



ATLANTIC AREA/D5 LEGAL BRANCH NEWSLETTER



#1-2000

July 2000

TOPICS: MISUSE OF GOVERNMENT TRAVEL CARDS, SEXUAL HARASSMENT, AND AN UPDATE TO ARTICLE 8-H OF THE PERSMAN

This is the first of what will hopefully be a continuing series of newsletters designed to provide useful information to you, our clients. The contents of the section dealing with the misuse of government travel cards has also been issued separately to MLCA units by LCDR Jon Beyer MLCA(lj).

1. MISUSE OF GOVERNMENT TRAVEL CARDS

Ref: (a) ALCOAST 145/00
(b) ALCOAST 065/00
(c) Travel Charge Card Program, COMDTINST 4600.14A

Executive summary: If you want to take a member to mast for abuse of a government travel card, please call legal first so we can safely guide you through the minefield.

Recently, Commandant issued reference (a), which emphasized the growing problem of travel card delinquencies. The message also reminded cardholders that disciplinary action may be taken by their command for card delinquency problems. The goal of this newsletter is to identify the tools that are available to assist you, including various military justice tools for the most difficult cases, and recommend procedures that will increase the options that are available to you.

Prevention . An ounce of prevention is worth a pound of cure. Reference (b) announced that use of the government travel card is mandatory for the vast majority of Coast Guard members. As commands implement this directive, the number of members holding and using a government travel card will increase. We can therefore expect a corresponding increase in the number of incidents of abuse. Of particular concern is the fact that many of the new card holders will be our more junior members, who often lack experience and maturity in the area of credit management.

Faced with an already difficult problem, and the potential for even greater challenges ahead, we recommend commands take an aggressive approach in using the administrative tools available to you to manage this program. The following is a summary of some of those tools.

Counseling of new card holders. We recommend advance counseling of new cardholders. In particular, we recommend that commands supplement the acceptance statement, enclosure (1) to reference (c), with a page 7 that clearly orders use of the card only for official travel expenses. A sample page 7 is provided at the end of this newsletter. The reasons for and advantages of this recommendation are discussed more fully below, but in short this is necessary because the current instruction, reference

(c), does not establish a legally enforceable order. In addition, any steps we can take to clarify expectations and educate our members are worth the effort.

Command card control. If your command is suffering from multiple instances of abuse and you need to put a roundturn on the problem, another option is to implement a program where the command holds the credit cards in a safe, and issues the card only when needed for official travel. The downside of this approach is that it would require even more command resources to run the program, but it may be worth the effort at particular commands. This approach comes with some risks to the command, and should be implemented by a well thought out directive. If interested, please call for assistance.

Prompt counseling of abusers. The first time a command realizes a member is using the travel card for personal expenses, we recommend counseling documented by a page 7. A sample page 7 follows at the end of this newsletter. The page 7 includes a direct order to use the card in the future only for official government travel. Again the details will be discussed more fully below, but use of this page 7 expands the options available to a command if problems continue.

Other options. References (a) and (c) highlighted the administrative tools available to you, including the new option of the Coast Guard collecting money from individuals who are delinquent in paying off their government travel card balances. These options include: 1) If not already aware, notify your primary travel card coordinator of the problem so that the coordinator can notify Citibank who can cancel or suspend use of the card. 2)

Consider lowering the next evaluation of the military member, and reconsider advancement recommendations. 3) A command might even begin administrative separation action under Chapter 12-B-18 of the PERSMAN for dishonorable failure to pay just debts. Notice that a 6 month probationary period is required, so you need good documentation and advance planning here. Please call for advice if you contemplate taking administrative separation action. 4) Finally, you might want to try the new approach of directly collecting delinquent amounts from the member's pay. Unfortunately, Mr. Mike O'Brien, the Government Travel Card Program Manager at Commandant (G-CFM-3), reports that, while the Coast Guard has issued the ALCOAST on the topic, actual procedures to collect delinquent amounts are not yet in place, and it will be awhile before they are. You probably don't want to be the first test case.

In summary, there are multiple administrative options. Our general advice is to use these administrative options as your primary tools when dealing with an abuser of the government travel card. Enforcement at mast should be reserved for the more serious offenders.

Enforcement at Mast. Many commands look to mast as the most efficient enforcement tool to deal with serious misuse of the government travel card. Misuse can really fall into two categories:

(1) Proper use while on government travel, but a failure to pay the bill in a timely fashion.

(2) Improper use of the government travel card for personal purchases rather than official travel.

We'll devote the majority of our attention to situation number two. Also, there's a third possibility of failure to obtain and use the travel card. Note that reference (b) now requires that most E-4 and above obtain and use the card for official travel. We will not address this area.

(1) Failure to Pay. The government travel card program is clearly intended to be a private contract between the card company and the individual. As a result, the individual bears the legal responsibility to pay the debts, and billing disputes are normally handled between the individual and the card company. If a command chooses to get involved because of the serious nature of the delinquencies, your best mast tool is Article 134 of the UCMJ, Dishonorably Failing to Pay Debt. We'll touch on this only briefly. Note that the debt must be due and payable, that the member must dishonorably fail to pay the debt, and that under the circumstances the conduct must be to the prejudice of good order and discipline or of a nature to bring discredit on the armed forces.

In real world terms this means the failure to pay must be something more than simple negligence or financial mismanagement. The failure to pay must be characterized by deceit, evasion, false promises, or other really bad conduct showing a deliberate or grossly indifferent attitude toward repayment. A real world example we've seen is \$45,000 in debt with no effort at payment over six months. Obviously, failure to pay official charges is usually a result of larger debt problems for the individual. Mast might accomplish something, but the larger problem of debt management still needs to be solved. For the real problem cases, the best Coast Guard outcome might be discharge of the

individual for dishonorable failure to pay just debts under the PERSMAN, Article 12-B-18. We recommend you call for advice if you anticipate either mast or admin separation for dishonorable failure to pay.

(2) Improper Use for Personal Purchases. Experience shows this is the real problem area. We've given a credit card to many people who otherwise would not have one, and misuse is a frequent result. Perhaps we shouldn't be surprised, but the result is a lot of work for commands. Unfortunately, it's such a financially attractive approach from a budget standpoint for the Coast Guard that the system is not going to change. Equally unfortunate is the fact that the government travel card instruction, reference (c), is outdated (e.g., it still refers to American Express) and is poorly drafted from a legal standpoint.

Many of you are aware that "legal" has expressed reservations about taking a person to mast based on the instruction. We'll go into possibly excessive detail below, but ***the main message today is that it is possible to take a person to mast, but it requires close coordination with legal and the proper facts.*** In this area it really is in your best interest to call for advice first.

Here are the details. The first tool that most commands consider when looking at punitive action for charge card abuse is Article 92 of the UCMJ for violating an order. Unfortunately, Article 92 is not easily used because of some problems with reference (c). First, Article 92 actually lists 3 different crimes: 1) Violation of a lawful general order; 2) Failure to obey some other lawful order; and 3) Dereliction of duty. We won't go too deeply into the differences, but the beauty of the first, a lawful general order, is that you don't need to prove that the

accused had knowledge of the order. In other words, a person is accountable even if they didn't know about the lawful general order. Examples of orders of this type include Coast Guard Regulations and parts of Section 8-H of the PERSMAN.

To be a lawful general order under this first clause of Article 92, the order (in this case reference (c)), must be issued by (i) an officer having general court-martial jurisdiction, (ii) a general or flag officer in command; or (iii) a commander superior to (i) or (ii). The Commandant is the only Flag Officer in Command at CG Headquarters with authority over all Coast Guard members, so he is the only one with clear authority to issue a Coast Guard wide punitive general order enforceable under Art. 92. The travel card program instruction was signed by the Director of Finance and Procurement, not the Commandant. A Coast Guard Court of Criminal Appeals opinion has stated that an "order" signed by someone other than the Commandant might be enforceable if it was signed with the Commandant's knowledge and at his specific direction, but proving this would require the Commandant to testify that such was the case. Probably not a good use of the Commandant's time. Our legal conclusion is that reference (c) is not a lawful general order. It would be unlawful to impose punishment at mast under this theory.

Under the second clause of Article 92, an "other lawful order," reference (c) still encounters problems because it doesn't clearly prohibit misuse by individuals. In other words, it very clearly sets policy, but not every policy is an enforceable order for which service members are held criminally accountable. Notice that the purpose line of the instruction is to outline "policy," and that the action line imposes obligations on

COs, but says nothing to individual service members. In the world of criminal justice, individuals should be on clear notice about what is prohibited, and doubt in this area should properly benefit the individual, not the government. Our legal conclusion is that reference (c) is likewise not an other lawful order. Again, it would be unlawful to impose punishment at mast under this theory

The third clause of the article, dereliction of duty, does offer some possibilities to hold a person accountable at mast or court-martial for misuse of a government credit card. While the Coast Guard Court of Criminal Appeals has not specifically addressed the Coast Guard government travel card instruction, the courts of criminal appeals for other services have upheld court martial convictions based on those services' directives. Our conclusion is that reference (c) is sufficient to establish a legally enforceable duty for purposes of finding a dereliction of duty, but we recommend commands impose punishment only when there is evidence of a willful dereliction of duty. There are some interesting legal distinctions between willful dereliction and dereliction through neglect or culpable inefficiency that the Manual for Courts-Martial (MCM) doesn't clearly address in paragraph 16 of Part IV. Courts have held that before a member may be punished under the UCMJ for dereliction in the performance of duties, it must be shown that the member had some knowledge of those duties, and such knowledge may be either actual or constructive knowledge. To establish constructive knowledge, it must be shown that the member reasonably should have known of the duties. In order to find a willful dereliction of duty, the commanding officer must find that the member had actual knowledge, rather than just constructive knowledge, of the duty. If you've made it

this far through the newsletter, you're probably drooling but thinking you really should call legal for help. That's the point. When you call, we'll focus on what evidence you have to show that the member knew of this duty. The government travel card program recommendation and acceptance statement, enclosure (1) to reference (c), may provide evidence of the members knowledge.

Here's our bottom line advice: If you want to take a person to mast for misuse of a government credit card, call legal for advice first. We'll be looking for some very specific facts that will help you to do so, particularly in the area of knowledge of the duty to use the government travel card only for official travel expenses.

Some final thoughts: We mentioned at the start of the newsletter that when initially counseling members who have misused the government travel card by making personal purchases, a page 7 should be created that includes a direct order to use the card only for official government travel. This page 7 clearly establishes knowledge, and in fact moves any future offenses up to the second clause of Article 92 as an "other lawful order." This offense authorizes more substantial punishment at court-martial, and would be the preferred approach for any case that would potentially proceed to court-martial. Again, we recommend use of the sample page 7s that follow. These page 7s eliminate any uncertainty about the member's actual knowledge, and expand the enforcement options available to a command.

Sample Page 7 for Current Cardholders Who Abuse the Card

DATE: Counseled this date regarding improper use of the government travel card on [dates] by [describe improper use]. Also counseled regarding the proper use of the government travel card. You are hereby ordered to use the government travel card only for official government travel expenses. Use of the card for personal, non-governmental business is prohibited.

I. M. TUFF
Executive Officer

DATE: I acknowledge receipt and understanding of this order.

J. G. DOE

Sample Page 7 for New Cardholders/Current Cardholders before abuse

DATE: Counseled this date regarding the proper use of the government travel card. You are hereby ordered to use the government travel card only for official government travel expenses. Use of the card for personal, non-governmental business is prohibited.

I. M. TUFF
Executive Officer

DATE: I acknowledge receipt and understanding of this order.

J. G. DOE

2. SEXUAL HARASSMENT

Executive Summary: *You should no longer take members to mast for violation of the lawful general order against sexual harassment.*

COMDTINST M5350.4, the new Civil Rights Manual, canceled COMDTINST 5350.30A, Sexual Harassment Prevention System. One (unintended?) consequence of this was the apparent cancellation of the punitive general order covering sexual harassment. Using the knowledge you've gained from reading the preceding section dealing with misuse of the government travel card, you realize that members should not be taken to mast for a violation of this apparently cancelled order under clause 1 of Article 92, UCMJ for sexual harassment. Here are some other options.

Maltreatment, Article 93, UCMJ: The elements of this offense require that the victim be subject to the orders of the offender and that the offender "was cruel toward, or oppressed, or maltreated" the victim. This charge is especially appropriate for severe cases of hostile work environment or any instances of quid pro quo harassment.

Conduct Unbecoming an Officer, Article 133, UCMJ: The elements of this offense require a showing that the offender did or omitted to do certain acts that under the circumstances constituted conduct unbecoming an officer and a gentleman. Incidents of sexual harassment by an officer or cadet would fit into the above elements.

Violation of Other Lawful Order and Dereliction of Duty, Article 92, UCMJ: The analysis here is the same as with the credit cards. Page sevens are recommended to

document actual knowledge and to allow charging under either of these theories.

Whenever an offender makes actual physical contact with a victim a whole series of additional charges are possible, including rape, indecent assault, indecent acts, and simple assault. Contact us to discuss the specific facts/evidence available. We can help guide you both on appropriate charges and the appropriate forum for resolution based on the facts of your particular case.

3. ARTICLE 8-H, PERSMAN UPDATE

Executive Summary: *CO's may issue local orders prohibiting conduct & relationships defined as "unacceptable" in Article 8-H.*

As all of you are no doubt aware, Article 8-H of the PERSMAN sets out the Coast Guard's interpersonal relationships policy. That policy discusses three categories of relationships: Acceptable Personal Relationships (see paragraph 8.H.2.c and examples contained in 8.H.3.b), Unacceptable Relationships (see paragraph 8.H.2.f. and examples in paragraph 8.H.3.b. and 8.H.3.c.), and Prohibited Relationships (see paragraph 8.H.2.g. and section 8.H.4). Generally, little if any confusion has attended the Acceptable and Prohibited Relationships categories, but commands often are unsure what their options are with respect to the third category, Unacceptable Relationships. First, it should be pointed out that Unacceptable Relationships are **not** the subject of a punitive general order and therefore cannot be charged as a violation of clause 1 of Article 92, UCMJ. It is also important to note that one of the purposes of Article 8-H is to provide for a consistent policy that applies to all Coast Guard units. Nevertheless, Commandant has authorized unit commanders to further limit personal

relationships **when a strong need exists** to do so. In a recent letter (copies available on request), Commandant (G-WPM) stated: “Coast Guard commands may issue local verbal or written orders or regulations prohibiting conduct and relationships defined as “unacceptable” in Article 8-H. Those orders may be directed at specific individuals, groups, or all members of the command. They may preclude specific types of conduct and describe and give examples of unacceptable conduct and relationships that violate the order. The order may be given following a specific occurrence of misconduct or prospectively before any command awareness of unacceptable relationships or conduct. The order may be given orally, individually in writing (i.e. letter, CG-3307), or published to members of the command via a valid local unit instruction or directive. For example, a command may order a member to not engage in unacceptable romantic relationships and conduct with one or all crewmembers of the same cutter or small unit.”

If your unit sees the need for such an order or instruction, contact our office for help in crafting the same. Any such instruction or order should be narrowly tailored to avoid infringing on those relationships that Commandant has determined to be Acceptable Relationships. Once such an order is issued, UCMJ action for violation of that “other lawful order” would be possible as discussed in the preceding two sections.

QUESTIONS?

Please don't hesitate to call with questions or concerns on the topics covered in this newsletter or any other legal topic. We exist to serve you, our customers.

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