



BENGOSHI 弁護士

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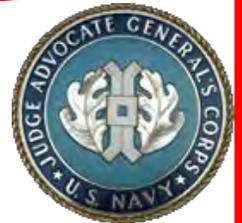


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CO's Corner

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 number of different topics, including:

- Administrative measures in response to alleged misconduct or substandard performance;
- Recent updates to command citizenship reporting requirements;
- The Navy’s new Controlled Unclassified Information policy;
- Updates to the Navy’s policy against fraternization;
- Federal ethics considerations surrounding gifts to superiors; and
- Search and seizure considerations when stationed OCONUS.

The breadth of topics covered highlight the wide range of services RLSO WESTPAC provides to the fleet.

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

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

ADMINISTRATIVE REMEDIES

LT Hannah Yi, JAGC, USN

Commanders are authorized and expected to use nonpunitive administrative corrective measures to further the efficiency of their commands or units. See JAGMAN § 0102. It is important to remember that these measures are not to be imposed as punishment for any military offense. Administrative corrective measures may be administered either orally or in writing and generally fall under three categories: (1) extra military instruction; (2) administrative withholding of privileges; and (3) counseling.

Extra Military Instruction

Extra Military Instruction (EMI), detailed within JAGMAN § 0103, is a leadership tool to address performance deficiencies. The type of training assigned must be logically related to the deficiency and cannot be used as a substitute for judicial action or nonjudicial punishment (NJP).

The following limitations apply when conducting EMI:

- 1) EMI normally will not be conducted for more than two hours per day;
- 2) EMI conducted outside normal working hours should be conducted either immediately before or after the service member's workday unless military exigencies do not permit such an arrangement;
- 3) EMI will not be assigned on the member's Sabbath; and
- 4) EMI will not be used for the purpose of depriving the member of normal liberty to which the member is otherwise entitled.

Administrative Withholding of Privileges & Liberty Risk

A privilege is a benefit, advantage, or favor provided for the convenience or enjoyment of a servicemember. Examples of privileges that may be temporarily withheld as administrative corrective measures are: special liberty; exchange of duty; special command programs; access to base or ship libraries, base or ship movies, or enlisted or officers' club; or base parking.

Generally speaking, deprivation of normal liberty as a punishment is illegal, except as specifically authorized under the Uniform Code of Military Justice (UCMJ) (e.g., pre-trial restraint or confinement, court-martial sentence, or restriction pursuant to nonjudicial punishment).

The liberty risk program is one limited exception to the general rule against deprivation of normal liberty. Under the liberty risk program, a servicemember's normal liberty may be lawfully withheld/curtailed only when that service member is in a foreign country or in foreign territorial waters. Placing a servicemember on liberty risk is only appropriate when doing so is necessary to protect U.S. foreign relations with host nations. For example, a servicemember may be placed on liberty risk based on their past behavior in a foreign country and when that behavior has or is likely to embarrass, discredit, or harm foreign relations.

Commands should establish formal liberty risk programs in consultation with a Staff Judge Advocate (SJA) prior to placing service members on liberty risk. Liberty risk programs must be reasonably tailored to achieve its authorized purpose and must not be punitive in nature.

Counseling Measures

Counseling has two objectives. First, counseling must identify a performance deficiency and appropriate remediation to address the deficiency. Second, counseling documents the command's attempt to correct a deficiency before proceeding with a more serious measure such as detachment for cause, administrative separation, or disciplinary action.

Counseling comes in many different forms, including a verbal or written counseling. In addition, a service member may be issued a nonpunitive letter of caution (NPLOC) or a letter of instruction (LOI).

A NPLOC is a nonpunitive censure stating any deficiencies in the service member's conduct or performance of duty, as detailed in JAGMAN § 0105. Any

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may issue a NPLOC. A NPLOC is a personal matter between the service member and the supervisor who administered the censure in order to remedy the noted deficiency. Therefore, the issuance of the NPLOC cannot be mentioned in an EVAL/FITREP or any other written documentation. However, the underlying conduct addressed by the NPLOC may be mentioned in the service member's EVAL/FITREP and to support other administrative measures (e.g. DFC) if the documentation required by those processes is satisfied elsewhere.

An LOI is a written administrative counseling that includes the description of the member's deficiencies, proposed/recommended means for remediation, description of desired performance standards, and reasonable period of time for correction. Unlike a NPLOC, an LOI may be referenced in any official service documentation, including FITREP, and be used as evidence in a separation processing and a DFC proceeding. Additionally, an LOI may be introduced into a member's personnel record. Prior to referencing an LOI into the official service documentation, the command should consult with their SJA or local Region Legal Service Office.

Conclusion

Administrative measures are important tools in addressing minor misconduct or performance deficiencies. However, these measures are not to be imposed as punishment for any military offense. Commands are authorized and encouraged to employ administrative measures to ensure efficiency in the command. When they are employed properly, administrative measures also establish reasonable justification for more serious responses to continued misconduct.

"The likelihood an individual's behavior on liberty will damage host nation relations is the key factor in making a liberty tier determination."

**-Commander, U.S. Naval Forces Japan/
Navy Region Japan Liberty Policy**

LEGAL ASSISTANCE UPDATES

Region Legal Service Office Western Pacific Legal Assistance Department

Command citizenship representatives (CCRs) are responsible for helping Service Members in a Command with their military naturalization applications. The CCR is a collateral duty. On 23 March 2021, MILPERSMAN 5352-010—which governs this collateral duty—was updated. This article walks CCRs through the major requirements of this collateral duty, including the new requirements to report certain information to the nearest Naturalization Area Coordinator (NAC).

RLSO WESTPAC's Legal Assistance Department is always available to help CCRs and their Sailors navigate the citizenship process. We have references, training materials, templates, and samples to help you execute this collateral duty. Please do not hesitate to contact us early and often!

Command Citizenship Representatives (CCR) must:

- Be appointed in writing by their Commanding Officer. Legal-Os who are already acting as CCRs will need a separate CCR designation letter;
- Help Sailors with their citizenship packages;
- Route their Sailors' N-426 forms (Request for Certification of Military or Naval Service) to the first O-6 in the chain of command for a wet-ink signature within 30 days of the Sailor submitting their N-426 to the CCR;
- Report to the Naturalization Area Coordinator (NAC)/Regional Citizenship Program Manager (RCPM) their CCR designation. The NAC/RCPM are able to provide training for CCRs to help them navigate this collateral; and
- Report quarterly to the NAC/RCPM on the number of N-426s processed and time it took to process each N-426.

Contact info:

Naturalization Area Coordinator: LT Alex Sakhanyuk, JAGC, USN (Alexander.Sakhanyuk@fe.navy.mil)

Regional Citizenship Program Manager: LT Andy Decker, JAGC, USN (Andrew.Decker@fe.navy.mil)

Office Emails for Sailors interested in citizenship: YokosakaLegalAssistance@fe.navy.mil,
SaseboLegalAssistance@fe.navy.mil, and GuamLegalAssistance@fe.navy.mil



CONTROLLED UNCLASSIFIED INFORMATION AND PII

LCDR Christopher Cook, JAGC, USNR

The Department of Defense recently issued a new marking policy for documents that contain “Controlled Unclassified Information” or “CUI.” The new policy is a significant change from the previous unclassified marking system; marking unclassified documents or documents containing PII as “FOUO” is no longer permitted. The new policy, codified at DODI 5200.48, requires that documents be marked as “CUI” if the information qualifies as such. This article is intended to give readers a quick snap-shot of what the new policy is, and how to mark documents going forward.

What qualifies as CUI?

CUI is UNCLASSIFIED information that allows for, or requires, safeguarding and dissemination controls in accordance with laws, regulations, or Government-wide policies. There are a number of categories of CUI (e.g. PII, legal privilege, law enforcement information, pre-decisional budget or policy information, etc.). An official list of all the categories used to identify the various types of CUI is available at <https://www.dodcui.mil>.

It is important to also remember what does NOT qualify as CUI. Anything that is classified, or any information not created by, or under the control of the U.S. Government, is not CUI. Think of CUI as a safeguarding system for UNCLASSIFIED information.

The establishment of the CUI policy is an acknowledgment that certain types of UNCLASSIFIED information are still extremely sensitive and are sought after by strategic competitors and adversaries. For this reason, we need to have legal safeguarding requirements for this type of information.

How Do I Mark Documents?

Once it has been determined that a document qualifies as CUI, there are specific procedures for marking that document. This article will use as an example the “Privacy” category of CUI, to illustrate the new marking guidance. While the “Privacy” category is one of many categories of CUI, it will be used often, and because many of us pass documents containing PII all the time,



the “Privacy” category will be most instructive. If you use the CUI marking, you should be able to identify the specific CUI in the document, but if a document contains PII, it is in the “Privacy” CUI category.

The general rule for all documents containing CUI is to mark the document at the top or “banner” with “CUI” and at the bottom, or “footer” with “CUI.” In addition, email subject lines should also be marked with “CUI.” Do not add additional descriptive wording to the “CUI” marking. For example, do not use “CUI-Privacy”, or “CUI-PII” or similar modifiers.

In addition to marking documents at the top and bottom with “CUI,” a CUI “Designation Indicator Block” is required at the bottom of the document’s first page within the “CUI” banner and footer markings. DOD guidance directs that this block be located at the lower right of the page. The block includes organization, office, CUI category, dissemination information, and POC information. Portion markings are optional, but if used, they must be used throughout the document.

Below is an example of what is in the “designator block” at the lower right corner of the document.

Controlled by:
 Controlled by:
 CUI Category:
 Distribution/Dissemination Control:
 POC:

(Continued on next page)

CONTROLLED UNCLASSIFIED INFORMATION AND PII

LCDR Christopher Cooke, JAGC, USNR

The first “Controlled by” line should always be “Department of the Navy” or “DON.” The second “Controlled by” line should be how you identify your office. The CUI category is the specific category of CUI that is found in the document. For general privacy information containing PII, the “CUI Category” can be “PRVCY” which stands for “General Privacy.” If your document contains other non-privacy categories (e.g., Legal, Financial, Law Enforcement, etc.) you would list those in the CUI Category accordingly. For the “Distribution/Dissemination Control” line, it is recommended that you use “FEDCON” which includes Federal, military, and contractor government employees (i.e., all government employees). The POC line can just be the person who originated the document and his/her contact information.

An example of a complete privacy CUI Designation Indicator Block is below:

Controlled by: Department of the Navy
Controlled by: OPNAV N96
CUI Category: PRVCY
Distribution/Dissemination Control: FEDCON
POC: CDR John Doe, john.doe@navy.mil, 555-555-5555

The “CUI Category” line is the line that you will likely need to change frequently depending on what kind of CUI you are working with. Remember to consult <https://www.dodcui.mil> for the listing of categories of CUI. The important thing to remember here is that if you are dealing with UNCLASSIFIED information that is controlled and falls into a specific CUI category pursuant to [dodcui.mil](https://www.dodcui.mil), then you will need to mark that document as outlined above.

This article is meant to be a quick primer on this subject. If you have more specific questions, please contact your security manager or visit the DON Information Security SharePoint site for more specific CUI marking guidance, training, and frequently asked questions.

WHAT YOU SHOULD KNOW ABOUT THE NAVY'S NEW FRATERNIZATION INSTRUCTION

LCDR Nicholas Cade, JAGC, USNR

In November 2020, the Navy published an update to its Fraternization Policy. The new instruction, OPNAVINST 5370.2E, provides updated reporting procedures for instances of fraternization, as well as a more robust discussion section to help members navigate a determination of what relationships might violate the policy. This article is meant to offer a synopsis of the newly published instruction – a lawful general order – and to clarify what responsibilities it imposes upon all servicemembers.

The Navy has a strict fraternization policy in order to maintain good order and discipline among the ranks. “Fraternization” refers to personal relationships that fail to respect the bounds of appropriate senior-subordinate relationships with the military structure. The Navy has long prohibited “unduly familiar” relationships within the ranks and has largely relied on tradition and custom to help members determine what kinds of personal relationships are acceptable.

There are certain kinds of personal relationships that are prohibited. These include unduly familiar relationships between an officer and enlisted member, between a chief petty officer (E-7 to E-9) and a more junior member (E-6 and below) of the same unit, or, generally, between an instructor or recruiter and a student or applicant, respectively.

Important Updates

1. Clarification that “prohibited relationships” include personal relationships between Chief Petty Officers (E-7 to E-9) and junior personnel (E-1 to E-6) who are assigned to the same command that are unduly familiar and that do not respect differences in grade and rank. The previous instruction did not explicitly delineate this as a “prohibited relationship,” but did include a discussion of the unique role of Chief Petty Officers in a separate section. The new policy should help clarify any confusion on this issue.

2. Unduly familiar relationships may exist with individuals outside one’s direct chain of command. In all cases, the key analysis will hinge on whether the rela-

tionship is prejudicial to good order and discipline or, if known, could discredit the naval service.

3. Members who violate the policy cannot absolve themselves by getting married. However, a pre-existing relationship or marriage may require a different result. For example, if two enlisted servicemembers are married and one member subsequently commissions as an officer, their relationship will not violate the instruction.

4. The new reporting procedures explicitly require that records must be maintained through the Department of the Navy Directorate for Administration, Logistics, and Operations, Directives and Records Management Division portal page. The old instruction only mandated that records be maintained.

Generally, personal relationships between members are acceptable provided they do not call into a question a senior’s objectivity or undermine that senior’s authority, result in even the appearance of preferential treatment, or otherwise compromise the chain of command. Going to an off-duty event, like a baseball game, as a unit is probably fine. An officer going to a number of baseball games with an individual enlisted member of the unit is probably not.

All members – not just the senior member in a potential relationship – are accountable for their own conduct and adherence to the instruction. Commanding officers (COs) and officers in charge (OICs) are responsible for ensuring that members of their command are aware of, trained on, and held accountable to the policy. COs and OICs are also responsible for reporting allegations of fraternization and corresponding investigations via Navy unit situation report (SITREP) and for ensuring that no member of their command faces reprisal for reporting any such allegations.

Please contact your staff judge advocate or the RLSO with any questions about the Navy’s new fraternization policy and its enforcement.

GIFTS TO SUPERIORS

LTJG Adam J. Bentley JAGC, USN

Gifts, tokens of appreciation, and items of recognition may be a facet of a healthy workplace. Such gifts can be used to mark significant personal or professional accomplishments, welcome newcomers, or recognize departing colleagues. Overall, the act of gift giving is a common and acceptable practice; but, care should still be taken to ensure that all applicable rules and guidelines are followed. This article will provide a brief overview of the policies for gifts among employees.

All Executive Branch employees are governed by the Standards of Ethical Conduct codified in 5 C.F.R. § 2635. Violations of the C.F.R. could result in adverse disciplinary or administrative action. The overall standard for this regulation is that employees are prohibited from “giving, donating to, or soliciting contributions for, a gift to an official superior” and from “accepting a gift from an employee receiving less pay,” unless there is an exception.

There are three exceptions to this general prohibition: (1) gifts given on an occasional basis, (2) special infrequent occasions, and (3) voluntary contributions.

An occasional gift is given on occasional basis such as when gifts are traditionally exchanged (e.g. birthdays). Occasional gifts may be given by a subordinate to a superior if:

- \$10 or less, and not cash;
- Shared food or refreshments for several employees;
- Normal personal hospitality (e.g., hosting a dinner);
- Normal hospitality gifts (e.g., bringing a dinner host a bottle of wine); or
- Leave transfer (for civilians only).

Special infrequent gifts may only be given to a superior by a subordinate in certain limited circumstances. Special infrequent occasions of personal significance that qualify include marriage, illness, or the birth or adoption of a child. Additionally, gifts may be given on the occasion that terminates the subordinate-official superior relationship (e.g., retirement gifts).

Lastly, employees may solicit and contribute nominal amounts for gifts to a superior if the special infrequent exception is met or if food or refreshments are to be shared in the office among several employees. While the regulation allows for “solicitation,” this must be reconciled with the Joint Ethics Regulations. Put simply, the aggregate value of the gift that is purchased with voluntary contributions must be \$300 or less. Additionally, solicitations for group gifts may not exceed \$10 per person, but an employee is free to donate more. All donations must be voluntary and non-coercive. By way of illustration, the members of a command may voluntarily contribute money to make a joint purchase of a gift for an official-superior in recognition of that superior’s retirement.

For additional information related to policies governing gifts among employees, please read 5 C.F.R. § 2635 and Joint Ethics Regulation sections 2-203 and 2-205. RLSO WESTPAC is standing by to answer your questions and to assist.



OFF-INSTALLATION SEARCH AND SEIZURE

LTJG Lan Nguyen, JAGC, USN

When stationed overseas, Commanding Officers often should apply additional considerations in their decisions when it comes to searches and seizures. Generally, Commanding Officers for personnel stationed in the United States may not authorize searches of off-base property. However, an exception exists for personnel outside the United States. Under the Military Rules of Evidence (MRE), a Commanding Officer of servicemembers, civilians, and their dependents stationed overseas may authorize a search of nonmilitary residential property within a foreign country. In those situations, certain considerations apply.

Under MRE 315, a Commanding Officer may authorize a search or seizure of off-base property located in a foreign country if:

(1) the Commanding Officer has control over the Sailor who owns or possesses the property to be searched; and

(2) the probable cause standard is satisfied.

Probable cause is defined as a reasonable belief that a crime has been committed and that evidence of the crime will be located at the place to be searched. The reasonable belief must be supported by reliable and credible facts and information. Note, whether probable cause existed at the time of the search authorization is frequently litigated at court-martial. Accordingly, Commanding Officers should consult their staff judge advocate when conducting a probable cause determination.

Overseas, off-base searches must also comply with any relevant international agreements in place. In Japan, the Status of Forces Agreement requires the law enforcement agency executing the search (i.e., Naval Criminal Investigative Service, Criminal Investigative Division, etc.) to coordinate closely with their Japanese counterparts. United States law enforcement officials will then execute the search in conjunction with Japanese law enforcement.

Improperly authorized searches can hinder the successful prosecution of a servicemember and potentially violate the servicemembers' rights under the U.S. Constitution. When in a foreign country, an improper or poorly coordinated search may also negatively impact host nation relations. Accordingly, Commanding Officers are encouraged to consult their staff judge advocate or RLSO Command Services Department for assistance before authorizing any off-base search or seizure.

RESULTS OF TRIAL



JANUARY 2021

On 16 February 2021 at a General Court-Martial in Yokosuka, Japan, MMA1 Terrell T. Hunter, USN, pleaded guilty to viewing child pornography and three specifications of possession of child pornography. The guilty plea was entered pursuant to a pretrial agreement. The military judge sentenced him to reduction in rank to paygrade E-1, confinement for 67 months, and a Dishonorable Discharge. In accordance with the terms of the pretrial agreement, all confinement greater than 36 months is to be suspended. The suspended punishment may be served if the Service Member violates the terms of the pretrial agreement.

MARCH 2021

On 9 March 2021, an active duty E-6 was tried for sexual assault at a General Court-Martial comprised of officer and enlisted members onboard Naval Base Guam. The member was found not guilty on all charges and specifications.

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