



Mandatory Processing for Separation - Domestic Abuse

Purpose. To clarify administrative processing procedures for Marines determined to have committed domestic abuse.

Background. On 15 February 2019, DC, M&RA published Change 2 to Marine Corps Order 1900.16 (Separation and Retirement Manual [Short Title: MARCORSEPMAN]), which requires mandatory separation processing for all Marines determined to have committed domestic abuse, including emotional abuse for which there is no analog in the UCMJ. Commanders attempting to comply with this policy have experienced challenges identifying the appropriate basis for separation.

Rule

Domestic Abuse Triggers Mandatory Separation Processing. Paragraph 1004(f) of the MARCORSEPMAN requires mandatory separation processing for all Marines, including officers, who have been determined to have committed domestic, intimate partner, and immediate family member abuse. Although the triggering language is vague, “determined to have committed,” means a “substantiated” allegation. A separation authority “may not take administrative or disciplinary action against a Service member based solely upon an Incident Status Determination for an act allegedly committed by the Service member.”¹ Rather, an incident is considered substantiated when there has been a court-martial conviction, imposition of nonjudicial punishment, or the commander determines, based on a preponderance of the evidence, that an incident has occurred.² When a commander substantiates an allegation of domestic abuse, defined below, the policy requires administrative separation processing for that Marine.

The MARCORSEPMAN, paragraph 1002.23 defines domestic, intimate partner, and immediate family member abuse as:

Domestic violence or a pattern of behavior resulting in emotional or psychological abuse, economic control, and/or interference with personal liberty that is directed toward a person who is: (a) a current or former spouse; (b) a person with whom the abuser shares a child in common; (c) an immediate family member; or (d) a current or former intimate partner with whom the abuser shares or has shared a common domicile.

Domestic violence is further defined as the use, attempted use, or threatened use of force or violence against a person, or a violation of a lawful order issued for the protection of a person who is: (a) a current or former spouse; (b) a person with whom the

¹ MARCORSEPMAN para. 1004(f); *See also*, DoDM 6400.01-V3, Encl. (3), para. 2a(2)(a).

² The MARCORSEPMAN defines “substantiated” in several places, but not specifically in reference to domestic abuse. *See*, MARCORSEPMAN paras. 4103.2(d), 4103.3(d), 6210.4(d), 6210.8(d), 6210.9(b), 6210.10(b). For Enlisted Marines, an administrative separation board convening authority (typically a SPCMCA) may substantiate an allegation. For officers, a GCMCA substantiates allegations in accordance with MCO 5800.16 V-15 (LSAM), para. 010603.

abuser shares a child in common; (c) an immediate family member; or (d) a current or former intimate partner with whom the abuser shares or has shared a common domicile.³

(Emphasis added). Thus, the authorities define domestic abuse to include a wide range of misconduct and per the MARCORSEPMAN, all actions that constitute domestic abuse, even on the minor end of the spectrum, require mandatory processing. But there must be a valid basis for separation before processing is required.

The Department of Defense Manual (DoDM) 6400.01-V3 defines spouse or intimate partner emotional abuse as: “non-accidental act or acts, excluding physical or sexual abuse, or threat adversely affecting the psychological well-being of the partner,” and lists a wide range of examples.

Elements of Domestic Abuse. Article 128b, UCMJ (Domestic Violence) went into effect on 1 January 2019, but the maximum punishment, explanatory language and sample specifications are still pending promulgation. This Article provides that any person who:

- (1) commits of a violent offense against a spouse, an intimate partner, or an immediate family member of that person;
 - (2) with intent to threaten or intimidate a spouse, an intimate partner, or an immediate family member of that person—
 - (A) commits an offense under this chapter against any person; or
 - (B) commits an offense under this chapter against any property, including an animal;
 - (3) with intent to threaten or intimidate a spouse, an intimate partner, or an immediate family member of that person, violates a protection order;
 - (4) with intent to commit a violent offense against a spouse, an intimate partner, or an immediate family member of that person, violates a protection order; or
 - (5) assaults a spouse, an intimate partner, or an immediate family member of that person by strangling or suffocating;
- shall be punished as a court-martial may direct.

Basis for Separation for Cause. Neither the MARCORSEPMAN nor SECNAVINST 1920.6D denote a specific basis for separation for domestic abuse. Rather, domestic abuse would generally fall under several different bases including, but not limited to the following:

Enlisted

- Commission of a serious military or civilian offense (COSO). MARCORSEPMAN paragraph 6210.6. This requires: (1) The specific circumstances of the offense warrant

³ DoDI 6400.06 defines domestic abuse in Encl (2), para. 13 as “Domestic violence or a pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty that is directed toward a person who is: A current or former spouse. A person with whom the abuser shares a child in common; or A current or former intimate partner with whom the abuser shares or has shared a common domicile.” (Subparagraph numbers omitted). DoDI 6400.06 defines domestic violence in the following paragraph as “An offense under the United States Code, the Uniform Code of Military Justice, or State law involving the use, attempted use, or threatened use of force or violence against a person, or a violation of a lawful order issued for the protection of a person who is: A current or former spouse. A person with whom the abuser shares a child in common; or A current or former intimate partner with whom the abuser shares or has shared a common domicile.” (Subparagraph numbers omitted).

separation; and (2) A punitive discharge would be authorized for the same or closely related offense under the UCMJ.⁴ In domestic abuse cases, separation processing is mandatory, thus the circumstances automatically warrant separation. There is no discretion. After domestic abuse is substantiated, the commander must then determine whether:

1. the actions constitute a violation of the UCMJ, and
 2. a punitive discharge would be authorized for the same or closely related offense.
- Pattern of misconduct (POM). MARCORSEPMAN paragraph 6210.3.
 - Civilian conviction. MARCORSEPMAN paragraph 6210.7.

Officer

- Commission of a military or civilian offense that could be punished by confinement of six months or more, or any other misconduct that would require specific intent for conviction. SECNAVINST 1920.6D, enclosure (6), paragraph b(1).
- Sexual misconduct or perversion. SECNAVINST 1920.6D, enclosure (6), paragraph b(2).
- Intentional mismanagement or discreditable management of personal affairs, including financial affairs, if done with the intent to abuse, threaten, or intimidate his or her spouse. SECNAVINST 1920.6D, enclosure (6), paragraph b(9).
- A pattern of serious or recurring misconduct, punishable by military or civilian authorities, notwithstanding the fact that such misconduct has not resulted in judicial or nonjudicial punishment under the UCMJ. SECNAVINST 1920.6D, enclosure (6), paragraph b(11).

Legal Gap: Emotional Abuse. To satisfy the COSO basis, as discussed above, the abuse must constitute an offense under the UCMJ for which a punitive discharge is authorized. Because emotional abuse is itself not a violation of the UCMJ, commanders may not use emotional abuse as the underlying offense for separation based on COSO. For officer cases, commanders may consider whether the emotional abuse constitutes a violation of Article 133.

In an extreme situation, commanders may pursue separation of an Enlisted Marine that is based on the Best Interest of the Service (BIOTS). The Secretary of the Navy, acting through ASN M&RA, exercises this plenary authority only in “unusual cases where such action is essential in the interest of justice, discipline, and proper administration in the naval service.” MARCORSEPMAN paragraph 6214.

Conclusion. When a Marine commits domestic abuse, the MARCORSEPMAN requires that the Marine be processed for separation. Commanders, however, must also find a basis for separation and the MARCORSEPMAN’s definition of abuse does not always fall neatly within a delineated basis. The underlying basis for separation will depend on the facts and circumstances of the case. Article 128b of the UCMJ criminalizes many domestic violence actions and violations of it may result in separation processing based on COSO if the approved maximum punishment includes a punitive discharge. Until that occurs, commanders should look for analogous offenses under the UCMJ for which a COSO may be authorized. When the Marine’s domestic abuse does not constitute a violation of the UCMJ, such as in the emotional abuse example, the commander must determine whether circumstances warrant separation under another basis such as POM. If there is

⁴ Because maximum punishments for Article 128b offenses have not yet been promulgated, this will require analysis of the offense by analogy in the same way trial counsel are currently doing so at courts-martial.

no applicable basis for administrative separation, commanders should consider documenting the misconduct with formal counseling entries.

Way Ahead. In coordination with M&RA, modify the MARCORSEPMAN to permit the proper processing of domestic abuse cases. This can be done by:

1. Creating a stand-alone separation basis for domestic abuse; or
2. For purposes of administrative separation, modify the definition of domestic abuse to include only those incidents that may be charged under the UCMJ.

For any questions concerning this new instruction, please contact Ms. Katherine Estes, Katherine.estes@usmc.mil, (703) 693-8404.