEN IF USING A PERSONAL DEVICE OR EMAIL ACCOUNT**
- ◆ Displaying campaign picture of the President

### **Permitted Activities by all DoD civilian employees:**

- ◆ Express personal opinions on candidates and issues
  - ◆ Place A campaign bumper sticker on their personal car and park in a gov't lot
  - ◆ Make financial contributions
  - ◆ Attend political events (not in uniform)
  - ◆ Follow, like, or comment on social media pages
- Activity that is not associated with a political party is not political activity. For example, legislation (Affordable Care Act, DACA); ballot initiatives focused on issue-oriented campaigns (gun control, medical marijuana, right to die); attending a march or rally.

As always, these are nuanced and complicated situations—for specific guidance on individual actions or engagements, contact your local Command Services attorney.

## In closing...

We hope that you have found this edition of The Millrind informative and useful. If there are particular topics that you would like to see covered in our next edition, please let us know by contacting LCDR Nicole Agricoli or LT Laura Jacobson.

