



# BENGOSHI 弁護士

Volume V Issue I



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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.

From my perspective as Commanding Officer, The Bengoshi also serves as a medium to connect the exceptional operators on the front lines around the region with the legal service providers at Region Legal Service Office Western Pacific (RLSO WESTPAC).

The Bengoshi has been redesigned to focus on those efforts to connect the warfighter with legal support ashore. The articles in this issue discuss:

- Considerations for investigating sexual harassment claims stemming from sexual assault allegations
- Factors to consider in addressing possible civilian misconduct
- Applicability and mechanics of Article 31(b) rights
- Recent courts-martial results

The RLSO WESTPAC team of attorneys, paralegals, and civilians are standing by to assist.

CAPT Elysia G. Ng-Baumhackl,  
JAGC, USN  
Commanding Officer  
RLSO WESTPAC

## PROVIDING RIGHTS ADVISEMENT TO SERVICE MEMBERS BEFORE QUESTIONING BEGINS

LTJG Cecilia L. Jimenez, JAGC, USN

Members of the military suspected of misconduct are afforded certain rights under Article 31(b) of the Uniform Code of Military Justice (UCMJ). One of those rights is to remain silent. While this may initially trigger thoughts related to the *Miranda* rights you are used to hearing in movies, Article 31(b) rights are different. Understanding those differences and knowing when to administer 31(b) rights is a key first step to ensuring a fair investigation and preserving future proceedings such as nonjudicial punishment (NJP).

### When Do I Have to Administer 31(b) Rights?

Article 31(b) rights must be administered when a reasonable person would view the questions as ones likely to elicit an incriminating response. More simply, Article 31(b)'s are required when (1) you suspect someone of an offense under the UCMJ, and (2) the questions would reasonably result in an incriminating response.

Notably, the questions may be formal or informal. In other words, Article 31(b) rights are not just for the formal interrogation settings you may initially envision. Even informal conversations may trigger the need to read someone his or her rights. In addition, unlike *Miranda* rights, the person does not have to be under arrest or in custody. Article 31(b) rights are appropriate in any setting in which the questions may illicit an incriminating response.

### The Mechanics of Administering 31(b) Rights

Okay, so you have determined it necessary to administer Article 31(b) rights. The next step is to actually administer those rights. A template can be found in Appendix A-1-v of the Manual of the Judge Advocate General (JAGMAN). You may use OPNAV Form 5580/3. In either case, you are required to read the suspect their rights as they are listed on the paper. Be sure the service member initials each block.

The service member must also know *why* they are being questioned (i.e. which offense you suspect they are suspected to have committed). The questioner should speak with the service member in a manner that any reasonable Sailor could understand. Examples of providing sufficient notice to the Sailor include:

- UCMJ Art. 107: False Official Statement
- UCMJ Art. 92: Failure to Obey a General Order (OPNAVINST 5354.1G: Navy Equal Opportunity Program, Sexual Harassment)
- UCMJ Art. 128: Assault Consummated by a Battery

### Election/Waiver of Rights

After having been read his or her rights, a suspect may choose to remain silent. If that is the case, you must respect the suspect's decision. Do not try to talk them out of their election to remain silent.

On the other hand, the suspect may elect to waive one or all of those rights. Any waiver must be completely voluntarily and documented, in writing,

on the rights advisement form. Once documented, you may commence questioning. Keep in mind, however, the suspect may elect to remain silent at any point during the interview. If that happens, stop questioning immediately. The command should not ask any additional questions, even if the service member had previously answered questions. Anything the member said before invoking his or her right to silence will be valid evidence to use moving forward.

### "Cleansing warning" – Getting Back on Track

In some instances, it may become apparent that someone asked the suspect about the possible misconduct prior to the interview. Before reading the Sailor their rights under Article 31(b), you should administer a "cleansing warning."



Image: Public Domain

**PROVIDING RIGHTS ADVISEMENT TO SERVICE MEMBERS BEFORE QUESTIONING BEGINS**

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The cleansing warning, in effect, informs the suspect that any prior statements may not be used against him or her of the process moving forward.

If this is the case, you should immediately contact your SJA to discuss in more detail to ensure a complete understanding of the process moving forward.

**New Offenses**

If the command ever suspects a service member of committing a new or different offense from the one originally suspected during an interview or questioning, the interviewer should immediately stop the questioning and complete a new rights warning form inclusive of the new or different offenses before continuing questioning.

As demonstrated above, the administration of rights advisements is not only important to preserve the rights of your Sailors, but also to ensure the fruits of an investigation may be used to facilitate a Commanding Officer's duty to maintain good order and discipline within the command. If there are questions regarding this topic, please reach out to the Command Services Department at the RLSO for support; contact information is on page 10.

## ADDRESSING CIVILIAN MISCONDUCT

*LT Gregory E. Lines, JAGC, USN*

When addressing misconduct by dependents and civilians on U.S. Navy Installations in Japan, remember three things: (1) Installation Commanders (ICOs) may take action against civilians and dependents whose misconduct affects their installation and Host Nation relations; (2) the DoD chain of command and HRO should be informed of and involved with investigations into civilian employee misconduct and administrative actions beyond base access; (3) non-ICO commanders also have the ability to address misconduct.

ICOs have authority to control civilians' access to installations and consequently the viability of their employment (if a civilian) and ability to remain in Japan (dependents). ICOs can suspend on-base privileges, or on the extreme end of the spectrum, issue a full debarment from an installation. In Japan, debarments at one installation will be honored across all installations of all Services within Japan. ICOs may issue debarments without a formal proceeding.

ICOs may also use Civilian Administrative Forum (CAF) hearings as a way to investigate and evaluate civilian misconduct. These hearings also offer civilians/dependents a chance to offer facts in mitigation. A CAF may recommend verbal or written counseling, debarment from the base or specific areas or buildings therein, suspension of privileges, and removal from assigned quarters. A CAF may also recommend termination of command sponsorship or area clearance of family members and transfer of sponsors from overseas areas (curtailment of tour) if the civilian or dependent's sponsor are attached to the installation.

Based on a CAF Hearing Officer's recommendation, the ICO will make a final determination as to the punishment. If the civilian/dependent is attached to another

unit (e.g. a tenant command), the ICO will recommend the appropriate CO takes action based on the CAF hearing recommendation. The ICO retains the authority to issue debarment, regardless of the civilian being attached to another unit. It is also important to note that religious and medical access/privileges cannot be denied. CAF proceedings may be appealed by the civilian/dependent up to Commander, Navy Region Japan.

Additionally, different organizations/chains of command may have authority over civilian personnel. For example, Master Labor Contractors (MLCs), Department of Defense (DoD) civilians and contractors may receive administrative action from DoD civilian supervisors, Human Resources (HRO), the Labor Office or their employer. These organizations primarily investigate and handle misconduct and administrative action. If an ICO is also taking action, subsequent action by the civilian offender's chain of command, or within their employer's discretion may follow.

Aside from ICOs, other commanding officers may also take similar action against family members sponsored by their command. These include the termination of command sponsorship, termination of area clearance, and Early Return of Dependents (ERD) in accordance with the Joint Travel Regulations.

It is always a good idea to consult your local HRO office and Staff Judge Advocate if your command is facing civilian misconduct issues. Investigations into possible civilian misconduct are unique and sometimes quite intricate. Having a roadmap before you proceed is vital to preserve the integrity of the investigation while also ensuring the protection of the civilian's rights.

## INVESTIGATING SEXUAL HARASSMENT ALLEGATIONS CONTAINED IN A REPORT OF SEXUAL ASSAULT

*LT Kevin Peck, JAGC, USN*

Sometimes a report of sexual assault may include allegations of sexual harassment. Instances of overlapping sexual assault and sexual harassment allegations are especially common when the nature of the sexual assault includes over-the-clothes contact offenses occurring in the work place. In such cases, the sexual assault allegation takes priority and NCIS investigates the sexual assault allegation. However, there are instances where it is appropriate, and in the interests of good order and discipline, to convert a sexual assault allegation into a sexual harassment case. This article will lay out the instances where that may be appropriate.

At the conclusion of a sexual assault investigation, NCIS submits the final Report of Investigation (ROI) to the Region Legal Service Office (RLSO) Trial Department; and, the RLSO subsequently provides the command a Prosecutorial Merit Review (PMR). The PMR recommends a course of action for the Convening Authority (CA) to dispose of the sexual assault case. Factors that inform the PMR recommendation include the strength of the evidence to support the sexual assault offense, as well as the proportionality of the forum appropriate for the offense.

Upon review of the PMR and evidence, the CA may decide that the evidence does not support pursuing the sexual assault charge, but that a sexual harassment charge is appropriate for non judicial punishment. If the evidence NCIS collected meets a preponderance of the evidence standard for the sexual harassment charge, then additional investigation may not be necessary. However, sometimes additional investigation is merited, especially if the previous focus on sexual assault resulted in unpursued leads for secondary misconduct, such as sexual harassment. If the CA decides to initiate an administrative investigation into the sexual harassment, then OPNAVINST 5300.13 (see paragraph 3i. of chapter 4

on page 4-6) requires the command to conduct a Command Investigation and treat the case as a formal report of sexual harassment.

If the CA determines early in the investigatory process (i.e. anytime prior to NCIS submitting the final ROI or RLSO issuing the PMR) that the sexual harassment allegation is a particular threat to good order and discipline, then it is recommended that the CA contact RLSO or the CA's billeted SJA. In particular cases, especially if the sexual assault allegation involves over-the-clothes physical contact, then an SJA may be able to advise on whether to conduct a Command Investigation concurrently and in coordination with NCIS to investigate the sexual harassment. Additionally, this course of action should be considered if there are credible concerns evidence of the sexual harassment will be lost or the sexual harassment case may go stale if not collected prior to NCIS submitting the final ROI or RLSO issuing the PMR.

## NEW QUARTERLY CRIMINAL ACTIVITY, DISCIPLINARY INFRACTIONS AND COURTS-MARTIAL REPORT (QCAR) REQUIREMENTS

The Navy recently revised military justice reporting procedures for officers exercising court-martial or nonjudicial punishment (NJP) authority. The new requirements are set forth in JAGINST 5800.9E issued on October 19, 2020. A copy of the instruction is included on the Navy Judge Advocate General's Corps website.

Moving forward, commands must record certain biographical and procedural data in all summary courts-martial and NJP proceedings. The required data fields (35 total) are listed and explained in JAGINST 5800.9E. Commands must record the data using the pertinent enclosure to the instruction.

Commands are responsible for submitting reports to the first General Courts-Martial Convening Authority in the chain of command within 30 days of the end of each quarter, as outlined below:

FY Quarter 1 (October – December)

FY Quarter 2 (January – March)

FY Quarter 3 (April – June)

FY Quarter 4 (July – September)



*Image: Public Domain*

## RESULTS OF TRIAL



### January 2020

At a Special Court-Martial in Yokosuka, Japan, MA3 Chase A. Burns, USN, pleaded guilty pursuant to a pretrial agreement to attempted indecent communications with a child and attempted indecent exposure to a child. On 29 January 2020, consistent with the pretrial agreement, the military judge sentenced him to reduction in rank to paygrade E-1 and confinement for 60 days. The pretrial agreement contained a waiver of the accused's administrative separation board.

### February 2020

At a General Court-Martial in Yokosuka, Japan, GSMFN Jose E. Wagner, USN, was tried for sexual assault. On 21 February 2020, the panel of members returned a verdict of guilty of sexual assault and sentenced him to be discharged with a Dishonorable Discharge, reduction in rank to paygrade E-1, and hard labor for 3 months.

At a Special Court-Martial in Yokosuka, Japan, NCC Ryan A. Blackmer, USN, was tried for driving under the influence of alcohol and false official statement. On 26 February 2020, the panel of members returned a verdict of guilty of false official statement and sentenced him to a reprimand.

### May 2020

At a Special Court-Martial in Yokosuka, Japan, PR3 Loren D. Anderson II, USN, pleaded guilty pursuant to a pretrial agreement to false official statement and wrongful use of a controlled substance. On 1 May 2020, the military judge sentenced him to a reprimand and reduction in rank to paygrade E-1. The pretrial agreement had no effect on his sentence. The pretrial agreement contained a waiver of the accused's administrative separation board.

At a Special Court-Martial in Yokosuka, Japan, HN Trey L. Watson, USN, pleaded guilty pursuant to a pretrial agreement to false official statement and two specifications of wrongful use of a controlled substance. On 15 May 2020, the military judge sentenced him to reduction in rank to paygrade E-1 and confinement for 6 months. Pursuant to the pretrial agreement all confinement greater than 90 days is to be suspended. The suspended punishment may be served if the service member violates the terms of the pretrial agreement. The pretrial agreement contained a waiver of the accused's administrative separation board.

## RESULTS OF TRIAL



### June 2020

At a General Court-Martial in Yokosuka, Japan, AEAR Keshawn M. Bocage, USN, pleaded guilty pursuant to a pretrial agreement to conspiracy to wrongfully distribute a controlled substance, wrongful distribution of a controlled substance, wrongful possession of a controlled substance, and wrongful use of a controlled substance. On 18 June 2020, the military judge sentenced him to confinement for 24 months and a Dishonorable Discharge. Pursuant to the pretrial agreement, only a Bad Conduct discharge will be approved and all confinement greater than 12 months is to be suspended. The suspended punishment may be served if the Service Member violates the terms of the pretrial agreement.

At a General Court-Martial in Yokosuka, Japan, CSSN Brandon S. Brown, USN, pleaded guilty pursuant to a pretrial agreement to two specifications of indecent recording and one specification of indecent viewing. On 26 June 2020, consistent with the pretrial agreement, the military judge sentenced him to reduction in rank to E-1, confinement for 12 months, and a Bad Conduct Discharge.

### July 2020

At a Special Court-Martial in Yokosuka, Japan, HN Fatima M. Aguayosanchez, USN, pleaded guilty pursuant to a pretrial agreement to false official statement, three specifications of wrongful distribution of a controlled substance, and four specifications of wrongful use of a controlled substance. On 16 July 2020, the military judge sentenced her to reduction in rank to paygrade E-1 and confinement for 90 days. The pretrial agreement had no effect on her sentence. The pretrial agreement contained a waiver of the accused's administrative separation board.

### August 2020

At a Special Court-Martial in Yokosuka, Japan, MA2 Deverell I. Brown Jr., USN, pleaded guilty pursuant to a pretrial agreement to reckless driving and assault consummated by a battery upon his spouse. On 2 August 2020, consistent with the pretrial agreement, the military judge sentenced him to reduction in rank to paygrade E-1 and confinement for 60 days. The pretrial agreement contained a waiver of the accused's administrative separation board.



## RESULTS OF TRIAL



### September 2020

At a General Court-Martial in Yokosuka, Japan, AN Trajon A. Jeter, pleaded guilty pursuant to a pretrial agreement to aggravated assault with substantial bodily harm, a lesser included offense of assault consummated by a battery, simple assault, and destruction of government property. On 8 September 2020, consistent with the pretrial agreement, the military judge sentenced him to be discharged with a Bad Conduct Discharge, reduction in rank to paygrade E-1, and 25 months confinement. The pretrial agreement had no effect on his sentence. The pretrial agreement contained a waiver of the accused's administrative separation board.

At a Special Court-Martial in Yokosuka, Japan, ABHAN Sheldon X. Myers, pleaded guilty pursuant to a pretrial agreement to assault with a dangerous weapon and drunk and disorderly conduct. On 1 September 2020, consistent with the pretrial agreement, the military judge sentenced him to reduction in rank to paygrade E-1 and confinement for 90 days. The pretrial agreement had no effect on his sentence. The pretrial agreement contained a waiver of the accused's administrative separation board.

### October 2020

At a Special Court-Martial in Yokosuka, Japan, LCDR Chanel G. Sims, was tried for failure to obey other lawful order, prevention of authorized seizure of property, obstructing justice, and conduct unbecoming generally. On 8 October 2020, the military judge returned a verdict of guilty of failure to obey other lawful order and prevention of authorized seizure of property, but adjudged no sentence.

## CONTACT INFO

### Command Services Contact Information

LCDR Nick Rausa — Department Head

315-243-9589

LT Kevin Peck — Assistant Department Head

315-243-9541

LNC Erica Keels — Department Leading Chief Petty Officer

315-243-9378

#### Atsugi

LT Kevin Peck  
LNC Ryan Pickens  
315-264-4586

#### Misawa

LT Kevin Peck  
LN1 Nicholas Colone  
315-226-4095

#### Singapore

LT Clare Fitzpatrick  
315-421-2305

#### Diego Garcia

LT Diana Ohrt  
315-370-2922

#### Okinawa

LT Autumn Gibo  
315-634-8255

#### Yokosuka

LT Mathew Bagioli  
315-243-8913

#### Guam

LT Amy Zajac  
315-339-4385

#### Sasebo

LT Gregory Lines  
315-252-3387

#### Tenant Command Support

RLSOWESTPACCSJA@fe.navy.mil

### Legal Assistance Contact Information

Yokosuka Legal Assistance: YokosukaLegalAssistance@fe.navy.mil

Sasebo Legal Assistance: SaseboLegalAssistance@fe.navy.mil

Guam Legal Assistance: GuamLegalAssistance@fe.navy.mil