

On Watch



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Service Members Can Protect Themselves Against Punitive Mental Health Evaluations

By *Susan Bassein*

Involuntary mental health evaluations and hospitalizations can be used by commands to punish whistleblowers or to undermine their credibility by creating adverse mental health records. In response to such abuses of the psychological evaluation and treatment process, Congress passed a law in 1993 that established mandatory procedures for involuntary mental health referrals and hospitalizations, and protections for service members against the inappropriate use of such actions.¹ That law became the basis for Department of Defense (DoD) Directives² and, subsequently, regulations for the service branches.³

The abusive use of psychiatric evaluations is not uncommon. Military counselors and attorneys have seen many cases in which soldiers or sailors were required to undergo evaluation after they have complained about improper performance of duties by superiors, sexual harassment or sexual assault, racial or other discrimination, or other problems which only a "troublemaker" would address. Psychiatrists or psychologists may be referred service members who are quite reasonably unhappy about being required to be there and with the command's biased information about their performance and portrayal of their complaints as paranoid or abusive. The process can be both insulting and humiliating. Psychiatrists or psychologists may jump to unwarranted diagnoses and recommendations. For example, a resulting diagnosis of personality disorder may lead to lowered performance evaluations, involuntary administrative discharge and a psychiatric label which appears on DD-214 discharge documents and may remain with the person for life.

Procedures for Ordering Involuntary Mental Health Evaluations and Hospitalization

An involuntary mental health evaluation of a service member may be ordered by his or her commanding officer, but only under certain conditions and in accordance with certain procedures. Subsequent involuntary hospitalization can

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only be ordered by a mental health practitioner after the commanding officer orders an evaluation. Evaluations must be conducted in a manner consistent with applicable standards of care.

A service member's commanding officer must consult with a mental healthcare provider, or other healthcare provider if a mental healthcare provider is not available, concerning the involuntary mental health evaluation. In non-emergency situations, this consultation must be done before ordering the evaluation. In emergencies, the commanding officer must make every effort to do the consultation before ordering the evaluation, but if that is not possible then the command must still consult with a provider at the facility to which the service member was sent as soon as possible afterwards. An emergency exists only if the commanding officer believes that the service member may be suffering from a severe mental disorder and if there are facts and circumstances that indicate that the service member intends or is likely to cause self-harm or harm to others.

Involuntary admission to a hospital can only be ordered by the provider. To order an initial period of evaluation and stabilization, which cannot exceed 72 hours, the provider must judge in good faith that the service member has a severe mental disorder and is at risk for causing self-harm or harm to others, and that the evaluation or treatment cannot be performed adequately in a less restrictive setting. Continued [involuntary] hospitalization beyond 72 hours can only be ordered by an *independent, privileged provider*, that is, a psychiatrist (or other medical officer if a psychiatrist is not available) who is not in the service member's chain of command, has rank O-4 or greater (or the civilian equivalent), and is appointed by the medical treatment facility commanding officer. An order for continued hospitalization requires that, in addition to the conditions for hospital admission, there must be a reasonable prospect that the service member's condition is treatable at the medical facility.

Service Member Must Be Given Statement of Rights and Explanatory Memorandum

When ordering a mental health evaluation, the commanding officer must provide the service member with a memorandum stating the reasons for the actions and the service member's rights, which include speaking to a military attorney, obtaining a second medical opinion (at the service member's expense), refusing consent (but not

refusing the evaluation) and filing a complaint. The right to receive the memorandum and statement of rights cannot be waived.

In non-emergency situations, the service member must be provided with the memorandum at least two business days before the referral. In emergency situations, the service member must be provided with the memorandum as soon as possible.

Before beginning an involuntary mental health evaluation, the mental healthcare provider must inform the service member of the reason for the evaluation, the likely consequences, and the fact that the evaluation is normally not confidential (See below, "Variations in Service Branch Policies," for a discussion of Air Force policy).

Within 24 hours of an involuntary hospitalization, the mental healthcare provider must evaluate the service member to determine if continued hospitalization for an initial period of further evaluation and stabilization up to 72 hours is warranted. If so, the service member must receive oral and written notice of that reason.

Under these circumstances, an *independent, privileged provider* (i.e. psychiatrist or other medical officer if a psychiatrist is not available) must conduct an evaluation within 72 hours of the admission. If that provider determines that continued hospitalization is warranted, s/he must inform the service member of his/her recommendations, including the clinical conditions for continued hospitalization or discharge from the hospital and the date of the next such review. That next review must be conducted within five business days.

Provider Required to Review Referral and Initial Hospitalization for Regulatory Compliance

In addition to determining whether continued hospitalization is warranted, the *independent provider* is required to review the records of the referral and initial hospitalization to determine whether the procedures mandated by the regulations were followed. That provider must inform the service member of his/her right to have legal representation during the review either by a judge advocate or, at the service member's expense and if reasonably available, a civilian attorney of the service member's choosing. If the provider finds evidence of im-



proper evaluation or hospitalization, s/he must confer with the commanding officer who ordered the involuntary mental health evaluation. If the provider determines that the referral or admission was made improperly, this finding must be reported through the provider's own chain of command to the next higher level of the chain of command of the referring commanding officer.

In an involuntary hospitalization, the service member has the right to contact a relative, friend, chaplain, attorney, or an Inspector General (IG) as soon after admission as the service member's condition permits.

Protections Against Abuse of the Psychological Evaluation and Treatment Process

A service member may communicate with an attorney, members of Congress, any appropriate authority in his/her chain of command, an IG, or a member of an audit, inspection, investigation or law enforcement organization of the DoD. Making a referral for an involuntary mental health evaluation as a reprisal for such communication is a violation of Article 92 of the UCMJ (and regulations governing civilians), as is restricting such communication regarding an involuntary mental health evaluation. DoD Directive 7050.6, Section 4.4, states: "No person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, in reprisal against any member of the Armed Forces for making or preparing a protected communication." (See Section 4.5 for applicable codes; also DoD Instruction 6490.4, Section 4.3, and DoD Directive 6490.1, Sections 1.2.2 and 4.3.2.)

When a commanding officer refers a service member to a mental healthcare provider for a non-emergency involuntary evaluation, that provider must consult with the commanding officer about the circumstances under which the referral was made before performing the evaluation. If the provider then judges that the evaluation may have been ordered improperly, s/he must report the evidence through his/her own chain of command to the next higher level of the chain of command of the referring commanding officer.

A service member has the right to consult with an attorney regarding ways of seeking redress for violations of these regulations, which can include filing a complaint under Article 138 of the UCMJ. Upon request, an attor-

ney who is a member of the Armed Forces or employed by the DoD will be appointed at no cost to the service member. If a military attorney is not reasonably available, every effort should be made to provide legal consultation by telephone.

Allegations of violations of these regulations may be submitted to a service IG by the service member (or former member) or his/her legal guardian within 60 days of the referral. The service IG must, within 10 working days, report all such allegations to the DoD's IG. Unless the DoD's IG assumes investigative responsibility, the service IG will be responsible for the investigation of the allegations and report its progress to the DoD's IG after 90 days, and every 60 days thereafter, until the final report is submitted. That report must be submitted within one week of completion. The service IG must report to the DoD's IG any administrative action within one week of taking it.

If the DoD's IG determines that an allegation of a violation has sufficient merit and initiates an investigation, or requests that the IG of a service branch initiate one, it must issue a report within 180 days of the receipt of the allegation or notify the Deputy Under Secretary of Defense for Program Integration (DUSD(PI)) and the service member (or former member) of the reasons for the delay and the date that the report will be issued. Within 30 days of the completion of the investigation, the IG must provide the service member (or former member) a copy of the report and, if requested, the documents acquired during the investigation and summaries of witness testimony. DoD Directive 7050.6, Section 5.1.7 states: "The copy of the report, and supporting documents, if requested, released to the member or former member shall include the maximum disclosure of information possible except what is not required to be disclosed under Section 552 of 5 U.S.C."

Some IG Investigations Fall Short; Appeal Possible

Unfortunately, service members are not normally designated "parties" in IG investigations, and so may be left out of the investigative process unless they are assertive in presenting to the IG specific evidence, witness statements, and reference to official records. Counselors and attorneys have encountered completed service IG investigations in which the complainant was never questioned by the investigator nor offered a chance to suggest possible witnesses to the matters under investigation.



The service member (or former member) may request further review by a Board for the Correction of Military Records (BCMR). In part because of these regulations' link to the Military Whistleblower Protection Act, the BCMRs should give well-documented complaints serious consideration.

If the involuntary mental health evaluation was allegedly used in reprisal for protected communication that itself contained allegations of violations of regulations, then the DoD's IG must, for those allegations, follow the same procedures as those established for investigating and reporting on the original allegation. This is a particularly important point, since it may focus investigative resources on questions that the command initially avoided by the very act of the psychiatric referral.

Variations in Service Policies

The regulations for the Army, Navy (and Marines), and the Air Force cite one or more of the DoD regulations and mandate compliance with those regulations. The significant departures from the DoD regulations are:

Army Regulation AR 600-20, Section 5-4, mandates the use of medical boards (a) to determine if a Soldier is mentally incompetent [5-4.c] and (b) to evaluate the appropriateness of specific medical care when the Soldier refuses the medical care that was ordered [5-4.e and 5-4.f]. In particular, if a medical board approves the treatment that was ordered, the Surgeon General concurs, and the Special Court-Martial Convening Authority orders the Soldier to submit to treatment but the Soldier still refuses, then the commander may take disciplinary action according to the MCM or separate the Soldier.

Air Force Instruction AFI 44-109 provides for a limited amount of psychotherapist-patient confidentiality. In particular, Section 2.1 states the general rule that communications between a patient and a psychotherapist (or an assistant to one) for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition are confidential. However, some exceptions to that confidentiality are authorized for persons or agencies with a proper and legitimate need for the information and who are authorized by law or regulation to receive it [Sections 2.2 through 2.5].

Exceptions to These Protections

It is important to note that the procedures and protections described in this memo do *not* apply in certain situations:

1. Voluntary self-referrals;
2. Responsibility and competency inquiries conducted under the Rule for Court Martial 706 of the Manual for Courts-Martial (MCM);
3. Interviews conducted in accordance with the Family Advocacy Program;
4. Interviews conducted in accordance with drug or alcohol abuse rehabilitation programs;
5. Diagnostic referrals requested by non-mental healthcare providers not part of the member's chain of command as a matter of independent clinical judgment and when the service member consents to the evaluation; and,
6. Evaluations expressly required by applicable service regulation, without discretion by the service member's commanding officer, for special duties or occupational classifications.

Conclusion

While the regulations cited in this memo offer a service member some protection by requiring members of a different chain of command to evaluate the actions of the service member's commanding officer, it must be noted that those evaluating the case are nevertheless members of the military. Because the regulations are complex and sometimes vague, and because many commands balk at following rules, this is an area in which the assistance of counsel or a counselor can be of great help to service members.

REFERENCES

1. Public Law 102-484, Section 546, "National Defense Authorization Act for Fiscal Year, 1993."



2. DoD Directive 6490.1 (October 1, 1997) provides a basic outline of procedures (4.2 and 4.5), protections (4.3), and investigations (5.1- 5.3). DoD Directive 6490.4 (August 28, 1997) elaborates in more detail than Directive 6490.1 on procedures (6.1.1 and 6.2.2), redress (6.1.2), responsibilities of mental healthcare providers, including reporting of violations (6.1.3 and 6.2.3), and investigations (6.1.4). DoD Directive 7050.6 (February 20, 2004) references applicable laws and regulations (4.5), and outlines procedures for investigations and reports for the DoD's IG (5.1), for the DUSD(PI) (5.2), for Secretaries and IGs of individual service branches (5.3), and for heads of DoD components other than the Secretaries of individual service branches (5.4).

3. Army: AR 600-20 (June 7, 2006); Army: MEDCOM 40-38 (June 1, 1999); Navy and Marines: SECNAVINST 6320.24A (February 16, 1999) Air Force: AF Instruction 44-109 (March 1, 2000).

AUTHOR

Susan Bassein is a volunteer GI rights counselor at the AFSC office in San Francisco, a member of and volunteer for the National Lawyers Guild Military Law Task Force, and the creator of www.Gldischarges.org. The author would like to thank Kathy Gilbert for providing essential help.

ERRATUM

In the last issue of *On Watch*, in "Medical Discharges and Retirement, the Department of Defense reference on page 7, in column 2, line 3, should be: Department of Defense Instruction 6130.4, "Criteria and Procedure Requirements for Physical Standards for Appointment, Enlistment or Induction in the Armed Forces."

MILITARY LAW SEMINARS

Would you like to arrange a seminar on military law and counseling or conscientious objection in your area? The MLTF can provide speakers and resources for day-long or half-day seminars on these issues: an overview of military law, with emphasis on discharges; handling cases of AWOL and dissent; and habeas corpus petitions in conscientious objection cases. Sessions can be geared to law students and counselors as well as attorneys. For more information, contact Marti Hiken at 415-566-3732.

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Plaintiffs Awarded \$200,000 in Marine Recruiter-Rape Settlement

By Michael Sorgen

Two women who were raped at age 17 by U.S. Marine recruiters during a Northern California “gang-bang” recently won \$200,000 in tort damages, an injunction requiring command supervision of future recruit activities, and other restrictions in a stipulated settlement with the U.S. government.

The court-approved settlement, recently concluded by Military Law Task Force members Michael Sorgen and Barry Vogel, highlights the seamy underside of military recruitment practice. Under this practice – facilitated and condoned by the highest U.S. military officers – persuasive recruiters are given free rein to target low-income, at-risk youths, ply them with alcohol and other drugs, and demand or coerce sex.

The central issue in this case (*Jane Doe and Mary Roe v. Hagee, et al.*, C-06-1777 MHP, N.D. Cal.) was the federal defendants’ gross and wanton disregard for plaintiffs’ Constitutional rights. Plaintiffs Jane Doe and Mary Roe were 17-year-old high school students pursuing a dream job in the U.S. Marine Corps when they were raped by their recruiters.¹ The defendants were the United States, the U.S. Marine Corps, the Department of the Navy, and their highest commanding officers.

Jane and Mary sued for violations of their Fifth Amendment Constitutional right to bodily integrity, which in this case means to be free from rape and other sexual violations while associating with the Marines. They sought injunctive relief to require the Marines to take demonstrably effective measures to substantially reduce sexual assault. Such measures include appropriate supervision of recruiters and the imposition of consequences on the Marine Corps’ leaders who allow sexual assault to continually occur in their recruiting stations or under their command. Under the Federal Tort Claims Act, Jane and Mary also sought damages for the federal defendants’ negligence.

Settlement Aims to Create a Safer Environment for Female Recruits

On January 12, 2007, Federal District Judge Marilyn Hall Patel denied defendants’ motion to dismiss the lawsuit. Jane and Mary settled the case in such a way that they can hope will prevent other young women from suffering similar violent treatment. The settlement stipulation of June 6, 2007, approved by U.S. District Judge Marilyn Hall Patel on June 7, provides:

- Constant on-site command supervision of recruitment activities, such as those at which the abuses suffered by the plaintiffs occurred;
- An effective notice that alerts recruits to the danger of sexual assault or other abuse when attempting to enlist in the Marines;
- A demonstrably effective system for encouraging and enabling recruits to report sexual assault or other abuse in confidence to a uniformed victim’s advocate and to talk with a female recruiter;
- Meaningful and enforceable prohibitions against use of alcohol or other drugs at recruitment activities and requirements that Marines truthfully report suspected or actual sexual misconduct by other Marines;
- Other necessary steps to ensure the effective prevention of rape and other sexual assault, abuse and misconduct; and,
- Damages of \$200,000 for the plaintiffs and their attorneys.

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Sexual Abuse Persists While High Command Averts Gaze

The plaintiffs are just two of many who have suffered sexual assault at the hands of Marine recruiters and other Marines, acts that are facilitated and condoned by the federal defendants. Despite clear indications that sexual assault and abuse of power are serious problems throughout the recruiting process, the defendants have traditionally turned a blind eye while recruiters used their position and power to coerce recruits into engaging in sexual activity.² Recruiters who become aware of sexual misconduct by their fellow recruiters, including rape, are supposed to report to their superiors. However, they have no incentive to do so.

Defendants select recruiters who are persuasive for the purpose of encouraging enlistment. The recruiters then are given free rein to ply recruits with alcohol and other drugs and to demand or coerce sex with impunity, as long as their superiors can claim ignorance. One of the perpetrators in this case had previously been accused of sexual abuse, but had nevertheless been permitted to continue working unsupervised as a recruiter.

The recruitment process often targets young people from at-risk populations and from low-income areas whose career options are limited. Military recruiters have access to private information about potential

recruits through the No Child Left Behind Act, then exercise unfettered power over recruits' access to military careers. Recruits are led to believe that they must acquiesce to recruiters' orders in order to join the Marines and that they have no recourse if abused.

'Gang Bang' Fueled With Alcohol

The *Doe* case involved essentially a "gang-bang" in the Ukiah, California recruiting office facilitated by ample supplies of alcohol. This occurred when three Marines were raping three potential female recruits at the same time in the front room of that recruiting office. However, not a single Marine who was present reported this incident or any other Marine misconduct. Indeed, during the subsequent investigation they lied about or covered up their own participation, observations or knowledge, but faced no negative consequences.

The Marine Corps strongly emphasizes loyalty to one's fellow Marines. Indeed, the Marine Corps proudly describes itself as "one of the finest cultures of brotherhood...in the world."¹³ This attitude, coupled with a lack of negative repercussions for failing to report sexual abuse of recruits, creates a culture and institution of silence in which rank-and-file Marines are aware of pervasive sexual abuse of recruits, but do nothing to stop it.

In this case, it was in defendants' best interest to work with plaintiffs to conclude a global settlement agreement that resulted in implementation of specific, demonstrably effective policies and practices to prevent such assaults in the future. Obviously, this result was also in defendants' best interests from a public relations and recruiting standpoint. Because plaintiffs were likely to prevail on their tort claims, and because their injuries were severe, defendants also agreed to the substantial monetary damages. Plaintiffs also intend to take default judgments against the two perpetrators, both of whom have faced courts martial and have been discharged from the Marines.

AUTHOR

Michael Sorgen is a San Francisco attorney and peace activist, and a member of the Military Law Task Force of the National Lawyers Guild. He has been litigating military-related cases in Federal Court since the Vietnam War. Most recently he sought to nullify the military's "Stop Loss" policy, by which the military staffs the Iraq and Afghanistan occupations. Sorgen is also working with peace groups to rid the

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world of foreign (mostly American) military bases. He can be reached at msorgen@sorgen.net; co-counsel Barry Vogel can be reached at vogel@pacific.net.

REFERENCES

1. Fictitious names utilized with Court approval to protect plaintiffs from stigma or embarrassment.
2. Across all military services, including the Marines, one out of every 200 front line recruiters (who deal directly with recruits) was disciplined for sexual misconduct last year. The Army, which accounts for almost half of the military, has had 722 recruiters accused of rape and sexual misconduct since 1996. See "Sexual Abuse by Military Recruiters" by CBS/AP, August 20, 2006, <http://www.cbsnews.com/stories/2006/08/19/national/main1913849.shtml>.
3. <http://www.military.com/Recruiting/Content/0,13898,031406-making-it-in-the-marines,,00.html>.

**NLG National Convention
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The Guild will hold its 70th anniversary convention this fall. The MLTF is planning several programs during the convention, including its annual business and planning meeting, workshops, and a major panel, "The Intersection of Militarism and Sexism." Other panels and workshops are planned on Guantanamo, the legality of the war in Iraq, and other issues of interest to our members.

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About the Military Law Task Force

The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *On Watch* as well as a range of legal memoranda and other educational material; maintains a list serve for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects..

The MLTF defends the rights of service members in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more valuable than property rights. The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please contact the Task Force at:

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