

Ask the Lawyer: Disobey an Order at Your Own Peril

By Mathew B. Tully

Question:

My commander is a little nuts. He keeps ordering me to do this or that. Sometimes I'm not even sure the things he's ordering me to do are lawful. What should I do?

Answer:

One trait common to many recipients of the Medal of Honor is that they disobeyed an order to do what they believed was the right thing to do. However, most service members who disobey an order they believe is unlawful or not right do not receive a medal. Instead, they get slapped with a charge of failure to obey a lawful order in violation of Article 92 of the Uniform Code of Military Justice.

In the military, orders are presumed to be lawful. For an order to be presumed lawful, according to the U.S. Court of Appeals for the Armed Forces, it must be given by a "competent authority" who is authorized to give such an order; the mandate must be communicated in words; and it must pertain to a military duty. If an order satisfies these requirements and the subordinate to which it applies still doubts its lawfulness then he or she can challenge the mandate when it is issued.

Alternatively, a service member can disobey a questionable order, as CAAF put it, at "his or her own peril." That is, the service member can choose to not obey the order, run the risk of being charged with an Article 92 violation and attempt to prove the mandate was unlawful at court martial. The "peril" here is significant because the maximum punishment for disobeying a lawful general order is dishonorable discharge, forfeiture of all pay and allowances and up to two years in jail.

Service members who take this route must know: the burden of proving the unlawfulness of an order is placed on them. For example, the case *United States v. Kasala* involved an Army specialist who disobeyed an order to submit to an anthrax vaccination. The specialist tried to overturn his Article 92 conviction by arguing the military overstepped its legal authority in requiring him to take what he claimed was an investigational new drug or drug not approved for its proposed use. CAAF in 2006 rejected these claims and upheld the soldier's conviction.

Service members charged with disobeying a lawful order should immediately contact a military law attorney. Depending on the circumstances, a military law attorney could challenge an order's lawfulness by claiming it is unconstitutionally overbroad or vague. An attorney could also challenge the lawfulness of orders that were issued by an incompetent or unauthorized authority, not properly communicated to the subordinate or did not pertain to a military duty. Service members should not let their efforts to serve their country and respect its laws undermine their military careers.

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. The information in this column is not intended as legal advice.