



# LEGAL ASSISTANCE PRACTICE ADVISORY

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3-16

## Code 16 Legal Assistance POCs

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**Subj: New Navy Dual Processing Policy for processing Disability Evaluation System cases when misconduct has also occurred.**

- 1. On June 1, 2016, the Secretary of the Navy signed a new policy memorandum to establish guidelines for processing Disability Evaluation System (DES) cases when misconduct may also have occurred. On June 7, 2016, LAPA 2-16 was released announcing this new policy.**
- 2. The new policy will ultimately require revision to various Navy regulations, including regulations regarding administrative separation. In the interim period before regulations are amended, the Naval Personnel Command Legal Office has created guidelines to assist practitioners in resolving dual processing issues and requested Code 16 disseminate the same through this LAPA.**

# DISABILITY EVALUATION SYSTEM DUAL PROCESSING

<input type="checkbox"/> SECNAV Memo of 1 Jun 16	
<input type="checkbox"/> SECNAVINST 1920.6	PERS-00J
<input type="checkbox"/> SECNAVINST 1850.4	DSN 882-3166
<input type="checkbox"/> MILPERSMAN 1910-702	901-874-3166
<input type="checkbox"/> MILPERSMAN 1910-704	
<input type="checkbox"/> ASN(M&RA) Memo of 2 Oct 15	
<input type="checkbox"/> DODM 1332.18-V2	

*The purpose of the below analysis is to provide context of how the policy outlined in the 1 June 2016 SECNAV memo titled “Disability Evaluation System Dual Processing” should be applied to the Navy separations process. This is intended to be interim guidance until appropriate changes can be made to the MILPERSMAN.*

1) The first question in the analysis is: **Has the Member been referred to the Disability Evaluation System (DES)?** Although the memo mentions Members “who have a ratable condition”, the real threshold point is DES referral and not the condition itself. Commands are not expected to have a list of “ratable conditions” to reference nor do they have an affirmative duty to require every Member they’re separating to be screened for potential DES referral prior to separation. If the Member has not been referred to the DES, they should be processed for ADSEP under the current guidance.

- What is the DES?
  - The Disability Evaluation System (DES) includes two potential processes: the Legacy Disability Evaluation System (LDES), and the Integrated Disability Evaluation System (IDES).
- When has a Service Member entered the DES process?
  - Per the ASN(M&RA) Memo of 2 October 2015, Members are considered to be in the DES process as of the day they are referred by a medical provider pursuant to DoDM 1332.18-V2.
  - In practice, the first General Officer/Flag Officer (GO/FO) will not be making a decision on whether a Member should be referred to the DES, because that decision belongs to the medical provider. The GO/FO will decide whether the Member should *continue* in the DES process once referred.
- How does a command know whether a Member has a DES referral?
  - Contact your local Military Treatment Facility (MTF) Patient Administration Physical Evaluation Board Liaison Officer (PEBLO) to verify.

2) If the Member has been referred to the DES, the next question is: **Is the Member is also being processed for ADSEP with a misconduct basis?** If yes, **does that misconduct basis authorize an Other than Honorable (OTH) discharge?**

- What matters is whether the basis authorizes an OTH, despite the fact that the Chain of Command may not intend to seek an OTH or a board may ultimately make a recommendation for a more favorable characterization.
- The only misconduct bases that authorize an OTH are:
  - MILPERSMAN 1910-134 (Defective Enlistments and Inductions – Fraudulent Entry Into the Naval Service)
  - MILPERSMAN 1910-140 (Misconduct – Pattern of Misconduct)
  - MILPERSMAN 1910-142 (Misconduct – Commission of a Serious Offense)
  - MILPERSMAN 1910-144 (Misconduct – Civil Conviction)
  - MILPERSMAN 1910-146 (Misconduct – Drug Abuse)
- MILPERSMAN 1910-138 (Misconduct – Minor Disciplinary Infractions) does NOT authorize an OTH and is therefore does NOT trigger the provisions of this Memo).
- DES processing supersedes all other forms of administrative processing except the aforementioned bases for which an OTH is authorized.

3) If the enlisted Member has been referred to the DES and is being processed for ADSEP with a misconduct basis that authorizes an OTH, the next question is: **Has the Member has been diagnosed with PTSD or a TBI?**

- If the Member has been diagnosed with either PTSD or a TBI, the package is to be routed to CNP as the Separation Authority pursuant to MILPERSMAN 1910-704. MILPERSMAN 1910-702 requires that a medical professional make a determination as to as to the presence or absence of the PTSD/TBI and whether the condition affected the Member’s judgment and behavior and may have been a contributing factor in the basis for separation.
  - For PTSD, this determination must be made by psychiatrist or a clinical psychologist.
  - For TBI, this determination must be made by a psychiatrist, a clinical psychologist, or a treating physician.

4) If the enlisted Member has been referred to the DES, is being processed for ADSEP with a misconduct basis that authorized an OTH, and has NOT been diagnosed with PTSD or a TBI, the package is to be routed to the first GO/FO in the Member’s chain of command as the Separation Authority. That GO/FO must then ask: **Has the Member been referred to the DES for a mental health condition?**

- If yes, an “appropriately privileged military healthcare provider” (psychiatrist or clinical psychologist) must provide the GO/FO with a medical opinion as to whether the mental health condition warranting the DES contributed to the misconduct basis. If the GO/FO still determines that separation for misconduct is appropriate, he/she must indicate in writing that the medical condition evaluation was reviewed and considered prior to rendering a decision that separation was appropriate despite the Member’s mental health condition.

- If no, the GO/FO as the Separation Authority must review the medical condition warranting the DES and note his/her determination in writing that the medical condition was reviewed and considered prior to rendering a decision to separate for misconduct despite the medical condition.
- The GO/FO can always use the medical opinion in extenuation/mitigation when determining characterization, or may decide to stop misconduct processing altogether in light of the medical opinion.

5) For **Officers**, the Separation Authority is still SECNAV. The GO/FO cannot make a determination to stop the DES process for Officers.

- If an Officer is pending ADSEP and has a DES referral for a mental health condition, route the required medical opinion with the ADSEP package to SECNAV. This medical opinion is not required prior to requesting an officer Show Cause.

### **Notes:**

- At any point in the DES process, the GO/FO (or higher) may decide that DES processing should cease and the Member should be separated for misconduct. The Member does not need to actually be awarded an OTH.
- The GO/FO cannot stop the DES and separate if the Separation Authority is higher than that GO/FO (see MILPERSMAN 1910-704). For example, a GO/FO cannot stop the DES and separate an enlisted member with 18+ years of service because the Separation Authority is the Chief of Naval Personnel (CNP).
- This memo applies to separations with misconduct bases that authorize an OTH. If a member is being separated for a basis that only authorizes an Honorable or a General (Under Honorable Conditions) discharge, the DES process continues to run until it is complete.
- If a Member states that he/she has a DES referral for a mental health condition in the middle of an ADSEP board, the process remains the same. Before the GO/FO acts on the results of the ADSEP board (if the board voted to separate) the GO/FO must get the medical opinion from a psychiatrist or clinical psychologist and state in writing that the medical opinion was reviewed and considered prior to separation. This opinion is for the GO/FO and not for the ADSEP board members. However, it does not preclude the board from considering any relevant material the Service Member or the Government wishes to submit for consideration.
- If an ADSEP board convenes and finds no basis for misconduct, the case ceases to be “dual processing” and the DES process continues until completion.
- If a GO/FO decides to wait for the completion of the DES process and the DES decides not to separate/retire due to a ratable condition, the GO/FO can still separate for misconduct.
- Even if the DES recommends separation for a medical condition, the GO/FO can still separate for misconduct instead if the GO/FO reviews the DES decision and notes in writing that separation for misconduct is appropriate despite that medical condition.