



BENGOSHI 弁護士

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CO's Corner

The Bengoshi, which means “lawyer” in Japanese, serves as a way to educate and inform fleet leaders, collateral duty legal officers, and others who may be interested in legal issues across the Indo-Pacific AOR.

This issue addresses a wide range of topics, including:

- Competence for duty medical examinations;
- Appropriate use of alcohol detection devices;
- A refresher on recent policy changes related to hemp products;
- Line of duty investigations; and
- Pretrial restraint and confinement.

The breadth of topics covered in this edition highlights the wide range of services RLSO WESTPAC provides to the fleet.

Our team of attorneys, legalmen, and civilians are always standing by to assist.

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COMPETENCE FOR DUTY MEDICAL SCREENINGS

LCDR Erin Schmitt, JAGC, USNR

The complex and often dangerous nature of naval service requires that Sailors and employees be physically and mentally competent to perform their duties every day. When an individual is intoxicated, under the influence of drugs, or otherwise impaired, they present a serious risk to the safety and welfare of the entire command. BUMEDINST 6120.20C authorizes a competence for duty (also commonly referred to as fitness for duty) examination to determine whether an individual's faculties are impaired to such an extent that they cannot safely and properly execute their duties. This article will give a brief overview of the governing instruction and what the command needs to know to initiate a fitness for duty exam.

Competence for duty examinations are appropriate only when there is a need to determine whether a person's physical and mental faculties are impaired by drugs, alcohol, or other factors. Sailors and civilians can be required to undergo an exam. Note, competence for duty examinations are not appropriate when the command's primary goal is to pursue disciplinary action.

To initiate a competence for duty examination, the command must complete the first 12 blocks of NAVMED 6120/1 (Rev. 10-2011). The form should be completed by someone in the chain of command who exercises authority over the individual, such as the Commanding Officer, Officer in Charge, or a civilian employee's supervisor. A command representative must then escort the individual to medical, where a medical officer will administer a physical exam. Upon conclusion of the exam, the medical officer will complete NAVMED 6120/1 and determine whether the individual is competent to perform their duties.

The results of a competence for duty exam cannot be used for disciplinary purposes. Often times a command will want a blood or urine sample from the individual and can request this on NAVMED 6120/1. However, only the medical officer can decide whether blood, urine, or other bodily fluids will be drawn; the command cannot mandate this during a fitness for duty exam.

BUMEDINST 6120.20C discourages drawing samples of body fluids; however, a medical officer has sole discretion to determine whether it is necessary. The medical officer will not use force to extract a sample if the individual objects.

If the command wants to pursue disciplinary action against a Sailor and has probable cause to believe a blood or urine sample is necessary, the Commanding Officer should immediately contact their staff judge advocate to discuss the possibility of an authorized search under Military Rule of Evidence 315. A medical officer can withdraw a sample over an individual's objection with proper search authorization.

When used appropriately, a competence for duty exam is an important tool in the command's toolbox to ensure a safe work environment for all. As always, if you have any questions regarding competence for duty exams, reach out to your staff judge advocate or the Region Legal Service Office Western Pacific Command Services Department.

"The results of a competence for duty exam cannot be used for disciplinary purposes."

USE OF UNIT ALCOHOL DETECTION DEVICES

LCDR Chris Cook, JAGC, USNR

Alcohol detection devices (ADD) are meant to assist commanders in promoting the responsible use of alcohol. OPNAVINST 5350.4E establishes policies and procedures for the use of hand-held ADD. This article summarizes that instruction and provides guidance on the proper and effective employment of ADDs.

What are ADDs & How May They Be Used?

ADDs are authorized as a complement to a command's initiative to deter irresponsible use of alcohol and to assist with identifying Sailors who may require support and assistance with alcohol use decisions. ADDs enhance a command's awareness of the crew's culture of alcohol use, educate Sailors on the effects of their alcohol use decisions and self-impairment, and support unit safety.

Test results from an ADD may not be used as a basis for disciplinary measures. However, the ADD results may form the basis of a subsequent search (discussed later in this article).

Commanding Officers are authorized to conduct random inspections of Sailors who are on duty during normal working hours. ADDs are not intended to test Sailors on leave or liberty. Any inspection must be random – that is, not regular or predictable. When an inspection is approved, an inspecting officer's order to provide a breath sample in conjunction with the inspection is a lawful order and refusal to submit to an ADD test may subject the member to appropriate disciplinary or administrative action.

Interpreting ADD Results

OPNAVINST 5350.4E provides the blood alcohol content (BAC) benchmarks that a Commanding Officer should be aware of when assessing the results of an ADD test. For instance, a 0.04 percent BAC is the benchmark limit for determining readiness to safely perform duties. A Sailor whose ADD-indicated reading is 0.04 percent BAC or higher shall be presumed to be not ready to safe-

ly perform duties and shall be relieved of duty and retained on board the command in a safe and secure environment until the ADD-indicated reading is not detectable.

Additionally, a command referral to the drug and alcohol program advisor (DAPA) is appropriate in response to any BAC of 0.04 percent or higher. Additional non-punitive action focused on safety, training, counseling and education may also be implemented at the discretion of the Commanding Officer. A Sailor who has previously completed DAPA treatment and has an ADD BAC of above 0.02 percent, shall at a minimum be referred to the DAPA. Similarly, any Sailor who is under the minimum legal drinking age and has an ADD reading of 0.02 or greater shall, at a minimum, be referred to DAPA.

In cases where the ADD reading is 0.02 or higher, the Sailor should be re-tested after a twenty minute waiting period to allow the effect of mouthwash, breath mints, gum, or sprays that may produce a detectable indicator of alcohol, to dissipate. A BAC of less than 0.02 percent shall be considered a negative result.

Action in Response to ADD Results

As noted above, the results of an ADD breathalyzer may not be used for disciplinary purposes. However, a Commanding Officer may use the ADD results as a basis to further evaluate a Sailor's fitness for duty, to remove a Sailor from a duty section or other specific assignment, or refer the Sailor to the DAPA.

Additionally, ADD results may form the basis for a probable cause search. It is important to note that probable cause search authorizations are based on the totality of circumstances. In other words, a positive ADD test without any other evidence may not provide a sufficient legal basis for a probable cause search. However, a positive ADD test, when considered in addition to other evidence, such as bloodshot eyes, slurred speech, muscular movement, general appearance or behavior, and/or an

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admission of alcohol use by the Sailor, may form the basis for probable cause. Commands are strongly advised to contact their assigned staff judge advocate or the command services team at Region Legal Service Office Western Pacific to discuss the legality of a probable cause search.

ADDs are useful tools to help identify alcohol issues within a command's ranks. However, the use of ADDs must be in strict accordance with established Navy procedures. Consult your staff judge advocate with specific questions about proper use of ADDs and how they can help your command.



DISPOSING OF NON-STANDARD DRUG ABUSE CASES: HEMP PRODUCTS

LT Ross Black, JAGC, USN

It is no secret that the use of illegal drugs is expressly prohibited under the Uniform Code of Military Justice and is incompatible with military service. However, recent changes to federal law have triggered some confusion as to the permissibility of certain legalized substances such as hemp or cannabidiol (CBD). This article provides a general overview of recent changes to federal law, discusses common substances that are commercially available as a result of those changes to the law, and addresses how the Navy addresses the use of those substances under its policy against the use of drugs.

Background

The Agriculture Improvement Act of 2018 removed industrial hemp from the list of controlled substances. Additionally, the new law excluded from the definition of marijuana those hemp products containing less than 0.03 percent of tetrahydrocannabinol (THC), the psychoactive substance in cannabis. Consequently, various hemp products are now commercially available in the United States. Moreover, the hemp plant is nearly identical in genetic makeup to the cannabis plant.

CBD is one of the many substances derived from hemp plants. The extraction and commercial sale of CBD is now common in the United States and is available in commercial establishments. CBD is often marketed to provide medicinal benefits and sold in various forms like oil, spray, liquid, gummies, and balms.

While not federally controlled, Delta-8-tetrahydrocannabinol (Delta-8) is also a naturally occurring psychoactive compound derived from hemp. Delta-8's unique psychoactive chemical compound has caused hospitalizations in some cases.

Given the nearly identical genetic makeup to the cannabis plant, hemp products like CBD and Delta-8 may contain appreciable levels of THC. Moreover, the United States Food and Drug Administration does not determine or certify the THC concentration in commercially available hemp products. The commercial packaging on these

products may therefore omit any reference to the presence of THC or may list an inaccurate THC concentration. Accordingly, consumers cannot rely on packaging to determine whether a certain hemp product will result in a positive urinalysis result.

Disciplinary and Administrative Responses



The Navy's zero tolerance drug policy applies to hemp products. OPNAVINST 5350.4E prohibits all Sailors from using any product made or derived from hemp, regardless of the advertised or actual THC concentration. "Use" means to inject, ingest, inhale, or otherwise introduce into the human body, to include penetrating the skin layer through the use of products like transdermal patches. "Use" also includes the use of topical products containing hemp, such as shampoos, conditioners, lotions, lip balms, or soaps. The prohibition does not apply to the use of durable goods such as rope or clothing.

For purposes of a nonjudicial punishment, the wrongful use of hemp products is most appropriately charged as a violation of Article 92 (Failure to Obey an Order or Regulation). Commands should not charge these types of offenses as violations of Article 112a (Wrongful Use of a Controlled Substance) because hemp products are not controlled substances.

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The recent changes to federal law have generated some confusion over the legality of substances derived from hemp, such as CBD. However, the Navy's policy is clear: Sailors are prohibited from using any product made or derived from hemp. Failure to obey that policy constitutes a violation of the UCMJ. The command services team at Region Legal Service Office Western Pacific is standing by to assist in those instances in which Sailors are suspected of the wrongful use of hemp products.

“Sailors are prohibited from knowingly using products made or derived from hemp...including CBD, regardless of the product's THC concentration...and regardless of whether such product may lawfully be bought, sold, and used under law applicable to civilians.”

-OPNAVINST 5350.4E



LINE OF DUTY INVESTIGATIONS

CDR Ronald Lenert, JAGC, USNR

A line of duty (LOD) investigation is a determination of a Sailor's duty status at the time of an injury, illness, disability, or death. A LOD investigation will come in the form of an administrative investigation convened under the Judge Advocate General's Manual (JAGMAN). Line officers are often tasked with serving as an investigation officer and will be responsible for making a LOD recommendation to the injured member's Commanding Officer. This article serves as a basic primer for LOD investigations.

A Sailor who becomes sick or injured while on active duty, during an excused absence, or during inactive duty training (IDT) is entitled to certain benefits, including pay and allowances, only if the Sailor's injuries or illness are not the result of their intentional misconduct or willful negligence. A LOD investigation determines the proximate cause of the illness or injury and thus plays a critical role in determining the Sailor's eligibility for those benefits in the wake of the injury or illness.

Generally, LOD investigations are required if a Sailor incurs an injury that: (1) might result in permanent disability, (2) resulted in the physical inability to perform duty for a period exceeding 24 hours, or (3) caused their death.

In some instances, a Sailor's LOD determination may be entered into their medical record without a formal investigation. This course of action is only appropriate when the Sailor's Commanding Officer, having been advised by medical, determines that the Sailor was in the line of duty and the cause of the injury was not due to the Sailor's own misconduct.

Command investigations are appropriate in all other instances. This is especially true when there is a question as to whether the Sailor's intentional misconduct or willful negligence caused the injury. In these cases, the appointed investigating officer is responsible for gathering the applicable facts surrounding the Sailor's injury, illness, or death by collecting all relevant physical evidence and interviewing key witnesses. The investigating officer

will then use the facts to formulate opinions on what caused the injury. Most importantly, the investigating officer will explicitly offer a LOD determination based on the facts and evidence.

Making a LOD Determination

There are two elements to a LOD determination: (1) the Sailor's duty status at the time of the injury, illness, or death, and (2) whether the injury, illness, or death is due to the Sailor's own misconduct. For purposes of LOD determinations, "misconduct" can never be "in the line of duty."

Therefore, there are only three possible LOD determinations:

- in the line of duty, not due to misconduct;
- not in the line of duty, not due to misconduct; or
- not in the line of duty, due to misconduct.

Injuries, illnesses, or death will be considered to have been incurred "in the line of duty" except in very limited circumstances. Those circumstances are outlined in the JAGMAN.

An injury, illness, or death is the result of the Sailor's own misconduct if it is either intentionally incurred or is the result of willful neglect that demonstrates a reckless disregard for the foreseeable and likely consequences of the conduct involved. For purposes of LOD investigations, misconduct is more than inappropriate behavior. For that reason, conduct while intoxicated or that violates law, regulation, or order does not alone constitute a basis for a misconduct determination. Investigating officers who believe injury, illness, or death is the result of a Sailor's own misconduct should immediately contact the appointed legal advisor to discuss the facts obtained in the course of the investigation.

In accordance with the JAGMAN, an injury, illness, or death is presumed to have been incurred in the line

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of duty and not as a result of a Sailor's own misconduct. Clear and convincing evidence is needed to overcome that presumption. In other words, the evidence must leave no serious or substantial doubt as to the correctness of the conclusion in the mind of an objective person.

An adverse LOD determination shall not be used as disciplinary action against a member. A servicemember cannot be denied medical treatment based on an LOD determination. Moreover, a LOD determination does not authorize the United States to recoup the cost of medical care for services provided.

However, an adverse LOD determination can have significant administrative consequences. For instance, a Sailor's disability retirement and severance pay, enlistment extensions, Veterans Association benefits, Survivor Benefit Plan, medical benefits, and death benefits may all be negatively affected.

LOD investigations have a significant impact on a Sailor's benefits, or in the case of deaths, on the survivor's benefits. In the event of an injury, prolonged illness, or death of a Sailor, commands and investigating officers should immediately contact a staff judge advocate to discuss appropriate first steps to properly initiate a LOD investigation.

"An injury, disease, or death suffered by a member of the Naval service is presumed to have been incurred in the line of duty and not to be the result of misconduct. Clear and convincing evidence...is required to overcome this presumption."

-JAGMAN, Section 0216



PRETRIAL RESTRAINT & PRETRIAL CONFINEMENT: APPROPRIATE USES AND CONSIDERATIONS FOR COMMANDERS

LN3 Juliana Sierra-Bedoya, USN

When a Sailor commits an offense and is awaiting trial or hearing, commanders are authorized to impose certain forms of pretrial restraints. Pretrial restraint is the moral or physical restraint on a person's liberty which can be imposed on a sailor before and during a trial. Rules for Court-Martial (R.C.M.) 304 and 305 establish four authorized forms of restraint: (1) conditions on liberty, (2) restriction in lieu of arrest, (3) arrest, and (4) confinement.

Definitions

Conditions on liberty. Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately. (R.C.M. 304(a)(1)). Conditions on liberty may include orders to report periodically to certain officials (e.g. commanders, duty section, etc.), orders not to go certain places, or orders not to associate with certain persons (e.g. victims, witnesses, etc.). Any condition imposed must be reasonable in order to avoid interfering with the defense's trial preparation.

Restriction in lieu of arrest. Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits such as a ship, barracks, or installation. When subject to restriction in lieu of arrest, a person shall normally perform full military duties while restricted. (R.C.M. 304(a)(2)).

Arrest. Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits. Unlike restriction in lieu of arrest, the arrested Sailor may not be required to perform full military duties such as commanding or supervising personnel, standing watch, or handling weapons. However, a Sailor under arrest can still be directed to perform ordinary cleaning or policing duties and take part in routine training. (R.C.M. 304(a)(3)).

Confinement. R.C.M. 305 defines pretrial confinement as the "physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses." This type of restraint usually involves sending someone to a brig or placing them in a secured area under guard. Pretrial confinement is only appropriate when the Commanding Officer believes, upon probable cause (i.e. reasonable grounds), that:

- (1) An offense triable by court-martial has been committed; and
- (2) The confinee committed it; and
- (3) Less severe forms of restraint are inadequate; and
- (4) That confinement is necessary because it is foreseeable that:
 - (a) The accused will continue to engage in serious criminal misconduct; or
 - (b) The confinee will not appear at trial, pretrial hearings, or preliminary hearings

Practical Considerations

The decision to impose pretrial restraint necessarily triggers a number of important considerations. First, restraint is not required in every case. When restraint is imposed, it should be no more rigorous than required to ensure the person's presence at trial or to prevent foreseeable serious criminal conduct. Commanding Officers should therefore thoroughly consider the credibility and reliability of the information available regarding the Sailor and the alleged events that may warrant confinement. Before relying on outside reports, the Commanding Officer must have a reasonable belief that the information holds a factual basis and gives probable cause and reasonable grounds to hold the accused sailor in confinement. Pretrial restraint must not be imposed out of convenience or expedience. (R.C.M. 305(h)(2)(B)).

Second, the decision to impose pretrial restraint may trigger significant legal considerations. R.C.M. 707 requires the accused to be "brought to trial" within 120 days after the imposition of restraint. In other words, the

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accused must be formally charged and arraigned within 120 days of the decision to impose pretrial restraint. The only form of restraint that does not trigger the 120-day “speedy trial” clock are conditions on liberty. Therefore, the command must be ready to expeditiously proceed towards court-martial as soon as a Sailor is placed on restriction in lieu of arrest, under arrest, or in pretrial confinement. Additionally, arrest and confinement trigger more rigorous speedy trial protections under Article 10 of the Uniform Code of Military Justice. Criminal charges may be dismissed if the Government does not satisfy the time provisions under Article 10 or R.C.M. 707.

Third, the actual form of pretrial restraint imposed is determined by the nature and specific facts surrounding the restraint, not the imposing officer’s characterization of the restraint. Geographic limits of the restraint, the extent of additional administrative requirements, whether escorts are required, and whether military duties are performed are just some examples of factors that will be considered when determining precisely which form of pretrial restraint a Sailor is subject to.

Finally, pretrial restraint is not punishment. Persons restrained pending trial may not be punished for the offense that is the basis of the restraint. Rather, the purpose of pretrial restraint is to ensure the person’s presence at trial and/or to prevent further serious misconduct.

Pretrial restraint is an important tool available to Commanding Officers; however, the decision to impose any form of pretrial restraint triggers significant legal and practical implications. Commands should immediately contact their assigned staff judge advocate or command services if they are considering the imposition of pretrial restraint.



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