

ALCOHOLIC BEVERAGES

Clarification of OpJAGAF 2007/21, 6 Apr 2007, Orders Restricting Alcohol Consumption

This responds to your request regarding the link to military duty required in a general order restricting the consumption of alcohol discussed in the referenced 2007 OpJAGAF opinion. Specifically, you asked if a commander could issue a general order prohibiting military members from consuming alcoholic beverages during a time of increased unit alert. Additionally, you asked if such a prohibition could be directed at civilian employees.

Our 2007 opinion laid out the basic requirements for a valid order: “[t]o be lawful, a military order must be tied to military duty. Further the link to military duty must be clear and articulable with specificity, not aspirational or hypothetical.” The *Manual for Courts-Martial United States* (2008 Edition), Part IV, paragraph 14c(2)(a)(iv) describes the relationship to military duty as follows:

The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service.

In the case at hand, the commander of Air Forces in Korea issued a general order prohibiting the consumption of alcohol by both military and civilian employees, stating that the current period of heightened tension on the Korean peninsula and concurrent high operational tempo necessitated optimum force readiness for mission accomplishment and force protection. Although a specific end-date to this order is not stated, it appears the end-date is conditions based—until the tensions decrease on the peninsula. With one caveat, we believe an order such as this is legally sufficient.

We note initially that the Korean peninsula is unique in that military members stationed in Korea are coded as “deployed in place,” and are not assigned to an AEF rotation. North and South Korea never signed a peace treaty ending the Korean War; rather the region has operated under an armistice agreement since 1953. Recent aggressive actions taken by North Korea therefore understandably drove United States Forces Korea/Combined Forces Command, United Nations Command, and 7th Air Force to increase the alert level of their forces. Under such uncertain conditions, it is reasonable to require forces to be capable of rapidly responding to defend and protect the Republic of Korea.

With regard to civilian employees, we believe the restriction is enforceable based on the specific facts discussed above. A heightened state of military alert in the volatile environment of the Korea peninsula requires all personnel to be prepared to perform duties on short notice. Civilian employees are a critical part of our military capabilities, and must be equally prepared to respond during times of crisis. We note that while violation of this restriction likely is administratively enforceable, prosecution as a criminal act under the UCMJ would be more difficult, as it would require a determination that the individual is serving with or accompanying an armed force in the field “in a time of declared war or contingency” (Article 22(a)(10), UCMJ). Although the

United States never declared war on Korea, arguably the conflict could be categorized as a contingency operation under 10 U.S.C. § 101(13). Pursuit of a criminal prosecution would raise difficult and unique issues of law and jurisdiction.

We do believe, however, that this order is overly broad in one area, namely the lack of a time frame over which the order is in effect. As noted above, there is no end-date specified in the sample order. Nor are there any provisions for periodic review of the continued necessity of the order. We believe the order would be stronger if it either required periodic review to assess its continued necessity or expired after a reasonable period of time (e.g., 30-60 days) unless extended or revoked. Based on historical precedent, it is not unusual for tensions in the Korean peninsula to continue over some period of time. However, the mere existence of tension is not sufficient to impose an indefinite order of this kind. Examples of such limiting language include stating that the order is in effect for X number of days unless earlier rescinded or specifically extended, or in effect until the alert status is reduced.

This opinion has been coordinated with the Labor Law Field Support Center.

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